

## BLASPHEMY IN A SECULAR STATE: A PARDONABLE SIN?

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### I. INTRODUCTION

In theology and the canon law blasphemy is a direct criticism of God and sacred objects. However, through its incorporation into the common law and three centuries of adjudication blasphemy has been laicised into a religious vilification law, still only protecting Christian doctrines and susceptibilities. In 1992, the New South Wales Law Reform Commission issued a Discussion Paper on the State blasphemy law.<sup>1</sup> The Paper continues a decade of investigation into blasphemy laws, adding to recommendations previously made by the Law Commission of England and Wales in 1985,<sup>2</sup> and by the Australian Law Reform Commission in 1992.<sup>3</sup> In outlining its options for reform, the New South Wales Commission indicated a preference for the abolition of the offence and some legislative

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1 New South Wales Law Reform Commission, *Blasphemy*, 1992.

2 Law Commission, *Criminal Law - Offences Against Religion and Public Worship*, 1985.

3 Law Reform Commission, *Multiculturalism and the Law*, 1992.

illumination of the existing racial discrimination and vilification laws.<sup>4</sup> This is largely consistent with the other Commissions' recommendations. However, despite the questions blasphemy and related profanity laws<sup>5</sup> raise about the legal position of religion in modern liberal democracies, none of the Commissions considered the effect that issues of state sponsorship of religion and religious freedom have on them. It is therefore intended in this article to contribute to the current scrutiny of blasphemy laws by assessing them in light of the legal and political principles of liberal secularism. This requires analysis of the development, purpose and substantive content of the blasphemy laws, the impact of s 116 of the Commonwealth Constitution and State provisions relating to liberty of conscience and belief, and the more general demands the secular state makes to preserve liberty in matters of opinion.

## II. HISTORICAL DEVELOPMENT

Several offences designed to preserve doctrinal integrity and to suppress or discipline any dissension existed in the medieval canon law. These included heresy, apostasy, schism and blasphemy, but in most cases, their operation overlapped.<sup>6</sup> To Aquinas,<sup>7</sup> blasphemy was "to cast insult or abuse at the dignity of our creator" and therefore involved "ill-will towards God" rather than unbelief.<sup>8</sup> But, in contrast to the other ecclesiastical causes, blasphemy did not presume prior membership of the catholic community. Historically, the offence has actually thrived in early conditions of religious pluralism when it serves to demarcate the spheres of orthodox doctrine and of rival opinions, which initially were perceived to threaten social stability. In England, the intellectual and organisational schisms of the Reformation in the sixteenth century helped to bring an increase in ecclesiastical causes for blasphemy<sup>9</sup> and, through the religious disintegrations of the seventeenth century, it was made a civil offence by legislation<sup>10</sup> and, in practice, by ad hoc parliamentary prosecutions.<sup>11</sup> The blasphemy legislation did

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4 Note 1 *supra* at [4.91] and [4.92], p 72.

5 Traditionally, profanity is a summary public order offence, and seems to address the same discourse prohibited by modern blasphemy laws. It may also address imprecations of divine vengeance: see *Holcomb v Cornish* (1831) 8 Conn 375, and *Gaines v Tennessee* (1881) 75 Tenn 410.

6 RH Helmholz, *Roman Canon Law in Reformation England*, Cambridge University Press (1990) p 2; LW Levy, *Treason Against God*, Schocken Books (1981) p 103; cf FW Maitland, *Canon Law in the Church of England*, Methuen (1898) pp 158 and 173.

7 Saint Thomas Aquinas (1225-74).

8 *Summa Theologiae* (1975) 2a2æ 13 i.

9 RH Helmholz, note 6 *supra* at 110 and 115-16.

10 3 Jas I c 21; *Printing Ordinance*, 30 September 1647; *Blasphemy Ordinance*, 2 May 1648, *Printing Ordinance*, 20 September 1649; *Blasphemy Ordinance*, 9 August 1650; *Ministers and Schoolmasters Ordinance*, 28 August 1654; D Lawton, *Blasphemy*, Harvester Wheatsheaf (1993) pp 16, 36, 37 and 118.

11 *James Nayler's Case* (1656) 5 St Tr 827; R Burn, *Ecclesiastical Law*, Cadell, Rivingtons, Butterworths, and Longman (8th ed, 1824) vol iii p 216; D Lawton, note 10 *supra* at 68-74.

not survive long after the restoration of Charles II in 1660.<sup>12</sup> However, the creation of an exclusive Anglican establishment in 1662 despite widespread dissent inevitably brought new blasphemy laws, and there were contemporaneous signs of common law jurisdiction to punish unorthodox opinions.<sup>13</sup> It was in *R v Taylor*<sup>14</sup> in 1677 that the Court of King's Bench first recognised the common law offence of blasphemy to punish a madman who had described Christ as a bastard and whoremaster, and religion as a cheat. Lord Chief Justice Hale said that:

...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.<sup>15</sup>

Hale's comments in *Taylor* reveal that the Court had both religious and social purposes in developing the offence: the protection of Christianity and the preservation of social order. The rationale for Hale's statement that "Christianity is parcel of the laws of England" is open to conjecture.<sup>16</sup> It did help to legitimate the assumption of a jurisdiction only previously exercised in the ecclesiastical courts.<sup>17</sup> It also remained the primary reason given for the common law offence until the nineteenth century.<sup>18</sup> Indeed, close examination of the reported cases suggests some association between the offence and the English church settlement. The institutions and opinions the blasphemy law protected have always been co-extensive with the dogmatic theology of the Church of England. Consequently, prosecutions have involved criticisms of the doctrines of the Trinity, Christ's virginal conception, divinity, resurrection and second coming, biblical inspiration and heaven and hell, and the liturgy and organisation of the established church.<sup>19</sup>

Hale's maxim also reflected contemporary political theory that true religion was a pre-requisite to social and political stability.<sup>20</sup> The assumption was later perpetuated in *R v Curl*,<sup>21</sup> a case of obscene libel. In this case the Court of King's

12 13 Ch II c 1.

13 *R v Field* (1661) 1 Keb 175 at 194, 209 and 233, 1 Sid 69; *R v Sedley* (1663) 1 Sid 168; see C Manchester, "A History of the Crime of Obscene Libel" (1991) 12 *Journal of Legal History* 36 at 37.

14 (1677) 1 Vent 293; see G Robertson, *Obscenity*, Weidenfeld and Nicolson (1979) pp 236-7.

15 *Ibid.*

16 Cf T Jefferson, "Christianity and the Common Law" in *Writings* (1984) pp 1323-4; *R v Hetherington* (1840) 4 St Tr (NS) 563 at 595; C Kenny, "The Evolution of the Law of Blasphemy" (1922) 1 *CLJ* 127 at 130-1.

17 Cf *Caudrey's Case* (1591) 5 Co Rep 1a at 8b-9a; cf *Atwood's Case* (1618) Cro Jac 421; *Traske's Case* (1618) Hob 236.

18 *R v Taylor* (1677) 1 Vent 293; *R v Curl* (1727) 2 Str 788 at 789-90; *R v Woolston* (1729) Fitz-G 64 at 65; W Blackstone, *Commentaries on the Laws of England*, Cadell and Davies, (14th ed, 1803) vol iv 3 iv; *R v Williams* (1797) 26 St Tr 653 at 704 and 715-17; *R v Eaton* (1812) 31 St Tr 927 at 950; *R v Richard Carlile* (1819) 4 St Tr (NS) 1423 at 1423 and 1425; *R v Wright* (1823) 1 St Tr (NS) 1370; *R v Waddington* (1823) 1 B & C 26 at 26 and 29-30; *R v Hetherington* (1840) 4 St Tr (NS) 563 at 582 and 597; cf *Thomas Paterson* (1843) 1 Broun 629.

19 GD Nokes, *A History of the Crime of Blasphemy*, Sweet & Maxwell (1928) pp 71-4 and 107-13; see *R v Gathercole* (1838) 2 Lew 237 at 254.

20 Thus, doctrinal deviations were sometimes prosecuted as sedition: *R v Keach* (1665) 6 St Tr 701 at 703; *R v Baxter* (1685) 11 St Tr 494, 3 Mod 68; cf G Robertson, "Blasphemy: The Law Commission Working Paper" [1981] *PL* 295 at 296.

21 (1727) 1 Str 790.

