NOT DEAD, JUST SLEEPING: CANADA'S PROHIBITION ON BLASPHEMOUS LIBEL AS A CASE STUDY IN OBSOLETE LEGISLATION

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I. INTRODUCTION

When I tell people that I am writing an article on Canada's prohibition on blasphemous libel, invariably the surprised response is: "Canada has a prohibition on blasphemy?" The prohibition is contained in section 296 of the *Criminal Code*:[1]

> (1) Every one who publishes a blasphemous libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
> (2) It is a question of fact whether or not any matter that is published is a blasphemous libel.
> (3) 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 opinion on a religious subject.

Although the prohibition has been the basis of several prosecutions over the years, it has not been the subject of a reported case since 1935.[2] This leads to another good question: why write about a law that the government has not used in decades? Part of the answer is that a study of blasphemy legislation sheds additional light on Canada's mixed history in the area of religious freedom, along with

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1 R.S.C. 1985, c. C-46.

2 See *R. c. Rahard*, [1936] 3 D.L.R. 230 (Qc. C.S.P.) [*Rahard*]; *R. c. St. Martin* (1933), 40 R. de Jur. 411 (Qc. C.S.P) [*St. Martin*]; *R. v. Sterry* (1926), 48 C.C.C. 1 (Ont. C.A.) (annotation only); *R. c. Kinler* (1925), 63 Que. C.S. 483 (Qc. Sup. Ct.) [*Kinler*]; *R. c. Pelletier* (1901), 6 R.L.(n.s.) 116 (Qc.).

other well-known examples such as the suppression of the Jehovah's Witnesses in Quebec[3] and discrimination against the Hutterites and other community land-holding religious groups in western Canada.[4]

Of more practical concern, however, is the fact that unlike people, dead laws do not always stay dead: judging by reported cases, England's prohibition on blasphemy,[5] for example, was inert for 55 years before leading to a conviction in 1977,[6] and Ireland's remained unused for 141 years before an (unsuccessful) prosecution was brought in 1996.[7] Similar phenomena have occurred in Canada: a statute prohibiting the spreading of "false news" was inserted into the first *Criminal Code* in 1892, used once in 1907, again 63 years later in 1970, and for the third and final reported time in a high profile conviction (overturned on appeal) of Holocaust-denier Ernst Zundel in the late 1980s.[8]

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[3] See e.g. Denise J. Doyle, "Religious Freedom in Canada" (1984) 26 Journal of Church and State 413 at 420–27.

[4] See e.g. William Janzen, *Limits on Liberty: The Experience of Mennonite, Hutterite, and Doukhobor Communities in Canada* (Toronto: University of Toronto Press, 1990).

[5] Throughout this paper, I use the word "blasphemy" and the phrase "blasphemous libel" interchangeably, but it should be noted that the former technically refers to spoken statements and the latter to written statements. English common law treats both spoken and written utterances as equally culpable. See Courtney Kenny, "The Evolution of the Law of Blasphemy" (1922) 1 Cambridge L.J. 127 ("We have seen that, from Sir Matthew Hale's time onward, it has been clear that the crime of blasphemy, unlike that of private defamation, may be committed by utterances merely oral, as well as by words written" at 140). It is not clear whether the same holds for Canada, as the issue has never been directly decided in a reported case; the five reported prosecutions all involved written works. The related crime of "defamatory libel" in the *Criminal Code* does explicitly limit its scope to written works. See *Criminal Code*, *supra* note 1, s. 299.

[6] Compare *R. v. Gott* (1922), 16 Cr. App. Rep. 87 (C.A.) [*Gott*] with *Whitehouse v. Lemon*, [1979] A.C. 617, 68 Cr. App. Rep. 381 (H.L.) [*Lemon* cited to Cr. App. Rep.].

[7] See Kathryn A. O'Brien, *Ireland's Secular Revolution:* "The Waning Influence of the Catholic Church and the Future of Ireland's Blasphemy Law" (2002) 18 Conn. J. Int'l L. 395 at 396 (citing *Corway v. Indep. Newspapers*, [1999] IESC 5, [1999] I.R. 484, [2000] 1 I.L.R.M. 426 [*Corway*]).

[8] See *R. v. Zundel*, [1992] 2 S.C.R. 731 at 745, 755, 95 D.L.R. (4th) 202.

It is therefore not inconceivable that section 296 will be used again, especially considering that one of the original rationales for prohibiting blasphemous libels was to prevent the type of moral outrage that may lead to public disorder and violence, a concern related to one of the given justifications for Canadian hate speech laws.[9] If there ever is another prosecution for blasphemous libel, an understanding of the statute's history, purpose, and scope will be crucial to determining whether it comports with the *Charter*.[10]

An analysis of Canada's blasphemy law is also an opportunity to discuss, in a more general sense, how the legal system should deal with obsolete penal statutes. Dusty old laws can often be perfectly innocuous—the stuff of humorous lists and books, encapsulated in pithy dust jacket statements like "[d]id you know that ... a Kentucky law specifies that you must remove your hat if you come face-to-face with a cow on the road?"[11] On the other hand, obscure, little-known statutes can also serve as a dangerous extension of police or prosecutorial discretion and create a greater opportunity for pretextual arrests and prosecutions.[12] One potential answer to this problem lies in the ancient doctrine of desuetude, itself half-forgotten, which has been applied by a handful of courts to strike down obsolete penal laws.[13]

The next part of this article surveys the offence of blasphemous libel under English common law, which provided the direct inspiration for Canada's blasphemy statute[14] and may still be of value in interpreting exactly what the statute means. Subsequent parts provide a history of reported blasphemy prosecutions in Canada, discuss why the statute may not be as obviously unconstitutional as it appears at first glance, and suggest that the

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[9] See e.g. *R. v. Keegstra*, [1990] 3 S.C.R. 697 at 747–749, 61 C.C.C. (3d) 1, Dickson, C.J. [*Keegstra*].

[10] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

[11] See e.g. Lance S. Davison, *Ludicrous Laws & Mindless Misdemeanors: The Silliest Lawsuits and Unruliest Rulings of All Times* (Edison, N.J.: Castle Books, 2004) (inside front flap).

[12] See e.g. "Desuetude", Note, (2006) 119 Harv. L. Rev. 2209 at 2226–28 [*Desuetude*].

[13] See Part V(F), below.

[14] See Part IV(A), below.

doctrine of desuetude would be a valuable corrective to obsolete criminal laws.

II. BACKGROUND: ENGLISH COMMON LAW

Blasphemy (as a sin, a crime, or both) is as old as religion, and several books have examined its place in Western history, both ancient and modern.[15] This history includes everything from the trial of Socrates[16] to the punishment of blasphemy by stoning in Leviticus,[17] and from the Code of Justinian[18] to the trial of Jesus[19] and medieval canon law.[20] However, for the purposes of examining the English common law influence on Canada's statute, the story really starts in 1663 with a drunken aristocrat by the name of Sir Charles Sedley. English law in the decades prior to Sedley's time had treated blasphemy as an offence triable either in the Ecclesiastical Courts (as an offence against the Church of England) or in the Star Chamber (as a form of sedition).[21] However, the Star

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[15] See e.g. Leonard W. Levy, *Treason Against God: A History of the Offense of Blasphemy* (New York: Schocken Books, 1981) [Levy, *Treason*]; Leonard W. Levy, *Blasphemy: Verbal Offense Against the Sacred, From Moses to Salman Rushdie* (New York: Knopf, 1993) [Levy, *Blasphemy*]; Joss Marsh, *Word Crimes: Blasphemy, Culture, and Literature in Nineteenth-Century England* (Chicago: University Chicago Press, 1998) [Marsh, *Word Crimes*]; Alain Cabantous, *Blasphemy: Impious Speech in the West from the Seventeenth to the Nineteenth Century*, trans. by Eric Rauth (New York: Columbia University Press, 2002). Because Levy's and Marsh's books provide thorough histories of blasphemy in England and the United States, only a brief overview will be given here. Cabantous's interesting book is one of the few English-language sources for information on blasphemy in French history.

[16] See Levy, *Treason*, *ibid.* ("Except for that of Jesus, the trial of Socrates for blasphemy is the best known in history." at 13).

[17] *Ibid.* ("Leviticus 24:16 fixed the precedent in Judeo-Christian history for punishing blasphemy as a crime" at 17). See also Daniel J. Lasker, "Blasphemy: Jewish Concept" in Lindsay Jones, ed., *Encyclopedia of Religion*, 2d ed. (Farmington Hills, MI: Thomson, 2005) at 968–69.

[18] See E.A. Livingstone, ed., *Oxford Dictionary of the Christian Church* (Oxford: Oxford University Press, 1997) *s.v.* "blasphemy".

[19] Discussed at great length in Levy, *Treason*, supra note 15.

[20] See Livingstone, *supra* note 18 at 214.

[21] See Cabantous, *supra* note 15 at 55; Kenny, *supra* note 5 at 129. In a country with an established church, disloyalty towards one was often seen as disloyalty towards the other. In 1979, the House of Lords explained it this way: "In the post-Restoration politics of seventeenth and eighteenth century England, Church and

Chamber was abolished in 1641 and the Ecclesiastical Courts "had suffered under Cromwell a paralysis from which they had not fully recovered."[22] This created a legal vacuum[23] when Sedley and several of his friends "exhibited themselves naked on the balcony of a tavern of ill-fame ... before a crowd of several hundred persons. ... [and] proceeded to gestures and acts so gross that the crowd stoned them".[24] Although there was no clear legal basis for punishing what Sedley and his friends did, a judge on the Court of King's Bench indicted and fined Sedley anyway. Sedley's display "straddled the categories of blasphemy, indecency and sedition",[25] but it was the first step toward establishing blasphemy as a common law crime. Firm legal footing for the establishment of blasphemy as a common law offence would come just a little over a decade later.

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". See *Lemon*, *supra* note 6 at 384, Lord Diplock. As we will see, this link between religious faith and patriotism is not as direct in the Canadian case law on blasphemy.

[22] Kenny, *supra* note 5 at 129.

[23] In 1648 and 1650, Parliament passed laws criminalizing certain types of blasphemy including the denial of God's existence, the denial of Christ's divinity, the denial of the existence of Heaven and Hell, and more. Much later, Parliament adopted the *Blasphemy Act, 1698* (U.K.), 9 & 10 Will. III, c. 32, which operated along somewhat similar lines. However, in the 18th, 19th, and 20th centuries these statutes were rarely invoked as anything more than rhetorical supplements to the common law offence of blasphemy. For example, "[t]he statute of 1698 was not once invoked in any of the two hundred trials for blasphemy in the nineteenth century; it performed its function merely in 'supplementing' and therefore stiffening the [common] law." Marsh, *supra* note 15 at 15 [citations omitted]. See generally "Blasphemy", Note (1970) 70 Colum. L. Rev. 694 [*Blasphemy Note*] ("Parliament's displeasure at the laxity of strictures in this area led to an 'Act for the more effectual suppressing of Blasphemy and Profaneness' in 1698. Technically this was an act against apostasy, as it only punished un-Christian acts and expressions by one who had been brought up as a Christian or who had professed to believe in it. There were few, if any, prosecutions under this statute" at 696); Levy, *Treason*, *supra* note 15 at 207–223, 245 (discussing the 1648 and 1650 Acts); Cabantous, *supra* note 15 at 56–57 (discussing 1648, 1650, and 1698 acts). According to Levy, the 1698 Act was repealed by Parliament in 1967. See Levy, *Blasphemy*, *supra* note 15 at 536.

[24] Kenny, *supra* note 5 at 129. See also Cabantous, *supra* note 15 at 88.

[25] Clive Unsworth, "Blasphemy, Cultural Divergence, and Legal Relativism" (1990) 58 Mod. L. Rev. 658 at 664.

In 1676, Lord Chief Justice Matthew Hale rendered a decision in *Taylor's Case*.[26] At trial before the King's Bench, witnesses established that the defendant, John Taylor, had stated that "Jesus Christ was a bastard, a whoremaster, religion was a cheat ; and that he neither feared God, the devil, or man."[27] Taylor was convicted for this "uttering of divers blasphemous expressions" and sentenced to fines and a stint in the pillory.[28] As collected in the *English Reports*, Hale's rationale for the conviction is just a paragraph long, but it would become an enormously influential paragraph, not just for the law on blasphemy but on the relationship between England and Christianity:

> And Hale said, that such kind of wicked blasphemous words were not only an offence to God and religion, but a crime against the laws, State and Government, and therefore punishable in this Court. For to say, religion is a cheat, is to dissolve all those obligations whereby the civil societies are preserved, and that *Christianity is parcel of the laws of England* ; and therefore to reproach the Christian religion is to speak in subversion of the law.[29]

Hale's "sweeping statement"[30] on the connection between church and state "remains authority for blasphemy being an offence at common law,"[31] was "the most important ever decided in England",[32] and "reverberated down the centuries in many cases in which freedom of religious opinion or separation of church and state was at issue."[33]

English poets, playwrights, editorialists, and street preachers faced a real risk of a prosecution for blasphemy throughout the next

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[26] (1676), 86 Eng. Rep. 189, 3 Keb. 607, 621.

[27] *Ibid.* A much fuller account of the incident can be found in Levy, *Treason*, *supra* note 15 at 312–14.

[28] *Ibid.*

[29] *Ibid.* [emphasis added].

[30] Kenny, *supra* note 5 at 130.

[31] U.K. Law Commission, *Offences Against Religion and Public Worship* (Working Paper No. 79) (London: Her Majesty's Stationery Office, 1981) at 5 [Law Commission, *Offences Against Religion*].

[32] Leonard W. Levy, "Blasphemy: Christian Concept" in Jones, *supra* note 17, 971 at 973 [*Christian Concept*].

[33] Levy, *Treason*, supra note 15 at 314.

two and a half centuries.[34] In the eighteenth and early nineteenth centuries, the targets of prosecutions were often serious, sincere proponents of religious tenets that differed from Church of England doctrine, including Quakers, deists, and secularists.[35] However, a great debate about the meaning of blasphemy took place in the common law in the mid- to late 19th century. One commentator summarizes it nicely:

> [I]t had been a question disputed amongst lawyers whether the common law rendered punishable *all* open expressions of a disbelief in Christianity, or only such as were couched in language so irreverent and scurrilous as to be likely to offend ordinary Christians deeply enough to provoke some of them to a breach of the peace. To put it briefly, could the mere Matter of an expression of disbelief constitute an offence of criminal blasphemy, or would the offence arise only when the Matter was aggravated by the Manner?[36]

In other words, was it the *substance* of a statement (such as a denial of the Trinity, Christ's resurrection, etc.) that rendered it blasphemous, or was it the *style* ("intemperate", "indecent", etc.) in which it was phrased that was the problem? Could a Christian theologian engage in an intellectual debate about the existence of God with a well-mannered atheist without the latter committing blasphemy?

Eventually, the answer became "Yes." Although previously the common law of blasphemy concerned itself with enforcing orthodoxy, it would increasingly transform itself into a tool to prevent "irreverent", "obscene", or otherwise "contumelious" attacks on Christianity. The landmark decision was rendered by Lord Chief Justice John Coleridge in an 1883 case involving the prosecution of

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[34] Extensive accounts are provided in Marsh, *supra* note 13 and Levy, *Treason*, *supra* note 13.

