

2 Blasphemy and the Law: The Fall and Rise of a Legal Non Sequitur

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ORIGINS OF A CONCEPT

Blasphemy as an offence originates most readily and successfully within cultures where the prevailing faith can be described as a religion of the book. Judaism, Christianity and Islam all possess very strong conceptions of blasphemy and the specifics of how their monotheistic worlds conceive the offence. The success of the concept may well rely upon the fact that religions of the book are religions that codify, prescribe, proscribe and enact. In other words, the fundamental basis of their faith rests on a series of laws motivated by a mixture of sacred pronouncement, or the development of custom based upon such pronouncement. Cursing or reviling the Gods was outlawed because it offended both the deity concerned and the social and cultural peace of communities within the ancient world. In many instances this was also linked to a sense of immanent providence whereby the community and its laws were under pressure to act or forms of harm were in danger of being visited upon the community.¹

The footprint of these laws is easily traceable within such religions of the book, and their impact is well known and reasonably well researched.² Thus it is not the function of this chapter to revisit this early development of such laws. Suffice it to say that many aspects of this early conception survived well into the early modern period and in many cases beyond. This chapter is primarily concerned with tracing the development of the laws against blasphemy into modern times—in short, to chart its progressive fall up to

1 Leonard Levy, *Blasphemy and Verbal Offense Against the Sacred: From Moses to Salman Rushdie* (New York: Knopf, 1995), 3–8.

2 See, e.g., Leonard Levy, *Treason Against God: A History of the Offense of Blasphemy* (New York: Schocken Books, 1981), 3–102 traces the origin of the law up to the heyday of medieval heresy.

the end of the twentieth century and then investigate its rapid rise after this date.

The precise history of blasphemy within the world of Christendom in the medieval period can appear opaque because it was, in this period, something of a subordinate concept. Although laws against blasphemy and heresy were both enforcing forms of discipline, it was the latter's focus upon religious orthodoxy which became more important than the former's prescription of mocking God and his powers. Thus through the medieval period the Papal Inquisition and often the secular arm of primitive states were engaged upon the pursuit of heretics and their webs of association and belief. Many historians note their proliferation and their self-sustaining power, which was often based on the growing literacy of certain groups within society.³ Campaigns against heresy also intensified and grew more serious as perceptions of new heretical groups as more deeply organised and committed began to circulate. This also stood in contrast to the blasphemer, who was almost exclusively conceived of as an isolated individual, and the focus upon organised groups of religious dissidents further downgraded the importance of the blasphemer. Most obvious in Europe were the concerted campaigns against heretical groups such as the Albigensians, Bogomils, Waldensians and Cathars that ranged across regions and borders of western Europe. The Inquisitions that pursued them were largely composed of individuals from the Dominican Order, which stressed the importance of theology as arguably more important than the interpretation and application of the law.⁴ Likewise such actions were replicated in England in pursuit of close-knit heretical groups such as the Lollards. All served to push blasphemy as an offence further into the shadows.

Nonetheless we do encounter blasphemy in some accusations and charges laid against individuals in the medieval period. Very often these appear as additional or adjunct charges in amongst a number of other accusations. Thus they were significant only as afterthoughts or as part of what we might describe as a basket of offences that instead place focus upon the general offensiveness of the individual rather than a deep realisation of blasphemy as a pernicious evil. The influence of Aquinas was quite important in

3 Malcolm Lambert, *Medieval Heresy: Popular Movements from the Gregorian Reform to the Reformation* (Oxford: Oxford University Press, 1992), 26–30.

4 Henry Asgar Kelly, "Inquisition and the Prosecution of Heresy: Misconceptions and Abuses," in Henry Asgar Kelly, *Inquisitions and Other Trials in the Medieval West* (Aldershot: Ashgate, 2001), 439–451, 451.

bringing blasphemy further forward into the picture, and his work was instrumental in theorising it as an errant faith-based position that sought to undermine the honour of God.⁵ This conception of the honour of God also had a distinctive social use that persuaded municipalities to enact sanctions against blasphemy. The power of religious oaths began to be of increasing importance as commerce developed in the city states of Northern Europe. As such, blasphemy served to cheapen these guarantees of trust and thus undermined their power, currency and validity.⁶ These really commenced with the Town Ordinances and Privileges of Vienna of 1221 but were then followed by the laws of Frederick II in 1231.⁷

This growing aspect of state involvement meant that the partnership between church and state that had commenced with heresy was continued into the greater seriousness with which blasphemy was coming to be treated. This became evident in a number of statutes that began to appear in the middle of the thirteenth century. In France, the monarchy's comparatively long involvement in curtailing blasphemy commenced with Louis IX's statute of 1263. This initiative gathered pace with subsequent action against blasphemers in the Low Countries, Spain and parts of Germany.⁸ It was almost ubiquitous that the punishments for such crimes were various species of physical mutilation or humiliation and sometimes both. This further served to highlight the individuality of the culprit and the comparative rarity of the offence, alongside an emphasis which placed this miscreant individual outside of society, however briefly.

Another feature of this time which unwittingly brought blasphemy more readily to the attention of the Church and local governing agencies was the late medieval fashion for lay confraternities. These were organised groups in regions and localities who were tasked with scrutinising and overseeing the practices of piety and orthodoxy in their community.⁹ The evidence that they

5 Leonard Levy, *Blasphemy and Verbal Offense Against the Sacred: From Moses to Salman Rushdie* (New York: Knopf, 1995), 51–53.

6 Carol Lansing, *Power and Purity: Cathar Heresy in Medieval Italy* (Oxford: Oxford University Press, 1998), 166–167 and John Marshall, *John Locke Toleration and Early Enlightenment Culture* (Cambridge: Cambridge University Press, 2006), 231–232.

