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Lowering the "Efficacy" Threshold for Section 3(d) of the Indian Patents (Amendment) Act 2005: A Case for a Broader Scope

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CAN I SAY THAT?: HOW AN INTERNATIONAL BLASPHEMY LAW PITS THE FREEDOM OF RELIGION AGAINST THE FREEDOM OF SPEECH

INTRODUCTION

On August 16, 2012, a young Christian girl, living in the overwhelmingly Muslim nation of Pakistan, was arrested for allegedly burning pages of the *Noorani Qaida*, a booklet used to learn the basics of the Qur'an.¹ Despite the fact that the 14-year-old had Down Syndrome, the police were forced to arrest the girl, fearing repercussions from violent and restless Islamic mobs.² The local citizenry, as part of their enraged protest prior to the arrest and indictment of the girl,³ physically beat and abused the girl and her mother.⁴ Following the arrest, the mobs set up roadblocks in Mehrabadi to prepare an attack on local Christian families.⁵ The mob agitators spent the day shouting into loudspeakers to incite the crowd, making inflammatory accusations against the girl's small Christian neighborhood.⁶ The impending attack on the Christians of that neighborhood was "expected to occur after Friday prayers at the local Mosque, but, at the last moment, negotiations with Muslim clerics were successful and the attacks were called off. However, Christian villagers were warned that the truce was only for the time being, and peace would depend on [the girl's] being punished for her crimes."⁷ After additional evidence was released that an Islamic cleric falsely accused the girl with Down Syndrome,⁸ who had in fact

¹ Qaiser Zulfiqar, *11-Year-Old Christian Girl Accused of Blasphemy*, EXPRESS TRIBUNE (Aug. 18, 2012), <http://tribune.com.pk/story/423815/11-year-old-christian-girl-accused-of-blasphemy/>.

² *11-Year-Old Girl With Downs Charged With Blasphemy In Pakistan*, INQUISITR (Aug. 21, 2012), <http://www.inquisitr.com/308066/11-year-old-girl-with-downs-charged-with-blasphemy-in-pakistan-2/>; see *Pakistani Cleric Cleared in Blasphemy Case*, ASSOCIATED PRESS, Aug. 18, 2013, available at <http://www.cbc.ca/news/world/story/2013/08/18/pakistan-cleric-blasphemy.html> (noting that a Pakistani medical board gave the girl's physical age as 14, but her mental age as much lower).

³ See Zulfiqar, *supra* note 1.

⁴ *Id.*

⁵ *11-Year-Old Girl With Downs Charged With Blasphemy in Pakistan*, *supra* note 2.

⁶ *Id.*

⁷ *Id.*

⁸ See *Pakistani Cleric Cleared in Blasphemy Case*, *supra* note 2 (noting that the cleric was cleared of all charges when the prosecution failed to bring sufficient evidence of the planted pages).

committed no infractions against the Qur'an, the Islamabad High Court dismissed the case in September 2012.⁹

In another recent case, an amateur, thirteen-minute satirical film incited riots across the globe.¹⁰ The film ridiculed Islam and its prophet Mohammed, inducing anger from religiously fervent Muslims, most notably in Cairo and Libya.¹¹ The clip was posted on YouTube for some time, and gave rise to anti-American protests and riots starting on September 11, 2012.¹² The producer of the film, Nakoula Basseley Nakoula, was forced into hiding.¹³ A Pakistani government minister, reacting to the perceived insult to his religion and religious figures, even placed a \$100,000 bounty on Nakoula's life.¹⁴

The legal justification for arresting the alleged criminals in these recent news stories is blasphemy laws, which purport to protect individuals, religions, or sacred personages from expression that is perceived as an unjust attack.¹⁵ Damaging the Qur'an is not representative of indictable action under blasphemy laws¹⁶ in every nation. However, cases such as these *are* the reason the international debate concerning blasphemy laws has been thrust into the

⁹ *Cold Christmas Awaits Pakistan's Christians*, AGENCE FRANCE-PRESSE, Dec. 21, 2012, available at <http://news.ph.msn.com/lifestyle/cold-christmas-awaits-pakistans-christians-1>.