[35] See Marsh, *supra* note 15 at 24–39 (discussing trials of a political parodist circa 1817); *ibid.* at 78–90 (discussing 1840 trial of the publisher of a deist newspaper); *ibid.* at 90–98 (discussing 1841 trial of the publisher of Shelley's poem *Queen Mab*); *ibid.* at 109–118 (discussing 1842 prosecution of secularist newspaper publisher). See also Levy, *Treason*, *supra* note 15 at 263–66 (discussing prosecution of Quaker leader George Fox); *Ibid.* at 332 (noting that early blasphemy prosecutions targeted devout individuals who differed on religious matters).

[36] Kenny, *supra* note 5 at 128 [emphasis in original].

a newspaper called the *Freethinker*.[37] In a famous statement frequently quoted in subsequent blasphemy cases, Coleridge said that "I now lay it down as law, that, if the decencies of controversy are observed, even the fundamentals of religion may be attacked without the writer being guilty of blasphemy."[38] Although this formulation of the law was disputed by other eminent jurists at the time,[39] it was adopted by the House of Lords in 1917[40] and continued to be the law in England for the remainder of the twentieth century.[41] More importantly for our present purposes, this common

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[37] See *R. v. Ramsay & Foote*, (1883) 15 Cox Crim. Cases 231 (Q.B.) [*Ramsay*]. See generally Marsh, *supra* note 15 at 127–62 (discussing case). Coleridge's famous decision was not unprecedented—an earlier case had reached basically the same conclusion. See *R. v. Hetherington*, (1840) 4 State Tr. (N.S.) 563 (U.K.). See also, Law Commission, *Offences Against Religion*, *supra* note 31 (stating that Coleridge "did no more than clarify and state in more emphatic terms the law as laid down in *Hetherington*." at 10); Marsh, *supra* note 15 at 78–90 (discussing case).

[38] *Ramsay*, *ibid.* at 238.

[39] See James Stephen, *A History of the Criminal Law of England* (London: Macmillan, 1883) vol. 2 at 475–76 ("To say that the crime lies in the manner and not in the matter appears to me to be an attempt to evade and explain away a law which has no doubt ceased to be in harmony with the temper of the times. ... [There] are certainly strong reasons why the law should be altered. ... [B]ut they are no reasons at all for saying that the law is not that which a long and uniform course of decisions has declared it to be"). Although Coleridge's ruling, in a strict legal sense narrowed the scope of the crime of blasphemy, it continues to have detractors into the modern era. See e.g. Marsh, *Word Crimes*, *supra* note 15 ("[Coleridge] turned to the value system erected by Victorian reviewers and cultural critics ... for a set of arbitrary standards by which to judge acceptability and offensiveness; and [his ruling] ensured that prosecutions would continue to be unpredictable" at 202); Levy, *Christian Concept*, *supra* note 32 (stating that Coleridge "supposedly liberalized the law by [creating a] fairly subjective test" and suggesting that "the authors of most of the books of the Old and New Testaments as well as many leading saints and the originators of most Protestant denominations" would not have satisfied the standard at 974).

[40] See *Bowman v. Secular Society*, [1917] A.C. 406 (H.L.), Lord Finlay [*Bowman*] ("I think we must hold that the law of England on this point is ... that the crime of blasphemy is not constituted by a temperate attack on religion in which the decencies of controversy are maintained." at 423). See also I.D. Leigh, "Not to Judge But to Save?: The Development of the Law of Blasphemy" (1977) 8 Cambrian Law Review 56 at 65 (noting unanimous adoption by House of Lords in *Bowman*).

[41] See *Lemon*, *supra* note 6 at 385, 406. See also Robert C. Post, "Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment"

law rule is clearly reflected in Canada's 1892 statutory prohibition of blasphemous libel, which applied (then and now) only to statements not made "in good faith and in decent language."[42]

As a matter of legal categorization, blasphemous libel constituted one of the four traditional criminal libels, along with seditious libel, obscene libel, and defamatory libel.[43] Historical blasphemy retained a close link with its brethren and in practice could easily slide into sedition (since the Church of England was an arm of the State)[44] or obscenity (since the tone used was in some cases more important to a jury than the substance of what was said).[45]

In the decades after Coleridge recast blasphemy law as a means of ensuring that the "decencies of controversy are observed", the number of prosecutions declined drastically and there were only five known cases between 1883 and 1922.[46] In 1922, the Court of Criminal Appeal confirmed the conviction of a man named Gott for

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(1988) 76 Cal. L. Rev. 297 ("Today the crime of blasphemy in England is essentially a restatement of Coleridge's view of the law." at 308).

[42] See *Criminal Code*, *supra* note 1, s. 296. The statute as originally enacted can be found in Henri E. Taschereau, *The Criminal Code of the Dominion of Canada* (Toronto: Carswell, 1893) at 114. See also John King, *The Law of Criminal Libel* (Toronto: Carswell, 1912) ("The declaration in the Code, as to what is not a blasphemous libel, represents the more tolerant view of the law, comparatively speaking, as expounded in the latest leading English cases." at 16). King briefly summarizes the debate between Coleridge and Stephen at 17–19.

[43] See Post, *supra* note 41 at 305; Levy, *Treason*, *supra* note 15 at 316. Unsworth, *supra* note 25 at 663, explains that "[t]he concept of libel here refers to representations which desecrate prized or hallowed institutions, figures or objects, the focus historically being upon the phenomenon traduced rather than injury to the audience."

[44] See Levy, *Treason*, *supra* note 15 at 195–96.

[45] See Richard Webster, *A Brief History of Blasphemy: Liberalism, Censorship and 'The Satanic Verses'* (Suffolk: The Orwell Press, 1990) ("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." at 23).

[46] See F. LaGard Smith, *Blasphemy and the Battle for Faith* (London: Hodder & Stoughton, 1990) at 45. In contrast, Levy notes that "the number of blasphemy cases peaked in England ... in the first half of the nineteenth centuries" and that between 1821 and 1834 alone there were 73 convictions. See Levy, *Christian Concept*, *supra* note 30 at 974. Marsh states that England held two hundred trials for blasphemy in the nineteenth century, but it is unclear if this is an actual tally or an estimate. See Marsh, *supra* note 15 at 15.

his "coarse and scurrilous ridicule of some of the narratives in the Four Gospels."[47] After *Gott*, several decades passed without another reported prosecution.[48] It would have been easy to assume that the common law crime of blasphemy had lapsed into obsolescence and had become a mere historical artifact.

However, a surprising thing happened in 1977. The editor and publisher of a gay newspaper were tried and convicted of the crime of blasphemous libel, and this conviction was upheld by the Court of Appeal,[49] the House of Lords,[50] and even the European Commission of Human Rights.[51] The case, known as *Lemon*, originated with a private prosecution brought by a Christian activist named Mary Whitehouse.[52] At issue was a poem penned by James Kirkup, a respected poet and visiting professor at Amherst College.[53] The poem, titled "The Love that Dares to Speak its Name", portrayed Jesus Christ as a life-long homosexual and "purports to describe in explicit detail acts of sodomy and fellatio with the body of Christ immediately after His death".[54] The jury convicted the defendants by a 10-2 margin; the trial judge fined both the editor and publisher, and

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[47] The phrase is from Kenny, *supra* note 5 at 127, quoting the then Home Secretary. The case is *Gott*, *supra* note 6.

[48] See Post, *supra* note 41 ("There were no successful prosecutions for blasphemy in England between the years 1922 and 1977" at 310); Law Commission, *Offences Against Religion*, *supra* note 31 at 17.

[49] See *Whitehouse v. Lemon*, (1978) 67 Cr. App. R. 70 (C.A.).

[50] See *Lemon*, *supra* note 6.

[51] See *Gay News Ltd. v. United Kingdom*, (1983) 5 E.H.R.R. 123. Subsequent European Court of Human Rights cases have continued to treat criminal or administrative prohibitions on blasphemy as allowable under the "margin of appreciation" doctrine. See *Wingrove v. United Kingdom*, (1997) 24 E.H.R.R. 1; *Otto-Preminger Institute v. Austria*, (1995) 19 E.H.R.R. 34. See generally Susannah C. Vance, "The Permissibility of Incitement to Religious Hatred Offenses Under European Convention Principles" (2004-05) 14 Transnat'l L. & Contemp. Probs. 201.

[52] See *Lemon*, supra note 6 at 382. See also "Protester says her crusade against sex and violence will help preserve democracy" *The Globe and Mail* (17 March 1977) F4 (profiling Whitehouse).

[53] See Levy, *Treason*, *supra* note 15 at 338.

[54] *Lemon*, *supra* note 6 at 382, Lord Diplock.

in addition sentenced the editor to nine months' imprisonment (suspended for 18 months).[55]

The *Lemon* case served to resolve three major questions around the offence of blasphemous libel under English common law. First, and most obviously, it made perfectly clear that common law crimes do not simply fade away after long periods of inactivity.[56] Second, it served to repudiate the view of some judges and commentators that blasphemous publications became criminal only if they had or were likely to provoke a breach of the peace; instead, a mere "tendency" to cause a breach of the peace was enough, and this was defined by Lord Scarman of the House of Lords as "words [that] are calculated to outrage and insult the Christian's religious feelings".[57] Finally, *Lemon* settled a long-standing controversy over the *mens rea* requirement of blasphemous libel by defining it in terms that approach strict liability: the prosecution need not prove that the author intended to blaspheme or offend anyone's religious sensibilities, but instead needs only to prove that the author intended to publish the disputed writing.[58] Viscount Dilhorne explained that "[i]f it be accepted, as I think it must, that that which it 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."[59] However, these exact same questions—the effect of

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[55] *Ibid.* As an interesting postscript, after the prosecution, other British newspapers promptly reprinted the poem and "The Free Speech Movement" offered free copies of it by mail. See Levy, *Blasphemy*, *supra* note 15 at 549.

[56] See *Gay News Ltd. and Lemon v. United Kingdom*, (1983) 5 E.H.R.R. 123 ("The applicants first submitted that the common law offence of blasphemous libel had fallen *in desuetudo*, the last case having been tried in 1921-22. The trial judge, however, ruled that he could not quash the indictment for this reason as in his opinion the offence still existed." at 124).

[57] See *Lemon*, *supra* note 6 at 407, Lord Scarman. See also, Levy, *Blasphemy*, *supra* note 15 (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." at 543); Law Commission, *Offences Against Religion*, *supra* note 31 (discussing "vestigial" character of breach of peace requirement applied by the trial judge at 34).

[58] *Lemon*, *ibid.* at 407–10.

[59] *Ibid.* at 394, Viscount Dilhorne. See also Smith, *supra* note 46 ("By the Law Lords' ruling, a person need not even know that the words would, or might have, the effect of shock or insult! Although the majority ruling denied it, it is difficult to conclude that blasphemy is now anything other than a crime of strict liability" at 57).

obsolescence, the link with breaching the peace, and the intent requirement—remain open questions under Canada's blasphemy statute and will be taken up again in Part IV, below.

Lemon also served to prompt the U.K. Parliament to study the issue of blasphemy. In 1981, the U.K. Law Commission issued a thorough and well-researched working paper on blasphemy, which proposed that the common law crime of blasphemous libel should simply be abolished.[60] The Commission believed it was impossible to accurately predict what a jury may or may not find blasphemous (given the inchoate state of the law) and argued that free speech concerns far outweighed any theoretical need to protect society from the 'dangers' of blasphemous speech.[61] The Commission's final report in 1985 echoed this recommendation, though two of the five members suggested that blasphemous libel should be replaced with a new type of religious vilification offence.[62] Parliament, however, took no action on the recommendations.[63]

England's next case involving blasphemous libel arose out of the furor over the publication of Salman Rushdie's *The Satanic Verses*.[64] Rushdie's novel, which many Muslims saw as a direct attack on Muhammad and Islam, was banned by several countries and even led to riots and fatalities in India and Pakistan.[65] The book also led to extensive demonstrations in England and an attempt to privately prosecute Rushdie and his publisher for blasphemous libel.[66] When a London magistrate refused to issue summonses against Rushdie and his publisher, the applicant appealed to the Queen's Bench Divisional Court.[67] In an opinion that did nothing to

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[60] See Law Commission, *Offences Against Religion*, *supra* note 31 at 140.

[61] See Levy, *Blasphemy*, *supra* note 15 at 551–52.

[62] *Ibid.* at 555.

[63] *Ibid.* at 558.

[64] Salman Rushdie, *The Satanic Verses* (London: Viking, 1988).

[65] See David A.J. Richards, *Free Speech and the Politics of Identity* (Oxford: Oxford University Press, 1999) at 211. According to Richards, Canada temporarily banned imports of Rushdie's book as "hate literature" until the "Prohibited Importations Branch" determined it was admissible. See *ibid.* at 214, citing Daniel Piper, *The Rushdie Affair: The Novel, the Ayatollah and the West* (Birch Lane Press: New York, 1990).

[66] See *R. v. Bow Street Magistrates' Court*, (1990) 91 Cr. App. R. 393 at 395 (C.A.). See generally Smith, *supra* note 46; Webster, *supra* note 45.

calm the uproar, the Court held that under the common law, the crime of blasphemous libel in England applies only to attacks on Christianity, and not to attacks on Islam or any other religion.[68]

The next and most recent attempt to invoke blasphemous libel came as this article was being written. In January of 2007, a member of the "Christian Voice" organization sought to launch a private prosecution against the producer of the theatrical production *Jerry Springer: The Opera*.[69] According to the Plymouth *Herald* newspaper, the show "features a gay Jesus in nappies, the Virgin Mary saying she was raped, more than 100 swear words and chat-show host Jerry Springer presenting from Hell".[70] A magistrate's refusal to issue summonses was upheld by the High Court, which formulated the elements of blasphemous libel in a manner less likely to lead to successful prosecutions than the House of Lords in *Lemon* had done almost two decades before. This formulation is therefore the most recent word we have on what blasphemous libel meant in England. According to the High Court,

> 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.
>
> ...
>
> What is necessary to make such material a crime is that the community (or society) generally should be threatened. This element will not be shown merely because some people of particular sensibility are, because deeply offended, moved to protest. It will be established if but only if what is done or said is such as to induce a

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[67] *Ibid.* at 395.

[68] *Ibid.* at 404.

[69] See *Green v. City of Westminster Magistrates' Court*, [2007] EWHC 2785 (Admin), [2008] E.M.L.R. 15, [2008] H.R.L.R. 12 [*Green*]. A summons was also sought against the Director General of the BBC because the network had aired a recorded performance of the show. *Ibid.* at para. 2.

[70] (Plymouth) *The Herald* (12 December 2007), online: The Herald <http://www.thisisplymouth.co.uk>.

