

Winner of the 2012 McCarthy Tétrault Law Journal Prize for Exceptional Writing

ARTICLE

BLASPHEMY AND THE MODERN, “SECULAR” STATE

By Rebecca Ross*

CITED: (2012) 17 Appeal 3-19

When twenty thousand people gathered on Dam Square on the day of [Theo] Van Gogh’s murder to demonstrate their anger, Aboutaleb was one of only a handful of Muslims. This was a disappointment to him. “Even though they might have found Van Gogh an asshole,” he says, “they should have been there to defend the rule of law.”¹

INTRODUCTION

Many western countries, including Canada, have a history of legally prohibiting blasphemy. Although rarely enforced in Canada, section 296 of the *Criminal Code*² is the product of a particular legal perspective that presumes blasphemy exists, that it can be set apart from criticism of religion “in good faith and in decent language”, and that the state has a role to play in its censorship.

In particular, the Canadian blasphemy law rests on certain premises about multiculturalism and freedom of religion that may have been consistent and just in early twentieth century Canadian society; however, they are gradually becoming unstable in the modern era. Can a western, multicultural, ostensibly secular country such as Canada have a blasphemy law on the books without admitting legal inconsistency and political hypocrisy? Answering this question depends upon determining whether the following premises hold true: that a law against blasphemy is consistent with freedoms of expression and religion; that these laws are justified in a multicultural society; and that laws against blasphemy are necessary to prevent public disorder. This paper will examine these justifications in the context of the current socio-political climate, and will argue that they do not justify the current blasphemy laws in Canada.

* Rebecca Ross graduated from the Faculty of Law at the University of Victoria in 2011, and went on to article at a criminal law firm in Vancouver. This paper was originally written for the course “Law and Religion” taught by Professor Benjamin Berger, and would not have been possible without his support and editorial advice. It was also inspired by her thoughtful and gracious classmates who continue to challenge and encourage her.

1. Ian Buruma, *Murder in Amsterdam: Liberal Europe, Islam, and the Limits of Tolerance* (New York: Penguin Books, 2006) at 249.
2. RSC, 1985, c C-46.

Contemporary international law is also wrestling with blasphemy prohibitions; this context, as well as high-profile incidents of supposed-blasphemy, illustrates that the existence of blasphemy laws is more problematic in a globalized world. This wider context includes confrontations between academic theory and practical reality, as well as between religion and expression. The best example of these collisions is the contemporary Western world's response to Islamic concerns regarding blasphemy, and I will use the Canadian blasphemy prohibition as a starting point to examine this larger issue. While the arguments that follow could theoretically apply to any religion, I will focus on Islam. As I will explain, this focus is due to contemporary Islam's pronounced conflict with both the international legal community, and with creative figures in the recent past.

I. CURRENT LAW

A. Canada and the United Kingdom

Section 296 of the Canadian *Criminal Code* prohibits blasphemous libel. The statute reads:

296.(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.³

Jeremy Patrick traces the current incarnation of the blasphemy law to a 1676 English case in which the court stated that blasphemous utterances were not merely offensive to God; they were offensive to the state:

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.⁴

Despite this rationale, the crime of blasphemy evolved to include only those criticisms of religion that were obscene or offensive,⁵ excluding attacks on religion made “in good faith and in decent language”, as blasphemous libel has been defined in Canada since its prohibition by statute in 1892.⁶

In England, unlike in Canada, the concept of blasphemy as a crime against the state meant that only Anglican Christianity was protected by the blasphemy prohibition.⁷ In

3. *Criminal Code*, RSC 2010, c C-34, s 296.

4. Jeremy Patrick, “Not Dead, Just Sleeping: Canada’s Prohibition on Blasphemous Libel as a Case Study in Obsolete Legislation” (2008) 41 UBC L Rev 193 at 198.

5. *Ibid*, at 199.

6. *Ibid*, at 201.

7. Peter Cumper, “The United Kingdom and the U.N. Declaration on the Elimination of Intolerance and Discrimination Based on Religion or Belief” (2007) 21 Emory Int’l L Rev 13 at 14.

1981 and again in 1985, working papers published by the UK Law Commission argued that blasphemy laws should be repealed in England, because they found them to violate freedom of speech.⁸ The law was attacked further in the aftermath of the publication of Salman Rushdie's *The Satanic Verses*, a novel that some Muslim communities found blasphemous. This incident led to a *fatwa*, an Islamic religious pronouncement, calling for the author's death, which resulted in a number of violent incidents, including the death of a translator and two attempted murders.⁹ British citizens attempted a private prosecution of Rushdie, at which time the court made clear that blasphemy laws were only concerned with the Church of England; since the religion allegedly blasphemed against was Islam, there could be no prosecution under that law.¹⁰ In 2008, after considering expanding the law to include other religions so as to avoid discrimination,¹¹ the crime of blasphemy was abolished in England altogether, making Canada one of the only remaining Western common law countries with such a law still on the books.¹²

Since the law's codification, there have been five prosecutions for blasphemy in Canada but none since 1936.¹³ The law, as it now stands, has been criticized for being too vague because it allows juries to determine what is blasphemous as well as what is "in good faith and decent language". Also, the *mens rea* of the offence is unclear,¹⁴ and the law itself may violate Canada's stated goals of multiculturalism and tolerance.¹⁵ Given that the five prosecutions for blasphemy in Canada involved attacks on the Roman Catholic religion, which is predominant in Quebec, it may be useful to compare the Canadian context to that of Ireland. Ireland too has a religious preface to its constitution (the reference to the Holy Trinity marks the Catholic departure), and it too is facing increasing pressure to secularize.¹⁶ As a result, its blasphemy law becomes more and more outdated, an artifact of a state more entwined with the religious faith of its citizens, although its outright repeal would undoubtedly spark heated debate about the culture of the country.¹⁷