7 Gerd Schwerhoff, *Zungen wie Schwerter: Blasphemie in alteuropäischen Gesellschaften* (Konstanz, 2005), 300.

8 David Nash, *Blasphemy in the Christian World: A History* (Oxford: Oxford University Press, 2007), 151.

9 Gerd Schwerhoff, *Zungen wie Schwerter: Blasphemie in alteuropäischen Gesellschaften* (Konstanz, 2005), 300.

came back with was potentially shocking and convinced many that bringing orthodoxy deeper into the lives of their local fellow Christians was almost tantamount to a new crusading impulse. The watchword of this impulse and its explicit intention was the restoration and maintenance of discipline. This remained a paramount consideration until well into the eighteenth century, although interpretation of it could be protean in both its conception and interpretation. With a premium on this sense of discipline and conformity, blasphemy was conceived of as a species of indiscipline, and this was arguably enhanced by several of the fissures which sprang out from the Reformation. Many of the instances of indisciplined blasphemy that the Reformation world uncovered, when not outbursts of simple anger and frustration, were frequently associated with either drink or gambling. Individuals whose reason had been impaired by alcohol frequently despoiled religious relics or statues or sought to command the almighty to do their bidding; this simultaneously broke the peace of the community and introduced the concern associated with providential judgement upon the community as a result. Gambling was also a common area where accusation of blasphemy originated, with individuals either commanding the almighty to provide them with luck or cursing him remorselessly for withholding apparently much needed good fortune.¹⁰

THE REFORMATION AND RELIGIOUS LAW

Leonard Levy has noted in particular that the Reformation was a catalyst for changing perceptions of blasphemy. Luther in particular lighted on blasphemy as a concept and accusation that he could use in his dialogues and disputations with the orthodox Catholic position, which appeared idolatrous. Rejuvenating the conception of this offence was also a method of avoiding the use of the more ideologically problematic term of heresy—an accusation and conception that Catholicism was itself dangerously cognizant of and

10 For instances of blasphemy whilst under the influence of alcohol see Francisca Loetz, *Dealings with God: From Blasphemers in Early Modern Zurich to a Cultural History of Religiousness* (Farnham: Ashgate, 2009); M.R. Baelde, *Studiën over Godsdienstdelicten* (*The Hague: Martinus Nijhoff, 1935*), 137; Thomas Brennan, *Public Drinking and Popular Culture in Eighteenth-Century Paris* (Princeton, NJ: Princeton University Press, 1988), 74. For gambling see Javier Villa-Flores, *Dangerous Speech: A Social History of Blasphemy in Colonial Mexico* (University of Arizona Press).

experienced in implementing.¹¹ Certainly Francisca Loetz and others have also detected a renewed interest in blasphemy in other “reformed” religious societies. What often emerges from this work is that authorities in cities like Geneva and Zurich displayed a fairly stringent attitude to the offence, even if their attitude to punishing those accused and convicted could vary according to individual circumstances, location, and over time.¹²

Meanwhile the Catholic world of the Counter-Reformation, particularly after the Council of Trent, made the individual the growing focus of attention, and this, likewise, went along with a revitalisation of the Church’s approach to blasphemy and laws against it.¹³ This might be seen as a perhaps logical reaction to the Catholic Church’s belief that the sacred was in danger of being profaned precisely at the time when it seemed to require the most veneration. One method of disseminating this view was to reiterate that orthodoxy and correct observance should be ingrained in institutions and family structures.¹⁴ This further associated dissenting and undisciplined behaviour with the errant personalities of individuals.

DISCIPLINE AND PUNISH?

The quest for a disciplinary ethos also crept further up the priorities of authority and governance which showed a renewed interest in curbing blasphemy that, thereafter, preoccupied the increasingly sophisticated early modern state. As the sixteenth century wore on the pace of legislation quickened. France enacted no fewer than fifteen separate statutes in the sixteenth century, with analogous developments also occurring in Spain. It is interesting that Venice constructed its own legal tribunal specifically to hear blasphemy cases.¹⁵ Perhaps this particular innovation recognised this city’s foreboding sense of providential menace brought on by a range of factors, including its potential political weakness and location, which left it

11 Leonard Levy, *Blasphemy and Verbal Offense Against the Sacred: From Moses to Salman Rushdie* (New York: Knopf, 1995), 60–61.

12 Francisca Loetz, *Dealings with God: From Blasphemers in Early Modern Zurich to a Cultural History of Religiousness* (Farnham: Ashgate, 2009), especially Parts II and III.

13 David Nash, *Blasphemy in the Christian World: A History* (Oxford: Oxford University Press, 2007), 151.

14 John Bossy *Christianity in the West* (Oxford: Oxford University Press, 1985), 155–156.

15 Elizabeth Horodowich, “Civic Identity and the Control of Blasphemy in Sixteenth Century Venice”, *Past and Present*, 181 (2003) 3.

vulnerable to everything from plague to potentially disastrous invasion and conquest.

The interest of government, authority and individual courts further draws our attention to a fundamentally important public order dimension which became an adjunct to the Church's search for orthodoxy and disciplined religious observance. The state's interest in providing communal punishments which were shared, either by passive observance of their instigation or their aftermath, became a part of this process. Thus shaming punishments, many involving public penance dressed in specific shame-ridden garments or devices (such as wooden barrels), showed the consequences of indiscipline to the whole community. The often used disfiguring punishments, which maimed the tongue, cheek, ears or lips, provided a constant reminder to the community of the past lapses of its errant individuals.¹⁶

Both public order concerns and a lingering sense of the providential also saw states enact military and naval ordinances which specifically aimed at preventing blasphemous utterances within such institutions.¹⁷ Again public order and discipline were paramount in creating a functioning institution. Yet the providential dimension was present in the recognition that soldiers and sailors were placed in perilous and unforgiving situations where they conceivably felt themselves to be at the mercy of divine judgement.¹⁸ Looking at this whole movement towards greater cultures of disciplined orthodoxy has led some historians, such as Alain Cabantous, to suggest that this constituted an attack upon a more coherent vibrant culture of plebeian blasphemy. The attitudes of authority were aimed at belittling and minimising the coherence of this culture whilst also obviously seeking to marginalise it.¹⁹

The English reformation, with its sudden, much closer connection between religious orthodoxy and the state, further enhanced the importance of enforcing forms of discipline.²⁰ Older heresy laws were strengthened by an Act of 1533 and a subsequent statute in 1547 which sought to protect the sacrament from abuse. A defining moment came towards the end of the

16 David Nash, *Blasphemy in the Christian World: A History* (Oxford: Oxford University Press, 2007), 153–154. See also Richard Van Dulmen, *Theatre of Horror: Crime and Punishment in Early Modern Germany* (trans. Elisabeth Neu, Cambridge, 1990), 155.