¹⁰ *See Pakistani Minister Places \$100,000 Bounty on Producer of Blasphemous Film*, TEHRAN TIMES (Sept. 23, 2012), <http://www.tehrantimes.com/world/101701-pakistani-minister-places-100000-bounty-on-blasphemous-filmmaker/>.

¹¹ *See, e.g., Protesters Attack U.S. Diplomatic Compounds in Egypt, Libya*, CNN (Sept. 12, 2012), <http://www.cnn.com/2012/09/11/world/meast/egypt-us-embassy-protests/>. There still exists controversy over exactly what spurred the September 11, 2012 attacks. In the widespread media coverage that followed, however, the YouTube clip was prominently featured as a catalyst. *Id.*

¹² *Pakistani Minister Places \$100,000 Bounty on Producer of Blasphemous Film*, *supra* note 10.

¹³ Christine Pelisek, *Anti-Muslim Filmmaker Nakoula Asks Court to Take Him Out of Protective Custody*, DAILY BEAST (Oct. 11, 2012), <http://www.thedailybeast.com/articles/2012/10/11/anti-muslim-filmmaker-nakoula-asks-court-to-take-him-out-of-protective-custody.html>.

¹⁴ *See Pakistani Minister Places \$100,000 Bounty on Producer of Blasphemous Film*, *supra* note 10. The Pakistani Prime Minister disassociated the government with the Railway minister's \$100,000 bounty, but no punitive actions for the Railway minister from the government have been recorded following the announcement. *See* Asif Shahzad, *Pakistan Disowns Minister's Offer of \$100,000 Bounty on Anti-Islam Filmmaker*, ASSOCIATED PRESS, Sept. 24, 2012, available at <http://news.nationalpost.com/2012/09/24/pakistan-disowns-ministers-offer-of-100000-bounty-on-anti-islam-filmmaker/>.

¹⁵ *See* LEONARD W. LEVY, *BLASPHEMY: VERBAL OFFENSE AGAINST THE SACRED, FROM MOSES TO SALMAN RUSHDIE* 3 (1993).

¹⁶ Throughout this Comment, the author will use the term "blasphemy laws" to refer to the gamut of general blasphemy laws, apostasy laws, and defamation of religions laws. As a general rule, these terms are interchangeable, but when differentiations are necessary, the Comment will refer to the specific typology of law and any distinguishing feature.

limelight in the past decade. Resolutions and recommendations supporting these laws, from both the United Nations General Assembly and the UN Human Rights Council, are increasing in their frequency and determination.¹⁷ These resolutions decry and condemn free speech that insults or outrages individuals on the basis of their religious beliefs.¹⁸ New developments in the blasphemy law debate emerge almost daily.¹⁹ Though these laws have yet to receive international approval while the debate continues,²⁰ the danger that blasphemy will be criminalized internationally is becoming real.

Blasphemy laws are a largely forgotten legal concept in the United States. The U.S. Constitution, almost uniquely among nations, expressly forbids any restriction on persons' freedom of speech.²¹ Legislation that impedes free speech is viewed negatively in the United States. The U.S. Constitution does not grant free speech²² but rather expressly bars Congress from interfering with its citizens' freedom of speech.²³ As a result, blasphemy remains a protected form of communication for which no legal repercussions exist. For this reason blasphemy laws remain a foreign discussion to many Americans. However unconnected blasphemy laws are to the conversation in the United States, the international debate concerning these blasphemy laws is quickly coming to a head.

As of 2011, there are fifty-nine countries with domestic statutes containing anti-blasphemy, apostasy, or defamation of religions bans.²⁴ Events of high or

¹⁷ See, e.g., Human Rights Council Res. 16/18, Rep. of the Human Rights Council, 16th Sess., Apr. 12, 2011, U.N. GAOR, 65th Sess., A/HRC/RES/16/18 para. 5(f) (Apr. 12, 2011) [hereinafter H.R.C. Res. 16/18].