> reasonable reaction involving civil strife, damage to the fabric of society or their equivalent.[71]

Although the High Court did not claim to be moving the law of blasphemous libel in a new direction, there is a clear shift from *Lemon*'s emphasis on preventing offence to religious sensibilities to a new emphasis on preventing "civil strife" or "damage to the fabric of society". Indeed, if the current formulation were applied to the previous two prosecutions, each could logically have reached the opposite result: a poem in a low-circulation gay newspaper about a homosexual Jesus (*Lemon*) probably wouldn't lead to "civil strife" but was prohibited, while the publication of a book that clearly did lead to "civil strife" in England and elsewhere (Rushdie's book) was allowed. In any event, the High Court held that *Jerry Springer: The Opera* "has as the object of its attack not religion but the exploitative television chat show" and therefore the magistrate was correct in refusing to issue the summonses.[72]

The attack on *Jerry Springer: The Opera* was the last hurrah for the common law prohibition on blasphemous libel in England. A House of Commons bill to abolish the offence received widespread support among legislators in January of 2008,[73] after a new offence prohibiting incitement to religious hatred passed in 2006.[74] The blasphemy repeal bill was temporarily postponed to allow

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[71] *Green*, *supra* note 69 at paras. 11, 16.

[72] See *ibid.* at para. 32. The High Court's decision is potentially reviewable by the House of Lords.

[73] BBC News, "Blasphemy Law 'May be Abolished'", BBC Online (9 January 2008), online: BBC <http://news.bbc.co.uk/2/hi/uk_news/politics/7178439.stm>. In 2003, the House of Lords had commissioned a study on the offence of blasphemous libel and whether it should be repealed or replaced with a more general "incitement to religious hatred" offence. The study examined various options but did not reach firm conclusions on anything other than that any religious offence should cover all religions equally. See House of Lords Select Committee on Religious Offences in England and Wales, *Religious Offences in England and Wales: First Report* (2003) at para. 133, online: House of Lords <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldrelof/95/9501.htm>.

[74] *Racial and Religious Hatred Act 2006* (U.K.), 2006, c. 1, Sch., s. 1, Part 3A, 29B(1), amending *Public Order Act 1986* (U.K.), 1986, c. 64. The nature of this new offence is discussed below in Part V(D).

consultation with the Church of England,[75] but according to newspaper reports "[t]he Church of England has cautiously elected not to oppose abolishing the British law, though senior clerics have emphasized that any change in the law should not be seen as a move toward secularism."[76] Shortly thereafter, in March of 2008 the House of Lords passed an amendment which would abolish blasphemy as a crime, and the House of Commons followed suit,[77] ending a ban that had been in place for over 325 years.

III. ENGLISH-INFLUENCED BLASPHEMY LAWS ELSEWHERE

Before proceeding to an in-depth look at Canada's blasphemy statute, this part of the article examines the state of blasphemy law in Australia, Ireland, and the United States. A brief survey of the legal state of blasphemy in these three English-influenced countries provides additional context for understanding Canada's prohibition and may provide some indication as to whether such a law has a continuing role to play in modern Western legal systems. The official legal status of blasphemy in these three countries differs significantly: in the United States, the Constitution has been interpreted in some jurisdictions to strike down blasphemy prohibitions; in Ireland, the Constitution contains an explicit statement that blasphemy is illegal. Meanwhile, some Australian States retain blasphemy laws but the major area of dispute is whether such laws should give way to a more general "religious vilification" offence.

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[75] See Alan Travis, "Ministerial compromise averts backbench revolt over repeal of blasphemy offence" *The Guardian* (10 January 2008), online: The Guardian <http://www.guardian.co.uk/uk/2008/jan/10/politics.religion>.

[76] Kim Murphy, "Britain's blasphemy law is no longer sacred: After a teddy bear incident and much debate, the House of Lords votes to abolish it" *Los Angeles Times* (6 March 2008) A3, online: Los Angeles Times <http://www.latimes.com/features/religion/la-fg-blasphemy6mar06,0,6126230.story>.

[77] See Martin Beckford, "Blasphemy laws are lifted" *Daily Telegraph* (30 May 2008), online: The Telegraph <http://www.telegraph.co.uk/news/1942668/Blasphemy-laws-are-lifted.html>.

A. AUSTRALIA

Unlike Canada, Australia lacks a nation-wide prohibition on blasphemous libel.[78] Although some Australian states retain statutory or common law prohibitions,[79] the secondary literature reports that the last two successful prosecutions were in 1871[80] and in 1919.[81] The last high-profile attempt to invoke blasphemous libel in Australia was in a 1998 case named *Pell*.[82]

Pell concerned an attempt by Melbourne's Catholic Archbishop to obtain an injunction preventing Australia's National Gallery from displaying a photograph of a crucifix immersed in urine.[83] In the course of denying the injunction, the hearing judge questioned whether the common law offence of blasphemous libel was still viable or had instead lapsed due to desuetude.[84] He decided that, in any event, the applicant had failed to satisfy an essential element of

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[78] See Caslon Analytics, "Blasphemy: Australia and New Zealand", online: Caslon Analytics <http://www.caslon.com.au/blasphemyprofile3.htm> ("at the national level blasphemy is not an offence in common law and ... there are few explicit references to blasphemy in federal legislation.") Publicly-licensed broadcasters are prohibited by Federal law from broadcasting "blasphemous" materials. See *ibid.*

[79] See *ibid.* See also Reid Mortensen, "Blasphemy in a Secular State: A Pardonable Sin?" (1994) 17 U.N.S.W.L.J. 409 at 417–18 (dated State by State summary).

[80] See 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", Case Note, (1998) 22 Melbourne U. L. Rev. 217 at 219 (presumably referring to the prosecution of William Jones for criticizing the Old Testament, discussed in Caslon Analytics, "Australian Blasphemy Cases" online: Caslon Analytics <http://www.caslon.com.au/blasphemyprofile4.htm>).

[81] See Caslon Analytics, *supra* note 78 (discussing the 1919 conviction of leftist Robert Ross for sending through the mail a "satire spoofing contemporary yellow journalism, with bolsheviks ransacking heaven, torturing the angels and rolling their own cigarettes with pages torn from the Book of Judgment." This Federal statute prohibiting the sending of blasphemous material through the post has since been repealed).

[82] See *Pell v. Council of Trustees of the National Gallery of Victoria*, [1998] 2 VR 391 (cited and discussed in Harris, *supra* note 80). See also Caslon Analytics, *supra* note 78.

[83] See Harris, *supra* note 80 at 217.

[84] *Ibid.* at 219.

the offence by being unable to demonstrate that the photograph had "a tendency to cause a breach of the peace."[85]

Instead of relying on statutory or common law prohibitions on blasphemy, the trend has been to enact religious vilification laws: half of Australian States have done so since 1990.[86] In many respects, religious vilification laws are simply a subset of more broad-ranging hate speech laws (familiar to most Canadians), which prohibit written or spoken words that incite hatred on specific grounds, usually including race, sex, nationality, and sexual orientation. As will be discussed more in Part V(D), religious vilification laws do raise special issues of their own and may not always offer a clear advantage over traditional prohibitions on blasphemous libel. Unless something drastic happens, however, it seems clear that blasphemous libel is a dead letter under Australian law.

B. IRELAND

Ireland's Constitution (adopted in 1937) adopts an interesting approach to blasphemy. The Constitution treats blasphemy in its civil liberties section as a limiting clause to the general free speech guarantee.[87] However, the Constitution does not just say that Parliament *can* prohibit blasphemy consistent with free speech; the Constitution affirmatively decides that blasphemy "is an offense which shall be punishable in accordance with law."[88] Although both a 1991 Law Commission on libel and a 1996 Constitution Review Group advocated removing this provision,[89] it remains in the Constitution.

Practically speaking, however, the Constitutional provision is irrelevant. There were only three known blasphemy prosecutions in

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[85] See *ibid.* Ironically, Harris reports that subsequent to the decision "vandals damaged the work and the gallery withdrew the exhibit for fear of injury to its staff should another attack be mounted." See *ibid.* at 226.

[86] See Nicholas Aroney, "The Constitutional (In)validity of Religious Vilification Laws: Implications for their Interpretation" (2006) 34 Federal Law Review 287 at 287–88.

[87] See *Constitution of Ireland*, 1937, art. 40.6.1.i

[88] *Ibid.*

[89] See Neville Cox, *Blasphemy and the Law in Ireland* (Lewiston, NY: Edwin Mellen Press, 2000) at xviii-xix, 68–69.

Ireland between 1703 and 1855, and only one since then.[90] This last case took place in 1996 and concerned an attempted private prosecution of a newspaper for publishing a political cartoon that comically portrayed priests and the Eucharist during a debate over whether divorce should be legalized.[91] After a High Court judge refused the applicant leave to begin the prosecution, the Supreme Court of Ireland took up the case.[92] The Court took note of the Constitution's statement about blasphemy and reviewed the history of blasphemy prosecutions in Ireland and England.[93]

Two main conceptual difficulties with blasphemy law were identified. First, is blasphemy possible in a country that, like Ireland, lacks an established church and constitutionally guarantees equal treatment of religions?[94] Second, if the *mens rea* of the crime of blasphemy is really is akin to strict liability (as controversially decided by the House of Lords in *Lemon*), does that not violate notions of free speech and expression?[95] The Court decided that these two issues were ones it was not inclined to resolve:

> In this state of the law, and in the absence of any legislative definition of the constitutional offence of blasphemy, it is impossible to say of what the offence of blasphemy consists. As the Law Reform Commission has pointed out neither the *actus reus* nor the *mens rea* is clear. The task of defining the crime is one for the Legislature, not for the Courts. In the absence of legislation and in the present uncertain state of the law the Court [can] not see its way to authorising the institution of a criminal prosecution for blasphemy[.][96]

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. After all, it seems apparent that the primary purpose of naming blasphemy as an offence in the civil liberties section of the Constitution would be to insulate it from

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[90] O'Brien, *supra* note 7 at 396.

[91] *Corway*, *supra* note 7 at para. 2.

[92] *Ibid.* at paras. 13–38.

[93] *Ibid.*

[94] *Ibid.*

[95] *Ibid.*

[96] *Ibid.* at para. 38.

concerns over free speech and religious equality. As for the 'problem' of defining the elements of blasphemy, the very *raison d'être* of courts in a jurisdiction where common law criminal offences still exist is to identify and define the elements of those offences and, if necessary, allow those elements to evolve and change over time.[97] In any event, given the unlikelihood of the Legislature suddenly deciding to define the elements of the crime, there is no longer a prohibition on blasphemy in Ireland.

C. UNITED STATES

Several American States in the early part of the 19th century inherited the English conception of blasphemous libel in their own common law courts.[98] The American cases quickly adopted the growing English distinction that blasphemous libel law should only address the manner in which religious subjects were addressed and not penalize the ideas themselves.[99] An interesting difference that one sees between the early English and American cases is that, lacking recourse to an established religion, the American cases focus far more on the "public order" rationale for prohibiting blasphemy and, therefore, show a more pronounced concern for establishing whether the publication at issue had led or would tend to lead to a

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[97] The situation, of course, would be different in a country (like Canada) where the legislature has abolished all or most common law crimes. See e.g. *Criminal Code*, *supra* note 1, s. 9(a) (abolishing all common law offences except contempt of court).

[98] See generally Levy, *Blasphemy*, *supra* note 15; Levy, *Treason*, *supra* note 15; Post, *supra* note 41 at 314–25.

[99] See Levy, *Blasphemy*, *supra* note 15 at 507. An example is *New York v. Ruggles*, 8 Johns. 290, 6 NY Reports 545 (N.Y. Sup. 1811) (discussing how impugned words must have been made "with a wicked and malicious disposition, and not in a serious discussion upon any controverted point in religion" at 293). Levy argues that in practice, this distinction was illusory: "In all the American decisions the courts maintained the legal fiction that the criminal law punished only malice, never mere difference of opinion. That is, the style rather than the substance of the expression was said to be the target of the law... . In fact, however, what was said, not how, was the decisive factor, because courts almost invariably found 'contumelious reproach' in a mere denial of the truths of Christianity, the doctrine of the Trinity, or the existence of God." Levy, *Treason*, *supra* note 15 at 335.

breach of the peace.[100] A good example is the 1837 case *Delaware v. Chandler.*[101]

In *Chandler*, the defendant was accused of saying that "the virgin Mary was a whore, and Jesus Christ was a bastard".[102] Chandler argued that the state blasphemy statute used against him violated the religious freedom guarantees in the Delaware Constitution, but in a thorough and learned opinion his views were rebuffed by Delaware's Court of General Sessions because, in its opinion, the foundations of blasphemous libel rested securely on the need to protect the public from disorder:

> We have endeavoured to mark down the length, width, height and depth, of the only principle upon which, as we think, blasphemy can be punished under our state constitution. We again repeat, that the only legitimate end of the prosecution is to preserve the public peace. It is sometimes said that our courts are the conservators of morals. This is true just so far as a breach of morals may necessarily tend to a breach of the peace, and no further.[103]

Indeed, blasphemous libel was likened to an invitation to fight a duel; although neither would *always* lead to a breach of the peace, the likelihood was real and therefore a legitimate target of the criminal justice system.[104] Along with emphasizing the public order nature of the offence, *Chandler* makes it clear that there was a willful intent requirement: "if another man was indicted for uttering these words, and the proof should be that he only uttered them in reply to a question what this charge was, without any intent to revile, but merely to satisfy the inquiry, it could not be pretended that the proof sustained the indictment for unlawful blasphemy."[105]

According to Leonard Levy, "[t]he number of prosecutions and convictions for blasphemy peaked in the first half of the nineteenth

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[100] See e.g. *Commonwealth v. Kneeland*, 37 Mass. 206 (1838) ("[The statute] is not intended to prevent or restrain the formation of any opinions or the profession of any religious sentiments whatever, but to restrain and punish acts which have a tendency to disturb the public peace" at 221).

[101] 2 Del. 553, 1837 WL 154 (Gen. Sess. 1837).

[102] *Ibid.* at 553 [emphasis omitted].

[103] *Ibid.* at 574.

[104] *Ibid.* at 569.

[105] *Ibid.* at 578.

century" in the United States.[106] After Massachusetts's highest court upheld the state blasphemy statute in 1838, there was not another reported prosecution in America until 1882 (which resulted in acquittal).[107] Although an agnostic preacher was convicted and fined for blasphemy in New Jersey in 1886,[108] a Kentucky trial court was the first to strike down a blasphemy statute as unconstitutional in 1894.[109] Twenty-two years passed until the next known American blasphemy case, involving an atheist lecturer who was subsequently prosecuted in two other states.[110] According to Levy, there was another long lull in prosecutions between 1926 and 1968;[111] the 1968 case involved Maryland's blasphemy statute, which was struck down as unconstitutional by a Maryland appellate court.[112] Apart from a case where charges were dropped in 1971, there have been no further reported blasphemy prosecutions to date.[113]

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[106]Levy, *Treason*, *supra* note 15 at 334.

[107]See Levy, *Blasphemy*, *supra* note 15 at 508.

[108]*Ibid.* at 508–11.

[109]*Ibid.* at 511–12.

[110]*Ibid.* at 512–15. See also *Maine v. Mockus*, 113 A.39 (Me. 1921) (finding that state blasphemy statute comports with state constitution).