Bench concluded that merely to offend religion was a breach of the peace, and thereby established the principle that a publication was indictable if it discredited religion or tended to threaten the peace.<sup>22</sup> *Curl* therefore reinforced the perceived interconnection of religion and organised society through legal principle, a connection the Court of King's Bench repeatedly affirmed throughout the eighteenth century<sup>23</sup> and, through a rash of prosecutions at the time of the French Revolution, into the nineteenth century.<sup>24</sup>

The 1840s brought an important change to this position, by legal recognition that peaceable social ordering did not depend on the holding of sound religious opinions.<sup>25</sup> Specifically, it was accepted in 1840 that Christian doctrines might be denied in a sober, temperate and decent manner. The blasphemy law was taken only to prohibit insult and ridicule.<sup>26</sup> The Scottish courts, which also enforced a common law offence of blasphemous libel, also recast blasphemy as a vilification law. In *Thomas Paterson*,<sup>27</sup> Lord Justice-Clerk Hope refused to decide whether merely to deny the truth of the Bible or Christianity was an offence. Instead, he directed the jury to consider the manner of publication and, more particularly, whether it vilified the Bible or Christianity.<sup>28</sup> In 1883, Lord Chief Justice Coleridge entrenched this approach in the English common law in *R v Bradlaugh*<sup>29</sup> and *R v Ramsay & Foote*,<sup>30</sup> where he made his celebrated statement of the offence:

A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred objects, or by wilful misrepresentations or artful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as moral, - a state of apathy and indifference to the interests of society, - is the broad boundary between right and wrong.<sup>31</sup>

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22 C Manchester, note 13 *supra* at 41.

23 For example, *R v Woolston* (1729) 2 Str 834, Fitz-G 64 at 65; *R v Ilive* (1756) referred to by JF Stephen, *History of the Criminal Law of England* (1883) vol ii p 471; *R v Annett* (1763) 1 Black W 395; *R v Wilkes* (1770) 4 Burr 2527 (an obscene and impious libel); *R v Williams* (1797) 26 St Tr 653 at 664, 665, 701, 703, 704, 706 and 715-17; *R v Brothers* (1794) referred to by R Burn, note 11 *supra* at 217.

24 *R v Eaton* (1812) 31 St Tr 927 at 930 and 950; *R v Richard Carlile* (1819) 1 St Tr (NS) 1388; 3 B & Ald 161; *R v Mary Carlile* (1819) 3 B & Ald 167; *R v Wedderburn* (1820) 1 St Tr (NS) 1370; *R v Davison* (1821) 4 B & Ald 329; *R v Boyle* (1822) 1 St Tr (NS) 1370; *R v Tunbridge* (1822) 1 St Tr (NS) 1368; *R v Wright* (1823) 1 St Tr (NS) 1370; *R v Waddington* (1823) 1 B & C 26. In 1834, a Return to the House of Commons reported 73 convictions for blasphemous libel in England between 1 January 1821 and April 1834: 1 St Tr (NS) 1387-8.

25 GD Nokes, note 19 *supra* at 92-3; RC Post, "Cultural Heterogeneity and Law: Pornography, Blasphemy, and the First Amendment" (1988) 76 *Cal Law Rev* 297 at 307; G Robertson, note 14 *supra* at 238; G Robertson, note 20 *supra* at 297; cf *R v Curl* note 21 *supra*; *R v Waddington* (1823) 1 B & C 26 at 29-30.

26 *R v Hetherington* (1840) 4 St Tr (NS) 563 at 591. See also *R v Moxon* (1841) 4 St Tr (NS) 693; *R v Pooley* (1857) 8 St Tr (NS) 1089.

27 (1843) 1 Broun 629.

28 *Ibid.* See also *Henry Robinson* (1843) 1 Broun 590 at 643; *Thomas Finlay* (1843) 1 Broun 648n.

29 (1883) 15 Cox CC 217.

30 (1883) 15 Cox CC 231.

31 *Ibid* at 236.

Most English courts have endorsed Lord Coleridge's principles since *Ramsay & Foote*<sup>32</sup> and, in the process, have illuminated two important characteristics of the modern law *Ramsay & Foote* introduced. First, the offence has been personalised. It no longer only protects the objective institutions and theology of the established church, but also the sensitivities of the believing Christian. Secondly, it gives discriminatory protection to sectional religious group rights. Both developments dislodge the blasphemy law from its original rationale, and it is debatable that it now achieves any legitimate social or political purpose.

### III. THE MODERN LAW

#### A. *Gay News*: The *Lemon* Decision

In 1976, *Gay News*, a British newspaper for homosexuals, printed Professor James Kirkup's "The Love that Dares to Speak its Name", a poem describing a Roman centurion's erotic fantasies about the body of Jesus immediately after his death. The text was accompanied by a drawing of the centurion embracing the crucified body. The newspaper and its editor, Denis Lemon, were subsequently prosecuted privately by Mrs Mary Whitehouse for blasphemous libel. Both *Gay News* and Lemon were convicted, by majority verdicts, and these were upheld by the Court of Appeal and the House of Lords. Further applications to the European Commission of Human Rights were also ruled inadmissible.

The trial in *R v Lemon*<sup>33</sup> was a *cause célèbre* and has since been dramatised by the BBC. However, the legal point the English appellate courts had to resolve in the case was a technical one, and only related to the precise intention needed to commit the offence.<sup>34</sup> More relevant in evaluating the institutional relations between the state and religion is the House's obiter dicta on the objects protected by the blasphemy law. The *Ramsay & Foote* principles required the criticism to constitute "licentious and contumelious abuse" to render it criminal<sup>35</sup> and, consistently with this requirement, in *Lemon* Lords Diplock and Russell identified the illegal criticism of religion in terms of material likely to shock and arouse resentment among believing Christians.<sup>36</sup> To be blasphemous, therefore, the tone or method of the communication had to be so insolent as to be likely to elicit some strong and negative emotional response. If the criticism be sober, temperate and decent, the publication cannot be considered blasphemous. In this connection, the

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32 *R v Boulter* (1908) 72 JP 188; *R v Gott* (1922) 16 Cr App Rep 87 at 89; *R v Lemon* [1979] 1 QB 10 at 20 and 21-2; *Whitehouse v Lemon* [1979] AC 617 at 635, 643-4, 661 and 664; *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury* [1990] 3 WLR 986 at 995; cf *Pankhurst v Thompson* (1886) 3 TLR 199 at 200; *R v Murray* [1951] 1 KB 391 at 397.

33 [1979] 1 QB 10; *Whitehouse v Lemon* [1979] AC 617 (*Lemon*); *Gay News Ltd & Lemon v United Kingdom* (1982) 5 EHRR 123.

34 On this issue, by a majority the House of Lords held that the only mental element required to commit blasphemy is the intention to publish the blasphemous material: *Lemon*, note 33 *supra* at 646.

35 Note 30 *supra* at 236.

36 *Lemon*, note 33 *supra* at 632 and 656-7.

primary object the law protects is not so much the Christian religion as the Christian believer.<sup>37</sup> Though doctrine remains relevant, ultimately the law only seeks to prevent Christians' personal resentment at criticisms of their beliefs.

### B. *Satanic Verses*: the *Choudhury* Decision

The limitation of the blasphemy law's protection to Christian doctrines and susceptibilities was confirmed in another case to have recently entered the annals of legal history; the Divisional Court of the Queen's Bench Division's decision in *Choudhury*.<sup>38</sup> These proceedings were aimed at suppressing Salman Rushdie's *Satanic Verses*. The debate between Muslims and literati as to whether Rushdie intended to offend Muslims by the book has been most acrimonious and, the Ayatollah Khomeini having earlier pronounced his *fatwa* against Rushdie, the significance of the case transcended any question of legal blasphemy. For the modern blasphemy law, however, the relevant issue is that *Satanic Verses* did offend significant Muslim elements. The general tone of the book was critical of Islam: it used derogatory names for the prophet Muhammad, it denounced the Islamic moral system and, throughout, Rushdie made liberal use of coarse language. In attempting to invoke the blasphemy law, British Muslims applied to have summonses issued against Rushdie and his publisher, but the magistrate rejected the application on the ground that the law only punished criticism of Christian doctrine and susceptibilities. The Divisional Court upheld this view and, in its conclusion, explicitly supported the relationship between the blasphemy law and the Church of England:

...no offence is committed if the religious beliefs which are attacked are not those of the Church of England ... [A]s the law now stands [the protection of the blasphemy law] does not extend to religions other than Christianity.<sup>39</sup>

*Choudhury* also went to the European Commission of Human Rights, but the complaint was unsuccessful.<sup>40</sup>

### C. Breach of the Peace

To the extent that they dealt with the objects protected by the blasphemy law, the *Lemon* and *Choudhury* proceedings therefore have upheld and, in doing so, mostly clarified the scope of the *Ramsay & Foote* paradigm. One doubt they nevertheless did not resolve was the old issue, suppressed by *R v Curl*,<sup>41</sup> on any necessity for a breach of the peace. In *Lemon*, Lord Scarman subsumed the issue to that of a calculated attempt to outrage and insult the Christian's religious feelings.<sup>42</sup> In consequence, he thought that any added requirement for a breach of the peace was

37 G Robertson, note 20 *supra* at 298.

38 [1990] 3 WLR 986 (*Choudhury*).