17 David Nash, *Blasphemy in the Christian World: A History* (Oxford: Oxford University Press, 2007), 115.

18 *Ibid.*, 115–116.

19 Alain Cabantous, *Blasphemy: Impious Speech in the West from the Seventeenth to the Nineteenth Century* (New York: Columbia University Press, 1998), *passim*.

20 David Nash, *Blasphemy in the Christian World: A History* (Oxford: Oxford University Press, 2007), 157.

subsequent century for both blasphemy and the state's role as a regulatory authority charged with ensuring conformity and discipline. Whilst the Commonwealth period had seen a systematic extension of religious toleration, it had nonetheless witnessed religious dissidents that had pushed the boundaries too far.²¹ The political and ideological ferment of these times meant that decisions about what to do with such people were manifestly less than clear-cut, and individuals like Best and Biddle languished in gaol whilst their potential fates were debated at length in Parliament.²² The resolution of both these cases did not indicate a clear policy or direction of thought.

This only really came in 1675 with a groundbreaking judgement in the case against James Nayler. The judge, Sir Matthew Hale, pronounced that Nayler's blasphemies should be dealt with relatively harshly because attacks upon religion were attacks upon the law and the state.²³ His famous phrase argued that religion was "part and parcel of the laws of England," and that to attack one of these facets was implicitly to attack the other. Again such ideas also contain a submerged public order dimension. This series of sentiments became enshrined in the English blasphemy statute of 1698 (9 & 10 William c. 32) which made provision for progressive punishments, finally prescribing capital punishment for a third offence.²⁴

This law and its provisions were also a manifestation of anxieties about the security of the kingdom and good order alongside a still lingering strand of providentialism. This heady mixture of concerns and feelings had also been evident in the trial and execution of Thomas Aikenhead in Scotland in 1697.²⁵ Although this statute was not used successfully, it was readily invoked, and its provisions served to threaten both individuals and religious groups whose doctrines (such as those of anti-trinitarian groups) were now perceived to exist in opposition to the Church as it had been established by law. This last aspect was important because the statute gave primacy of place to the established church and its doctrines and, in the mind, arguably made other religious doctrines capable of being regarded as blasphemous.

21 David Nash, *Blasphemy in Britain 1789 to the Present* (Aldershot: Ashgate, 1999), 27–28.

22 *Ibid.*, 28–29.

23 *Ibid.*, 29–30.

24 Courtney Kenny, "The Evolution of the Law of Blasphemy," in *Cambridge Law Journal* 1 (1922) 127 at 132.

25 M.F. Graham, *The Blasphemies of Thomas Aikenhead: Boundaries of Belief on the Eve of the Enlightenment* (Edinburgh: Edinburgh University Press, 2013 edn.).

Although the injustice of this would be cited by some defendants, no successful prosecutions were brought under this statute.²⁶

What functioned in its place was the Common Law offence of blasphemous libel. This particular provision eventually had considerable influence, and this can be readily seen in the history of both American and Australian jurisprudence which ensured that the reactions of these societies defined themselves in relation to this legal precedent.²⁷ What was fundamental to this state of affairs was the capacity for the judge presiding over a particular case to pronounce on the state of the law within any given context. Whilst precedent could be drawn upon within reason, the opportunity to innovate was intrinsic to this system, which often led to the law being disparagingly referred to as “judge-made law.” Yet this approach had many devotees who regularly suggested that it enabled each age to assess what was acceptable and what was not before the ultimate jury of public opinion at large. If material offended sensibilities and was likely to provoke outraged breaches of the peace, then either individuals or policing authorities would be able to bring a prosecution. A trial was a further legitimate check and balance that ensured freedom and fairness between rights of free speech and the right to remain unoffended by the actions and expressions of others. Even into the twentieth century the United Kingdom Home Office expressed itself to be manifestly in favour of the law’s retention precisely because it offered these regulatory checks and balances.²⁸ Despite the Common Law of blasphemous libel functioning as an inherited precedent which eventually informed the attitudes of American Federal law, the development of attitudes to blasphemy within the American colonies, and eventually states, was considerably more piecemeal. In their different forms of legislation around blasphemy these different colonies and states represented everything from draconian and strict persecution right through to what appeared to be full religious toleration.²⁹

26 This fact was noted when the Act was repealed in 1967.

27 See David Nash, *Blasphemy in the Christian World: A History* (Oxford: Oxford University Press, 2007); for the situation in America see 78–79, 166–168, 173–175 and 179. For Australia see 22–23, 98, 178–179.

28 See the various Home Office Papers in file HO 4524619. An account of their significance is in David Nash, *Blasphemy in the Christian World: A History* (Oxford: Oxford University Press, 2007), Ch. 6.