[111]See Levy, *Blasphemy*, *supra* note 15 at 520–21. There were two Federal cases involving challenges to the constitutional validity of municipal blasphemy ordinances during this period. See *Oney v. Oklahoma City*, 120 F.2d 861 (10th Cir. 1941) (upholding a blasphemy ordinance with a clear nexus to breach of the peace concerns); *Lynch v. City of Muskogee*, 47 F.Supp. 589 (E.D. Okla. 1942) (finding that a blasphemy ordinance used against Jehovah's Witnesses was constitutional on its face but unconstitutional as applied). See also Levy, *Blasphemy*, *supra* note 15 at 524–25.

[112]*Maryland v. West*, 263 A.2d 602 at 604–05 (Md. App. 1970) (striking down the statute under the Free Exercise and Establishment Clauses for lack of a secular purpose).

[113]See Levy, *Blasphemy*, *supra* note 15 at 521, 530. See also Robert A. Brazener, "Validity of Blasphemy Statutes or Ordinances" 41 A.L.R. 3d 519. Much like the offence of blasphemy was linked with sedition in early English law, American law has often blended concerns over blasphemy with concerns over profanity, and some cases confuse the two concepts. See Levy, *Blasphemy*, *supra* note 15 at 506, 518–20. A recent case shows how the concepts can easily blend together. In *Leonard v. Robinson*, 477 F.3d 347 (6th Cir. 2007), the defendant was arrested for "uttering 'God Damn' while addressing the township board" and then sued the police officer for wrongful arrest, at 351–352. One of the state statutes relied upon by the township stated that "Any person who has arrived at the age of discretion, who shall profanely curse or damn or swear by the name of God, Jesus

Although the U.S. Supreme Court has never directly ruled on the constitutionality of statutory or common law blasphemy prohibitions, it seems clear that under current doctrine such a prohibition has little chance of surviving.[114] In order to avoid a rehearsal of (probably familiar) First Amendment doctrine, suffice it to say that a Court that protects public flag desecration[115] and cross-burning[116] as free speech seems unlikely to give great credence to a public order justification for prohibiting blasphemy.

The results of this brief survey of blasphemy laws in Australia, Ireland, and the United States are probably not surprising: blasphemy as a legal offence is on its last legs. Such prosecutions are either presumptively unconstitutional (United States), officially moribund unless legislatively defined (Ireland), or falling into desuetude and being replaced with more modern religious vilification statutes (Australia). Even in England, the originator of blasphemous libel as a common law crime, the offence has been abolished by Parliament. What is remarkable, however, is that the offence of blasphemy has lingered for as long as it has and continues to be the subject of judicial interpretation at the end of the twentieth- and beginning of the twenty-first centuries.

IV. BLASPHEMY IN CANADA

Very little has been published to date about Canada's blasphemy law. Apart from a few paragraphs in Leonard Levy's *Blasphemy*[117] and a couple of pages in a U.K. Law Commission report,[118] the fact that several men in the early 1900s were prosecuted for blasphemous libel in Canada has been forgotten. This part of the article discusses

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Christ, or the Holy Ghost, shall be guilty of a misdemeanor." at 356, citing Mich. Comp. Laws s. 750.103 (1979). The Court found that "no reasonable officer would find that probable cause" to arrest the defendant however "vigorous or blasphemous" his speech, because of the First Amendment, at 361.

[114]See e.g. *Blasphemy Note*, *supra* note 23 ("Although blasphemy is probably entitled to full first amendment protection when it is used to criticize religious beliefs or sensibilities, it might be subject to punishment, like all other speech, when used merely as an epithet or as 'fighting words.'" at 726).

[115]See *Texas v. Johnson*, 491 U.S. 397 (1989).

[116]See *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

[117]See Levy, *Blasphemy*, *supra* note 15 at 520.

[118]See Law Commission, *Offences Against Religion*, *supra* note 31 at 45–46.

Canada's blasphemy statute and the five reported prosecutions made under it.

A. THE STATUTE

Canada's statutory prohibition on blasphemy first appeared in the original 1892 *Criminal Code*, in substantially the same form as it is today.[119] However, the drafters did not create the language of the statute out of whole cloth; instead they borrowed the provision from the (never enacted) English Draft Code of 1879.[120] Henri Taschereau's edition of the *Criminal Code,* published in 1893, includes extracts from the English Royal Commission report[121] that accompanied the 1879 Draft Code:

> This section provides a punishment for blasphemous libels, which offence we deem it inexpedient to define otherwise than by the use of that expression. As, however, we consider that the essence of that offence (regarded as a subject for criminal punishment) lies in the outrage which it inflicts upon the religious feelings of the community and not in the expression of erroneous opinions, we have added a proviso to [that] effect[.][122]

In the 116 years since it was enacted, the statute has undergone minor stylistic changes, but the only change in substance was a mid-century increase in the penalty from a maximum of 1 year's imprisonment to 2 years' imprisonment.[123] In 1927, during the

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[119]S.C. 1892, c. 29. Compare Henri E. Taschereau, *The Criminal Code of the Dominion of Canada* (Toronto: Carswell, 1893) at 114 (s. 170) with Alan D. Gold, *The Practitioner's* Criminal Code, *2007 Edition* (Markham, Ont.: LexisNexis, 2006) at 445 (s. 296).

[120]See King, *supra* note 42 at 14; Law Commission, *Offences Against Religion*, *supra* note 31 at 43. King's book has a chapter on blasphemous libel in Canada, but because it was published in 1912 only one Canadian prosecution was available for analysis and the chapter instead recounts English blasphemous libel law.

[121]U.K. Royal Commission on the Criminal Code, *Report of the Royal Commission on the Criminal Code 1880 and Imperial Criminal Code and Criminal Bills* (London: Her Majesty's Stationery Office, 1888) [*Royal Commission*]. I have been unable to obtain a copy of this source to verify Taschereau's extract, but the quotation matches the one provided in King, *supra* note 42 at 14.

[122]Taschereau, *supra* note 117 at 114 (quoting *Royal Commission*, *supra* note 119).

[123]The change took place between 1944 and 1955.

notoriety of the *Sterry* case,[124] a Labor M.P. named J.S. Woodsworth introduced a bill to repeal the provision, but was unsuccessful.[125] The statute has therefore survived multiple revisions and consolidations of the *Criminal Code*, including the 1952–53 Royal Commission on the Revision of Criminal Code[126] and the 1987 Law Reform Commission of Canada's *Report on Recodifying Criminal Law*.[127] Indeed, 25 years after the *Charter* guaranteed religious freedom and free speech, Parliament has not yet seen fit to repeal the statute.

Putting the case law on hold for the next part of this article, what can be gleaned purely from the statute's text and relationship to other aspects of Canadian criminal law? First, we know that in Canada (unlike England and Australia) this statute is the only basis for the prohibition of blasphemous libel as a crime because all common law crimes other than contempt have been legislatively abolished.[128] Of course, courts can still rely on English common law cases in attempting to interpret the statute. Second, because blasphemous libel is a straight indictable offence we know that private prosecutions, although theoretically possible, require a judge's consent.[129] Judges refusing to consent to private prosecutions was the major stumbling block would-be private prosecutors faced in the English *Jerry Springer: The Opera* and *The Satanic Verses* cases.[130] Third, unlike English common law, the Canadian statute on its face is not explicitly limited to protecting Christianity: Jews, Muslims, and others who feel aggrieved by a

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[124]See Part IV(B)(4), below.

[125]See "Laborite Would End Trials for Blasphemy" *Toronto Daily Star* (5 April 1927) 3 ["Laborite"]; "Member Would Abolish Blasphemous Libel Law" *Toronto Daily Star* (30 January 1928) 5.

[126]See House of Commons, Special Committee on the Bill No. 93, *Report of Royal Commission on the Revision of Criminal Code* (16 December 1953) (Ottawa: Queen's Printer, 1954) at 17 (renumbering the blasphemous libel section).

[127]See Canada, Law Reform Commission of Canada, *Report on Recodifying Criminal Law* (Ottawa: Law Reform Commission, 1987) at 100, 103 (omitting discussion of blasphemous libel and suggesting more general crimes of "Stirring up Hatred", s. 21(1), and "Disturbing Public Order by Hatred", s. 22(2)).

[128]See *Criminal Code*, *supra* note 1, s. 9(a).

[129]*Ibid.* s. 574(3).

[130]See Part II, above.

publication have at least a plausible argument for invoking the statute in their defence.

However, what we know seems far outweighed by what we do not. First, an obviously problematic aspect is that the statute provides no definition of "blasphemous libel."[131] We supposedly know what is *not* a blasphemous libel ("good faith" discussion of "religious subjects" made in "decent language"),[132] but the question of determining what *is* a blasphemous libel is purely a question of fact for a jury.[133] This vagueness makes it difficult for a publisher's lawyer to advise what will fall within the scope of the prohibition, difficult for a prosecutor to be confident in his or her case, and difficult for a trial judge to give helpful instructions to the jury.

Second, the statute leaves open the question that plagued English law for over a century: what is the *mens rea* for blasphemous libel? Is mere intent to publish material that turns out to be blasphemous enough, or is there an added requirement that the publisher intend to blaspheme or offend religious sensibilities? The latter definition is far more in line with modern *Charter* sensibilities, but the former was later determined by the House of Lords to be the correct interpretation of the English common law that Canada's statute was based on.[134]

Third, is there any basis for imputing a requirement under the statute that the offending publication "tend to cause a breach of the peace" as seen in older English and American cases,[135] or a requirement that it "induce a reasonable reaction involving civil strife, damage to the fabric of society or their equivalent" as stated in the most recent English blasphemy case?[136] The difference is a crucial one, as a statute plausibly directed towards preventing

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[131]See *Criminal Code*, *supra* note 1, s. 296.

[132]See *ibid.* s. 296(3).

[133]See *ibid.* s. 296(2).

[134]See the discussion of *Lemon* in Part II, above. According to King, *supra* note 42 at 15, writing in 1912, "The Crown must prove the intent, the existence of which is a question of fact for the jury, the best evidence of it being found in the language of the publication itself. If it is full of scurrilous and opprobrious language, if sacred subjects are treated with offensive levity, if indiscriminate abuse is employed instead of argument, then a malicious design to wound the religious feelings of others may be readily inferred".

[135]See Parts II and III(C), above.

[136]See Part II, above.

fistfights and riots seems more likely to comport with the free speech and freedom of religion guarantees in the *Charter* than a statute concerned with merely preventing coarse, offensive, or intemperate attacks on religious sensibilities.

Each of these three questions is taken up again in the next part, which examines the case law on blasphemous libel in Canada.

B. THE CASE LAW

1. *PRINGLE V. NAPANEE (TOWN)* AND FREETHINKER LECTURES (1878)

The first Canadian case to consider blasphemy in a substantive way actually predated the *Criminal Code* by several years. In the 1878 case *Pringle v. Napanee (Town)*,[137] a pair of judges on the Upper Canada Court of Queen's Bench were called upon to decide a breach of contract case between a freethinker lecturer and the Town Council of Napanee, Ontario. The lecturer had leased the Town Hall to give a series of public talks, but the Town Council balked when they learned the subject matter of the three lectures: "Evolution v. Creation", "What liberalism offers as a substitute for Christianity" and "Fallacies and Assumptions of Theologians regarding the Bible and Christianity".[138] The narrow issue in the case was whether the Town Council was liable for breach of contract; however, in the court's mind "the broad question is, whether Christianity is so far a part of the law of the land that an attack upon it, or upon some of its fundamental doctrines, is illegal."[139]

The court summarized several English blasphemous libel cases to establish its view that Christianity was part of English common law[140] and then noted that the Legislature of Upper Canada had, by statute, imported the criminal common law of England as it stood on 17 September 1792.[141] The logical conclusion to the court's simple syllogism then was that Christianity had become part of Canadian

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[137](1878) 43 U.C.Q.B. 285 [*Pringle*]. See also King, *supra* note 42 at 21–22.

[138]*Pringle*, *ibid.* at 286.

[139]*Ibid.* at 293.

[140]*Ibid.* at 295–298.

[141]*Ibid.* at 293.

common law as well.[142] Able arguments from the freethinker's counsel that (1) Canada lacked an established religion,[143] that (2) "[n]o case, as far as can be found, is to be met with in the books in Ontario of an indictment for blasphemy",[144] and that (3) the Legislature had passed a statute guaranteeing the free exercise of religion[145] were all rebuffed by the court as unpersuasive.[146]

In a statement that anticipates the eventual language in the *Criminal Code*'s blasphemous libel prohibition, the court said:

> [M]ore latitude is allowed to religious discussions in the present day, than was allowed when some of the cases to which we have referred were decided.... It is not likely that any man in the present day will be convicted, or if convicted punished for the honest and temperate expression of his opinion.[147]

However, the court went on:

> No one is attempting to punish [the freethinker plaintiff] for the expression of his opinions about the supposed fallacies of the Bible and Christianity. The guardians of the town hall ... simply refused, when they learned of his peculiar views, to permit him to express them in that hall. This was not more than the exercise of the legal right which they possess of refusing to allow their property to be used for what the law holds to be an illegal purpose.... The purpose being illegal, the contract is illegal.[148]

As mentioned in the case, there are no reported prosecutions for blasphemy under the common law in Canada. Indeed, the first reported statutory prosecution did not occur until almost a decade

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[142] *Ibid.* at 298.

[143] *Ibid.* at 290.

[144] *Ibid.* at 292.

[145] *Ibid.*

[146] *Ibid.* at 303–04.

[147] *Ibid.* at 305.

[148] *Ibid.* at 305–06. The *Pringle* decision closely followed a factually similar English decision which contained an often repeated-maxim: "a thing may be unlawful, in the sense that the law will not aid it, and yet that the law will not immediately punish it." *Cowan v. Milbourn*, (1867) L.R. 2 Ex. 230 at 236. It wasn't until 1917 that this reasoning was rejected in England, allowing for the enforcement of contracts and wills that involved an "anti-Christian" purpose. See *Bowman, supra* note 40.

after the provision was enacted, in the 1901 case of *R. v. Pelletier*.[149]

2. *R. V. PELLETIER* AND *THE LITTLE REVIEW* (1901)

Canada's first reported blasphemy prosecution unfortunately does not reveal much about the law, as the defendants pled guilty and the Montreal trial judge's remarks only concern the appropriate sentence to be handed down.[150] The defendants admitted to publishing a periodical entitled *The Little Review,* one issue of which contained an article (written by someone else) which "consist[ed] of a conversation between the author and a servant on the alleged schism between the apostles Saint Peter and Saint Paul at the beginning of Christianity, regarding the baptism of Christians."[151] No passages from the article are reproduced, but it clearly outraged the trial judge who stated that "[t]hings most sacred have been turned into jokes; sarcasm appears in every sentence in a most impious form, and, I would add, most obscene"[152] and concluded that "[i]t is, one feels, the creation of a libertine mind and of a spoiled heart.... these expressions can be understood only as the writing of a heathen espousing evil."[153] Indeed, because "[t]he religion of Jesus Christ is the school of morality and truth",[154] the defendants were responsible for "deliver[ing] with composure and with a cheerful heart this poison, capable of causing the death of faith and of virtue."[155] Fortunately for the defendants, the trial judge believed their testimony that they had neither written nor even read the article

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[149] *Pelletier*, *supra* note 2 at 116. To be precise, sentencing occurred in 1900, but the reported opinion was not published until 1901. In this and the other Quebec cases discussed in this part, all quotations are my (admittedly imperfect) translations from the French.