39 *Ibid* at 998-9.

40 *Choudhury v United Kingdom* (1991) HRLJ 172.

41 Note 21 *supra*.

42 *Lemon*, note 33 *supra* at 662.

“a minor contribution to the discussion of the subject”.<sup>43</sup> This opinion is fundamentally incompatible with various dicta stated in the House of Lords in *Bowman v Secular Society Limited*.<sup>44</sup> There, the separate requirement for a breach of the peace in the blasphemy law was held to exist, although how serious that breach had to be was not resolved. Lord Sumner thought it had to be a shaking of “the fabric of society”,<sup>45</sup> but Lord Parker, that it involved any public threat to person or property.<sup>46</sup> *Lemon* now makes it uncertain whether at common law even the latter and less serious kind is necessary.

#### IV. THE MODERN PURPOSE OF THE BLASPHEMY LAW

In its origin as a common law offence, the stated purposes of the blasphemy law were the protection of religion and social order. These were so intermingled in the confessional state that merely to deny the doctrines of the religious establishment presented some threat to both. However, once the courts in the 1840s began to reshape blasphemous libel into a vilification law, its religious purpose inevitably disappeared. Ironically, the controlled and critical methods Charles Bradlaugh used to attack Christianity did not offend Lord Coleridge’s restatement of the blasphemy law,<sup>47</sup> but achieved more for the anti-religionist cause than John Gott’s scurrilous *Rib Ticklers*, which did offend it.<sup>48</sup> Furthermore, in *Bowman v Secular Society Limited*, Lord Sumner held that its proof-text, the maxim “Christianity is part and parcel of the law of England”, was not legal principle but disposable rhetoric.<sup>49</sup> If any symbolic legacy of a religious purpose to the blasphemy law persisted until then, *Bowman* laid it to rest.

The social purpose of the offence lasted longer as a juridical legitimation, and was still used by Lord Scarman in *Lemon*.<sup>50</sup> It was only when the British Government had to defend the result in *Lemon* before the European Commission of Human Rights that a genuine attempt to elicit the modern purpose of the blasphemy law from its substantive content did emerge.<sup>51</sup> The Commission held that the law violated the right to freedom of expression in the European Convention for the Protection of Human Rights.<sup>52</sup> It could therefore only survive the Convention’s demands if the Government proved that it served one of the secular justifications permitted by the Convention. These were that the law was needed to prevent disorder or to protect morals or the rights of others. In *Lemon* especially,

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43 *Ibid.*

44 [1917] AC 406.

45 *Ibid* at 467.

46 *Ibid* at 446.

47 *R v Bradlaugh* (1883) 15 Cox CC 217.

48 *R v Gott* (1922) 16 Cr App Rep 87; cf *R v Ramsay & Foote* note 30 *supra* at 239.

49 Note 44 *supra* at 464.

50 *Lemon*, note 33 *supra* at 662.

51 *Gay News Ltd & Lemon v United Kingdom*, note 33 *supra*.

52 Article 10.

the Commission found the public interest explanations unconvincing since Mrs Whitehouse had prosecuted privately and the Government took no part in the proceedings. It nevertheless upheld the law on the ground that it protected the prosecutrix's rights:

The Commission considers that the offence of blasphemous libel as it is construed under the applicable common law in fact has the main purpose to protect the rights of citizens not to be offended in their religious feelings by publications.<sup>53</sup>

One could question this reasoning. The issue before the Commission was not *who* prosecuted, but the legitimacy of the *convictions* under the Convention. Hence, whether the prosecutions were brought publicly or privately was irrelevant.<sup>54</sup> The lesson of the opinion, however, is that the present purpose of the blasphemy law lies in the protection of a particular religious group's rights and, irrespective of the identity of the prosecutor, this conclusion is reinforced by the elements of the offence. To be blasphemous, the material must shock and arouse resentment among believing Christians. If Lord Scarman's opinion that no additional tendency towards a breach of the peace is also accepted, then social consequences to the publication need not be essential. That being so, *Lemon* recognised the demise of the legitimations initially used by Hale in assuming common law jurisdiction over blasphemy. The law no longer protects either religion or society. It still sets the sphere of orthodox expression recognised by the law, but this is now ultimately defined by reference to the susceptibilities of the practising Christian community.

## V. BLASPHEMY LAWS IN AUSTRALIA

The English blasphemy law is in operation in Australia, although it has several sources and exists in a number of permutations in the statute law. The Federal Court seems to have assumed that the common law meaning of blasphemy dictates its meaning in the legislation,<sup>55</sup> and so it is most likely that the statutory expressions of blasphemy and profanity largely belong to the same genre as the common law offence. Its possible reception as a common law offence is therefore an important threshold issue, as it not only affects the scope and content of the offence, but also the pattern the blasphemy law takes in the legislation. To some extent, this issue is also affected by the legal status of the Church of England in colonial New South Wales, because the origin and substantive content of the English blasphemy law depended on the legal monopolies and privileges of the English establishment. It is generally held that the Church of England was not established in the colony.<sup>56</sup> However, before responsible government was granted

53 *Gay News*, note 51 *supra* at 130.

54 See S Leader, "Blasphemy and Human Rights" (1983) 46 *MLR* 338 at 339.

55 *Ogle v Strickland* (1987) 71 *ALR* 41 at 52, 53-4 and 59.

56 *Ex parte Ryan* (1855) 2 *Legge* 876 at 877 and 878-9; *In the Will of Purcell* (1895) 21 *VLJ* 249 at 252-3; *Re Harnett*; *Condon v Harnett* (1907) 7 *SR (NSW)* 463 at 465; *Fielding v Houison* (1908) 7 *CLR* 393 at

in 1842, the Church in New South Wales enjoyed monopolies, privileges, unique statutory recognition and state support. The colonial Government did actually treat the Church as established by law. These suggest it was initially established but gradually became *disestablished*.<sup>57</sup> They also support the reception of the blasphemy law and, in practice, it has been assumed that the law was received in New South Wales and several British colonies. Prosecutions for blasphemous libel at common law have been brought in New South Wales and Victoria,<sup>58</sup> and the offence has also been recognised at common law in New Zealand<sup>59</sup> and the United States.<sup>60</sup>

The colonial Parliament introduced the statutory regulation of blasphemy into New South Wales as early as 1827, by imposing exile on any person twice convicted of publishing blasphemous matter "tending to bring into hatred or contempt the Government of the Colony as by law established or to excite His Majesty's subjects to attempt the alteration of any matter in Church or State as by law established otherwise than by lawful means".<sup>61</sup> This legislation was repealed in 1898<sup>62</sup> although, in the meantime, the New South Wales Parliament had passed an upgraded blasphemy law in accordance with the *Ramsay & Foote* principles.<sup>63</sup> It is in that form that the State blasphemy law exists today.<sup>64</sup>

## A. The Criminal Law

Only in South Australia, Norfolk Island<sup>65</sup> and perhaps the Northern Territory, where it is not completely certain whether the *Criminal Code* abolishes common law offences, is it necessary to have exclusive recourse to the common law to determine whether blasphemy laws exist. Most problems about the existence of blasphemy laws in Australia are resolved by legislation. In Tasmania, the *Criminal Code* creates the crime of blasphemous libel directly.<sup>66</sup> The statutory offence largely replicates the common law offence, although the written consent of the Tasmanian Attorney-General is required before any prosecution can be

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402, 406, 419 and 423; *Wylde v Attorney-General (NSW)(ex rel Ashelford)* (1948) 78 CLR 224 at 275; *Gent v Robin* [1958] SASR 328 at 347; *Canterbury Municipal Association v Moslem Alawy Society* (1985) 1 NSWLR 525 at 543; *Glebe Administration Board v Commissioner of Pay-roll Tax* (1987) 10 NSWLR 352 at 357.