B. Europe

Denmark, like Canada, has an official prohibition against blasphemy that has not been used since the 1930s. Unlike Canada, however, this law became a topical issue in the wake of the Jyllands-Posten Muhammad cartoon controversy, during which cartoons were published by Jyllands-Posten and other Danish newspapers that portrayed the prophet Muhammad in ways offensive to many Muslims. Despite public calls for the courts to prosecute the cartoonists, charges were never pressed. In her article about the incident, Stephanie Lagouette points out that the last blasphemy prosecution in Denmark saw Nazis convicted of spreading hateful untruths about Jewish men.¹⁸ She goes on to argue that this historical protection of a minority population at the expense of freedom of expression¹⁹ has been overlooked in modern times, resulting in a lack of political

8. Patrick, *supra* note 4 at 204.

9. Christopher Hitchens, *Hitch-22* (London: McClelland & Stewart, 2010) at 268.

10. Patrick, *supra* note 4 at 204-05.

11. Cumper, *supra* note 7 at 33.

12. Patrick, *supra* note 4 at 207, 232.

13. *Ibid* at 201.

14. *Ibid* at 217.

15. *Ibid* at 232.

16. 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 430.

17. *Ibid* at 430.

18. Stephanie Lagouette, "The Cartoon Controversy in Context: Analyzing the Decision not to Prosecute Under Danish Law" (2007) 33 Brook J Int'l L 379 at 379.

19. *Ibid* at 380.

will to prosecute the Danish cartoonists.²⁰ This raises the question of whether Islam is claiming special treatment to which they, or any cultural group, are not entitled, or whether they are simply attacking the privileged position of most other religions which are typically protected from insult by the conventions of society, if not by legal means.²¹ For instance, Cindy Holder frames the issue as such: “what is actually being defended in this case is not civil liberty but civil privilege. In particular, what is at issue is the privilege to exclude and define Muslims.”²² Of course, this does not address the concern that the criminal law is not the proper method to resolve this dispute; however, it does illustrate the complexity of the problem. Blasphemy is not only concerned with religious sensibilities, it is also concerned with the rights of whole segments of the population to be free from discrimination.

Scholars such as Lagouette who believe that blasphemy laws should have been used to protect the European Muslim community frequently refer to the Nazi era, comparing the blasphemy of novels, cartoons and films that are critical of Islam to anti-Semitic propaganda. This is common in many European countries, such as the Netherlands, where memories of past failures to protect one religious community create conflicting feelings towards blasphemy laws. These laws can feel like an imposition on the majority culture, restricting their speech about others’ religious faith; however, this imposition may be necessary to protect minorities, especially in light of past atrocities. Ian Buruma discusses this problem in his novel about the murder of Theo van Gogh, a Dutch filmmaker killed for his work on Ayaan Hirsi Ali’s critical portrayal of Islam:

Hirsi Ali spoke out against oppression, not for it. The exclusion of Muslims, or any other group, is not part of her program. And yet to reach for examples from the Holocaust, or the Jewish diaspora, has become a natural reflex when the question of ethnic or religious minorities comes up. It is a moral yardstick, yet at the same time an evasion. To be reminded of past crimes, of negligence or complicity, is never a bad thing. But it can confuse the issues at hand, or worse, bring all discussion to a halt by tarring opponents with the brush of mass murder.²³

A similar problem with the conflation of blasphemy with racist propaganda is that scholars have argued that the laws were historically developed in order to protect the state (and the majority) religion. For instance, Peter Cumper states that blasphemy laws historically promoted anti-Semitism and the persecution of Catholics.²⁴ As mentioned, in countries such as Ireland and England, a political push to do away with blasphemy laws was met with resistance by the particular Christian denomination associated with the

20. *Ibid* at 381.

21. Richard Webster would agree with the latter: “For what students of religious and social history have almost always failed to observe is that the seeming obsolescence of blasphemy laws does not indicate simply that we have grown out of them. Both in cultural and in psychological terms, it might be a great deal more accurate to suggest that we have grown *into* them, and that, behind the change in legal attitudes towards blasphemy, there lies a profound process of cultural and psychological internalization.” Richard Webster, “A Brief History of Blasphemy” online: <<http://www.richardwebster.net/abriefhistoryofblasphemy.html>>.

22. Cindy Holder, “Debating the Danish Cartoons: Civil Rights or Civil Power” (2006) 55 UNB LJ 179 at 179.

23. Buruma, *supra* note 1 at 240. Christopher Hitchens makes the point somewhat more stridently: “Yes, we all recall the Jewish suicide bombers of that period, as we recall the Jewish yells for holy war, the Jewish demands for the veiling of women and the stoning of homosexuals, and the Jewish burning of newspapers that published cartoons they did not like.” Christopher Hitchens, “Free Exercise of Religion? No, Thanks” online, Slate Magazine: <<http://www.slate.com/id/2266154/>>.

24. Cumper, *supra* note 7 at 14.

state,²⁵ not from small religious minorities, even though these groups have sought to have the laws expanded to include them. If nothing else, this disagreement surrounding the nature of blasphemy laws and their contradictory goals of preserving the state's religion and protecting minorities illustrates the difficulty of analysing such a legal area.²⁶

Ultimately, the Danish courts held that the depictions of Muhammad were not sufficiently offensive to warrant prosecution, stating that though the intent of the cartoons was clearly to mock, it did not approach contempt or debasement.²⁷ Lagouette has argued that this indicates that, to the court, “freedom of expression of the majority outranked the freedom of religion of the minority.”²⁸ Of course, this framing of the issue rests upon the premise that freedom of religion includes being free from unfavourable views being aired regarding your religion, which is problematic, if only because some criticism of religion is done in the name of other religions.²⁹ Also, the dichotomy Lagouette draws between majority and minority works in the case of the Danish cartoonists, but falls apart when applied to other instances of blasphemy where the blasphemer is him or herself a member (at least originally) of the minority religion.