[150] *Ibid.* at 117.

[151] *Ibid.* at 116. According to the article, Saint Peter argued for baptism by circumcision, while Saint Paul, contrary to the wishes of Jesus Christ, argued for baptism by water and it was this view that prevailed in the Christian Church. See *ibid.*

[152] *Ibid.* at 117.

[153] *Ibid.*

[154] *Ibid.*

[155] *Ibid.* at 118.

before publishing it,[156] and instead of sentencing them to imprisonment let them off with a stern warning and a 100 dollar fine.[157]

3. *R. v. Kinler* and *The Golden Age* (1925)

Two and a half decades after *Pelletier*, Canada saw its second reported blasphemy prosecution in the 1925 case *R. v. Kinler*.[158] *Kinler* concerned a pamphlet called *The Golden Age* which the defendants spread throughout the Quebec town of Coaticooke.[159] Brought before a magistrate on charges of blasphemous libel, one could assume the accused were in trouble after the magistrate summarized their pamphlet thus:

> The most salient points of this article are that it attacks the clergy of different denominations, that it puts them all on the same standing, but on a very low standing, under the heel of the author.
>
> They accuse the clergy of being themselves taken by the suggestions of Satan, and of being joined in a plot with the devil for the purpose of ruining the world; of having repudiated the word of God, of having refused to teach the people the message of the kingdom of the Messiah, of having wanted the Kingdom of God without God, of having declared loyalty to the devil, the god of evil ... they attack the dogmas of the Catholic Church, the right of succession of popes and bishops to the throne of St. Peter and the apostles; the dogma of the Holy Trinity; they deny the Church the right to interpret the Bible; they deny the doctrine of the immortality of the soul, and other similar things.[160]

Surprisingly, however, the magistrate interpreted the blasphemous libel statute in a quite narrow way. Based upon his analysis of the

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[156] See *ibid.* at 117 (stating that "I believe that without difficulty, for I do not believe a Canadian pen to be capable of producing such obscenities ... . A foreign pen must have committed this horror").

[157] See *ibid.* at 119 (warning against publishing "mocking, sarcastic, and slanderous articles against the Christian religion and its august representatives" and instead advising "making an honest Review, respectful of religious beliefs and Christian morality").

[158] *Kinler*, *supra* note 2.

[159] See *ibid.* at 484.

[160] *Ibid.* at 484.

common law (and acknowledging that the statue did not define "blasphemous libel"),[161] he concluded that "[i]t may well be that these days the only thing considered to be blasphemy is a direct insult hurled at God."[162] Because *The Golden Age* consisted only of attacks against clergy and doctrine, and "does not contain anything in itself blasphemous against the Divinity",[163] the magistrate dismissed the charges and the defendants were free to go.

The decision was laudable from a freedom of speech and religion perspective, but it probably did not accurately represent the contemporary jurisprudence on blasphemous libel. The magistrate did not discuss which sources he looked at in his analysis of the common law, other than a reference that the English author Odger wrote "an interesting history on this point, and one which would be too long to recite here."[164] The last English blasphemous libel case prior to *Kinler* was the 1922 case *R. v. Gott*.[165] In *Gott*, the trial judge had instructed the jury that "[w]hat you have to ask yourselves in this case is whether these words which are published ... are ... indecent and offensive attacks on *Christianity or the Scriptures or sacred persons or objects*".[166] The Court of Criminal Appeal stated that "[t]here was no misdirection in the summing up."[167] Similarly, when the English High Court in 2007 presented its analysis of the common law meaning of blasphemous libel, it included "contemptuous, reviling, scurrilous and/or ludicrous material relating to God, Christ, *the bible or the formularies of the Church of England*."[168] Nor did the magistrate mention that the only prior prosecution for blasphemous libel in Canada was premised on a debate over baptism.[169] Thus, it seems clear that the definition of blasphemous libel embraces attacks on religious doctrines and

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[161] See *ibid.* at 485.

[162] *Ibid.* at 485.

[163] *Ibid.* at 486.

[164] *Ibid.* at 485.

[165] *Gott*, *supra* note 6. This case is briefly discussed by Doyle, *supra* note 3.

[166] *Gott*, *ibid.* at 89 [emphasis added].

[167] *Ibid.* at 90.

[168] See *Green v. City of Westminster Magistrates' Court*, [2007] EWHC 2785 (Admin) at para. 11, [2008] E.M.L.R. 15, [2008] H.R.L.R. 12 [emphasis added].

[169] See Part IV(B)(2), above.

institutions, not just the Divinity. As we will see, later Canadian cases repudiated the rule announced in *Kinler* when faced with analogous facts.

4. *R. V. STERRY* AND THE *CHRISTIAN ENQUIRER* (1926)

R. v. Sterry[170] holds the distinction of being the only one of Canada's five reported blasphemous libel prosecutions to take place outside of Quebec. The verdict was front-page news in Canada,[171] the subject of several editorials in American newspapers,[172] led to a (failed) bill to repeal blasphemy as a crime,[173] inspired the case's prosecutor to publish an annotation on blasphemous libel (drawn largely from his trial brief),[174] and the *Canadian Bar Review* to publish a short comment on the case[175] along with the trial judge's jury instructions.[176]

So what did the defendant, Ernest Sterry, do that merited all of this attention? According to the indictment, he "unlawfully and wickedly and with intent to asperse and vilify Almighty God and bring the Holy Bible, the Holy Scriptures and the Christian religion into contempt ... to the high displeasure of Almighty God, to the great scandal and reproach of the Christian religion, to the evil example of all others in like case offending, and contrary to the

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[170]Unreported (15 March 1927), Coatsworth, Co. Ct. J., aff'd (4 May 1927) (Ont. Sup. Ct. (A.D.)).

[171]Canadian examples include "Find Sterry Guilty of Blasphemy" *Toronto Daily Star* (15 March 1927) (front page, banner headline); "To Do 60 Days in Jail and To Be Deported, Sentence on Sterry" *The Globe* (17 March 1927) (front page, with picture of successful prosecutor).

[172]See "Libeling God in Canada" *Literary Digest* 93:2 (9 April 1927) at 30 (discussing editorials on *Sterry* in the Indianapolis *News*, the Pittsburgh *Gazette Times*, the Hartford *Times*, the Omaha *Bee*, and the New York *Evening World*).

[173]See "Laborite", *supra* note 125 and accompanying text.

[174]See E.J. Murphy, "Blasphemy", Annotation, (1926) 48 C.C.C. 1. I suggest this was drawn from litigation materials because the Annotation quotes from the indictment in the *Sterry* case and then presents a lengthy history of blasphemous libel in England, with an adversarial approach and trial-brief style references such as "the defendant will urge that". See *ibid.* at 20.

[175]See "Blasphemous Libel", Case Comment, (1927) 5 Can. Bar Rev. 377.

[176]See Coatsworth, J., "Blasphemous Libel: Charge to the Jury in *R. v. Sterry*" (1927) 5 Can. Bar Rev. 362.

Criminal Code"[177] wrote articles for a publication called *The Christian Enquirer*[178] in which he said that, *inter alia*:

> Read your Bible, if you have not done it before, and you will find in it hundreds of passages relative to the Divine Being, which any moral and honest man would be ashamed to have appended to his character ... The God of the Bible is depicted as one who ... thunders imprecations from the mountain or mutters and grouches in the Tabernacle, and whom Moses finds so hard to tame, who in his paroxysms of rage has massacred hundreds of thousands of His own Chosen People .... This touchy Jehovah whom the deluded superstitionists claim to be the creator of the whole universe, makes one feel utter contempt for the preachers and unfeigned pity for the mental state of those who can retain a serious countenance as they peruse the stories of His peculiar whims, freaks and fancies and His frenzied megalomaniac boastings[.][179]

In jury instructions filled with Christian statements of faith,[180] the trial judge summarized two definitions of blasphemous libel drawn from English common law[181] and concluded by instructing the jury that "What you have to consider, gentlemen, is whether or not this publication is limited to the decency of proper controversy. [Sterry] is perfectly entitled to express his opinions so long as he does so in respectful and proper language that does not outrage your feelings and the feelings of the rest of the community."[182] After the jury initially retired, defence counsel asked and received a specific instruction to the jury that Sterry could be found guilty only if the jury determined that he *intended* to "'asperse and vilify'" God and "arouse the resentful feeling of the community."[183] The jury retired

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[177]See Murphy, *supra* note 174 at 2–3 (quoting indictment).

[178]See "Blasphemous Libel", *supra* note 175 at 377.

[179]See *supra* note 172 at 3 (quoting indictment).

[180]See e.g. Coatsworth, *supra* note 176 (stating that "Probably nothing is more sacred to us than our religion. ... It is part of our faith that God so loved the world that He gave His only begotten and well beloved Son that whosoever believeth on [*sic*] Him should not perish but have eternal life. ... We look upon the Bible as the basis of every good law in our country. It is to us the dearest and most precious book in all the world." at 362–63).

[181]See *ibid.* at 363.

[182]*Ibid.* at 364.

[183]*Ibid.* at 364–65.

for 25 minutes and then returned with a guilty verdict, and Sterry was sentenced to 60 days' imprisonment.[184] A unanimous five-judge panel of the Appellate Division of the Supreme Court of Ontario dismissed his appeal.[185]

5. *R. V. ST. MARTIN* AND *SPARTAKUS* (1933)

In the past few cases we have seen prosecutions for a debate about circumcision, a screed against the clergy, and a direct assault on the character of God in the Old Testament. In *R. v. Martin*,[186] we must turn our attention to an att ack on religious charity for the poor. The accused, Albert St. Martin, published several pieces in a newspaper called *Spartakus* ("official organ of the unemployed")[187] that argued against the Catholic Church and its affiliated organizations' practice of providing alms to the poor. In the author's words, "[w]e mean to attack charity as a palliative, and to demonstrate that this means is iniquitous, cruel, [and] inhumane; that, inevitably those who distribute those alms are and always will be barbaric hypocrites, utter thieves, and shameless criminals...".[188] The author goes on to argue that receiving charity from the Church is humiliating,[189] that the Church receives far more money in special collections for the poor than they actually use for charitable purposes,[190] and that these charities use religion to "exploit credulity, fear, hope, ignorance, and their kind."[191]

Suffice it to say, this did not go over well in 1930s Quebec. St. Martin was convicted of blasphemous libel and sentenced to pay a 100 dollar fine and two 500 dollar bonds that would be forfeited,

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[184] See *ibid.* at 365 (Editor's Note).

[185] See *ibid.* See also "Sterry Conviction Upheld[,] Court Considers Language an Insult to Christianity" *Toronto Daily Star* (4 May 1927).

[186] *St. Martin*, *supra* note 2.

[187] *Ibid.* at 412.

[188] *Ibid.* at 416.

[189] See *ibid.* at 418-19 (describing how recipients are forced to kneel through a religious ceremony before being fed).

[190] See *ibid.* at 420 ("Every crime has a motive; that of these charitable institutions is evident: it is for making money and profit composing the difference between the fabulous sums which they receive from the gullible, including our legislators, and the insignificant pittance which they donate to the needy").

[191] *Ibid.* at 421.

along with his freedom, if he repeated the offence.[192] Although he does not mention the case by name, the trial judge rejected as erroneous the earlier ruling in *R. v. Kinler*[193] that only direct attacks on the Divinity are culpable.[194] In his view, the law applies more generally to the discussion of "religious subjects" which are not limited to "the divine or the accounts of the Saints, but also [include] all persons or sacred objects."[195] It is true that the phrase "religious subject[s]" is in the text of Canada's blasphemous libel provision, but it is contained in the proviso which says that good faith and decent discussions of religious subjects are *not* blasphemous libel. Here, the trial judge has imported the phrase into the otherwise undefined prohibition to state what blasphemous libel *is*.

By determining that the statute covers "religious subjects" generally, the trial judge is able to find that almost every aspect of St. Martin's writings are culpable. First, the attacks on charity are culpable because "Charity is a theological virtue" that "plays a part in the beliefs not only of followers of the Catholic religion, but also of the religion of the Christian people."[196] Second, the criticism of the priesthood is culpable because priests "form an integral part of the Catholic and Christian religion."[197] Finally, attacks on the church itself and affiliated charitable organizations are culpable because "[r]eligious institutions similarly form part of the religion practiced by the majority of the people in this province."[198] Notably, the trial judge does conclude that blasphemous libel is a specific intent offence[199] and finds that St. Martin's "intent is all the more clear and definite."[200]

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[192] *Ibid.* at 432.

[193] *Kinler*, *supra* note 2.

[194] *St. Martin*, *supra* note 2 at 413.

[195] *Ibid.*

[196] *Ibid.* at 426.

[197] *Ibid.*

[198] *Ibid.*

[199] See *ibid.* at 428–32, especially at 432.

[200] *Ibid.* at 432.

6. *R. V. RAHARD* AND THE "SERMON BY AN OLD MONK" (1936)

Canada's last reported prosecution for blasphemous libel involved a classic case of inter-denominational rivalry. In *R. v. Rahard*,[201] the minister of an Anglican church in predominantly Catholic Montreal put a poster up on the wall of his church titled "Sermon by An Old Monk" that said, in part:

> Judas sold Christ but did not kill Him, the priests attempt to sell Him and immolate Him. Judas sold Christ for a large sum of money; the Roman priests sell Him every day and even three times.
>
> Judas repented and threw his money away; the Roman priests do not repent and keep the money. Now what do you think of the papist religion?[202]

Indicted for blasphemous libel before a Quebec trial court, the minister's position was that "[b]lasphemy is a crime by English common law which exists only in an attack against the Divinity or Christianity in general; and the writing attacks neither the Divinity or Christianity."[203] On the other hand, the Crown argued that:

> [The statute] gives every freedom of opinion upon any religious subject whatever ... provided that this publication is made in good faith and in agreeable language, in such a manner as not to offend either by its terms or expressions the feelings of others who are not of the same opinion or point of view and finally to keep from disturbing the peace through offensive or injurious terms.
>
> In short to insure the public peace among His Majesty's subjects is the object of all the provisions of the [Criminal] Code.[204]

The trial judge had two precedents to choose from on the question of whether blasphemous libel covers more than direct attacks on the Divinity: the 1925 *Kinler* case (favourable to the defendant) or the more recent 1933 *St. Martin* case (favourable to the prosecution). The trial judge picked the latter and did not even cite to the

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[201] *Rahard, supra* note 2. The decision was actually handed down in 1935.

[202] *Ibid.* at 231.

[203] *Ibid.* at 232. This statement and that of the Crown in the next sentence are the trial judge's characterization of the parties' positions.