57 R Border, *Church and State in Australia*, SPCK (1962) pp 51-62; *Attorney-General v Wylde* (1948) 48 SR (NSW) 366 at 380-2; *Wylde v Attorney-General (NSW) (ex rel Ashelford)* (1948) 78 CLR 224 at 284-5.

58 P Coleman, *Obscenity, Blasphemy, Sedition: 100 Years of Censorship in Australia*, Angus & Robertson (1974) pp 65-7 and 72-4.

59 *R v Glover* [1922] GLR 185.

60 *Updegraph v Commonwealth of Pennsylvania* (1824) 11 Serg & R 394; *State of Maine v Mockus* (1921) 113 A 39 at 41.

61 *Blasphemous and Seditious Libels Act 1827* (8 Geo IV No 2) (NSW), s 20.

62 *Newspapers Act 1898* (NSW), s 1.

63 *Criminal Law Amendment Act 1883* (NSW), s 483.

64 *Crimes Act 1900* (NSW), s 574.

65 English law as of 1828 was received in Norfolk Island: *Norfolk Island Act 1843* (UK), s 2; *Norfolk Island Act 1913* (Cth); *Norfolk Island Act 1957* (Cth), s 12; *Norfolk Island Act 1979* (Cth), ss 16 and 17.

66 *Criminal Code* (Tas), s 119.

brought.<sup>67</sup> In New South Wales and Victoria, legislation does not create a blasphemy law but assumes that one does exist at common law and partially regulates it.<sup>68</sup> The New South Wales blasphemy law also operates in some Territories, through the direct reception of New South Wales law in the Australian Capital Territory and its indirect reception in the Jervis Bay Territory and the Australian Antarctic Territory.<sup>69</sup>

In Queensland and Western Australia, the *Criminal Codes* have abolished all common law offences<sup>70</sup> and do not include blasphemy laws.

There are summary offences prohibiting the use of profane language or, in some cases, the singing of profane songs in public in Queensland, South Australia, Tasmania, Victoria and Western Australia.<sup>71</sup>

## B. Censorship Laws

The Federal Government has powers to prevent the import of some blasphemous material into the country under the *Customs (Cinematograph Films) Regulations*. These provide that imported cinematograph films, video tapes, video discs and any promotional material used in connection with them may only be released from Customs on being approved by the Censorship Board. One ground on which the Board may withhold approval is that the material is blasphemous.<sup>72</sup> These regulations received some consideration in the Full Court of the Federal Court's decision in *Ogle v Strickland*.<sup>73</sup> There, the Court held that an Anglican priest and a Roman Catholic priest had standing to challenge the Censorship Board's decision to allow the importation of the film *Hail Mary*. The priests believed that the film was blasphemous, and therefore an illegal import, but this question did not have to be decided in *Ogle*. However, in obiter dicta Justice Lockhart seemed to assume that the meaning of the term "blasphemous" in the *Customs (Cinematograph Films) Regulations* was similar to its meaning at common law.<sup>74</sup>

The only State to have censorship laws explicitly directed at blasphemous literature is Queensland. The *Objectionable Literature Acts* of 1954 to 1967 create the Literature Board of Review and empower it to prohibit the distribution in Queensland of literature it considers to be objectionable, including blasphemous

67 *Criminal Code (Tas)*, s 119(4).

68 *Crimes Act 1900 (NSW)*, s 574; *Crimes Act 1958 (Vic)*, s 469AA.

69 *Crimes Act 1900 (ACT)*, s 574; *Seat of Government Acceptance Act 1909 (Cth)*, s 6; *Jervis Bay Territory Acceptance Act 1915 (Cth)*, s 4A; *Australian Antarctic Territory Act 1954 (Cth)*, s 6(2).

70 *Criminal Code Act 1899 (Qld)*, ss 3 and 5; *Criminal Code Act Compilation Act 1913 (WA)*, s 4.

71 *Vagrants, Gaming and Other Offences Act 1931 (Qld)*, s 7(c); *Summary Offences Act 1953 (SA)*, s 22; *Police Offences Act 1935 (Tas)*, ss 12(1)(b)-(c); *Summary Offences Act 1966 (Vic)*, s 17(1)(c); *Police Act 1892 (WA)*, s 59.

72 *Customs (Cinematographic Films) Regulations*, Regulations 2A, 4, 9, 11, 12, 13 and 39.

73 (1987) 71 ALR 41.

74 *Ibid* at 52. Federal legislation relating to the broadcast or posting of blasphemous matter has been repealed: see *Broadcasting Act 1942 (Cth)*, s 118; *Broadcasting Services (Transitional Provisions and Consequential Amendments) Act 1992 (Cth)*, s 28; *Post and Telegraph Act 1901 (Cth)*, s 43; *Postal and Telecommunications Commissions (Transitional Provisions) Act 1975 (Cth)*, s 4.

literature that has a tendency to deprave or corrupt.<sup>75</sup> It is incongruous, therefore, that the Board is also prevented from examining or reviewing material consisting solely of "religious matter, or any remarks or observations therein".<sup>76</sup> To be blasphemous, the material must make *some* comment on religion and may sometimes exclusively comprise remarks or observations on religious subjects. The qualification is poorly expressed, and no guidance is provided by the *Objectionable Literature Acts* as to how the Board's inability to review religious material is to be balanced against its powers to regulate blasphemous literature.

### C. The Doctrinal Objects Protected by Australian Blasphemy Laws

The close relationship between the substantive content of the English blasphemy laws and the established church, recognised as recently as *Choudhury*,<sup>77</sup> prompts the question whether there could be a difference in the blasphemy laws received in colonies in which the Church of England was not established or, as was probably the case in New South Wales, became disestablished. In particular, in colonies where all religions were regarded legally as equal there is some suggestion that the institutions and opinions the blasphemy laws protect extend beyond those of dogmatic Anglicanism. There were certainly suggestions in Upper Canada that it was some interdenominational expression of Christianity that was protected by the blasphemy laws.<sup>78</sup> In addition, criticisms of peculiarly Roman Catholic institutions were successfully prosecuted under the blasphemy laws in South Africa<sup>79</sup> and Quebec,<sup>80</sup> although these laws had Roman-Dutch and statutory bases. In the Quebec case of *R v Rahard*,<sup>81</sup> the accused was an Anglican clergyman, and was indicted for pasting on his church walls posters criticising the Roman priesthood, the mass and the Catholic moral system. He was convicted, despite his plea that his specific criticisms of the Roman mass were doctrines of the Church of England. Chief Justice Perrault's judgment in *Rahard* ignored this issue. Its effect, though, was not only to extend the protection of the Canadian blasphemy law beyond the doctrines of the Church of England, but possibly even to punish the offensive expression of those very same doctrines.

In *Ogle v Strickland*, Justice Lockhart could only say that the possible extension of the Australian blasphemy law to Judaism and other non-Christian religions was "an interesting question".<sup>82</sup> There is no indication in any common law jurisdiction that the common law offence could protect any opinions not held in mainstream Christianity. Indeed, this position was actually reinforced by the Federal Court's decision in *Ogle* that, if anyone had been aggrieved by the Censorship Board's

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75 *Objectionable Literature Acts* 1954-67 (Qld), ss 5, 6, 10.

76 *Objectionable Literature Acts* 1954-67 (Qld), s 8.

77 Note 38 *supra*.

78 *Pringle v Town of Napanee* (1878) 43 UCQBR 285 at 293; cf *Boucher v Shewan* (1864) 14 UCCPR 419.

79 *R v Webb* [1934] AD 493.

80 *R v St Martin* (1933) 41 R de Jur 411.

81 [1936] 3 DLR 230.