C. Internationally

Blasphemy resolutions have been passed through the United Nations every year for the past decade.³⁰ Scholars have argued that these resolutions are largely concerned with Muslim countries, as Western countries rarely vote for their passage.³¹ Despite this, it is difficult for countries such as Canada – and, until recently, Britain – to criticize these resolutions without an air of hypocrisy, as their own history of blasphemy prohibition contradicts any argument they may make about blasphemy laws suppressing freedom of speech. Rebecca Dobras argues that these international resolutions offer cover to countries with extremely punitive sanctions for blasphemy, typically designed to protect one religion: Islam.³² An example she cites is Pakistan where “any kind of direct or indirect action that either defiles Islam’s Holy Prophet Muhammad or upsets the religious feelings of Muslims may be punished with life imprisonment or even death.”³³ One of the problems with such a law, aside from the infringement of freedom of expression and the extreme punishment, is that many other religions are held to be defaming Muhammad or Islam, simply by promoting certain claims of their own orthodoxy, such as the divinity of Jesus, or the rejection of Muhammad as the last prophet.³⁴ Much of this is justified in the same way as was the British law of blasphemy; Islam and the state are intertwined in many Muslim countries like Pakistan. Therefore, an attack on Islam is deemed to be an attack on the state and thus necessitates punishment.³⁵ Also, legal scholars in Pakistan claim that Islamic law takes precedence over international human rights law³⁶ and so

25. O'Brien, *supra* note 16 at 430.

26. Lagouette, *supra* note 18 at 384.

27. *Ibid* at 390.

28. *Ibid* at 402.

29. Webster states: “As the Bible itself bears witness, one of the distinctive characteristics of Judaeo-Christian monotheism has always been the contempt in which it holds other people’s religious faith.” Webster, “A Brief History”, *supra* note 21.

30. Rebecca J Dobras, “Is the United Nations Endorsing Human Rights Violations?: An Analysis of the United Nations’ Combating Defamation of Religions Resolutions and Pakistan’s Blasphemy Laws” (2009) 37 Ga J Int’l & Comp L 339 at 342.

31. *Ibid*.

32. *Ibid*.

33. *Ibid* at 343.

34. *Ibid* at 343-44.

35. *Ibid* at 346.

36. *Ibid* at 360.

guarantees of freedom of speech or conscience in earlier UN declarations are irrelevant when in conflict with the protection of Islam. This is also how capital punishment is justified, as it is mandated by *Sharia* law, the Islamic legal code.³⁷ Quite tellingly, the defamation resolutions which began to be passed through the United Nations in 1999 originally named Islam as the only religious beneficiary of the prohibition. Although this wording was eventually changed, critics argue that the laws are still meant to silence legitimate criticism of Islam.³⁸

Yet another concern with the blasphemy prohibition is that it seeks, through human rights discourse, to protect the religion, not the individual.³⁹ Some scholars have claimed that the distinction drawn between individual religion and group rights makes sense only within a Western standpoint, with its Christian concept of a separation of church and state. While this may ignore religion's communal nature,⁴⁰ the protection of a belief system, as opposed to individuals, suggests that religious systems are above reproach which threatens to characterize any dissension as discrimination. This protection also violates a typical characteristic of human rights law, which is that while ethnicity and race are protected from harm, opinions and beliefs are not.⁴¹ Here we encounter one of the foundational concerns with religious freedom: is religion a choice, or is it a cultural identity? While some scholars argue that certain faiths like Islam view religion as an identity because of their different philosophical worldview,⁴² cultural critics argue that Islam is simply a more coercive form of opinion, due to the serious – and often fatal – consequences of apostasy and the forbiddance of religious critique.⁴³ While the standard Post-Colonial academic response to such criticism is to argue that the Western world is “othering” a different culture and perpetuating stereotypes of Muslim barbarism,⁴⁴ and while it is true that theoretically, any religion could require the same responses to blasphemy, we are still left with the uncomfortable fact that in contemporary society there are different consequences for criticizing Islam as opposed to other religions. This is evidenced by the three incidents already cited: the fatwa against Salman Rushdie for publishing a novel, the death of Theo van Gogh for making a film, and the riots and death threats that accompanied the publication of the *Jyllands-Posten* cartoons.

Canada's law against blasphemy must be considered within this context; to do otherwise would be to ignore contemporary socio-political reality as well as law's impact on the real world outside of Academia. With this in mind, I now turn to Canadian law to determine whether the blasphemy prohibition is consistent with the stated goals of our own jurisprudence and whether it is defensible in the modern world.

37. *Ibid* at 360.

38. *Ibid* at 352.

39. *Ibid* at 367.

40. James Q Whitman, “Separating Church and State: The Atlantic Divide” (2008) 34:3 Historical Reflections 86.

41. Dobras, *supra* note 30 at 367.

42. Winnifred Sullivan, *The Impossibility of Religious Freedom* (Princeton, NJ: Princeton University Press, 2005) at 8.

43. See Salman Rushdie, “Yes, This is About Islam” *The Gazette*. Nov 10, 2001. p. B5, and Sam Harris, “Bombing our Illusions” online: *The Huffington Post*, <http://www.huffingtonpost.com/sam-harris/bombing-our-illusions_b_8615.html>.

44. See Natasha Bakht, “Were Muslim Barbarians really knocking on the gates of Ontario?: The religious arbitration controversy – another perspective” (2006) 40th Anniv Ed *Ottawa L Rev* 67.