[204] *Ibid.* at 232.

former.[205] Concluding that "[t]he bad faith of the accused is more than manifest"[206] and that "these terms [he used] are offensive and injurious to the Roman Catholics",[207] the court found the minister guilty[208] and fined him 100 dollars.[209]

Three things make *Rahard* an interesting case. First, as discussed, it is further authority for the proposition that the law extends to insults directed toward religious institutions, doctrines, and clergy. Second, the trial judge rejected a defence submission that the indictment should be quashed because it did not allege intent. According to the trial judge, "[i]ntent results from facts" and "the fact that the indictment alleges that the accused published a blasphemous writing was sufficient to include all the elements of the offence."[210] This is not perfectly clear, but it seems to lend some support to the strict liability conception of blasphemous libel. Third, *Rahard* is the first Canadian case to explicitly find that preventing breaches of the peace is either one of or the main purpose behind prohibiting blasphemy. Not only was this the submission of the Crown, but the trial judge found that the minister's words were "of such a nature that they may lead to a disturbance of the public peace."[211]

C. ANALYSIS

Five reported prosecutions between 1901 and 1936; none before and none since. What do these cases tell us about the crime of blasphemous libel in Canada? A table may help to reveal some of the patterns:

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[205] See *ibid.* at 236.

[206] *Ibid.* at 237.

[207] *Ibid.*

[208] See *ibid.* at 238.

[209] See "Rev. V. Rahard is Found Guilty of Blasphemy" *Toronto Daily Star* (25 April 1935). Rahard filed an appeal but then dropped it: see "Blasphemous Libel Appeal Dropped" *The Globe and Mail* (17 September 1935).

[210] *Ibid.*

[211] *Ibid.* at 237.

Case	Year	At Issue	Court	Conviction?	Sentence
Pelletier	1901	Circumcision Debate	Quebec trial	Yes	$100 fine
Kinler	1925	Anti-Catholic Pamphlet	Quebec trial	No	None
Sterry	1926	Attack on Scripture	Ontario trial & Appeal	Yes	60 day jail term
St. Martin	1933	Attack on Catholic Charity	Quebec trial	Yes	$100 fine
Rahard	1936	Anti-Catholic Poster	Quebec trial	Yes	$100 fine

As far as we know, only the Ontario conviction was appealed to a higher court (which affirmed in an unpublished opinion), meaning that the precedental value of all five of these cases is relatively low. Despite the strident denunciations of the defendants' conduct and the lectures on the evils of blasphemy made by judges in all four of the cases resulting in convictions, the sentences handed down were light compared to the maximum: three 100 dollar fines and a 60 day jail sentence; given that the statute at the time allowed for up to a year's imprisonment, some of the defendants must have considered themselves quite lucky to get the sentence they did. As indicated above, four out of the five prosecutions took place in Quebec and at least three of those primarily involved direct criticism of the Catholic Church. This fact fits well with what we already know about the strong ties between the government and the Church in Quebec before the "Quiet Revolution" occurred in the 1960s.[212] The five cases also

[212]See e.g. Peter Beyer, "Roman Catholicism in Contemporary Quebec: The Ghosts of Religion Past?" in W.E. Hewitt, ed., *The Sociology of Religion: A Canadian Focus* (Toronto: Butterworths, 1993) at 136–140. Prior to the Quiet Revolution, at least one religious sect seen as too critical of the Catholic Church (the Jehovah's Witnesses) were repressed in Quebec through the criminal law. See *Chaput v. Romain*, [1955] S.C.R. 834, 1 D.L.R. (2d) 241; *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299, 1953] 4 D.L.R. 641; *Boucher v. R.*, [1951] S.C.R. 265, [1951] 2 D.L.R. 369. Although none of these cases involved use of the *Criminal Code*'s blasphemy provision, newspaper accounts do reveal at least two prosecutions of Jehovah's Witnesses for blasphemous libel in Quebec. See "Jehovah's Witnesses Face Charges at Rouyn" *The Globe and Mail* (3 August 1938), "Jury Selected to Try Witnesses of Jehovah" *The Globe and Mail* (9 February, 1939).

share practically no mention of freedom of speech or religion,[213] which is not surprising for Canadian judges writing in the first third of the twentieth century.

In terms of the larger doctrinal questions, the case law clearly deviates from the English rule that only the brand of Christianity embraced by the Church of England is protected. At the very least, Catholic Christianity is protected, but most of the case law talks more generally about respect toward "religious subjects" in general. Whether this should be considered precedent for arguing that all religions are protected by Canada's blasphemy statute is hard to say without a case on point, but equality guarantees in both the *Charter* and the *Canadian Bill of Rights*[214] would militate in the direction of such an interpretation.[215] There is some support from *Rahard* that blasphemous libel requires that the publication tend to breach the peace, but the other four cases do not use the phrase or make such a finding, and even in *Rahard* the "tendency" was apparently inferred from the language on the poster itself without any evidence of actual or near public disorder. Instead of seeing it as an independent element of the offence, it is more likely that early Canadian (and English) judges saw all blasphemous publications as inherently tending to breach the peace, thus meriting the prohibition to begin with. There appears to be a split in the case law as to whether blasphemous libel is a strict liability offence or instead whether a jury must find that the defendant intended to blaspheme; *Rahard* seems to adopt the former view while *St. Martin* and *Sterry* clearly adopt the latter. Because modern Canadian law has created a presumption that an offence in the Criminal Code has a *mens rea* requirement,[216] it seems safe to discount anything in *Rahard* to the contrary.

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[213] E.J. Murphy, the prosecutor in *Sterry*, wrote "[t]here is a vast difference between freedom of speech and license of abuse. The main question in blasphemy is not whether one is free to express his disbelief in God, but how that disbelief may be expressed." See Murphy, *supra* note 174 at 20.

[214] R.S.C. 1960, c. 44, reprinted in R.S.C. 1985, App. III.

[215] S. 15 of the *Charter*, *supra* note 10, guarantees equality on particular grounds, including religion, while section 1(b) of the *Canadian Bill of Rights*, *ibid.*, guarantees "the right of the individual to equality before the law and the protection of the law".

[216] See *R. v. Prue*, [1979] 2 S.C.R. 547 at 548, 96 D.L.R. (3d) 577 [*Prue* cited to S.C.R.] ("the inclusion of an offence in the *Criminal Code* by that very fact must

An interesting mystery is why, after four reported prosecutions in one ten-year period (three of them successful), did the Crown suddenly give up on blasphemous libel? Without something definite in the historical record, one can only speculate. Perhaps Canadian involvement in World War II pushed blasphemy quite low on the list of federal government priorities and it never recovered? Perhaps rising secularization (especially in Quebec) made the criminal law seem like too blunt of an instrument?[217] In any event, it is important to acknowledge that the five reported prosecutions we know about do not necessarily exhaust the impact of the *Criminal Code*'s blasphemous libel prohibition: we do not know how many unreported cases there are, how often defendants plea bargained to have blasphemous libel charges dropped, or even to what extent writers and religious dissidents ceased or altered their activities after simply being investigated or receiving advice from a cautious lawyer.

The next and final part of this article looks at what, if anything, should be done about the statute.

V. DEALING WITH AN OBSOLETE PENAL STATUTE: THE OPTIONS

Obsolete penal statutes, like Canada's prohibition on blasphemous libel, can be dealt with in several different ways. This part briefly discusses the obvious responses (ignore it, enforce it, repeal it, replace it, or apply the *Charter*) and then moves on to discuss at more length a response that is new to the Canadian legal system: the doctrine of desuetude.

A. IGNORE IT

The easiest and most likely response from Canadian lawmakers is simply to continue the status quo and ignore the blasphemous libel prohibition entirely. Under the "let sleeping dogs lie" approach, a

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be taken to import *mens rea*, and there would have to be a clear indication against it before a court would be justified in denying its essentiality." at 553).

[217] See Robert Martin, *A Sourcebook of Canadian Media Law*, 2d ed. (Ottawa: Carleton University Press, 1994) ("That blasphemy has ceased to be regarded as a crime reflects the process of secularization in which a substantial percentage of Canada's population profess neither a belief in God nor an attachment to a particular doctrinal tradition." at 425).

criminal prohibition that is invisible to the public and has not been enforced in several decades simply is not worth the time and effort it would take to deal with it.[218] Unless there is suddenly a zealous private prosecutor (or a desperate Crown), there is no reason to think that Canada's blasphemy prohibition will be invoked anytime soon and manifest on the public's radar. With little practical risk of the law being invoked, the strongest arguments for dealing with it nonetheless are probably symbolic and reputational in nature. On the symbolic front, the ongoing existence of a criminal prohibition on blasphemy in the federal *Criminal Code* directly conflicts with Canada's public and self-image as a pluralist, multicultural democracy with a strong commitment to freedom of speech and religion. Of perhaps more practical concern is that the existence of the prohibition places Canada in a hypocritical position if it were to publicly condemn real blasphemy prosecutions taking place in countries with little religious freedom. Just such an embarrassment took place recently in England according to the *Los Angeles Times*:

> A funny thing happened in November when Britain launched a righteous protest over Sudan's arrest of a British schoolteacher accused of insulting Islam by letting her students name a class teddy bear Muhammad. The Sudanese ambassador was summoned; Prime Minister Gordon Brown issued a protest. But it didn't take long for someone to point out that Downing Street was standing on diplomatic quicksand: Britain itself has a law making blasphemy a crime.[219]

Indeed, now that England has legislatively abrogated its prohibition on blasphemous libel, Canada finds itself alone among Western common law countries to retain a national ban.

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[218] See e.g. Linda Rogers & William Rogers, "Desuetude as a Defense" (1966) 52 Iowa L. Rev. 1 (asserting that obsolete statutes continue to exist because "the legislature ... has neither the time nor the inclination to concern itself with matters which are not of pressing contemporary significance." at 9).

[219] Murphy, *supra* note 76. A member of the House of Lords is quoted in the article as having said that "as long as this law remains on the statute books, it hinders the UK's ability to challenge oppressive blasphemy laws in other jurisdictions." See e.g. Perry S. Smith, "Speak No Evil: Apostasy, Blasphemy and Heresy in Malaysian and Syariah Law" (2004) 10 University of California at Davis Journal of International Law and Policy 357; David F. Forte, "Apostasy and Blasphemy in Pakistan" (1994) 10 Conn. J. Int'l L. 27.

B. ENFORCE IT

In theory, one way to deal with an obsolete statute is for the government to resurrect it by regularly enforcing it. When would this realistically happen? Two different possibilities come to mind: (1) when a new government comes into power and can use an obsolete statute to achieve a policy goal that differs from the goals of the previous administration; or (2) when high-profile conduct occurs that seems to cry out for a strong government response, but that conduct is not currently prohibited by any modern criminal statutes. An example of the latter might be the *Zundel* case (mentioned in Part I, above), where a largely obsolete statute prohibiting the spreading of false news was used to prosecute a Holocaust-denier.[220] In any event, public notice of the government's new intentions would probably be necessary to alleviate concerns over what would otherwise be seen as the sudden and arbitrary enforcement of an old law.[221]

Given its obvious *Charter* vulnerabilities, the possibility of the Canadian government resurrecting the blasphemous libel prohibition seems remote. For the sake of argument one might imagine a scenario where the use of the statute would be tempting; for example, if the newspaper that printed several depictions and caricatures of Muhammed[222] had originally been Canadian, and Canada suffered the full force of the global public disturbances and threats of violence that were in reality directed towards Denmark. In such a scenario, the *Criminal Code*'s prohibition on hate propaganda[223] would probably not be available because the newspaper's intention to incite hatred towards Muslims could be difficult to prove; but proving an intention to insult and disrespect a "religious subject" under the blasphemous libel prohibition would presumably be much easier. However, even under this hypothetical

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[220]See *R. v. Zundel*, *supra* note 8. The likely alternative to a "false news" prosecution would have been a prosecution under the *Criminal Code*, *supra* note 1, for inciting hatred (s. 319(2)), but presumably the authorities felt that route was less likely to end in a conviction. In his Annotation of the case, H.R.S. Ryan notes that "It is not clear that Zundel would have been convicted under s. 319(2) of the Code, but he might have been." See 16 C.R. (4th) 1.

[221]This concern is discussed below in the part on the doctrine of desuetude.

[222]See e.g. Forum, "The Danish Cartoon Controversy" (2006) 55 U.N.B.L.J. 177.

[223]See *Criminal Code*, *supra* note 1, s. 319(2).

situation, it seems more likely that the federal government would resort to the civil *Canadian Human Rights Act*,[224] which can enjoin a publication without the need to prove an intent to incite hatred.[225] Indeed, when one Canadian magazine reprinted the Danish cartoons, the editor faced a hearing before a provincial analogue to the Canadian Human Rights Commission, the Alberta Human Rights and Citizenship Commission.[226]

In reality, the most likely scenario for enforcement of the blasphemous libel prohibition would be one or a series of private prosecutions. The plaintiff would face several obstacles, but it would be a real opportunity to test the law's current validity.

C. REPEAL IT

The obvious and most democratically-legitimate way to deal with a piece of obsolete legislation is for the legislative body that originally enacted it to repeal it. However, the continuing existence of old and unenforced statutes[227] tells us that this course of action is not necessarily the one favoured by real-world legislatures.[228] Inertia keeps anachronistic laws in place while legislators concern themselves with passing new legislation that seems (and very well may be) of far more importance than the mundane pruning of old statute books.[229] In some cases, a legislature may be very well aware that an old law is unenforced, but conclude that its continued existence has symbolic value with political interests and that a repeal

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[224]R.S.C. 1985, c. H-6.

[225]See e.g. *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at 931, 75 D.L.R. (4th) 577 (discussing and approving the Act's lack of an intent requirement) [*Taylor* cited to S.C.R.].

[226]See Keith Bonnell, "Defiant Levant Republishes Cartoons" *National Post* (12 January 2008) A6. The complaint which led to the tribunal hearing was later withdrawn. See Graeme Morton, "Muslim Leader Drops Complaint Against Levant" *National Post* (13 February 2008) A2.

[227]See e.g Guido Calabresi, *A Common Law for the Age of Statutes* (Cambridge: Harvard University Press, 1982) (noting the "multitude of obsolete statutes in the face of the manifest incapacity of legislatures to keep those statutes up to date." at 6–7).

[228]See e.g. Arthur E. Bonfield, "The Abrogation of Penal Statutes by Nonenforcement" (1964) 49 Iowa L. Rev. 390 (noting the "observable reluctance among legislators to repeal existing enactments." at 390).

[229]See Rogers & Rogers, *supra* note 218.

attempt is likely to generate controversy and (potentially) do more harm than good.

The recent political controversy in England over legislatively abrogating blasphemous libel may be instructive. Although the government had not prosecuted anyone for blasphemy since 1922,[230] it acted with great care when it finally decided to abolish the prohibition and held lengthy consultations with the Church of England.[231] The greatest opposition to the government's move was based on symbolic reasons. Two archbishops, although supporting abolition in principle, worried that the change might be seen as a "secularising move" and argued that "laws which carry 'a significant symbolic charge' should not be changed lightly."[232] Similarly, opposition members in the House of Lords cast "substantial doubt about the wisdom of abandoning what for many is a symbol of the ... nation's reliance on Christian values as a foundation for law and society."[233]

A similar debate would likely occur if the Canadian Parliament attempted to repeal section 296. Newspaper editorials and civil liberties groups would strongly support such a move as an important guarantee of free speech, while some conservative and religious groups would see it as just another step in the unfortunate secularisation of Canada. The best way to avoid such a debate and still repeal the blasphemy prohibition might be to bury the change as part of one of the occasional comprehensive revisions and modernizations of the *Criminal Code*, or as a small part of a much larger legislative 'housekeeping' bill.