29 See David Nash, *Blasphemy in the Christian World: A History* (Oxford: Oxford University Press, 2007), 163–167.

By the eighteenth century most blasphemy sentences passed against those convicted were commuted to lesser forms of imprisonment or banishment. This may have occurred as an unprompted relaxation of concerns about discipline, but equally it might be argued that this was a growing recognition that upholding the privilege of a single religious orthodoxy within states was problematic and of diminishing importance. However, what split this view, arguably, wide open was the impact of the American Constitution's construction and the subsequent impact of the French Revolution. In their separate ways both displayed models for how the church-state relationship might be rethought or, instead, actively unravelled.

The American constitution, in pursuit of some contemporary ideals of freedom, shelved the whole conception of an established and even a state church. Instead Christianity would eventually become an official religion, even if the idea of support through state subscription would remain anathema. Thus an area of American law came to be a battleground between local conceptions of morality upheld by local sanctions and the federal legal system's rejection of many such actions as unconstitutional.³⁰ One legacy of America's innovative disestablishment is that dissolving, breaking or unravelling the link between church and state would hereafter become the preoccupation and enthusiasm of secular-inspired liberalism everywhere.

Quite obviously the French Revolution's destruction of the church and state link was more far reaching. The construction of these two more obviously secular states foregrounded individual rights whilst emphasising that species of religio-state compulsion were intolerable. For many, such freedoms would almost never go far enough, as their various critiques of religion would periodically trouble the courts in many Western countries up to the last quarter of the nineteenth century.³¹ However, what this does really highlight is that the blasphemer, during the age of reason, was an ideological dissident with firm views about the place of religion within the universe as either wholly a private concern or, indeed, entirely irrelevant. This was a marked change from the earlier archetype of the blasphemer as merely an indisciplined individual who, for various reasons, had merely lapsed from the orthodox straight and narrow—with the task of the state and church merely to restore them to this correct pathway.

The legacy of blasphemy laws in nineteenth century Europe thus really became exercises in upholding the church-state link, in various degrees of

³⁰ Ibid., 205 and 343.

³¹ Ibid., 117.

rigidity, as a means of preserving national self-images as god-fearing states rather than maintaining strict religious orthodoxy. Thus one offshoot of this was a religio-national providentialism.³²

REVOLUTIONS AND UPHEAVALS

This maintenance of morality characterised early nineteenth century society's approach to the control and regulation of blasphemy. Certainly there is evidence of its success in suppressing the virulent Jacobin-inspired ideas of Richard Carlile in England.³³ The 1820s and 1830s witnessed a succession of court cases where ideas associated with free expression were effectively trumped by the necessity of protecting society from the social implications of such freedoms.³⁴ This situation had its counterpart in the United States in the case against Ruggles, who represented an American expression of similar ideologies and sentiments.³⁵ As the century wore on, both countries also witnessed cases that produced embarrassment for high-handed authority that could no longer rely upon the wholehearted support of the population at large or even of some of its own government officials.³⁶ Such authority increasingly found its justification for action critiqued by the rise of social democratic societies founded on forms of liberalism. In

32 See David Nash, "'To Prostitute Morality, Libel Religion, and Undermine Government' Blasphemy and the Strange Persistence of Providence in Britain since the Seventeenth Century," in *Journal of Religious History* 32(4) 439.

33 See Joel Wiener, *Radicalism and Freethought in Nineteenth Century Britain: The Life of Richard Carlile* (Westport, CT: Praeger, 1983); M.J.D. Roberts, "Making Victorian Morals? The Society for the Suppression of Vice and its Critics 1802–1886", *Historical Studies* xxi (1984) 157; and M.J.D. Roberts, 'Blasphemy, Obscenity and the Courts: Contours of Tolerance in Nineteenth Century England', in Paul Hyland and Neil Sammells (eds.), *Writing and Censorship in Britain* (London: Routledge, 1992).

34 Joel Wiener, *Radicalism and Freethought in Nineteenth Century Britain: The Life of Richard Carlile* (Westport, CT: Praeger, 1983), *passim*.

35 See Theodore Schroeder, *Constitutional Free Speech Defined and Defended in an Unfinished argument in a case of blasphemy* (New York: Free Speech League, 1919, De Capo Press Edn, 1970), 69–71. See also David Nash, *Blasphemy in the Christian World: A History* (Oxford: Oxford University Press, 2007), 78–79.

36 See the reactions to the trial of Thomas Pooley, where a manifestly insane man's treatment became an indictment of the law and its proceedings in such matters. See Timothy J. Toohey, "Blasphemy in Nineteenth-Century England: The Pooley Case and Its Background", *Victorian Studies* 30, no. 3 (Spring, 1987) 315.

England this is evidenced by the Foote case of 1883–1884 and in America in the case against Moore.³⁷ Australia would also follow suit in the outcome of the case against Lorando Jones.³⁸

The verdict in the Foote case was monumental because it finally unravelled the psychologically important link between religion and the law. The presiding judge, Justice Coleridge, set aside the letter and spirit of the Hale judgement and emphatically stated that religion was no longer “Part and Parcel of the Law of the land.”³⁹ But Coleridge went further, establishing an important species of test of offence that also proved influential. The true test of blasphemy in court was now no longer the *matter* uttered (such logic naturally proceeded from the demise of the “part and parcel” argument) but instead the *manner* uttered.⁴⁰ Thus the test came to associate the crime with wounding the feelings of individuals.

When policing authorities were ever involved in discussions of the offence of blasphemy they would often express satisfaction at such an outcome. No longer did they have to run the gamut of defence cases which focussed upon the purchase of material which sometimes embarrassed such policing authorities who could not identify vendors in court or whose members gave woolly and unsatisfactory answers when questioned about their individual responses to the material they had purchased whilst trying to establish grounds for prosecution.⁴¹ Likewise, such authorities were also spared the problems of law enforcement officers tasked with deciding whether material or speech actually contained blasphemous content. Henceforth this decision was taken out of their hands so that they became concerned with issues that they were more readily equipped to deal with. This conception of “manner,” once again, had an important public order dimension, so that the material itself now underwent a test of whether it was liable to provoke violence or some other species of breach of the peace.