¹⁸ See, e.g., *id.*

¹⁹ See, e.g., Press Release, Uzra Zeya, Acting Assistant Secretary, Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State (Dec. 17, 2013).

²⁰ See, e.g., Alhassan Y. Babalwaiz, *United Nations: Banking on Ban, UN Correspondent and ANA's North America Editor*, AFRICANEWSANALYSIS (Oct. 9, 2012), <http://www.africanewsanalysis.com/2012/10/09/united-nations-banking-on-ban-from-alhassan-y-babalwaiz-un-correspondent-and-anas-north-america-editor/>; *UN Calls for Respect of Religious Beliefs*, NATION (Pak.) (Sept. 20, 2012), <http://www.nation.com.pk/pakistan-news-newspaper-daily-english-online/national/20-Sep-2012/un-calls-for-respect-of-religious-beliefs>.

²¹ U.S. CONST. amend. I.

²² See *id.* The U.S. Constitution frames the First Amendment as "Congress shall make no law . . ." *Id.* A "positive" framing would grant freedom, not deny restriction.

²³ See *id.*

²⁴ PEW RESEARCH RELIGION & PUB. LIFE PROJECT, LAWS AGAINST BLASPHEMY, APOSTASY, AND DEFAMATION OF RELIGION (2011), <http://www.pewforum.org/2011/08/09/rising-restrictions-on-religion6/> [hereinafter LAWS AGAINST BLASPHEMY].

very high social hostility or restrictions against religion, directly stemming from religious issues, occurred in thirty-five of those countries.²⁵

Violent reactions to religion also increased by twenty-eight percent in fourteen of these countries from 2006 to 2009, while decreasing in only 3.4 percent of these countries.²⁶ Events of moderate social hostility or restrictions against religion occurred in an additional twenty-three percent of countries.²⁷

In contrast, in the 139 countries *without* such blasphemy laws, only seventeen percent had a “high” hostility rating.²⁸ Hostilities only rose in six percent and decreased in seven percent of these countries.²⁹

These statistics help to reveal that blasphemy laws currently affect global hostilities. Nearly thirty percent of nations now have some form of blasphemy law, and fifty-five percent of nations experienced events of moderate to high hostility stemming from religious incidents.³⁰ The international conversation concerning these laws will not go away soon.

Freedom of speech is a foundational human right. Its enumeration in history stretches far back into antiquity, but was eloquently voiced by great social philosophers including Locke, Voltaire, and Mill.³¹ Article 19 of the 1948 Universal Declaration of Human Rights laid the foundation for freedom of speech as customary international law, asserting: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”³² The 1966 International Covenant on Civil and Political Rights reaffirmed freedom of speech in nearly identical language: “Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *See generally* FREEDOM OF SPEECH: THE HISTORY OF AN IDEA (Elizabeth Powers ed. 2011); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1690); *see also* JOHN STUART MILL, ON LIBERTY ch. 2 (1869).

³² Universal Declaration of Human Rights, A/RES/217(111) (Dec. 10, 1948).

the form of art, or through any other media of his choice.”³³ Freedom of speech is essential in any free society. It makes possible the free flow of knowledge and ideas, upon which opinions and actions necessary for society are founded. Scientific development, social growth, political change, and even religious development owe a debt of gratitude to dissemination made possible by the freedom of speech. Freedom of speech as a foundational international human right and binding international law is well established.

This Comment aims to illustrate the dangers inherent in blasphemy laws, by examining both their past and present state. If blasphemy laws become customary international law, as recent resolutions passed in the United Nations indicate, an important human right is unnecessarily threatened. Though blasphemy laws protect the freedom of some individuals to practice religion as they see fit without insult or unjust attack, blasphemy laws also inherently limit other individuals’ freedom of speech. The conversation over enacting and enforcing blasphemy laws is multi-layered and complex, but the foremost concern about certain new blasphemy laws is that they give freedom of religion undue precedence over freedom of speech, to the detriment of society. This Comment will illustrate the faulty thought processes behind blasphemy laws and the danger of allowing domestic blasphemy laws to evolve into international customary law.