82 (1987) 71 ALR 41 at 52.

decision that *Hail Mary* was not blasphemous, it was a Christian priest<sup>83</sup> or a committed Christian.<sup>84</sup>

## VI. THE IMPACT OF CONSTITUTIONAL DEMANDS

The extensive investigations and analyses of blasphemy laws undertaken since *Lemon*<sup>85</sup> have given little attention to the possible effect of constitutional limitations on governmental powers over religion. This is understandable in Australia, where no State constitution except that of Tasmania includes any provision expressly relating to religion. Section 116 of the Commonwealth Constitution does, however, specifically limit the Commonwealth's powers over religion, and the overwhelming weight of judicial opinion supports its application to the laws of the Federal Territories.<sup>86</sup> Hence, in circumstances where several governments in Australia have limited powers to support and shape laws relating to religion, some question of the validity of blasphemy laws could arise.

### A. The Commonwealth Establishment Clause

Section 116 of the Commonwealth Constitution begins,

The Commonwealth shall not make any law for establishing any religion ...

This provision copies and modifies the First Amendment of the United States Constitution, which states in part that:

Congress shall make no law respecting an establishment of religion ...

For the Commonwealth and Territories the establishment clause is the supreme determinant of permissible institutional relations with religion. It therefore dictates the primary constitutional considerations addressing the validity of blasphemy laws, although these have varied with the oscillations in the courts' approaches to establishment clause interpretation. In the United States, most challenges to State blasphemy laws under the First Amendment's and State establishment clauses have been unsuccessful. The earliest of these cases, *People v Ruggles*,<sup>87</sup> reflects establishment clause interpretation in an unrefined state of development. There, Chancellor Kent held that New York blasphemy laws did not violate the State establishment clause, on the assumption that religion undergirded the security of social ties.<sup>88</sup> In 1967, the Supreme Court of Pennsylvania dismissed a challenge to the State blasphemy law under the First Amendment's establishment clause, but

83 *Ibid* at 53-4.

84 *Ibid* at 59.

85 Note 33 *supra*.

86 *Lamshed v Lake* (1958) 99 CLR 132 at 143, 152 and 154; *Teori Tau v Commonwealth* (1969) 119 CLR 564 at 567 and 571; *Attorney-General (Vic) (ex rel Black) v Commonwealth (State Aid)* (1981) 146 CLR 559 at 594, 621 and 649; cf *Porter v R; ex parte Yee* (1926) 37 CLR 432 at 448.

87 (1811) 8 Johns 290.

88 *Ibid* at 294; cf also *Updegraph v Commonwealth of Pennsylvania* (1824) 11 Serg & R 394; *Shover v Arkansas* (1850) 5 Eng 259.

gave no explanation.<sup>89</sup> In contrast, the closer attention paid to establishment clause principles in *Maryland v West*<sup>90</sup> led to the State's blasphemy law's being invalidated. In that case, the Maryland Court of Special Appeals had to apply the separatist principles developed by the Supreme Court in the 1960s,<sup>91</sup> to the effect that the law had to be secular in both purpose and primary effect. Finding that it had its origin in a 1649 statute designed to protect Christian doctrine and that its purpose had not changed, the Court held that the law violated the First Amendment.

The result in *Maryland v West* was a logical and uncontroversial application of the establishment clause principles then operating. The same result might not be achieved under the United States Supreme Court's present approach to the establishment clause, by which government is only unable "to give direct benefits to religion in such a degree that it in fact "establishes a [state] religion or religious faith or tends to do so".<sup>92</sup> The High Court's analogous holding that section 116's establishment clause only prohibits governments from passing legislation having the purpose of creating a national church or religion<sup>93</sup> is equally unlikely to invalidate the various Commonwealth and Territory blasphemy laws. Historically, they do seem to originate in the national territorial establishment of the Church of England. The provisions of the *Customs (Cinematograph Films) Regulations* and the Territory offences of blasphemous libel also have the purpose of protecting Christian doctrines and susceptibilities, and clearly concede a legal preference to Christianity and, more specifically, to Anglicanism which other religious groups do not enjoy. However, in themselves these do not create the prohibited national church. They only create a preference, and the High Court has also held that it is only unconstitutional to concede a preference to one religion over others to the extent that the preference tends to the creation of a national church or religion.<sup>94</sup>

## B. The Commonwealth Free Exercise Clause

Section 116 also denies the Commonwealth the power to make any law "for prohibiting the free exercise of any religion" and this clause is also modelled on, but varies, a limitation on congressional power in the First Amendment. In the United States, there has also been little success in challenges to blasphemy laws under free exercise clauses. In *Maryland v West*, the Maryland Court of Special Appeals did hold that the First Amendment's free exercise clause invalidated the State blasphemy law. However, the reasoning in the case relied exclusively on establishment clause principles and, given that no question of a burden on religious

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89 *Commonwealth of Pennsylvania (ex rel Brown) v Rundle* (1967) 227 A 2d 895.

90 (1970) 263 A 2d 602.

91 See *School District of Abington Township v Schempp* (1962) 374 US 203.

92 *Lee v Weisman* (1992) 112 S Ct 2649; *County of Allegheny v American Civil Liberties Union* (1989) 492 US 573 at 659.

93 *State Aid*, note 86 *supra*.

94 *Ibid* at 609-10, 612-14 and 653.

liberty arose, this particular conclusion was probably not justified.<sup>95</sup> Indeed, because it does not necessarily address institutional relations, even when broadly interpreted the free exercise clause does not always have an impact on blasphemy laws. In the first place, the free exercise clause only prohibits burdens on religion. Blasphemy laws might protect religious susceptibilities but do not necessarily burden other religious expression. Frequently, the personal motivation for scandalising religious opinions might have no religious source.<sup>96</sup>

In the second place, it does happen that religious beliefs often require criticism of other religions and, conceivably, religious speech and publications might then, on occasions, constitute blasphemous discourse. Blasphemy laws can therefore burden the expression of religious opinions. Thus, a Protestant clergyman might plead he had a vocational duty to criticise the Roman mass and thereby offend the blasphemy law.<sup>97</sup> Or, Jehovah's Witnesses might claim a divine charge to distribute *The Watchtower's* denunciations of other religious groups and also thereby offend profanity laws.<sup>98</sup> However, the burden on these and other religious expression might also be constitutionally permissible. In this connection, a problem of interpretation arises under s 116, in that the limitations on the protection of religion are not authoritatively settled in the case law. But there are several characteristics of blasphemy laws which indicate that these possible limitations, though unresolved, would not validate blasphemy laws if they burdened religious discourse. First, blasphemy laws undoubtedly operate as restraints on expression.<sup>99</sup> The right to liberty of religious opinions under constitutional guarantees has traditionally been considered absolute, leaving actions alone open to reasonable regulation.<sup>100</sup> It might be considered that a restraint on the expression of an opinion is effectively a burden on the opinion itself, and unconstitutional. Admittedly, the conceptual dichotomy between opinion and action is, at best, superficial and is, in any case, inconsistent with the practice of the courts.<sup>101</sup> The High Court nevertheless supported it in the *Scientology Case*.<sup>102</sup> Furthermore, the High Court has held that liberty of expression in public political debate is never

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95 (1970) 263 A 2d 602 at 604-5.

96 Cf *Gay News*, note 71 *supra* at 131.

97 *R v Rahard* [1936] 3 DLR 230.

98 *Oney v Oklahoma City* (1941) 120 F 2d 861.

99 *Joseph Burstyn Inc v Wilson* (1952) 343 US 495; *Gay News* note 71 *supra* at 126; HB Bonner, *Penalties Upon Opinion*, Watts & Co (1934) p 137; cf *Beauharnais v Illinois* (1952) 343 US 250.

100 *Reynolds v United States* (1878) 98 US 145 at 164; *Cantwell v Connecticut* (1940) 310 US 296 at 303-4; *Braunfield v Brown* (1961) 366 US 599 at 603; *Sherbert v Verner* (1962) 374 US 398 at 402-3.

101 G Moens, "The Action-Belief Dichotomy and Freedom of Religion" (1989) 12 *Sydney Law Review* 195 at 213. In *Davis v Beason* (1889) 133 US 333 and *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116 (*Jehovah's Witnesses*), laws which did punish religious opinions were held not to violate the United States and Commonwealth free exercise clauses respectively.