Paradoxically this preoccupation with breaches of the peace coincided with a shift in the character of those who were indicted and tried for blasphemy.

37 David Nash, *Blasphemy in the Christian World: A History* (Oxford: Oxford University Press, 2007), 175.

38 *Ibid.*, 178–179.

39 Ernest Hartley Coleridge, *Life and Correspondence of John Duke, Lord Coleridge* (London, 1904), 291.

40 David Nash, *Blasphemy in the Christian World: A History* (Oxford: Oxford University Press, 2007), 155–162.

41 This had been a feature of many early nineteenth century cases. See David Nash, *Blasphemy in the Christian World: A History* (Oxford: Oxford University Press, 2007), Ch. 3.

From the middle of the nineteenth century there was a growing tendency for such individuals to be artists and writers rather than revolutionaries and political radicals. This, in itself, may represent some wider philosophical changes in which political sub- and countercultures themselves had become more individualistic and had also acquired some degree of acceptance within late nineteenth century liberal cultures. Thus boundaries had been pulled back, but moral and regulating authorities always saw blasphemy as perhaps a touchstone of how far critics of conventional morality and social arrangements should really be allowed to go.

Thus public order concerns became fused with new ways of thinking about the offensiveness of new types of writing and precisely where these might be consumed. Whether the reading of blasphemous material in a public place, or the encounter with it in a public place, would provoke a reaction became a *bona fide* test of offensiveness. Policing authorities, rather than being charged with hunting down offensive material (in truth, most were weary of this responsibility now), had public order-style tests that would be discussed in court concerning whether an item or facet of speech was liable to offend or endanger the peace.

EVOLUTION OR MODERNISATION

One dimension of this was the invention of a style of “casual encounter with blasphemy.” In other words, the law had shifted from whether the blasphemous material was, under a state-regulated definition, blasphemous, but instead to whether it could be proven to offend—resulting in a possible public order related consequence. Thus blasphemy became an offence in which the casual encounter with such material was the issue to be avoided. One method of policing blasphemy was to persuade its potential perpetrators to police themselves and restrict access as far as possible to those who were unlikely to be offended by material. This perhaps also reflected aspects of post-war individual conceptions of human rights, which were also persuading centralised authority to retreat from actions it might previously have been prepared to take.⁴²

Procedures designed to warn consumers of the nature of material were considered a part of modern democratic systems, which themselves urged plurality and choice which could supposedly be ensured by expecting

⁴² Ibid., 182.

audiences to be self-regulating. This philosophy was adopted for a time in some European countries, notably France and Germany, but was somewhat less successful in Britain. In the latter the arguments which were brought forward in the Gay News Case of 1978 indicated that suggestions that material was intended only for a restricted audience would be trumped by their apparent offensiveness. This was true even if they were seen, perhaps unwittingly, by subsequently shocked individuals—some with an agenda of their own.⁴³

Nonetheless the focus upon “manner” as the test of offence in countries accepting English legal precedent and jurisprudence and even beyond did serve to remove the state’s role as censor and arbiter of religiously motivated debate. So, for most of the twentieth century the laws of blasphemy were slumbering. Although debates were occasionally held about their apparent anachronism they were generally regarded as insignificant and as a gentle reminder of Christian heritages in the West. As such these laws, during this period, encouraged populations to look firmly back to their past and not forward to any conception of an altered religious future. Indeed, it is relatively noteworthy that few political parties were prepared to consider the repeal of blasphemy laws as in any way important in their own potential legislative programmes. Petitions for their removal would often meet with considerable sympathy, but also with inertia, often in equal measure. Such laws slumbered and apparently did no harm—so what reason could be given for their removal? Especially when other pressing considerations could always be found to occupy the mind of government.

However, by the century’s end such laws were, unknowingly, on borrowed time. The slow progress of supranational agencies and their growing quest to enforce religious equality began an argument that saw the concept of religious privilege enshrined in law as untenable. Although this was taken seriously, its logic became dwarfed by the counter-claims of religious groups demanding such equality. This liberal claim for the religious equality of the individual ironically became undermined by other agendas that saw such individual equality as somehow threatening. Liberating and empowering the individual began to be seen solely as a project intended to enhance and extend Western liberalism and its own projects. This was frequently contrasted with the sense of collective revelation that entered the language and arguments emanating from Islamic communities.

43 For an account of the events leading to the Gay News Case see David Nash, *Blasphemy in the Christian World: A History* (Oxford: Oxford University Press, 2007), Ch. 8.

The complacency of Western thinking about blasphemy laws was rudely shattered and derailed from a course of gradual liberalisation by the explosion of feelings around Salman Rushdie's *The Satanic Verses*.⁴⁴ This event in particular motivated Muslims to connect politics and religion in a dangerous mixture which, when focussed, argued explicitly for the extension of religious protection. Such demands were offered not so readily on the grounds of equality and justice, but in order to seek protection from the religious bias evident still in the legal apparatus of many Western countries. In Britain this was an incident which provoked probably the last defence of the cosy status quo of slumbering anachronism. When a legal challenge was mounted to the partial protection for Christianity enshrined in British law, this was rebuffed by the reassertion of the legitimacy of protection for the state church.⁴⁵

WESTERN STATES RESPOND

One element in the revival of blasphemy that was to a great extent unforeseen was the revival of blasphemy legislation in the West. The pressure produced by the agendas of multiculturalism and of hate crime made the balancing act that Western social democracies had to indulge in still more precarious. Their populations reflected the legacy of a colonial past that in many respects had seen such countries promote cultures of tolerant and enforceable liberalism (as evidenced by the British government's installation and subsequent redrafting of the Indian Criminal Code of 1858).⁴⁶ It was scarcely surprising that a thirst for tolerance and equality was now a part of some views expressed, demanding equality before the law.