II. FREEDOM OF EXPRESSION

Criticism of religion, even if calculated to cause offence, is expression. In the context of hate speech, courts have typically shown deference to those being discriminated against over the freedom of those making derogatory statements, usually in an analysis under section 1 of the *Canadian Charter of Rights and Freedoms*.⁴⁵ The Supreme Court of Canada in both *Ross v. New Brunswick School District No. 15* (“*Ross*”)⁴⁶ and *R v. Keegstra* (“*Keegstra*”)⁴⁷ took great pains to state that freedom of religion and freedom of expression are not absolute. The fact that this must be made explicit is indicative of the level of hysteria surrounding these particular freedoms. The Supreme Court in *Keegstra* posed several rhetorical questions asking whether wilfully promoting hatred against a minority group is in accordance with certain key principles of Canadian law – such as the supremacy of God, the dignity and worth of the human person, respect for moral and spiritual values, and the rule of law. The Court found that freedom of expression emerged from these foundational values, and an attack upon them can be suppressed not in spite of, but in order to preserve freedom of expression. The Court stated:

While the questions are posed separately, the principles referred to in each, are not contradictory of one another. The acknowledgment of the Supremacy of God, the dignity and worth of the human person, and respect for moral and spiritual values and the rule of law, having regard to the context in which they are found, are principles which must be regarded as, being harmoniously interwoven for the single purpose of giving a particular and efficacious meaning to the words “rights” and “freedoms” as used in the Bill of Rights and the Charter.⁴⁸

The Court went on to use section 15(1) to show that one acceptable limit on freedom of expression is the well-being of particular ethnic or religious groups.⁴⁹ Interestingly, this case found that criminalizing the wilful promotion of hatred is necessary to safeguard freedom of expression, because the other safeguards, such as libel, were not applicable in that case. This included the crime of blasphemous libel, which the Court held only protected an individual, and not “groups distinguished by race or religion”.⁵⁰ This illustrates the Court’s concern with harm as a rationale for limiting expression, yet also shows that the Court considers the Canadian blasphemy provision to provide protection for individuals and not religious groups.⁵¹

However, this Canadian justification must be examined within the wider, international context of our increasingly globalized world. Within this context, one of the most emblematic clashes of speech and religion was the publication of Salman Rushdie’s *The Satanic Verses*. The incident is particularly interesting because theorists continue to frame the events surrounding the publication differently. For instance, Christopher Hitchens, a friend of Rushdie’s and an advocate of freedom of speech, remembers the aftermath as a time in which few academics were brave enough to support Rushdie, while the dominant view of both the general public and the academic left was that Rushdie had overstepped

45. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

46. *Ross v New Brunswick School District No. 15*, 133 DLR (4th) 1, [1996] SCJ No 40 (QL) (*Ross* cited to QL).

47. *R v Keegstra*, 19 CCC (3d) 254, [1984] AJ No 643 (QL) (*Keegstra* cited to QL).

48. *Ibid* at para 54.

49. *Ibid* at paras 56-59.

50. *Ibid* at para 74.

51. *Ibid* at para 81.

his bounds.⁵² Hitchens also remembers how, prior to publication, Rushdie asked his colleague, Edward Said, whether his book may cause offence,⁵³ thereby obviously not intending to provoke the Muslim community.

On the other hand, one of Hitchens' contemporaries, Richard Webster, frames the incident as a planned provocation,⁵⁴ appropriated by a cult of free speech libertarians who would not allow Rushdie to fully retract his novel, castigating him for his half-hearted apology of an essay, entitled "Why I have Embraced Islam". Seemingly without irony, Webster characterizes the academic left as an orthodoxy that cannot be challenged, referring to "the huge pressure there is both on Salman Rushdie and on his publishers to conform to orthodox doctrines of 'freedom of speech'". The enemies of freedom of speech in Webster's view are "the most extreme proponents of the libertarian position ... the uncritical defenders of a narrow orthodoxy whose all but universal currency has been taken as a guarantee of its ultimate value" and who have "tended to impose on those who dare to question the sacred doctrine of freedom the sanctions of orthodoxy as they are described by Mill."⁵⁵

Further, he states that "critics of the liberal position have thus frequently been met with the kind of stigmatisation, intolerance and abuse which Mill implicitly identifies as the chief instruments of the modern Inquisition."⁵⁶ These are remarkably bold statements to make in light of the fact that, following the publication of Rushdie's novel, it was a religious figure who called for the literal murder of others, and the people who ultimately murdered a translator and attempted to murder others were those on the opposing side of the libertarians with respect to Rushdie's novel. Similarly, Webster ignores the more obvious reason why Rushdie would be so equivocal in his repudiation of the novel: he wrote it under threat of death. In fact, he himself said as much, according to Hitchens, who tells an anecdote in his memoirs in which Rushdie crosses out the offending essay in his own anthology.⁵⁷

However, if Webster has such problems with the "narrow orthodoxy" of libertarianism, and if he has such qualms about Rushdie not being able to fully apologize for his novel, it is unclear how he can argue against freedom of expression, particularly in the face of an orthodoxy calling for the death of an author. That those who originally supported Rushdie would have preferred he not apologize would have been ironic and indicative of hypocrisy had they actually attempted to prevent him from doing so in any way other than by voicing their opinions; however, they did not. Even if Rushdie's supporters had attempted to censor his apology, it would be ludicrous to draw from this the implication that a criminal sanction for the publication of the novel is necessary or productive.

52. Hitchens, *supra* note 9 at 269: "In Britain, writers and figures of a more specifically Tory type... openly vented their distaste for the uppity wog in their midst and also accused him or deliberately provoking a fight with a great religion. (Meanwhile, in an unattractive example of what I nicknamed 'reverse ecumenicism,' the archbishop of Canterbury, the Vatican, and the Sephardic Chief Rabbi of Israel all issued statements to the effect that the main problem was not the offer of pay for the murder of a writer, but the offense of blasphemy)... More worrying to me were those on the Left who took almost exactly the same tone."

53. *Ibid* at 267.

54. Webster, "A Brief History", *supra* note 21: "In the particular case of *The Satanic Verses*, we should have no doubt at all that Salman Rushdie's intention was to use blasphemy as a way of attacking unjustifiable forms of political and religious rigidity."

55. Richard Webster, "Reconsidering the Rushdie affair: Freedom, censorship, and American foreign policy" online: <<http://www.richardwebster.net/therushdieaffairreconsidered.html>>.

56. *Ibid*.

57. Hitchens, *supra* note 9 at 280: "It really read as if it had been written at gunpoint, which of course it had been. ... [Rushdie] seized the volume of essays in which this literary abortion was preserved like a nasty freak in a bottle ... he then carefully crossed out every page of the 'offensive' piece, signing each one to confirm his own authorial deletion."