102 *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120 at 135-6 (*Scientology*); see also *Employment Division, Department of Human Resources v Smith* (1990) 110 S Ct 1595 at 1599 but cf *Religious Freedom Restoration Act 1993* (US), s 3.

absolute<sup>103</sup> and it is unlikely the expression of religious opinion would be treated differently. Still, a restraint on either is probably hard for government to justify.<sup>104</sup>

Secondly, the only limitations on religion permitted by the High Court in the *Jehovah's Witnesses' Case*<sup>105</sup> were those necessary to maintain civil government and the continued existence of an organised community.<sup>106</sup> Blasphemy laws are unlikely to rank so highly, especially since the protection they provide does not extend across the whole organised community but only to one particular religious group, albeit the largest one.

Thirdly, the only burdens the High Court has allowed on other constitutional liberties are those which government imposes in pursuance of a legitimate governmental interest and which are reasonable and proportionate to the realisation of that interest.<sup>107</sup> Blasphemy laws again are unlikely to meet this requirement. It is questionable whether government has any legitimate interest in protecting religious opinions,<sup>108</sup> let alone in treating them unequally. Though still unprepared to elevate the idea of religious equality to constitutional status, the High Court has recognised its importance in local legal and constitutional development,<sup>109</sup> and this suggests that, except in the most extraordinary circumstances, the Commonwealth and Territory governments have no interest in burdening one religious group in order to protect another. In addition, in their present form blasphemy laws could be disproportionate or unreasonable burdens on religious opinions. If they only imposed standards of decorum in public debate they could, perhaps, be considered reasonable and place no restraint on the individual's quest for religious truth.<sup>110</sup> The present blasphemy laws extend further, however, and are more likely to offend standards of reasonableness because, being limited to the protection of Christian doctrine and susceptibilities, the protection they offer is sectional and exclusive of significant minorities.

### C. The Tasmanian Free Exercise Clause

To be valid, the Tasmanian blasphemy and profanity laws must survive the operation of that State's free exercise clause, s 46 of the *Constitution Act* of 1934. This provides,

Freedom of conscience and the free profession and practice of religion are, subject to public order and morality, guaranteed to every citizen.

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103 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 66 ALJR 695 at 704.

104 *Cf Ibid.*

105 Note 101 *supra*.

106 *Ibid* at 131-2, 149, 155 and 160.

107 For s 92 see *Cole v Whitfield* (1988) 165 CLR 360 at 408 and *Castlemaine-Tooheys Pty Ltd v South Australia* (1990) 169 CLR 436 at 472, 477 and 480. For the implied right of free communication see *Australian Capital Television Pty Ltd v Commonwealth* note 103 *supra* at 704.

108 *Joseph Burstyn Inc v Wilson* (1952) 343 US 495 at 504-5.

109 For example, *State Aid* note 86 *supra* at 613 and 617.

110 *Commonwealth of Massachusetts v Kneeland* (1838) 20 Pick 220; *State of Maine v Mockus* (1921) 113 A 39 at 44.

The Tasmanian free exercise clause is more likely to have an impact on a blasphemy or profanity law than the Commonwealth clause because, in addition to its protecting the profession and practice of religion, it also guarantees freedom of conscience. Thus, the Tasmanian blasphemy law could be *prima facie* invalid if the criticism directed at Christian opinions had *either* secular conscientious *or* religious motivations.

In the second place, the Tasmanian clause also states its permissible limitations on liberty of conscience and religion expressly. These limitations, are measures directed towards public order and morality, and are admittedly broader than those usually credited to the Commonwealth clause.<sup>111</sup> *Gay News & Lemon v United Kingdom* established that the convictions under the English blasphemy law did *not* protect public order and morals because the prosecutions had been brought privately.<sup>112</sup> The reasoning towards that conclusion was dubious, and in any case it is probable that it is not so relevant to the Tasmanian blasphemy law because, unlike the English law, it requires executive *fiat* before a prosecution can be brought.<sup>113</sup> But the law is still in substance primarily directed towards protecting Christian doctrines and susceptibilities, and this is not altered by governmental control of prosecutions. That it protects only one section of society again might indicate that it does not address the basic issues of peaceable social ordering required for validity by the Tasmanian free exercise clause.

## VII. RECOMMENDATIONS FOR REFORM: EXTENSION OR ABOLITION

The New South Wales, English and Australian Law Reform Commissions agreed that the present blasphemy laws were unsuitable in current social conditions,<sup>114</sup> and the striking anomaly of an assimilating blasphemy law in a pluralist society helped lead to that conclusion. In the words of the New South Wales Commission:

In the modern plural society that Australia has become, this inherited discrimination is hard to defend, given that it is contrary to contemporary morality, many judicial pronouncements, and expressed State and federal policies.<sup>115</sup>

However, the Commissions are also agreed in preferring that the blasphemy laws should not be extended to protect religions other than Christianity, and this second conclusion is probably not required by the institutionalising of pluralism.<sup>116</sup>

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111 Cf *Jehovah's Witnesses* note 101 *supra* at 155.

112 Note 51 *supra* at 130.

113 *Criminal Code (Tas)*, s 119(4).

114 NSW Commission, note 1 *supra* at [4.58], p 64; English Commission, note 2 *supra* at [2.54-57], pp 28-9; Australian Commission, note 3 *supra* at [7.59], p 167.

115 NSW Commission, note 1 *supra* at [4.52], p 62.

116 Cf for example the racial and religious group libel law discussed in *Beauharnais v Illinois* (1951) 343 US 250 at 263, 273, 283 and 303; RC Post, note 25 *supra* at 302. Two dissentients on the English Commission

These recommendations resist longstanding liberal opinion in support of the equal protection of religious groups through modified blasphemy laws. Lord Macaulay's Indian *Penal Code*, which prohibited words and actions deliberately intended to wound the religious feelings of others,<sup>117</sup> introduced this ecumenical approach to blasphemy regulation. In *Lemon*, Lord Scarman lent it his support, stating that his criticism of the English blasphemy law was "not that it exists but that it is not sufficiently comprehensive".<sup>118</sup> He implied that the extension of blasphemy laws to other religions was required by the recent emergence of religious pluralism in the United Kingdom.<sup>119</sup>

However, the Commissions have raised three specific objections to extended blasphemy laws. First, the English Commission concluded that there was no significant difference in kind between religious susceptibilities and the non-religious reverence people pay to national symbols or to great thinkers, artists or musicians. Hence, it concluded that religion does not deserve special protection, and should be treated the same as the objects of secular reverence.<sup>120</sup> This issue is intimately related to the nature of religion, and there is enough speculation on this subject to show that, at best, the Law Commission's major premise is debatable.<sup>121</sup>

The second objection was practical; a suitable definition of the religious groups and sacred objects to be protected by ecumenical blasphemy laws is hard to formulate.<sup>122</sup> None of the Commissions discussed the possible use or adaptation of the High Court's broad definition of religion in the *Scientology Case*,<sup>123</sup> but its parameters of belief in a supernatural being or idea and associated canons of conduct do not seem to provide the certainty and precision needed in the criminal law.<sup>124</sup>

The third objection was that blasphemy laws already impose legal restraints on communication. In extending them to other religions, the English and Australian Commissions thought that an unreasonable burden on freedom of expression would also be extended.<sup>125</sup> This is a classical liberal concern; related to it is the marked incongruity of blasphemy laws in a secular state, and especially the notion that the law should define orthodox religious discourse.

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preferred the extension of the blasphemy law to other religions instead of its complete abolition: English Commission, note 2 *supra* at [1.1-6.2], pp 41-5.

117 *Penal Code* 1860 (India), s 298.

118 Note 33 *supra* at 658.

119 *Ibid* at 658. Cf *Anti-Discrimination Act* 1991 (Qld), s 126, which, in prohibiting racial or religious hatred or hostility, is something like an extended blasphemy or religious vilification law. It has an added requirement that there also be incitement to unlawful discrimination or some other breach of the *Anti-Discrimination Act*, and this empties it of any substantive quality as a vilification law.

120 English Commission, note 2 *supra* at [2.38-41], pp 20-1.

121 Cf S Lee, *The Cost of Free Speech*, Faber & Faber (1990) p 82.

122 English Commission, note 2 *supra* at [2.49]-[2.50], pp 26-7; Australian Commission, note 3 *supra* at [7.59], p 167; NSW Commission, note 1 *supra* at [4.65]-[4.6.9], pp 66-7.

123 Note 102 *supra*.

124 In *Choudhury*, the Court of Appeal referred to *Scientology*, but sub silentio did not seem to consider that it provided an adequate definition of religion for the blasphemy law: note 38 *supra* at 1000.