European countries also found themselves under pressure to finally expunge the inequalities which remaining blasphemy laws represented. As we have seen these were products of very different historical and religious

44 There are various different accounts of the Salman Rushdie case which probably by now deserves its own carefully annotated bibliography. Places to start include Kenan Malik, *From Fatwa to Jihad: The Rushdie Affair and its Legacy* (London, Atlantic Books, 2009) and Malise Ruthven, *A Satanic Affair: Salman Rushdie and the Rage of Islam* (London: Chatto and Windus, 1990).

45 *Ex parte Choudhury* 1 All ER 306. See also Marcus Tregilgas-Davey, "Ex Parte Choudhury: An Opportunity Missed", *The Modern Law Review* 54, no. 2 (1991) 294.

46 This was suggested during discussions around the House of Lords Select Committee on Religious Offences in England and Wales (2003), Ch. 4: Blasphemy: the Options, paras 52 and 53.

circumstances. Anachronism provided civil servants with a kind of comfort that they protected religion without seriously contemplating the use of such laws. But the pressure of the European Union's treaty obligations and the resultant quest to harmonise legal codes created considerable tensions in this area. Not least of these was a dialogue about whether individual states had a right to maintain such laws as a discretionary part of the "margin of appreciation" or simply had to cave in under the pressure from the whole European community to establish a supranational single standard of law. At first sight the decision to resist such changes seems strange, especially since the logic of harmonisation appeared rational and inescapable. Even harder to understand was the reassertion of ideas associated with the "margin of appreciation," as the United Kingdom sought to plead around the *Wingrove* case in 1996.⁴⁷ All these laws associated with blasphemy had fallen into disuse, so how precisely could a reasonable and rational argument be constructed for their retention? However, it might be argued that the quest to remove these laws genuinely exposed a raw nerve in Western societies and their views of themselves. Removal of blasphemy laws—laws which, as we have seen, protected the state-sanctioned version of Christianity, or a wider generic conception of this same belief system—seemed somehow really final as these societies approached the millennium. Removing protection, and by definition privilege, from previously state-protected religion was an admission that such countries were no longer nominally or realistically Christian. Moreover, the multicultural future that awaited them cut an umbilical cord with a Christian and imperial past. Admitting to the necessary depth of this sea change also brought forth concerns about the apparent reality of secularisation which had clearly affected the Christian religion most obviously in every Western country. It was no coincidence that the House of Lords Select Committee on Religious Offences in England and Wales (2003) felt itself duty-bound to open its final report with a declaration that Britain was "still a Christian country."⁴⁸

Sensibilities were sharpened and heightened by a series of high-profile international incidents that indicated religion had once more become central to ideology and identity. The logic of this seemed to suggest that wider protection should be offered to religions that perceived themselves to be

47 See David Nash, *Blasphemy in the Christian World: A History* (Oxford: Oxford University Press, 2007), 265–266.

48 House of Lords Select Committee on Religious Offences in England and Wales (2003), Introduction and conclusion.

minorities in Western countries. Generally speaking, the solution proffered for this situation stemmed from the agenda associated with multiculturalism. This removed the sense of privilege from host communities to actively share it around with minorities that had previously been excluded. It offered disaffected minorities a degree of citizenship, solved any remaining concerns lingering around the retention of blasphemy laws in Western countries, and also provided a viable public order solution through equalising treatment and seeking to set a series of boundaries within which intervention was actively required. This really manifested itself in the development of the concept of hate crime.⁴⁹ This readily came to see species of interpersonal conflict as motivated by and containing factors which the law came to describe as aggravating. Whilst the language and legal mechanisms for investigating hate crime had been developed, at least in embryo, it was certainly the case that conceptions of incitement to religious hatred came later. This was part of the wider history of hate crime in which categories actually expanded as awareness and agendas of inclusion widened in response to society's demands, expressed through the multicultural ethos.

Thus societies in the West began to think actively about how incitement to religious hatred laws were the magic bullet, one which would provide robust solutions to the targeting of immigrant communities whose religion had become a high-profile signifier of their identity as a result of developments in the contemporary political context. So it was believed, incitement to religious hatred laws could actively replace blasphemy laws. The logic seemed both simple and impeccable. The removal of blasphemy laws and their replacement with incitement to religious hatred would, at a stroke, equalise the status of all religious groups and denominations before the law. These would henceforth all have protection from unprovoked, and even provoked, attacks upon their beliefs and status. The problem was how precisely to define what should be protected. In England the House of Lords Select Committee on Religious Offences discussed the lessons that might be learned from the twentieth century reframing of the Indian Criminal Code. However, this potential solution still contained the remnants of neo-colonial attitudes, and likewise it focussed upon artefacts and buildings and was manifestly less well-suited to a world where the exchange of views and attitudes was now happening in real time on the internet and beyond.

49 This concept was implicit in the deliberations of the House of Lords Select Committee on Religious Offences. See *ibid.*, verbal evidence given 18 July 2002, questions 220–238.

These were scarcely the only objections. Why, many from the secular camp asked, was religion singled out to be protected as a category of identity and belief status whereas other belief systems were excluded? It was also the case that many of the issues that had hampered attempts to extend the blasphemy laws to encompass all religions also resurfaced in the construction of adequate incitement laws. In particular how religion was to be defined, alongside how to regulate and police the content of such a definition, remained a perplexing problem that was never going to be resolved.

In theory most countries would have thought the ideal route forward would have been to repeal what blasphemy laws remained and immediately replace these with incitement to religious hatred laws. This indeed had been one intention behind the questioning of the 2003 House of Lords Select Committee on Religious Offences in England and Wales. This saw the repeal of the laws against blasphemous libel in England as a clear and obvious *quid pro quo* for installing a replacement Incitement to Religious Hatred Law. Apparently unworkable and anachronistic laws that maintained privilege were to be removed in favour of laws which seemingly reached for equality amongst believers and non-believers. Nonetheless it was significant that the Select Committee's final report stopped short of an unequivocal recommendation.⁵⁰ However, in many instances the seemingly simple process of enacting these ideas fell foul of procedural difficulties and political inertia. Certainly in Britain embracing repeal of such laws has never been popular with individual political parties.