This Comment will describe the inevitable human rights violation—the destruction of important facets of the freedom of speech—that will occur if international blasphemy laws are condoned. Part I will briefly explore the history of blasphemy laws, from their ancient conception through their revival in modern times. Part I will also consider the three major approaches to blasphemy laws and freedom of speech in existence today: (1) laws that prohibit any formulation of a domestic blasphemy law; (2) laws that protect religions or religious groups from defamation and criticism; and (3) laws that protect individuals from religious insult and incitement. To illustrate, Part I will include an example of a modern law falling under the two latter blasphemy law types. Turning to Part II, the conversation will turn to international law and trace the United Nations’ insistence that blasphemy laws become customary, and therefore enforceable international law. Part III will explore the debate over blasphemy laws, including a look at current legal

³³ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

trends and cases, as well as an idea of what the future conversation is likely to hold for international blasphemy laws. Finally in Part IV, the conclusion will argue that the best course of action is to reject both types of blasphemy laws, allowing freedom of speech and freedom of religion to continue to coexist as equally necessary human rights.

I. BLASPHEMY LAWS: HISTORY AND CURRENT USAGE

A. *The History of Blasphemy Laws*

Blasphemy laws are nearly as old as civilization itself. In ancient Greece and Rome, one could criticize the State, but would face strict legal consequences for mocking or defiling the gods.³⁴ Biblical sources portray blasphemy laws dating from 4000 to 5000 years ago.³⁵ Originally, blasphemy laws were not written to protect against defamation of any religion, but rather to protect the honor of a particular deity.³⁶ Leviticus 24:15-16 harshly declares, “[w]hoever curses his God shall bear his sin. He who blasphemes the name of the Lord shall be put to death; all the congregation shall stone him; the sojourner as well as the native, when he blasphemes the Name, shall be put to death.”³⁷ This is the law under which the Judaic Sanhedrin accused Jesus Christ.³⁸

As Christianity moved from the Early Church, through the Middle Ages, and into the Reformation/Counter-Reformation, blasphemy laws remained, but their purposes shifted. Blasphemy laws became a way to exclude and punish heretics, preserving what was perceived as the proper dogma of the Church.³⁹ As Islam emerged as a religion in the seventh century, blasphemy laws likewise surfaced as a way to protect its community, faith, and sacred persons, since modeling the Prophet Muhamad is intolerable, but mocking of others in positions of respect is allowed.⁴⁰ Section A will discuss the modern history of

³⁴ LEVY, *supra* note 15, at 4.

³⁵ *See id.* at 7–14.

³⁶ *See id.* at 4.

³⁷ *Leviticus* 24:15–16 (Revised Standard Version).

³⁸ *See Matthew* 26:65.

³⁹ LEVY, *supra* note 15, at 44–45.

⁴⁰ *See generally* Khalid Saifullah Khan, *What Is the Punishment for Blasphemy in Islam?*, REVIEW OF RELIGION (Sept. 2011), <http://www.reviewofreligions.org/5002/> (discussing how blasphemy laws protect the Muslim community, Islamic faith, and Muslim sacred persons).

blasphemy laws in the West, while section B will discuss the modern history of blasphemy laws in Islamic nations.