This wider context illustrates the problematic nature of attempts to balance freedom of speech and freedom of religion. Paul Kahn argues that issues of freedom and diversity are so difficult to define and protect because of the binary of the universal and the particular – our fears of supporting practices which violate Human Rights (the universal) must confront our fears of privileging our own cultural biases over those of other communities (the particular).⁵⁸ However, the Rushdie affair, as well as other incidents involving blasphemy, seems to be better explained with a binary of the academic and the practical. For instance, Webster takes a nuanced, theoretical and wide-sweepingly historical view of the incident, stating:

What we need is a little less pressure on the trigger of cultural patriotism, and a little more historical perspective. For only then is it likely that we can take a more balanced and considered view of one of the most disturbing cultural clashes there has ever been and of a dilemma which is going to face Western writers and intellectuals for many years to come, whether they like it or not.⁵⁹

For Hitchens, it is this very intellectualizing that is the problem, a point he makes over and over again in his memoirs,⁶⁰ feeling that academia is blind to the real problems of cultural conflict, citing both Saïd and Noam Chomsky as the architects of an ideology that sees America and the Western world as always, definitively in the wrong.⁶¹ Of course, blind cultural patriotism is not helpful – on either side of the issue – but neither is the flight from problems of the present into abstract theoretical arguments revolving around the historical nature of religion itself.

Elucidating a further complication in the law's treatment of freedom of expression, Stanley Fish argues that truly respecting all differences of opinion is impossible, as this would require respecting opinions that wish to abolish others; at some point, the most tolerant multiculturalist must draw a line in the sand. For most libertarians, hate speech is the point at which this line is drawn; however, there remain theoretical problems with such an approach:

The vocabulary will not stand up to even the most obvious lines of interrogation. How respectful can one be of “fundamental” differences? If the difference is fundamental – that is, touches basic beliefs and commitments – how can you respect it without disrespecting your own beliefs and commitments? And on the other side, do you really show respect for a view by tolerating it, as you might tolerate the buzzing of a fly? Or do you show respect when you take it seriously enough to oppose it, root and branch? ... Fiercer disagreements, disagreements marked by the refusal of either party to listen to reason, are placed beyond the pale where, presumably, they occupy the status of monstrosities, both above and below our notice ... As a result, the category of the fundamental has

58. Paul Kahn, *Putting Liberalism in its Place* (Princeton, NJ: Princeton University Press, 2005).

59. Webster, “A Brief History”, *supra* note 21.

60. Hitchens quotes the following entry from a blog written by an American soldier who died in Iraq, a conversation between the soldier and a Kurdish civilian regarding whether insurgents should be considered freedom fighters or terrorists: “...shaking his head as I attempted to articulate what can only be described as pathetic apologetics, he cut me off and said ‘the difference between insurgents and American soldiers is that they get paid to take life – to murder, and you get paid to save lives’. He looked at me in such a way that made me feel like he was looking through me, into all the moral insecurity that living in a free nation will instill in you. He ‘oversimplified’ the issue, or at least that is what college professors would accuse him of doing.” Hitchens, *supra* note 9 at 324.

61. *Ibid* at 394.

been reconfigured – indeed, stood on its head – so as to exclude conflicts between deeply antithetical positions; that is, to exclude conflicts that are, in fact, fundamental.⁶²

The same arguments which apply to hate speech apply to blasphemy: is it more productive to engage with the opinions of those with whom you disagree, in order to achieve a dialogue, or is it more important to stop the opinion from being sounded entirely? This same balancing of expression and avoidance of harm has already been done in the context of hate speech, which, although criticized as an infringement of expression,⁶³ is typically considered necessary to protect minorities. Even Fish, who believes that multiculturalism is impossible, and who advocates for freedom of speech, finds that hate speech codes are occasionally useful, as a necessary evil to preserve order in society.⁶⁴ However, blasphemy laws are obviously something different than hate speech, otherwise their existence would be redundant. Blasphemy, though undefined in the code, must be something other than the wilful promotion of hatred against a group. This requires us to ask: is yet another law necessary for the offence of blasphemy? To answer this question, we must consider the difference between hate speech and blasphemy; namely, religion.

III. FREEDOM OF RELIGION

In a country that guarantees freedom of religion, blasphemy laws are problematic: they may be necessary to protect one religion, yet the law itself may infringe another. Michael Bohlander characterizes blasphemy laws as protecting not the deity – as the deity can protect itself – and certainly not a prophet, as “it should be fairly obvious...that a single human being cannot by right demand the respect of all others, let alone their worship.”⁶⁵ Of course, this is not fairly obvious to Muslim communities who consider it a religious – if not state – crime to blaspheme against God and Muhammad. Herein Bohlander allows his own cultural biases to show, illustrating the problematic nature of freedom of religion which has led some scholars to believe that it should not even be granted, as it is so difficult to define and defend.⁶⁶

Religious beliefs are protected for a variety of reasons (not the least of which is the fear of violence⁶⁷), but one stated reason is the importance of the religious beliefs to the believer. As Bohlander states:

[r]eligious beliefs are by their very nature amongst the most basic foundations of our lives and attacks upon them may lead to personal instability resulting in unhappiness if such attacks are of a severe nature, as they eat into the very roots of our conception of life. Causing a person to doubt his or her faith is an extreme act, cutting the ground from under their feet to speak metaphorically ... True believers ... therefore feel the force of the attack on their faith in a far more substantial way than if it had

62. Stanley Fish, “Boutique Multiculturalism, or Why Liberals are Incapable of Thinking about Hate Speech” (1997) 23.2 *Critical Inquiry* 378 at 388.

63. *Ibid* at 393.

64. *Ibid* at 394.

65. Michael Bohlander, “Public Peace, Rational Discourse and the Law of Blasphemy” (1992) 21 *Anglo-Am L Rev* 163 at 164.