In Britain political pressure, mostly from outside Parliament, saw incitement laws appear on the statute book wholly independently of any move to remove the law of blasphemous libel. The Common Law of blasphemous libel was finally repealed as a result of a private member's amendment to the Criminal Justice and Immigration Bill of 2008. This further emphasised that government would actively distance itself at every opportunity from the issue of blasphemy repeal. Religious hatred itself was finally dealt with under the Racial and Religious Hatred Act of 2008, which amended the 1986 Public Order Act to create the offence of stirring up hatred against persons on religious grounds.

Whilst this may have appeared to be the end of conventional blasphemy laws in Western countries (New Zealand and Australia had departed from the logic of English common law sometime earlier) some anomalies remained. Of considerably more interest for our purposes were situations

⁵⁰ Ibid., conclusion.

where the logic of older legal precedent and requirement collided with the new agendas bequeathed to Western legal systems by the rise of laws seeking to prevent religious hatred.

In Ireland there was just such a collision which produced a further departure from the apparently smooth transition from blasphemy to incitement to religious hatred that caught almost everybody by surprise. In the same year as repeal was enacted in England, the Republic of Ireland chose to revisit its blasphemy laws. Certainly there is evidence that the judiciary and the ruling Fianna Fáil party felt constrained by the situation they both found themselves in. The Irish Constitution of 1937 contains a statutory requirement that there be a clause concerning blasphemy. Whilst Ireland was scarcely a theocratic state, large sections of its constitution did privilege the holding and practising of the Christian religion, and especially the state-recognised religion of Catholicism.

Within the new world of equality and under the pressures of harmonisation with European law, the Irish government felt a pressing imperative to revise the law of blasphemy. Up to this point in Ireland this had more or less followed the evolution of English Common Law precedent, and this had evolved along this same path until incorporation in the Irish Constitution. Indeed, in the few blasphemy cases that emerged before the millennium the tendency had been to cite the same English Common Law precedents that governed the application of the law of blasphemous libel in England.⁵¹

However, new thinking and a departure from English Common Law precedent was confirmed by the resolution of the Corway case of 1999. In this instance the Supreme Court declared that blasphemy could no longer be interpreted in a “narrow sense” and had thereafter to embrace the logic of modern multicultural and multifaith states.⁵² Faced with the twin issues of satisfying the needs of the Constitution and the imperatives for wider religious equality and inclusion, the Irish Justice Minister, Dermot Ahern, brought a bill before Parliament which sought to change the laws against blasphemy in the context of articles 36 and 37 of the 2009 Defamation Act. Rumours suggested that even his own political party was taken aback by this development, and considerable anxiety attended its progress through the Dáil. Owing almost nothing to previous precedents around the construction

51 This is discussed in Law Reform Commission, *Consultation Paper on the Crime of Libel* (Law Reform Commission, 1991) Chapter One—Historical Development of the Crime of Libel. See also Constitution of Ireland, Article 40.6.i (Dublin: Stationery Office), 158.

52 Aodhán Ó Ríordáin, Dáil debates, Thursday, 2 October 2014.

of blasphemy laws, the new provisions were very obviously shaped with combatting “hate crime” as a priority.

The provisions of articles 36 and 37 made the “publishing or uttering” of “blasphemous matter” an offence liable to a fine of 25,000 Euros. Blasphemy was here defined as matter which was “grossly abusive or insulting in relation to matters held sacred by any religion.” Likewise, article 36 subsection b required “intention” to cause “outrage.” There were also provisions for the seizure of blasphemous material by the police (article 37, section 1 subsections a, b and c, and article 3). Aware that this all looked rather draconian and reminiscent of nineteenth century actions against atheist material in Britain, article 36 proposed a number of defences. Very clearly the public order dimension was uppermost in the presumption that the material in question had to be capable of offending a “reasonable person.” Likewise, creative, academic and intellectually motivated people could seek protection under the law through its category of legitimate defences. It became a defence if material could demonstrate “genuine literary, artistic, political, scientific or academic value in the matter to which the offence relates.” Realising also that this potentially gave significant advantages to the category of the offended, the law tried to deny this potential status from religions for which “the principal object ... is the making of profit,” or those which employed “oppressive psychological manipulation” (Article 36, section 4, subsections a and b).

The sheer haste involved in the construction of this law meant that a very significant number of legal hostages to fortune lay in its framing. The blasphemous matter needed to be “grossly” abusive and there seemed no clear definition of when this level of abuse, as opposed to “mild” or “minimal” abuse, had been reached. Likewise, “outrage” again was not clearly defined. The range of possible defences also appeared likely to be problematic. Given the possible defences offered, many convicted of blasphemy in the past would have noted how much this looked like a class discriminatory law akin to those of the nineteenth century. As such it created provisions whereby a skilled and educated debater stood far less chance of prosecution than a less educated individual in a non-academic context. A closer examination also made many wonder quite how the courts would define “... genuine literary, artistic, political, scientific or academic value.” Speculating about the legal differences between “genuine” manifestations and “false” manifestations of these could potentially prove spectacularly embarrassing in court—as could defining the concept of a “reasonable person,” or “substantial number of adherents” in the context of religious debate.

Beyond this the attempts to define “religion” were clumsy at best, and the attempts to prevent religious “cults” (something again not positively defined) from seeking protection under the law failed to envisage where this might lead. Debates about the propriety and status of mainstream religions in the Irish courts would potentially have been spectacularly embarrassing for all concerned. Speaking in the Irish Senate (Upper House of Government) in February 2012, Senator Ivana Bacik noted that this law had “gone against the EU norm in adopting a new statutory definition of blasphemy based on a definition of offence.”