1. Revival of Blasphemy Laws in the West; The Traditional American Approach to Freedom of Speech

U.S. law will serve as our standard for nations whose laws support nearly unconditional free speech rights. This first category of nations, most notably the United States and Great Britain, adhere to a strong and expansive free speech doctrine. Strict blasphemy laws protecting Christianity followed European and new American civilization into the nineteenth and early twentieth centuries.⁴¹ Through slow, steady evolution of society and Christianity, British and American courts made clear that nearly every form of speech would be tolerated and justified under freedom of expression protections provided in their constitutions, by the mid-twentieth-century.⁴²

The Supreme Court, in the 1952 case *Joseph Burstyn, Inc. v. Wilson*, laid down the American precedent for free speech's interaction with blasphemy.⁴³ Though the New York Board of Regents found a film sacrilegious and religious bigotry,⁴⁴ the Court held that a New York state blasphemy law was an unconstitutional violation of the filmmaker's First Amendment right to freedom of speech.⁴⁵ Following this landmark decision, the precedent in the United States is to consider freedom of speech an exceedingly broad right extending to blasphemers. Blasphemy laws, with no significant court challenges in the last sixty years, remain unconstitutional in the United States.⁴⁶

Even in Great Britain and the United States, there are necessarily certain limitations to select forms of speech, including hate speech, treason, and

⁴¹ See generally Jonathan Zimmerman, *Anti-Blasphemy Laws Have a History In America*, NEWSWORKS (Oct. 9, 2012), <http://www.newsworks.org/index.php/homepage-feature/item/45356-anti-blasphemy-laws-have-a-history-in-america> (discussing events where laws protected Christianity in the new American civilizations).

⁴² See *Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (holding that a state law which allowed prosecution for a "blasphemous" film violated the First Amendment); see also LEVY, *supra* note 15, at 543–50 (discussing the *Gay News* case in England and the subsequent disintegration of blasphemy laws).

⁴³ See *Burstyn*, 343 U.S. at 502.

⁴⁴ JOHN BAXTER, FELLINI 82 (1993).

⁴⁵ *Id.*

⁴⁶ See U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . ."); *Burstyn*, 343 U.S. 495.

incitement to immediate violence.⁴⁷ Legislation reacting to conspiracy and terrorism even makes a person responsible for the reasonably foreseeable consequences of his or her speech causing harm to others as long as that harm results from that speaker's actions.⁴⁸ The limiting categories remain very small and specific, hinging on the authority of the speaker and the immediacy of the response and reaction to the speech, not the general content of the speech itself.⁴⁹ For example, a conservative Christian minister thundering from the pulpit to "kill the abortionists" may well be indicted for accomplice liability if one of his congregants storms out and immediately kills an abortionist. American and British courts, have as of yet been loath to include traditional blasphemy among these speech-limiting categories. Free expression and traditional speech rights are still nearly boundless in these democratic nations, and blasphemy is a protected act.

The Obama Administration has fluctuated on what free speech standards mean. Obama and his administration have drawn considerable criticism for their weak support of free speech limitation internationally.⁵⁰ This administration has repeatedly avoided answering the question, will "this administration's Department of Justice never entertain or advance a proposal that criminalizes speech against any religion?"⁵¹ Obama even championed a UN Resolution with Egypt that tolerates the enforcement of certain blasphemy laws internationally.⁵² However, in contradiction to this, Obama has also made seemingly strong statements in favor of traditional free speech concepts. In a September 2012 speech made to the U.N. General Assembly, President Obama "deliver[ed] a vigorous defense of freedom of speech, including the right of

⁴⁷ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

⁴⁸ See, e.g., Racketeer Influenced and Corruption Organizations Act, 18 U.S.C.A. §§ 1961–1968 (2006). RICO has created an avenue to indict persons for crimes they ordered or urged others to commit. *Id.*

⁴⁹ See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476 (1993). The Supreme Court increased the penalty in this case because of the racial aim of the speech and not the speech itself. *Id.*

⁵⁰ See Publius, *The Obama Doctrine? Censuring Free Speech*, INT'L BUSINESS TIMES (Oct. 1, 2012, 4:39 PM), <http://www.ibtimes.com/obama-doctrine-censuring-free-speech-798541>; see also Hillary Rodham Clinton, Secretary of State, Remarks at the Organization of the Islamic Conference (OIC) High-Level Meeting on Combating Religious Intolerance (July 15, 2011), <http://www.state.gov/secretary/rm/2011/07/168636.htm>.