125 English Commission, note 2 *supra* at [2.37] and [2.50], pp 20 and 27; Australian Commission, note 3 *supra* at [7.59], p 167.

## VIII. BLASPHEMY AND LIBERAL SECULARISM

### A. The Secular State

The reasons for the emergence of the secular state are complex, and include separate philosophical, theological, political, social and religious considerations. Thus, the Reformation of the sixteenth century, the religious wars and the political successes of Protestant dissenters in the seventeenth century all helped to bring a reluctant decriminalisation of religious diversity in England.<sup>126</sup> This was first enshrined in the *Toleration Act* of 1689,<sup>127</sup> though it is probable that this political settlement only became in retrospect a landmark in liberal democracy because John Locke provided it a coherent theoretical rationale. Locke's conclusion that religion was a private concern was based primarily on his Protestantism. It emphasised individual responsibility for a person's own salvation. It also taught the inability of the state's coercive powers to intrude on that responsibility because, as faith alone justified before God, salvation depended on the persuasion of the mind.<sup>128</sup> However, the theory could survive, without reference to the Protestant doctrine of salvation, on Locke's epistemological distinction between belief and knowledge. Locke maintained that he *believed* the Christian religion to be true but did not *know* it to be true, and resolved that no political institution could make any stronger claim.<sup>129</sup> This distinction between belief and empirical knowledge is an important one, and in it lies the need for a secular state. To the extent that it can be ascribed a fictional personality, the state is recognised as operating beneath a cloud of unknowing. This is a position which requires it to remain disinterested and sceptical in religious issues. It is true that the non-religious are less likely than the religious to reject this conclusion. But even the religious have asserted that historical expressions of the eternal are prone to error and relativity and, consequently, Locke is only one in a longstanding Christian tradition who denies the political validity of religious monopolies and privileges.<sup>130</sup> Therefore, the state is denied the power to define permissible belief and, in the rich but sometimes delicate conditions of religious pluralism, to assimilate harmless dissenters and heretics to an official orthodoxy.

The inability of the state to define religious truth and error means that, so far as is practicable, religion is to be irrelevant to political and legal status. This core value of liberal secularism has occasionally peeped through the law in adjudication. Thus, Chief Justice Latham held in 1943 that "[s]ection 116 ... is based upon the principle that religion should, for political purposes, be regarded as irrelevant".<sup>131</sup> In similar terms, Justice Sandra Day O'Connor said in 1984 that "[t]he

126 For example, D Martin, *A General Theory of Secularization*, Blackwell (1978) pp 4-6; BE Meland, *The Secularization of Modern Cultures*, Oxford University Press (1966) p 3; W Pannenberg, *Christianity in a Secularized World*, SCM Press (1988) pp 17-18.

127 1 Will & Mar c18.

128 J Locke, *First Letter Concerning Toleration in Works* (1823) vol vi, pp 5-58.

129 J Locke, *Third Letter For Toleration in Works*, vol vi pp 144-5.

130 Cf R Niebuhr, *The Children of Light and the Children of Darkness*, Charles Scribner, (1960) pp 134-5.

131 *Jehovah's Witnesses* note 101 *supra* at 126.

Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community".<sup>132</sup> Certainly, it is not clear what specific institutions are needed to secure the irrelevance of religion to political and legal status, and its constitutional and legal expressions could legitimately differ between time and place. However, in Australia there is little reason to be satisfied with the High Court's present interpretation of one of our most important institutions of liberal secularism, the establishment clause. Its holding that the clause only prohibits the deliberate creation of a national church or religion<sup>133</sup> merely restates what, even in the absence of an establishment clause, the Commonwealth has no power to do. The Court has therefore given the establishment clause a declaratory effect only, contrary to earlier opinions that section 116 was not declaratory, but prevailed over and limited Commonwealth power.<sup>134</sup> It also allows government to use religious adherence as a relevant consideration in the preferential concession and recognition of legal rights and privileges to religious groups.

In arguing for a more coherent and neutral interpretation of s 116, Stephen McLeish identified autonomy and participation as historical secularist values s 116 was intended to incorporate:

[U]nderlying s 116 there exists a general conception of state neutrality towards religion, reflected both in the avoidance of religious preferences and in respect for the autonomy of individuals in matters of religion, especially as participants in the wider community.<sup>135</sup>

Together, the preservation of the legal autonomy of religious individuals and groups and of their rights and obligations of equal participation in the community largely realise the political and legal irrelevance of religion. Furthermore, it is submitted that, even contrary to the legal protection of religious pluralism, they would also require the complete abolition of blasphemy laws.

## B. Autonomy

There has been some suggestion that blasphemy laws are needed to preserve religious autonomy, because they immunise the religious from the liabilities of criticism and verbal harassment.<sup>136</sup> This assumption is implicit in Lord Scarman's speech in *Lemon*<sup>137</sup> and was the substance of the complaint brought before the European Commission of Human Rights in *Choudhury*.<sup>138</sup> It was argued that, since the English blasphemy law did not protect Muslims against abuse and criticism, their rights to religious freedom under article 9 of the European

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132 *Lynch v Donnelly* (1984) 465 US 668 at 687.

133 *State Aid* note 86 *supra*.

134 *Jehovah's Witnesses*, note 101 *supra* at 122-3.

135 S McLeish, "Making Sense of Religion and the Constitution: A Fresh Start for Section 116" (1992) 18 *Monash Univ Law Rev* 207 at 223.

136 S Poulter, "Towards Legislative Reform of the Blasphemy and Racial Hatred Laws" [1991] *PL* 371 at 376; cf JR Spencer, "Blasphemy: The Law Commission's Working Paper" [1981] *Crim LR* 810 at 813.

137 Note 33 *supra* at 228-30.

138 Note 40 *supra*.

Convention for the Protection of Human Rights were impaired. The Commission ruled the complaint inadmissible, and rightly so. The argument clearly mistakes the legal nature of religious autonomy. This concept underlies the liberties defined by the various free exercise clauses and, even if they were unnecessary, the principles of institutional separation previously upheld in United States establishment clause adjudication.<sup>139</sup> It is, through these guarantees, traditionally directed towards minimising *governmental* - and not *social* - burdens on religion. In *Choudhury*, the European Commission of Human Rights indicated that no claim that the British Government had interfered with Muslim religious autonomy had been made, and therefore any offence caused to Muslims by Rushdie and his publisher had no bearing on the liberties of article 9.

Indeed, the right that a religious group has to autonomy arguably carries a correlated responsibility that it endure social burdens like criticism free of special governmental protection, and therefore to survive independently in the market-place of opinion on the basis of demonstrated merit. The recognition that religious autonomy also includes a responsibility not to rely on governmental protection would also seem to preclude the extension of blasphemy laws to religions other than Christianity. For if Muslims and Christians are to enjoy protection from governmental burdens on the practice of their religions, Muslims as well as Christians also should be expected to answer their own critics without the coercive assistance of the state.

### C. Participation

The political and legal irrelevance of religion implies that, irrespective of religious adherence, individuals have rights and responsibilities of equal participation in the political community. However, the blasphemy law, as expounded in *Choudhury*,<sup>140</sup> is deliberately protective of Christians only and therefore operates to exclude non-Christians from similar status. Even if not enforced but retained to symbolise an acceptable level of community standards, it sends a message that non-Christians are not completely equal participants in the political community.<sup>141</sup> It would not therefore serve the objective of equal participation to extend the blasphemy law to other religions because the message of exclusion would still be sent to the non-religious.

The implication of *Gay News & Lemon v United Kingdom*<sup>142</sup> in Europe is that the religious have legitimate group rights that could attract legal recognition. However, once religious group rights are conceded through ecumenical blasphemy

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139 Cf W Sadurski, "Neutrality of Law Towards Religion" (1990) 12 *Sydney Law Review* 420 at 453-4. It is arguable that legal autonomy is not compromised if a religious group voluntarily engages to undertake governmental educational and welfare programs which fulfil secular purposes. Indeed, religion does become a relevant consideration to political status if a group is to be denied funding for secular purposes just because it is religious.

140 Note 38 *supra*.

141 Cf M Bohlander, "Public Peace, Rational Discourse and the Law of Blasphemy" (1992) 12 *Anglo-American Law Rev* 162 at 167.