Such misgivings became more widely manifest amongst members of the Fine Gael/Labour coalition government after Senator Bacik’s pronouncement. This growing scepticism and willingness to investigate the law’s value led to the decision to submit it to the consideration of a Constitutional Convention, which took place outside Dublin in November 2013. The Convention heard a number of speakers and was eventually asked to vote on two questions. The first was asking if the removal of a blasphemy provision from the Irish Constitution was desirable. This elicited a considerable majority in favour of its removal, which gave some heart to the abolitionists’ cause. However, it was something of a surprise when a few hours later the Convention was asked whether it still wanted to retain a blasphemy law that would not be considered to be part of the Constitution. When the vote on this latter measure was counted it revealed only a very narrow majority wanting to avoid this law’s retention.

Taken together these two votes were revealing about how one Western nation with a still considerable religious tradition wanted to think about the phenomenon of blasphemy and legislate for its existence. The vote against retaining it in the Constitution was a major move towards recognising that the age of confessional states was over and the plural nature of the country’s religious life should be acknowledged by the Constitution. However, the much narrower outcome to the vote about retaining blasphemy somewhere perhaps told a different story. It spoke of fears of abolishing such a law and how this might be a final admission of the state religion relinquishing power unnecessarily. After all, as many nations before had discovered, the law here was an almost silent, almost moribund gatekeeper that actively reassured those fearful of religious change. In this instance it genuinely appeared that a blasphemy law, even conceptions of a newly created but flawed one, could provide sources of reassurance and comfort to a population at large. Others may well have seen the retention of such a law as shorthand for offering protection to religious status and identities. Whatever else this did, it also

suggested that governments genuinely needed to take into account this groundswell of opinions before taking anything that appeared to be decisive action. In the written evidence offered to the Convention's website, before it met in session, some interesting trends could be discerned. One submission from the Catholic Church itself argued for repeal of the law, whilst that from a Catholic lay organisation (the Order of the Knights of St. Columbanus) argued for retention.⁵³ This replicated several earlier historical instances where the laity of a Christian church appeared much more conservative than that same church's hierarchy. Indeed, the former's suspicion of the latter and their conceivably more ambivalent (or alternatively pragmatic) relationship to the faith would be a constant theme in such discussions.

Whether the inconclusive outcome from the Convention's two votes had any influence or not on subsequent events and government opinion is an interesting question. However, the Fine Gael/Labour Coalition government reversed course and eventually decided to postpone action in the matter, even though interest in the issue was reopened by the *Charlie Hebdo* affair in Paris.⁵⁴ Whilst recognising that the law was an anomaly and a problem, a failure to act risked making matters considerably worse by declaring that a referendum would not occur in the lifetime of the current government.

So why was the Irish government increasingly persuaded that a referendum (which was always couched as a referendum to remove the law) would eventually be necessary and should be both publicised and timetabled? Chief amongst the misgivings of both politicians and civil servants was a realisation that Ireland's parochial decision in relation to its own Constitution had ignored the wider global context. As opposition opinion reminded the Irish government and its civil servants alike, the country could no longer behave as though it operated in a vacuum. Ireland had unwittingly sailed against the tide in producing a new and viable law which altered the entire legal landscape of the offence in the West. An almost uniform status of legal anachronism was challenged by the impetus of a new law made viable. This was noticed by other countries and would very soon lead to acute embarrassment in Irish government circles as well as pressure from other interest groups seeking repeal.

53 See <https://www.constitution.ie/SubmissionDetails.aspx?sid=d21e4103-e542-e311-8571-005056a32ee4> (accessed 6 March 2016).

54 See <http://www.irishexaminer.com/ireland/blasphemy-offence-may-be-removed-next-year-306162.html> (accessed 5 February 2016).

The impetus behind this was the actions of other countries who had taken note of Ireland's new stance on blasphemy. The Organisation of Islamic Cooperation (OIC) had been gaining more universal acceptance of its desire to extend the concept of defamation since 2009. Such requests had been offered at the Human Rights Council and also at the United Nations General Assembly.⁵⁵

However, the developments in Ireland represented something of a sea change. Pakistan, speaking as the lead voice in the Organisation of Islamic Cooperation (OIC), cited part of the wording of the Irish blasphemy law when proposing a resolution on defamation of religion.⁵⁶ This proved beyond reasonable doubt that while moribund blasphemy laws were bad enough, still worse new laws created a dangerous culture of viability for such laws. Thus, criticism of Islamic countries that sought to reinvigorate such laws looked now like the worst kind of hypocritical orientalism. Nonetheless whilst the law in Ireland remains it is a provocation to all involved in the debate and seems to incite opinions in almost every direction.

Thus blasphemy laws have risen to address the needs of societies that sought to protect the sanctity of religious belief whilst also the peace of mind of individuals fearful of the providential consequences of denying God. Although overshadowed by heresy laws, initially blasphemy laws evolved to police and punish indiscipline. By the late eighteenth century they were enacted against religious radicals and political activists who were largely replaced by artists and writers as the twentieth century dawned. Within liberal societies, supposedly in favour of religious toleration, such laws increasingly seemed anachronistic, and many withered away or were repealed. However, their widespread demise was prevented by a new premium placed upon the status of the religiously oppressed. This saw blasphemy as a weapon to re-establish and reconfirm identity for individuals and nation states. The chance and opportunity to do this was readily afforded by Western states adopting hate crime laws and the extension of such laws to cover all religions without due care and attention. This has created an international deadlock that gives such laws a modern credibility that would have seemed almost incredible only fifteen years earlier.

55 Austen Dacey, *The Future of Blasphemy* (London: Continuum, 2012), 2.

56 Clare Daly, Dáil debates, Thursday, 2 October 2014.