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[230] See *Gott*, *supra* note 6. There have been private prosecutions since that time.

[231] See Travis, *supra* note 75.

[232] Alan Travis, "Archbishops Question Timing of Plans to Abolish Blasphemy Laws" *The Guardian* (4 March 2008).

[233] Murphy, *supra* note 76. See also House of Lords Select Committee, *supra* note 73 at para. 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 46 ("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." at 14–15).

D. REPLACE/MODERNIZE IT

Some pieces of obsolete legislation have, over time, completely lost their legitimacy through widespread changes in technology, political attitudes, or religious beliefs. For example, rarely-enforced (and now unconstitutional) laws prohibiting homosexual conduct[234] or the use of contraception[235] in the United States exist because of a legislature's (or a court's) acceptance of the validity of those laws' underlying principles; they are not the sorts of laws that simply require some legislative tinkering to keep them up to date. They rise or fall as an organic whole.

On the other hand, some obsolete enactments may retain a kernel of validity and be worth salvaging through either legislative amendment or substitution with a prohibition that better expresses a modern justification for their existence. Arguably, this is the state in which current blasphemous libel statutes are situated: Forbidding criticism or mocking of religion because of a government endorsement of religious precepts is widely accepted as an improper violation of free speech and government neutrality towards religion; but forbidding criticism or mocking of religion because of a perceived need to protect religious minorities from the baneful effects of hate speech is seen by many as laudable.[236]

As discussed above, instead of relying on common law blasphemy, some Australian states have passed "religious vilification" laws.[237] In a similar vein, the Parliament of the United Kingdom recently passed the *Racial and Religious Hatred Act 2006*, which states that "A person who uses threatening words or

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[234]See *Lawrence v. Texas*, 539 U.S. 558 (2003).

[235]See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[236]See e.g. the influential views of Lord Scarman in *Lemon*, *supra* note 6 ("In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings, and practices of all but also to protect them from scurrility, vilification, ridicule, and contempt." at 404). Two dissenting members of the 1985 UK Law Commission supported creating a new offence to protect religious feelings. See Levy, *Blasphemy*, *supra* note 15 at 554. Similarly, the 2003 House of Lords Select Committee on Religious Offences studied whether blasphemy should be abolished or whether "a new offence of incitement to religious hatred" should be created, and was unable to come to a consensus. See House of Lords Select Committee, *supra* note 73 at paras. 1 and 133.

[237]See Part III(A), above.

behaviour, or displays any written material which is threatening, is guilty of an offence if he intends thereby to stir up religious hatred."[238] The passage of this Act was considered a crucial step toward abolishing blasphemy as a common law offence.[239] The existence of the new Act undercuts arguments that a blasphemy prohibition is necessary to prevent the worst sorts of outrages on religious feelings, even though the new Act clearly prohibits far less material than the blasphemy offence does. In addition, the new Act contains a lengthy proviso titled "Protection of Freedom of Expression":

> Nothing in this Part shall be read or given effect in a way which prohibits or restricts discussion, criticism or expressions of antipathy, dislike, ridicule, insult or abuse of particular religions or the beliefs or practices of their adherents, or of any other belief system or the beliefs or practices of its adherents, or proselytising or urging adherents of a different religion or belief system to cease practising their religion or belief system.[240]

Canada has long had a hate propaganda offence that covers the promotion and incitement of hatred on religious grounds.[241] Like the new English statute, it too has a proviso intended to protect some types of religious expression, "if, in good faith, the person expressed or attempted to establish by an argument an opinion on a religious subject or an opinion based on a belief in a religious text".[242] And as in the English context, it is clear that Canada's religious hate

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[238] *Racial and Religious Hatred Act 2006*, *supra* note 74, s. 29B(1).

[239] See Alan Travis, "Blasphemy Law to Be Scrapped", *The Guardian* (18 October 2004) 8 (stating that "Britain's ancient laws of blasphemy and blasphemous libel are likely to be repealed ... . The move is being considered as part of a package that will include a new offence of incitement to religious hatred").

[240] See *Racial and Religious Hatred Act, 2006*, *supra* note 74, s. 29J.

[241] See *Criminal Code*, *supra* note 1, s. 319(1) (prohibiting public "incitement" of hatred likely to create a breach of the peace) and s. 319(2) (prohibiting "promotion" of hatred except in private conversations). In this part I have focused on criminal law prohibitions on hate speech, but one could also plausibly argue that federal and provincial human rights commissions in Canada (civil in origin) also adequately replace prosecutions for blasphemous libel.

[242] *Ibid.*, s. 319(3)(b). Note that the first part of this defence (expressing a good faith opinion on a religious subject) mirrors the proviso contained in the blasphemous libel statute.

propaganda law does not cover nearly the same territory as that covered by the blasphemous libel offence.

The key question that must be answered in order to determine if modern criminal law statutes preventing religious hatred (whether styled "hate propaganda", "religious vilification", or "incitement to religious hatred") have adequately replaced traditional prohibitions on blasphemy is: "If we carve out of the blasphemy offence the ground now covered by the religious hatred offence, is there anything still prohibited by blasphemy that we still *want* to be prohibited?"[243] If we subtract material that promotes or incites hatred, there is presumably still a vast swath of material published on religious subjects that is extremely offensive to the vast majority of Canadians. The question then becomes, Is preventing mere offence a valid purpose of the criminal law?[244] And this question, in turn, seems to involve a fundamental and long-standing normative debate about the value of free speech versus the role of community values and morality. In addition, a practical difficulty facing a government interested in maintaining a modern role for blasphemous libel in Canada is that the far more limited prohibition on hate propaganda only narrowly survived constitutional review by the Supreme Court;[245] as will be seen in the next part, the offence of blasphemy, if ever used again, would face an even tougher challenge.

E. USE THE CHARTER

"The law ticks away as if it were a time bomb that no longer detonates. Yet it is no dud; it is merely dormant and may go off again one day."[246] If Levy's statement, made about England's

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[243] See Cox, *supra* note 89 ("Lampooning, mocking or criticizing a person is not the same as inciting listeners to hate him. Accordingly we should be aware that to replace blasphemy law with incitement to hatred rules would be significantly to reduce the amount of material which could be covered by the law." at 86).

[244] See generally, Joel Feinberg, *Offense to Others* (Oxford: Oxford U. Press, 1985) (discussing whether actions which are offensive, but not harmful, should be cognizable by the criminal law). See also Cox, *supra* note 89, at 122-128 (discussing whether blasphemy is "harmful" or "offensive", and concluding that it is only the latter).

[245] See *Keegstra*, *supra* note 9 (upholding hate propaganda offence by 4-3 margin).

[246] Levy, *Blasphemy*, *supra* note 15 at 550 (discussing British blasphemy law). See also *ibid.* at 520 ("Canada has not again prosecuted blasphemy [since *Rahard*]. Its

blasphemy prohibition, were transferred to the Canadian context, the obvious and justifiable response from Canadian lawyers would be: "But we have the *Charter*."[247] Relying on constitutional rights guarantees to weed out obsolete legislation is not always a wise move: the "Kentucky law [that] specifies that you must remove your hat if you come face-to-face with a cow on the road"[248] mentioned in the Introduction might not clearly violate any of the rights listed in the *Charter* or the United States Constitution.[249] However, the applicability of the *Charter* to blasphemy prosecutions is clear: a prohibition on blasphemy, by its very nature, infringes freedom of speech and (in at least some cases) freedom of religion and conscience,[250] and would therefore have to be justified under section 1.[251] An extensive discussion of how a statute that has lain dormant for over 70 years would fare against the *Charter* would be extravagant. On the other hand, 55 and 141 years passed between reported English and Irish blasphemy prosecutions (respectively), so a few brief remarks might be in order.

In theory, there are four different ways in which a *Charter* challenge to Canada's blasphemy prosecution might arise. First, if the government were to attempt to enforce the law; second, if the

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precedents, however, allow the possibility of suppression even of normal sectarian controversy.").

[247]See Edward L. Greenspan & Marc Rosenberg, *Martin's Annual Criminal Code 2009* (Aurora, Ont.: Canada Law Book, 2008) at 618 ("This rather archaic section, if used, would, in all likelihood, be challenged under the Charter."); Gold, *supra* note 119 ("If ever prosecuted this section would be unlikely to survive Charter challenge." at 445).

[248]See *supra* note 11.

[249]Though, on second thought, one might argue it is unlawful compelled speech. In any event, examples of real prosecutions under obsolete penal statutes where the defendant was unable to rely on constitutional rights guarantees are discussed in the part on the doctrine of desuetude, below.

[250]See *Charter*, *supra* note 10, s. 2(a) (protecting freedom of religion and conscience) and s. 2(b) (protecting freedom of speech). The freedom of speech guarantee applies even to speech thought to be odious or dangerous. See *Taylor*, *supra* note 225 at 913–15.

[251]S. 1 requires an analysis of whether an infringement of a right is a "reasonable limit prescribed by law" that "can be demonstrably justified in a free and democratic society." The Supreme Court of Canada first created an analytical test for applying section 1 in *R. v. Oakes*, [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 and this test continues to be applicable.

government sought a reference opinion from the Supreme Court on whether the law was still valid; third, if a private prosecutor attempted to enforce the law and the trial judge (who is required to give permission for the prosecution to continue) refused to do so on *Charter* grounds; last, if a civil liberties activist or organization sought a declaratory order that the section was invalid, perhaps relying on either the "chilling effect" of the prohibition for standing or the long-standing legal rule that a new wrong occurs when material previously found to be libellous is republished.[252]

Under a *Charter* analysis, there are numerous potential defects with Canada's blasphemous libel statute. To begin, no definition is provided of what constitutes "blasphemous libel"[253] and the common law authorities on the question are few and split.[254] The proviso that the law does not apply to language made in "good faith and decent language"[255] may exacerbate, rather than diminish, the inherent vagueness of the law,[256] and, in any event, a strong case can be made that even statements made in bad faith or indecent language still contribute to the search for truth and the marketplace of ideas. Further, it is unclear why statements about religious subjects receive special scrutiny, while statements about political, artistic, or other controversial subjects are left untouched by the law. The fact that the prohibition is criminal in nature and punishable by up to two years in prison makes it even harder to defend.[257]

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[252]See e.g. *St. Elizabeth Home Society v. Hamilton (City)*, 2005 CarswellOnt 7298 at para. 203 (Ont. Sup. Ct. J.) (WLeC). See also Law Commission, *Offences Against Religion*, *supra* note 31 ("quotation from material found to be blasphemous in more recent cases is not possible without repeating the offence" at 4).

[253]See *Criminal Code*, *supra* note 1, s. 296(2) (stating that whether something is a blasphemous libel is a question of fact).

[254]See Part IV(B), above.

[255]See *Criminal Code*, *supra* note 1, s. 296(3).

[256]*Cf.* Law Commission, *Offences Against Religion*, *supra* note 31 ("it is hardly an exaggeration to say that whether or not a publication is a blasphemous libel can only be judged *ex post facto*. It is blasphemous if [members of the jury] think it is sufficiently 'scurrilous', 'abusive' or 'inoffensive' ... it is likely to be difficult if not impossible to prophesy in any particular case what the verdict may be." at 73).

[257]See e.g. *Taylor*, *supra* note 225 at 932 ("[t]he chill placed upon open expression in such a context [involving a civil statute] will ordinarily be less severe than that occasioned where criminal legislation is involved, for attached to a criminal conviction is a significant degree of stigma and punishment").

A Crown in the unenviable position of having to defend section 296 would have to be prepared to make the following concessions in order to have any hope of salvaging the law: (1) that there is a willful intent element to the offence; (2) that the offence protects all religions, not just Christianity; (3) that an element of the offence is that the impugned material either has caused or is likely to cause a breach of the peace or civil strife.[258] A tenuous connection might be drawn between the justification for prohibiting blasphemous material and the two justifications given for prohibiting hate propaganda in *Keegstra*: that "the emotional damage caused by words may be of grave psychological and social consequence" to individuals and that the "influence upon society at large" of such words is negative and dangerous.[259] In other words, the Crown would have to argue that extremely offensive blasphemous speech, even if not rising to the extreme of constituting hate propaganda, can have such deleterious effects on individual conscience and social stability as to be worth prohibiting. The riots, death threats, and murders caused in other countries by the *The Satanic Verses* and the Danish Muhammed cartoons would be drawn in for support. For example, F. Lagard Smith argues that:

> Blasphemy laws recognise what blasphemy produces: gut-level *outrage*! It is that welling up of the emotions that makes a peaceful person want to throttle somebody. It's the feeling that one gets when his house is broken into or his car is stolen. It's that overwhelming sense of rage you would feel if you saw someone intentionally knock down a helpless old woman ... . It is *justifiable anger*. It is *righteous indignation*. It is what happens when your most serious psychological nerves have been touched.[260]

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[258] Such an element would have to be read in, because as it currently stands there is simply not a tight fit between an absolute prohibition on blasphemous libel made at all times and places, and the presumably more rare contexts in which such a libel would be likely to cause a breach of the peace or social unrest. *Cf. Maryland v. West*, 263 A.2d 602 (Md. App. 1970) (striking down blasphemy statute as unconstitutional, in part because "[t]he statute does not purport to relate the blasphemous utterances therein proscribed to the prevention of violence or breaches of the public peace .... The setting or circumstances in which the writing or utterance occurs is unrestricted. It simply and categorically proscribes such utterances under any and all circumstances." at 604–05).

[259] *Keegstra*, *supra* note 9 at 748, 750.

[260] Smith, *supra* note 46 at 48 [emphasis in original]. See also *Lemon*, *supra* note 6, Lord Scarman ("The offence belongs to a group of criminal offences designed to

Finally, arguments of last resort could include the *Charter*'s reference to the multicultural nature of Canada[261] and to the Preamble which states that Canada is "founded upon principles that recognize the supremacy of God and the rule of law."[262] If all these arguments were made by able counsel in a case with a favourable fact pattern, is there a chance that blasphemous libel could be found to comport with the *Charter*? According to my Magic 8-Ball, the answer is still "Outlook Not So Good."

F. USE THE DOCTRINE OF DESUETUDE

The annals of jurisprudence tell of a doctrine specifically designed to deal with obsolete penal statutes: the doctrine of desuetude.[263] In short, desuetude is a legal doctrine "by which a legislative enactment is judicially abrogated following a long period of intentional nonenforcement and notorious disregard."[264] The theory behind the modern doctrine of desuetude is that suddenly-resurrected offences pose the same problems as unconstitutionally vague offences: a lack of fair warning of what the legal system really prohibits and the danger of arbitrary or discriminatory enforcement.[265] According to

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safeguard the internal tranquility of the kingdom. In an increasingly plural society... it is necessary not only to respect the differing religious beliefs, feelings, and practices of all but also to protect them from scurrility, vilification, ridicule, and contempt." at 404).