66. Sullivan, *supra* note 42.

67. Jeremy Webber, “Understanding the Religion in Freedom of Religion” in Peter Cane, Carolyn Evans and Zöe Robinson, eds, *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008) 26 at 40: “It was precisely the readiness of people to stick fast to their religious beliefs and defend them to the death that resulted in their religious commitments being recognised as significant.”

only been an attack on their everyday life opinions...it is the threat to the basis of their lives.⁶⁸

This implies that religious belief cannot be defended within the marketplace of ideas, that even if a belief is patently absurd or repulsive, it must still be protected due to the egregious harm that will come from criticizing it. Such an understanding of religious belief becomes apparent when we consider the history of blasphemy, especially with its *mens rea* of strict liability and its original purpose of protecting an established state religion.⁶⁹ Rushdie characterizes this as “[r]eligions play[ing] bare-knuckle rough all the time while demanding kid-glove treatment in return.”⁷⁰

Canadian courts have defined freedom of religion broadly, allowing a test for what qualifies as religion to be subjective belief in order to avoid adjudicating religious disputes.⁷¹ This means that the right is often limited at the section 1 stage of the *Charter* analysis. At that point, the courts take a more narrow approach, particularly when the issue is one that Canadian culture holds particularly dear.⁷² Examples of areas where the court feels obliged to limit religious freedom are children who refuse blood transfusions,⁷³ marriage commissioners who refuse to marry same-sex couples⁷⁴ or Catholic schools who seek to restrict dance attendance to heterosexual couples.⁷⁵ In all of these cases, the courts have found that despite the religious freedoms at issue, the equality or right to life concerns outweighed that freedom. These are important principles in society, as stated in *R v Big M Drug Mart Ltd* (“*Big M*”),⁷⁶ quoted by Justice La Forest in *RB v Children’s Aid Society*,⁷⁷ a case in which parents sought to refuse a blood transfusion for their young child:

The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.⁷⁸

Therefore, despite the courts stating that they penalize actions and not beliefs,⁷⁹ in essence, a section 1 proportionality analysis does weigh the merits of religious doctrine. In sanctioning certain actions, the court inevitably makes a statement about the state’s view of the beliefs that justify those actions to the religious individual. When these beliefs can be shown to harm others at a level the court deems inappropriate, the freedom can be limited. Or, as the court in *Ross* states, “[f]reedom of religion is subject to such limitations as are necessary to protect public safety, order, health or morals and the fundamental rights and freedoms of others.”⁸⁰

68. Bohlander, *supra* note 65 at 166. He goes on to state that even this hurt cannot justify blasphemy laws, as a pluralistic society demands dialogue. He instead rests his support of blasphemy laws on the public unrest that blasphemy may cause.

69. Clive Unsworth, “Blasphemy, Cultural Divergence and Legal Relativism” (1995) 58 Mod L Rev 658 at 662.

70. Salman Rushdie, “Give me that old time atheism” *The Gazette* (2005) D8.

71. *Syndicat Northcrest v Amselem*, [2004] 2 SCR 551 at para. 56 (*Amselem*).

72. See Benjamin Berger, “The Cultural Limits of Legal Tolerance” (2008) 21:2 Can JL & Jur 245.

73. *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30.

74. *Reference Re: Marriage Commissioners*, 2011 SKCA 3.

75. *Hall (Litigation guardian of) v Powers*, 59 OR (3d) 423.

76. *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295.

77. *RB v Children’s Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at para 231.

78. *Big M*, *supra* note 76 at 346.

79. *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772 at para 36.

80. *Ross*, *supra* note 46 at para 72.

The *Hutteritian Brethren* case,⁸¹ however, is different. It does involve a limitation of religious freedom using a section 1 analysis, but the harm it seeks to avoid is identity theft, a much lower-stakes issue than the refusal of a blood transfusion, and a much less topical and contentious issue in Canadian culture than same-sex marriage. This case suggests that the communal, isolated nature of the religion was what truly disturbed the court, and the floodgates loomed all too large – considering issues relating to the Bountiful case, Sharia law in Canada, and legal pluralism in general – were the court to acquiesce to the demands of this particular community. And while some scholars argue that this fear of particular religions is indicative of cultural bias,⁸² the court has reason to fear particular doctrines which advocate the substitution of state law with religious law.

For instance, how else can a state deal with this: the murderer of Theo van Gogh was prompted to murder because of his subjectively held view that this was his religious duty. As Buruma states:

[h]e explained to the court that he was obligated to ‘cut off the heads of all those who insult Allah and his prophet’ by the same divine law that didn’t allow him ‘to live in this country, or in any country where free speech is allowed.’⁸³

This raises a question about the law of blasphemy, which is essentially a law in which the state at least partially condones the above worldview. This requires governmental involvement in religious faith, a situation from which our country has been backpedaling since the 1980s when *Big M* was decided. Hypothetically, if such a murder occurred in Canada, the defendant could point to the blasphemy prohibition that still exists as evidence of the state-sanctioned gravity of the insult that he or she suffered.

Beyond these academic discussions, it would be dishonest to ignore the fact that certain religions mandate death penalties for blasphemy, and certain countries take these religious prohibitions as their secular laws. Considerations of Canada’s own laws should not exist outside of this practical context, and the inherent hypocrisy of a country with blasphemy laws speaking out, for instance, about capital punishment for blasphemy in Pakistan, is problematic. Of course, by “certain religions” I am referring to Islam, which means that this issue is not merely about freedom of religion and speech, but it is also about multiculturalism.

IV. MULTICULTURALISM

Charter jurisprudence in Canada considers not simply formal equality or the purposes of legislation, but also the substantial equality involved in adverse effects.⁸⁴ Therefore, realizing that blasphemy laws are contributing to a climate that denies the freedom of the dissenters of one particular religion is a valid concern when considering the validity of such laws, regardless of their apparent neutrality. While some scholars argue that blasphemy laws are necessary to keep the level of debate at a rational, inclusive, non-discriminatory level, still others argue that this very law will contribute to a climate of fear that stifles debate, essentially defeating the aims of a tolerant pluralistic society. The court articulates this difficulty in *Ross*:

Ours is a free society built upon a foundation of diversity of views; it is also a society that seeks to accommodate this diversity to the greatest extent

81. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37.