⁵¹ See, e.g., RepTrentFranks, *High Ranking DOJ Official Refuses to Affirm 1st Amendment Rights*, YOUTUBE (July 26, 2012), <http://www.youtube.com/watch?v=0wwv9l6W8yc>.

⁵² See generally H.R.C. Res. 16/18, *supra* note 17; Publius, *supra* note 50.

individuals to ‘blasphemy against our most sacred beliefs.’”⁵³ The current administration’s enigmatic and wavering approach to free speech internationally has left free speech advocates suspicious and confused.⁵⁴

Despite these executive concerns, constitutional free speech standards in America firmly remain among the most expansive laws in the world. In 2011, the Supreme Court powerfully reiterated these traditional free speech standards as a Constitutional foundation.⁵⁵ *Snyder v. Phelps* involved the controversial picketing of fallen Marine Lance Corporal Matthew Snyder’s funeral by members of the Westboro Baptist Church.⁵⁶ Chief Justice Roberts, writing for the majority, stated: “What Westboro said, in the whole context of how and where it chose to say it, is entitled to ‘special protection’ under the First Amendment, and that protection cannot be overcome by a jury finding that the picketing was *outrageous*.”⁵⁷ Though a reasonable jury could (and likely would) find Westboro’s actions morally reprehensible, even outrageous, its expression, including funeral signs that read: “You’re Going to Hell,” “God Hates You,” “Fag Troops,” “Semper Fi Fags,” and “Thank God for Dead Soldiers,” was protected free speech.⁵⁸ Commentators note that this case calls into question even those traditional limitations at the edge of free speech, such as hate speech and fighting words, possibly expanding free speech doctrine.⁵⁹ Going forward, this case at the least reaffirms American law’s adherence to its traditional free speech standards in the face of offensive words or actions.

2. *Blasphemy Laws that Protect Individual Human Rights*

Unlike in the United States and Great Britain, blasphemy laws have become increasingly commonplace in other democratic countries. To date, Israel, Italy, Greece, Norway, Poland, and other nations have some form of

⁵³ Editorial, *Mr. Obama’s Refreshing Defense of Free Speech*, WASH. POST (Sept. 25, 2012), http://articles.washingtonpost.com/2012-09-25/opinions/35497245_1_anti-muslim-video-weapon-against-hateful-speech-free-speech.

⁵⁴ See Hans Bader, *Obama Endorses ‘Blasphemy’ Exception to Free Speech*, EXAMINER (Oct. 21, 2009), <http://www.examiner.com/article/obama-endorses-blasphemy-exception-to-free-speech>.

⁵⁵ See *Snyder v. Phelps*, 131 S. Ct. 1207, 1222 (2011).

⁵⁶ *Id.* at 1213.

⁵⁷ *Id.* at 1219 (emphasis added).

⁵⁸ *Id.*

⁵⁹ See, e.g., Rebecca D. Gill, *Fighting Words*, UNLV FACULTY: BLOG ARCHIVES (Feb. 19, 2014, 8:13 PM), <http://faculty.unlv.edu/wpmu/gill/2013/02/fighting-words/>; see also Adam Cohen, *Why Spewing Hate at Funerals Is Still Free Speech*, TIME (Sept. 29, 2010), <http://www.time.com/time/nation/article/0,8599,202220,00.html>.

blasphemy or religious laws in place.⁶⁰ Certain countries, such as Australia, have not indicted a person under their blasphemy laws for generations.⁶¹ However, other nations, such as Ireland, Germany, and Finland, have become much more active in using blasphemy laws to stifle expression deemed harmful to society or certain individuals.⁶² These nations have, in effect, expanded the traditional boundaries of hate speech, fighting words, and speech that incites to violence to include concepts of blasphemy.