142 Note 51 *supra*.

laws, the imbalance in legal status they bring could lead other groups defined on the secular lines of politics, race, sex and sexual preference to lobby for the same concessions. The problem is a common objection to the extension of blasphemy laws:<sup>143</sup>

If a majority of Christians is allowed to suppress what it finds shocking, so too would a majority of Communists, Fascists, conservatives, racists, puritans, etc.<sup>144</sup>

The trend works similarly in reverse, and makes the recent recognition of secular group rights through vilification laws punishing the incitement of hatred, contempt and ridicule a serious practical barrier to the abolition of blasphemy laws. There are racial vilification laws in the Australian Capital Territory and New South Wales,<sup>145</sup> and narrower provisions in Western Australia prohibiting the publication or possession of material which is intended to create, promote or increase racial hatred.<sup>146</sup> Furthermore, there are more limited racial and religious hatred laws in Queensland which, to be violated, also require a breach of the State discrimination laws.<sup>147</sup> Immediate social problems might make it expedient to bend principle temporarily and give special immunity from criticism to particular groups. So, on the one hand the English Commission recommended retention of the racial vilification law and, on the other, the abolition of the blasphemy law. It nonetheless justified the imbalance on the basis that the seriousness of the hostility shown through racial prejudice did not presently seem to exist in criticisms of religion.<sup>148</sup> But, even if it is necessary to compromise equal participation and protection like this, it does not prevent other groups from arguing principles of equality to secure the same protection. Thus, just as it has been argued that the extension of blasphemy laws would lead to pressure for other group vilification laws, racial vilification laws seem to have had that precise effect. In New South Wales, the protection of vilification laws has recently been extended to homosexuals.<sup>149</sup> The New South Wales Commission has also suggested an explicit extension of the existing racial vilification laws to racial groups defined on ethno-religious lines.<sup>150</sup> In these conditions, it is more difficult to argue that the older protection from vilification in the blasphemy law be relinquished and it strengthens the case for the extension of blasphemy laws. The Commission's proposal to extend racial vilification laws is certainly not going to satisfy Muslim demands for protection from abuse and scurrilous criticism as Muslims are unlikely to qualify

143 Note "Blasphemy" [1979] *Crim LR* 311 at 313-14; JR Spencer, note 136 *supra* at 812 and 816; CL Ten, "Blasphemy and Obscenity" (1978) 5 *Brit Jnl Law & Soc* 89 at 90-1.

144 CL Ten, *ibid* at 90.

145 *Discrimination Act* 1991 (ACT) ss 66-7; *Anti-Discrimination Act* 1977 (NSW) ss 20C-D.

146 *Criminal Code* (WA), ss 76-80.

147 *Anti-Discrimination Act* 1991 (Qld), s 126.

148 English Commission, note 2 *supra* at [2.42], pp 22-3. The *fatwa* against Rushdie and the general disturbance caused by the publication of *Satanic Verses* might now suggest a different conclusion: S Poulter, note 136 *supra* at 376.

149 *Anti-Discrimination Act* 1977 (NSW), ss 49ZT and 49ZTA. Section 49ZT provides an exemption from the offence of homosexual vilification for public acts done reasonably and in good faith for, inter alia, religious instruction purposes.

150 NSW Commission, note 1 *supra* at [4.91], p 72.

as an ethnic group.<sup>151</sup> Ironically, the newer vilification laws have even led to suggestions in New South Wales that religious vilification laws be introduced to prevent homosexual abuse of Christians *via* the “Sisters of Perpetual Indulgence” and the Gay Mardi Gras!<sup>152</sup> Most likely, ignorance of the existence or potential effect of the State blasphemy law reinforces this perceived imbalance.

Equal protection in generalised vilification laws is only one solution to this problem consistent with the secular state, but is arguably unnecessary. The primary consideration of public order is already addressed by offences prohibiting the use in public of offensive language<sup>153</sup> or threatening, abusive or insulting language intended to provoke unlawful violence,<sup>154</sup> and vilification laws are probably superfluous to this purpose.<sup>155</sup> These public order offences deal with the criticism of the religious and the non-religious when it tends to create social disruption in all degrees, and thus becomes the proper concern of the civil government.<sup>156</sup> The Australian and New South Wales Commissions have recommended the refinement of these offences, having them refer explicitly to the members of religious groups<sup>157</sup> or racial groups defined on religious lines.<sup>158</sup> If implemented, these would only seem to clarify the existing reach of the law and, as such, the express reference to religious groups would not in substance contradict the secularist demand that religion and non-religion be treated equally.

## IX. CONCLUSION

“The law knows no heresy, and is committed to no dogma, the establishment of no sect.” This grandiloquent statement was made by United States Supreme Court Justice Miller in 1872,<sup>159</sup> and translated an older jurisdictional rule that the common law courts took no cognisance of heresy<sup>160</sup> into a quasi-constitutional

151 S Poulter, note 136 *supra* at 373.

152 P McPhee, “Would Nile Get Equal Treatment” *The Australian*, 1 December 1993, p 10; A Livingstone, “Licence to Humiliate” *The Australian*, 9 March 1994, p 14; cf S Lee, note 121 *supra* at 76, 88-9 and 90-1.

153 *Crimes Act* 1900 (ACT), s 546A; *Summary Offences Act* 1988 (NSW), s 4; *Vagrants, Gaming and Other Offences Act* 1931 (Qld), s 7(d); *Summary Offences Act* 1953 (SA), s 7; *Summary Offences Act* 1966 (Vic), s 17(1)(c); cf *Police Act* 1892 (WA), s 59.

154 *Police Offences Act* 1935 (Tas), s 12(1)(d); *Public Order Act* 1986 (UK), s 4.

155 Cf JR Spencer, note 136 *supra* at 812; SJ Robilliard, “Offences Against Religion and Public Worship” (1981) 44 *MLR* 556 at 563; Note (1979) 129 *New LJ* 205; CL Ten, note 143 *supra* at 76, 88-9 and 90-1; M Bohlander, note 141 *supra* at 169.

156 The English offence has been used to punish those who, as an insult, deliberately released a pig into a mosque: G Robertson, note 20 *supra* at 300, 302.

157 Australian Commission, note 3 *supra*, at [7.59] pp 166-7.

158 NSW Commission, note 1 *supra* at [4.86]-[4.93], pp 71-2.

159 *Watson v Jones* (1872) 80 US 679 at 728.

160 R Burn, note 11 *supra*, at vol 2 pp 305-6; *Palmer v Thorpe* (1583) 4 Co Rep 20a; *Nicholson v Lyne* (1588) Cro Eliz 94; *Specot's Case* (1590) 5 Co Rep 57a at 57b and 58a; *Davis v Gardiner* (1593) 4 Co Rep 16b at 17a; *Holwood v Hopkins* (1594) Cro Eliz 787; *R v Tymberly* (1662) 1 Keb 254 at 254; *Dickison v Holcroft* (1673) 3 Keb 148 at 150; *Dudley v Spencer* (1675) 1 Freem 277; *Roe v Clargis* (1683) 3 Mod 26 at 27; *Skinner* 68 at 88 and 89, 2 Show KB 250 at 251; *Marriott v Knightly* (1683) *Skinner* 111 at 112; *Ogden v.*

principle of state neutrality towards religion. But while blasphemy laws remain enforceable, Justice Miller's statement remains in Australia as well as the United States more a declaration of political ideal than of positive law.

From the seventeenth century to *Choudhury*,<sup>161</sup> the operation of blasphemy laws beside a policy of religious toleration has been uneasy. Certainly, a "free market in all opinions"<sup>162</sup> does not leave it open to Christians, Muslims, Hindus or Secular Humanists to define through the coercive powers of the state spheres of orthodoxy and permissible religious and anti-religious discourse. The case for the abolition of the blasphemy laws is a strong one. It has still met with little success, and if the more recent trend towards the extension of vilification laws should persist, the law will continue to claim it can know and designate its heresiarchs, of old kinds and new.

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*Turner* (1703) 6 Mod 104 at 105; *Groves v Blanchett* (1704) 6 Mod 148; and *Bowman v Secular Society Limited*, note 44 *supra* at 446.

161 Note 38 *supra*.

162 O Chadwick, *The Secularization of the European Mind in the Nineteenth Century*, Cambridge University Press (1975) p 21.