82. Sullivan, *supra* note 42 at 8.

83. Buruma, *supra* note 1 at 189.

84. *Big M*, *supra* note 76 at para 80.

possible. Such accommodation reflects an adherence to the principle of equality, valuing all divergent views equally and recognizing the contribution that a wide range of beliefs may make in the search for truth. However, to give protection to views that attack and condemn the views, beliefs and practices of others is to undermine the principle that all views deserve equal protection and muzzles the voice of truth.⁸⁵

For most liberal multiculturalists, the line is drawn at hate speech. The problem, however, is that what one culture considers hate speech, another may consider an integral part of their own culture. And so we come to Kahn's problem with multiculturalism; we are continually torn between two instincts: one is to protect basic human rights, which must be defined and must therefore be biased and that reek of imperialism; the other is to allow groups to say and do things which we find fundamentally wrong.⁸⁶ This is made even more difficult when we are discussing religion, which is more nebulous and complicated than ethnicity, as evidenced by the fact that no one can quite decide whether it is an identity or a choice.

One concern that is rarely discussed in the literature is the growing number of non-religious Canadian citizens. Despite not having a common ethnic or cultural background, this group is technically a minority, and therefore deserves protection.⁸⁷ A blasphemy law implies that religious sensibilities ought to be protected from insult; however, these insults may be a secular humanists' only method of anti-religious expression, particularly if the definition of "insult" is left up to the finder of fact. For instance, Unsworth defends the need for blasphemy thusly:

[F]rom the perspective of militant atheism ... if the pervasive social power of religion ... its invocation of the supernatural to legitimate the repressive ordering of personal and social relation, is to be defeated, then it might be argued that what is needed is a strategy of demystification which precisely involves taking on the sense of the sacred which is protected by blasphemy law.⁸⁸

If the nation and the court disagrees with this, then they are essentially taking a religious position and not accommodating the plethora of views which they ostensibly respect.

While this argument may not hold water in a country in which the "supremacy of God" is recognized in the Preamble to the *Charter*, blasphemy laws still discriminate against powerless minorities within ethnic and cultural minorities; for instance, the dissenters and the apostates who may seek sanctuary in the state's laws from their own families or communities. Ultimately the problem of religion and culture is that it is complex and fractured; no one is purely and solely a member of one group or faction. As Rushdie says: "The melange of culture is in us all, with its irreconcilable contradictions. In our swollen, polyglot cities...we are all cultural mestizos, and the argument within rages to some degree in us all."⁸⁹ With this in mind, it is important to note that two of the three international incidents discussed in this paper – those involving Ayaan Hirsi Ali and Salman Rushdie – involve public figures who were born to Muslim parents. The Canadian blasphemy law makes no distinction between those who criticize others' religions as opposed to those who criticize their own; arguably, a much different state of

85. Ross, *supra* note 46 at para 96.

86. Kahn, *supra* note 58.

87. The 2001 census is the most recent data on this topic: it found 16.5% of respondents to have no religion. Statistics Canada, online: <www.statcan.ca>.

88. Unsworth, *supra* note 69 at 675.

89. Salman Rushdie, "The Great Debate on Multiculturalism" *The Gazette* (2006) D8.

affairs, although not to those who believe that their God or prophet must be spared the offence of blasphemy.

This is the dangerous territory of religion and multiculturalism: it involves ethnic groups and identities but it also involves culture, and the way it is produced and shared. As Unsworth states:

The law of blasphemy provides a coercive weapon which can be deployed in this kind of struggle within and between faiths. It is a legal trump card in a contest over how far the sacred images and myths which are the heritage of different elements within the broader culture can be adapted in the depiction of meaning...Believers effectively claim an exclusive intellectual property in these icons deserving of legal protection.⁹⁰

A criminal law determining who can say what about religion may affect society differently than one which protects minority groups from hate speech because the law will in essence be restricting the evolution of the religion itself, intruding into areas the courts have stated that they definitely do not want to go; as in *Amselem*, wherein the court stated: “the State is in no position to be, or should it become, the arbiter of religious dogma”.⁹¹

V. THE THREAT OF PUBLIC DISORDER

Throughout the literature on blasphemy, the fear of violent uprisings is continually used to justify censorship. Bohlander argues that this is the only way blasphemy laws can be justified.⁹² It is the only reason Webber offers in support of freedom of religion.⁹³ In the context of Islamic immigration, negative stereotypes are typically cited as reasons to avoid blasphemy.⁹⁴ The Supreme Court of Canada cites this very threat in *Keegstra*,⁹⁵ and Patrick identifies this threat as one of the only potential advantages of leaving the blasphemy prohibition on the books:

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 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 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

90. Unsworth, *supra* note 69 at 674-75.

91. *Amselem*, *supra* note 71 at para 50.

92. Bohlander, *supra* note 65 at 167.

93. Webber, *supra* note 67 at 40.

94. Dobras, *supra* note 30 at 364.

95. *Keegstra*, *supra* note 47 at paras 81-82: “These effects have been documented throughout history and are self evident. ... In my view, it is beyond doubt that breeding hate is detrimental to society for psychological and social reasons and that it can easily create hostility and aggression which leads to violence...The inherent danger of an aggressive response by target groups is self evident with history supplying us with many illustrations. Avoidance of the issue or acceptance of the prejudice can have cruel economic, social and psychological consequences. Such degradation and demoralization should not have to be accepted by any minority group in Canadian society. In my view, such kind of expression must be modified and any bias in favour of maximum rhetoric must give way in view of the serious injury to the community itself and to individual members of identifiable groups innocently caught by such prejudice.”

blasphemous libel prohibition would presumably be much easier.⁹⁶

Cindy Holder also uses the violence that followed the publication of the Danish cartoons as proof of how deeply hurt the feelings of the Muslim community were and therefore how much blasphemy prosecutions are needed.⁹⁷