Two distinct types of blasphemy laws have recently emerged around the world: those that protect individuals and those that protect religions. Each will be examined in turn. The first type of blasphemy law protects an individual's freedom of religion and freedom from insult. These laws are most prominent in Western democratic nations and are designed to protect persons of every religion from defamation, especially targeting instances of blasphemy that cause incitement or outrage.⁶³ The intention of these laws is to protect human dignity, freedom from insult, and individual religious choice against those expressions deemed unacceptable.⁶⁴

A good example of this first type of blasphemy law is Ireland's Defamation Act, which went into effect on January 1, 2010.⁶⁵ Ireland's 1937 Constitution requires a ban of blasphemy,⁶⁶ but in 1999 Ireland's Supreme Court ruled that

⁶⁰ See Penal Laws, 5737–1977, 7 LSI 170, 173 (1977) (Isr.); POINIKOS KODIKAS [P.K.] [CRIMINAL CODE] 7:198 (Greece); Rebecca J. Dobras, *Is the United Nations Endorsing Human Rights Violations? An Analysis of the United Nations' Combating Defamation of Religions Resolutions and Pakistan's Blasphemy Laws*, 37 GA. J. INT'L & COMP. L. 339, 341, 359 (2009); *Europe's Blasphemy Laws*, DEUTSCHE WELLE, <http://www.dw.de/europes-blasphemy-laws/a-1894686-1>; Brenton Priestly, *Blasphemy and the Law: A Comparative Study*, BRENTONPRIESTLY.COM (2006), <http://www.brentonpriestley.com/writing/blasphemy.htm> [hereinafter *Blasphemy and the Law*].

⁶¹ See *Blasphemy and the Law*, *supra* note 60.

⁶² KGS, *Finnish Court Serves Seppo Lehto Two Year Jail Sentence for Insensitivity Against Islam*, TUNDRA TABLOIDS (Apr. 6, 2008), <http://tundratabloids.com/2008/06/finnish-court-serves-seppo-lehto-two.html>; *Suspended Prison for German Who Insulted Koran*, EXPATICA (Feb. 23, 2006), http://www.expatica.com/de/news/local_news/suspended-prison-for-german-who-insulted-koran-27912.html; Staks Rosch, *Ireland Passes Blasphemy Law*, EXAMINER (July 11, 2009), <http://www.examiner.com/article/ireland-passes-blasphemy-law>. *But see* *Corway v. Indep. Newspapers Ltd.*, [1999] 4 I.R. 485\4 (Ir.) (ruling that an indictment based on a cause of action for blasphemy is unconstitutional).

⁶³ See, e.g., Defamation Act 2009 (Act No. 31/2009), pt. 5, para. 36 (Ir.), available at www.irishstatutebook.ie/2009/en/act/pub/0031/print.html.

⁶⁴ See *id.*

⁶⁵ *Id.*; Defamation Act (Commencement) Order 2009 (S.I. No. 517/2009) (Ir.).

⁶⁶ IR. CONST., 1937, art. 40.6.1.i (“The publication or utterance of blasphemous, seditious or indecent matter is an offence which shall be punishable in accordance with law.”).

the common law offense of blasphemy, protecting only Christianity, was unconstitutional as it stood.⁶⁷ After this law was stricken, Ireland passed a new Defamation Act in 2009.⁶⁸ This new law is typical of the international legal trend in which individuals, instead of religions, are protected from speech that defames their religious beliefs or their personality.⁶⁹ The Irish law condemns speech made with the intention of outrage and “grossly abusive or insulting” speech.⁷⁰ The Irish Defamation Act makes both forms of speech a ground for conviction of the offense:

- (1) A person who publishes or utters blasphemous matter shall be guilty of an offence and shall be liable upon conviction on indictment to a fine not exceeding €25,000.
- (2) For the purposes of this section, a person publishes or utters blasphemous matter if—
 - (a) he or she publishes or utters matter that is grossly abusive or insulting in relation to matters held sacred by any religion, thereby causing outrage among a substantial number of the adherents of that religion, and
 - (b) he or she intends, by the publication or utterance of the matter concerned, to cause such outrage.⁷¹