[261] *Charter*, *supra* note 10, s. 27.

[262] *Charter*, *ibid.*, Preamble.

[263] See generally Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962) at 148–56; *Desuetude*, *supra* note 12; Corey R. Chivers, "Desuetude, Due Process, and the Scarlet Letter Revisited" [1992] Utah Law Review 449; Mark P. Henriques, "Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws", Note, (1990) 76 Va. L. Rev. 1057; "Judicial Abrogation of the Obsolete Statute: A Comparative Study", Note, (1951) 64 Harv. L. Rev. 1181 [*Judicial Abrogation*]; Bonfield, *supra* note 228; Calabresi, *supra* note 227 at fn. 17; Rogers & Rogers, *supra* note 218.

[264] *Desuetude*, *ibid.* at 2210. See also Chivers, *ibid.* ("Under its tenets, courts may abrogate statutes that have fallen into disuse." at 449).

[265] See Chivers, *ibid.* at 458 (discussing Professor Bickel's views in *The Least Dangerous Branch*). Chivers goes on to discuss the application of desuetude to three different types of cases: "'ignorant violators' who unknowingly transgress a law that both citizens and prosecutors have long forgotten; 'confident violators' who are conscious that their conduct is illegal, but who believe the law need not

one commentator, "'Fair notice' is a key component of this line of reasoning, the idea being that the citizenry cannot be expected to distinguish legal from illegal conduct if the criminal statute demarcating that boundary is never enforced."[266] According to another:

> To the extent that our legal system recognizes the continuing validity of long-unenforced enactments, it becomes capable of grave injustice. This is true not only because the administrative nullification of such an act may have denied violators fair notice that its proscriptions are binding law. A continuing ability to enforce such statutes may also be dangerous because almost everyone may have violated this kind of provision.[267]

The doctrine has its roots in ancient Roman law[268] and was followed by some judicial authorities in the Middle Ages,[269] before falling into disfavour in England[270] and most of the United States.[271] As far as I can tell, no Canadian cases have explicitly discussed the doctrine.[272] However, in the past 15 years a tiny handful of

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be taken seriously; and 'victims of caprice' whom administrators or parties with private interests blackmail, harass, or subject to the capricious enforcement of desuetudinal statutes." *Ibid.* at 452.

[266] *Desuetude*, *supra* note 12 at 2216.

[267] Bonfield, *supra* note 228 at 391.

[268] See *ibid.* at 395–96 (noting that under Roman law "[a] statute would fall into desuetude only if the long failure to enforce it was in the face of a public disregard so prevalent and long established that one could deduce a custom of its nonobservance." at 398); *Judicial Abrogation*, *supra* note 263, at 1184–85 (discussing concept embodied in Justinian's *Institutes*).

[269] See "Judicial Abrogation", *ibid.*

[270] See Bonfield, *supra* note 228 at 408. Bonfield was writing in 1964, but a brief search of recent English jurisprudence did not show a re-emergence of the doctrine.

[271] See Chivers, *supra* note 263 at 449 ("The 'American Rule' is that disuse, or desuetude, does not give courts the power to nullify or disregard a statute."); *Desuetude*, *supra* note 12 (noting "the courts' chilly reception of desuetude doctrine" at 2213).

[272] The closest is *R. v. Mercure*, [1988] 1 S.C.R. 234 at 301, 48 D.L.R. (4th) 1, LaForest J. ("statutes do not, of course, cease to be law from mere disuse") [*Mercure* cited to S.C.R.]. The case concerned a Saskatchewan civil statute guaranteeing English and French language rights in some government proceedings. Although this is certainly an accurate statement of the law regarding statutory interpretation generally, the concerns animating the penal doctrine of

American cases have tied the doctrine into constitutional due process guarantees and used it to invalidate obsolete statutes. A brief summary will demonstrate how the doctrine works in practice.

In the 1992 case *Committee v. Printz*,[273] a lawyer, on behalf of his client, sent a letter to the client's former business partner, a suspected embezzler, offering not to press charges if the allegedly embezzled money was returned.[274] The lawyer's conduct fell afoul of a statute prohibiting "offering not to prosecute a crime in exchange for the return of funds lost due to a crime."[275] The statute had not been invoked in a reported case since 1938,[276] and the West Virginia Supreme Court saw this as a problem raising due process and equal protection concerns.[277] Noting that "[d]esuetude is not ... a judicial repeal provision that abrogates any criminal statute that has not been used in X years",[278] the Court developed a three part test to determine if a statute had fallen into desuetude:

> The first factor is the distinction between crimes that are *malum in se* and crimes that are *malum prohibitum*. Crimes that are *malum in se* will not lose their criminal character through desuetude, but crimes that are *malum prohibitum* may. For instance, if no one had been prosecuted under an obscure statute prohibiting ax murders since Lizzie Borden was acquitted, we would still allow prosecution under that statute today.... Second, there must be an open, notorious, and pervasive violation of the statute for a long period before desuetude will take hold. ... The final criterion that we may take from modern law is that there must be a conspicuous policy of nonenforcement[.][279]

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desuetude involve due process and fundamental fairness concerns that arguably require a different result than the normal rule.

[273] 416 S.E.2d 720 (W.Va. 1992) [*Printz*].

[274] *Ibid.* at 721–22.

[275] *Ibid.* at 724 (paraphrasing the statute).

[276] *Ibid.* at 727.

[277] *Ibid.* at 724.

[278] *Ibid.* at 726.

[279] *Ibid.* A crime that is *malum in se* is "inherently immoral, such as murder, arson, or rape", while a crime that is *malum prohibitum* is "a crime merely because it is prohibited by statute, although the act itself is not necessarily immoral." See *Black's Law Dictionary*, 8th ed., *s.v.* "*malum in se*", "*malum prohibitum*".

Applying the test, the Court found that the offence in question was "obviously *malum prohibitum* since it utterly defies both human nature and good sense."[280] The dearth of prosecutions in both West Virginia and across the United States sufficed to satisfy the second and third factors,[281] leading the Court to conclude that the statute was "void under the doctrine of desuetude"[282] but that when a statute "die[s] a desuetudinal death. ... the Legislature may revitalize [it] simply by repassing it."[283]

In 2003, the same court invalidated a statute requiring pawn shop owners to keep detailed records because the statute hadn't been enforced since its inception in 1981.[284] The following year, however, it found that a prosecution for "felony concealment of minor child" passed the desuetude test because it was a crime *mala in se* and there was no evidence of nonenforcement.[285] Beyond these examples, the doctrine of desuetude has been discussed inconclusively in a few recent American cases but has not been determinative of their outcome.[286] One can be understandably skeptical of a doctrine that has received wholesale adoption in the great State of West Virginia and nowhere else in North America. Indeed, the doctrine of desuetude receives far more attention from legal academics than it

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[280] *Ibid.* at 727.

[281] *Ibid.*

[282] *Ibid.*

[283] *Ibid.* at 726.

[284] See *West Virginia v. Blake*, 584 S.E.2d 512 at 517 (W. Va. 2003).

[285] See *West Virginia v. Donley*, 607 S.E.2d 474 at 479 (W. Va. 2004).

[286] See *United States v. Greenpeace*, 314 F.Supp.2d 1252 at 1258 (S.D. Fla. 2004) (stating that, by itself, the fact that the statute used hadn't been enforced in over 100 years doesn't create a constitutional infirmity), citing for support *District of Columbia v. Thompson Co.*, 346 U.S. 100, 113–14 (1953); *United States v. Jones*, 347 F.Supp.2d 626 at 628–29 (E.D. Wis. 2004) (rejecting a desuetude defence on the ground that the offence involved had been prosecuted several times in recent years, but acknowledging that the doctrine may be tenable in certain cases), citing for support *Cent. Bank of Mattoon v. U.S. Dept. Treasury*, 912 F.2d 897 at 906 (7th Cir. 1990); *Franklin v. Hill*, 444 S.E.2d 778 (Ga. Sup. Ct. 1994), Sears-Collins J., concurring (arguing in relation to a statute prohibiting seduction of unmarried daughters that "where the constitutionality of the statute is doubtful, where the statute is woefully out of step with current legal and societal standards, and where the statute has been rarely used, the court should not hesitate to declare the statute void so as to give our General Assembly the opportunity to reexamine the statute in its entirety." at 782).

does judges.[287] In its defence, however, the doctrine does seem to address, in a forthright way,[288] the problem of obsolete penal statutes: "[I]t is part of the intelligent cooperation the courts owe the legislature to relieve it from the burden of seeking out and repealing statutes that clearly serve no modern purpose."[289] Or, in less charitable terms, if the legislature cannot clean up after itself, the courts may have to by applying the doctrine of desuetude.

The doctrine seems especially well-suited to the Canadian legal system. The Parliamentary system of government mitigates American-style separation of power concerns (that the legislature is being punished for the executive's lack of zeal), while the Supreme Court of Canda's stated interest in partaking in a "dialogue" with Parliament[290] is furthered by a doctrine that invalidates a statute only until it is re-enacted.[291] In a legal system that, on occasion, generates legal rights and responsibilities through unwritten "constitutional conventions"[292] and preambulary statements,[293] a doctrine that can be comfortably linked to due process concerns in the *Charter*[294] may not be quite so far-fetched.

Applying the doctrine of desuetude to the offence of blasphemous libel would allow a court to sidestep the entire question of exactly

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[287]See *Judicial Abrogation*, *supra* note 263.

[288]This is in contrast to other ways of mitigating the harm of obsolete penal statutes, such as strained judicial interpretation of their scope or the doctrine of repeal by implication. See e.g. *Judicial Abrogration*, *ibid.* at 1181 ("frequently interpretation by judges unsympathetic to its purposes can strip a statute of much its vigor."); Bonfield, *supra* note 228 at 393.

[289]"Judicial Abrogration", *ibid.* at 1184.

[290]See *R. v. Mills*, [1999] 3 S.C.R. 668 at 711, 244 A.R. 201, 180 D.L.R. (4th) 1 [*Mills* cited to S.C.R.].

[291]This is especially fitting given the Court's penchant for suspending invalidation of statutes for a period of time in order to give Parliament a chance to respond. See Bruce Ryder, "Suspending the Charter" (2003) 21 Sup. Ct. L. Rev. (2d) 267.

[292]See e.g. Dale Gibson, "Constitutional Vibes: Reflections on the Secession Reference and the Unwritten Constitution" (1999-2000) 11 N.J.C.L. 49.

[293]See *Ell v. Alberta*, 2003 SCC 35, [2003] 1 S.C.R. 857 at para. 19, 330 A.R. 201, 227 D.L.R. (4th) 217 (discussing the principle of "judicial independence" drawn from Preamble to the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5).

[294]See *Charter*, *supra* note 10, s. 7 (guaranteeing the right not to be deprived of liberty except in accordance with the "principles of fundamental justice").

what the statute means and whether it comports with the *Charter*'s guarantees of free speech and religion. Instead, the mere fact that blasphemous libel has not been the subject of a reported prosecution since the 1930s while at the same being the subject of "open, notorious, and pervasive violation"[295] would be enough for a court to invalidate the statute and place it back in the hands of Parliament with the question: "Are you *sure* you want this law on the books?" If the surprising answer is "Yes", then the traditional *Charter* analysis could take place.

VI. CONCLUSION

Judging by the case law, the crime of blasphemous libel in Canada saw its heyday in the 1920s and 1930s and was primarily used in Quebec to stifle criticism of the Catholic Church. Although judges rhetorically denounced it as a serious crime, they sentenced offenders to small fines or short jail sentences compared to the statutory maximum available. Now that England has abolished the common law crime of blasphemous libel, Canada's continuing retention of a national ban is all the more unusual when placed in the context of English-inspired common law countries.

Several aspects of Canada's prohibition on blasphemous libel merit further research. Although time-consuming, an exploration into unreported prosecutions would shed additional light on how the judiciary interpreted the statute and indicate just how long the statute was used: early research has turned up an unreported government prosecution as late as 1938–1939[296] and a private prosecution as late as 1979.[297] An in-depth look at drafting notes and committee minutes of the various law reform and Criminal Code revision

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[295] *Printz*, *supra* note 273 at 726. This analysis assumes the arguable point that blasphemy is *malum prohibitum* and not *malum in se*. Furthermore, the widespread availability in Canada of Monty Python's 1979 film *Life of Brian* should, by itself, constitute sufficient evidence of notorious disregard of the statute.

[296] See "Religious Censorship Laid to Quebec Police" *The Globe and Mail* (11 February 1939) 3. Research into unreported prosecutions, contemporary newspaper commentary on reported cases, and court files is underway by the author and will be incorporated into a subsequent project.

[297] See "Monty Python film to be shown tonight" *The Globe and Mail* (12 November 1979) 22 (reporting a charge of blasphemous libel laid against the film *Life of Brian* by an Anglican clergyman).

initiatives over the years might provide clues on why the statute has been retained for as long as it has. Although this article has incorporated the scant secondary materials on Canada's prohibition, it has certainly not exhausted the wealth of secondary literature on blasphemy laws in other countries.[298]

Without reservation, we can be confident that the offence of blasphemous libel deserves the neglect it has long received from the criminal justice system. Simply put, other than as a prompt for exploring how our legal system should deal with obsolete statutes generally, it serves no legitimate modern purpose. It is simply a sad reminder of a time when disagreeing with mainstream religion and using "uncouth" speech was enough to merit a prison sentence. We need to remain disappointed, but not surprised, at its continued existence.

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[298] As a bibliographical note, additional sources that may be relevant, (but which have not been examined for this article) include: J.W. Montgomery, "Can Blasphemy Law Be Justified?" (2000) 145 Law & Justice 6; Ian Bryan, "Suffering Offence: The Place, Functions and Future of the Blasphemy Laws Revisited" (1999) 4 Journal of Civil Liberties 332; Neville Cox, "Sacrilege and Sensibility: The Value of Irish Blasphemy Law" (1997) 19 Dublin University Law Journal 87; Michael Bohlander, "Public Peace, Rational Discourse and the Law of Blasphemy" (1992) 21 Anglo-Am. L. Rev. 162; Robert C. Post, "Blasphemy, the First Amendment and the Concept of Intrinsic Harm" (1988) 8 Tel Aviv University Studies of Law 293; F.H. Micklewright, "Blasphemy and the Law Commission" (1981) 70/71 Law & Justice 109; F.H. Micklewright, "Blasphemy and the Law" (1979) 60/61 Law & Justice 20; G.F. Orchard, "Blasphemy and Mens Rea" (1979) N.Z.L.J. 347; Unknown, "Intention to Blaspheme" (1979) 129 New L.J. 205; C.L. Ten, "Blasphemy and Obscenity" (1978) 5 British Journal of Law and Society 89; P. O'Higgins, "Blasphemy in Irish Law" (1960) 23 Mod. L. Rev. 151. As this article went to press, the author came across Bob Tarantino's *Under Arrest: Canadian Laws You Won't Believe* (Toronto: Dundurn Press, 2007), which contains several examples of obsolete Canadian legislation and a short discussion of blasphemous libel, at 108–112.