However, it is possible that the state's public disapproval of blasphemy encourages these uprisings by justifying taking offence to the blasphemy. And despite scholars such as Sam Harris arguing that it is not persecution that causes terrorism, but rather religious fundamentalism,⁹⁸ the threat of violence is continually used to promote blasphemy laws and to silence dissenters. Hitchens put it thusly:

The script is becoming a very familiar one. And those who make such demands are of course usually quite careful to avoid any association with violence. They merely hint that, if their demands are not taken seriously, there just might be a teeny smidgeon of violence from some other unnamed quarter.⁹⁹

Here again we see the blend of religion and politics – in this case, political negotiation – and again it appears that this would be a regression for a country such as Canada that has by-and-large secularized its government. In fact, Rushdie argues that in order to defeat terrorism, religion must cease to mix with politics in order to become more modern and secular, as he believes all nations must become.¹⁰⁰

Harris similarly believes that modernity requires a lack of blasphemy prohibitions:

The time for political correctness and multi-cultural shibboleths has long passed. Moderate Muslims must accept and practice open criticism of their religion. We are now in the 21st century: all books, including the Koran, should be fair game for flushing down the toilet without fear of violent reprisal. If you disagree, you are not a religious moderate, and you are on a collision course with modernity.¹⁰¹

While there are undoubtedly some critics that would dismiss such a statement – as it endorses a linear, progressive view of history that assumes secularization to be good – it is worth noting that the days of the Canadian state becoming involved in religious disputes are indeed in the past. And countries which regularly prosecute citizens for blasphemy are not countries which Canada seeks to emulate; in fact, they are countries with which Canada fundamentally disagrees about international blasphemy prohibitions. Consider this statement from Holder, writing about the Danish cartoon controversy:

At the heart of this controversy is an implicit assertion that Westerners

96. Patrick, *supra* note 4 at 232-33.

97. Holder, *supra* note 22 at 184.

98. "How many more architects and electrical engineers must fly planes into buildings before we realize that the problem of Muslim extremism is not merely a matter of education? How many more middle-class British citizens must blow themselves up along with scores of noncombatants before we acknowledge that Muslim terrorism is not matter of poverty or political oppression?" Harris, *supra* note 43.

99. Hitchens, "A Test of Tolerance", online, Slate Magazine: <<http://www.slate.com/id/2264770/>>.

100. "The restoration of religion to the sphere of the personal, its depoliticization, is the nettle that all Muslim societies must grasp in order to become modern. The only aspect of modernity interesting to the terrorists is technology, which they see as a weapon that can be turned on its makers. If terrorism is to be defeated, the world of Islam must take on board the secularist-humanist principles on which the modern is based, and without which Muslim countries' freedom will remain a distant dream." Rushdie, "Yes, this is about Islam", *supra* note 43.

101. Harris, *supra* note 43.

can and should speak with impunity about Islam and its adherents. The violence that has greeted this assertion calls into question whether it is in fact true.¹⁰²

Here Holder frames the issue correctly; it is about who can speak about certain topics. Although her example of the Danish cartoons is a more clear distinction between Westerners and non-Westerners, incidents of blasphemy will not always have such clearly drawn racial and ethnic lines. Blasphemy laws raise the specter of censorship in an area of religion, not race or ethnicity, and the threat of violence in this area should be defined in exactly the way threats of violence in pursuit of political aims are usually defined – as terrorism. The question is: should the state be involved in determining who can speak about religion? According to Canadian notions of freedom of expression, religion and multiculturalism, the answer must be a resounding “No”.

CONCLUSION

In order for the blasphemy provision to be considered appropriate in contemporary Canadian society, it must be found to be consistent with freedom of expression. However, courts have been reluctant to limit this freedom except in cases of the promotion of hatred against identifiable groups. Given that there is already a law forbidding hate speech, it seems unlikely that courts would find that blasphemy justified yet another infringement on freedom of expression; particularly because, unlike ethnicity, it is expression itself that creates religious doctrine and tradition. Similarly, courts have stated unequivocally that they do not want to be involved in the adjudication of religious disputes, and that religious freedom can be limited in situations where its expression will compromise the freedom and rights of others in the community. Since situations of blasphemy are conflicts between two different religions or within one religion, it is difficult to justify blasphemy on the basis of freedom of religion because one’s freedom of religion may infringe another’s by the mere fact that one holds a religious belief that contradicts another’s.

Multiculturalism as a concept is fraught with difficulty because it is impossible to always respect every divergent opinion that may be offered. However, in the case of blasphemy, the court would be privileging religious sensitivities over those of the non-religious were it to uphold the current law and prosecute blasphemers, inevitably finding itself adjudicating debates between different religious viewpoints. Similarly, the state which seeks to protect minorities would be siding with the majority in the case of dissenters within a particular religion.

Moreover, the threat of violence as a result of blasphemy is real and is often used as a justification for the law, especially in calls for certain authors and artists to be prosecuted. However, these threats merely illustrate the destructive potential of the privileging of a certain view point above others, and the dangers of imposing state sanctions against opinions. Having a law against blasphemy makes it impossible for the state to honestly speak out against outrageous human rights abuses in the name of religion without an air of hypocrisy.

The Canadian state has been gradually divesting itself of its religious past, seeking to move further and further away from the context in which it first codified its law against blasphemy. Considering that it is no longer used, and that internationally Canada does not support blasphemy prohibitions, it is incongruous for the prohibition to remain. While there is presumably little political will to become involved in repealing such a provision,

102. Holder, *supra* note 22 at 185.

and while little damage is done to Canadian citizens by its existence at the moment, it remains an example of the convergence of law and religion, and the complexities borne from therein, not the least of which is the collision between contemporary academic ideology and practical consequences of blasphemy internationally. This issue will continue to challenge the current generation of legal scholars, forcing them to confront issues of freedom and diversity both at home and abroad.