The Irish Defamation Act illustrates a critical feature of the new blasphemy laws in Western nations, namely, the erosion of traditional free speech norms. The Defamation Act effectively classifies blasphemy as unacceptable hate speech.⁷² Section 36(2)(b) is close to the traditional hate speech or fighting words that Western constitutional laws have accepted as a narrow exception to free speech laws.⁷³ But the Defamation Act goes further because it does not require an *immediate* action or outrage, or even an act of outrage *in response* to the speech. Instead, it hinges on speech that offends.⁷⁴ Section 36(2)(a) completely breaks from traditional democratic precedent, allowing “outrage

⁶⁷ See *Corway*, [1999] 4 I.R. 485.

⁶⁸ Defamation Act 2009 (Act No. 31/2009), pt. 1, para. 1 (Ir.).

⁶⁹ BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. DEP'T OF STATE, INTERNATIONAL RELIGIOUS FREEDOM REPORT FOR 2012—EXECUTIVE SUMMARY (2012), available at <http://www.state.gov/documents/organization/208324.pdf>.

⁷⁰ *Id.* pt. 5, para. 36.

⁷¹ *Id.*

⁷² See *id.*

⁷³ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (discussing fighting words limitations).

⁷⁴ Defamation Act 2009 (Act No. 31/2009), pt. 5, para. 36 (Ir.), available at www.irishstatutebook.ie/2009/en/act/pub/0031/print.html.

among a substantial number of the adherents of that religion” as a basis for the criminal offense of defamation.⁷⁵ Relying on the prospect of a third party’s outraged reaction for a conviction is a radical step toward limiting free speech expression. Blasphemy is now seen as speech that must be condemned because it is “grossly abusive or insulting” and causes “outrage.”⁷⁶ This same trend seems to be evident in recent United Nations resolutions.⁷⁷

A second critical feature of this Irish blasphemy law is that it aims to protect the individual’s rights of privacy, freedom from insult, and freedom of religion. These laws have both similarities and differences to those laws of Muslim states examined in Part B. Certain Muslim states’ blasphemy laws protect the Islamic religion and not individuals.⁷⁸ The Irish Defamation Act, by contrast, protects religious adherents, not their religion.⁷⁹ The Western laws aim to protect an important human rights concern: individual choices concerning religion. Muslim blasphemy laws seek only to protect their sacred religion and its holy personages; human rights concerns and protections are not their aim. The practical implication of the two types of blasphemy laws is irrelevant, however: Both types punish blasphemous speech that outrages individuals’ convictions.

3. *Blasphemy Laws in Islamic Nations; Blasphemy Laws that Protect Religions*

The second type of blasphemy law recently emerged in predominantly Islamic countries. Sharia is the moral code and religious law of Islam that, at least in theory, regulates every aspect of Muslim life.⁸⁰ There are two primary sources of Sharia: (1) the commands found in the Qur’an; and (2) the example that the prophet Muhammad established in the Sunnah.⁸¹ Islamic jurists over

⁷⁵ *Id.*

⁷⁶ *See id.*

⁷⁷ *See* Discussion in Part II.A; *see also* Austin Dacey, *Blasphemy, Religious Hatred, and the United Nations*, HUFFINGTON POST (Sept. 26, 2012, 10:09 AM), http://www.huffingtonpost.com/austin-dacey/un-blasphemy-laws_b_1915920.html.

⁷⁸ *See, e.g.*, Pakistan Penal Code, No. 45 of 1860, PAK. PENAL CODE §§ 295, 297–98.

⁷⁹ *See* Defamation Act 2009 (Act No. 31/2009), pt. 5, para. 36 (Ir.).

⁸⁰ *See Sharī'ah*, BRITANNICA, <http://www.britannica.com/EBchecked/topic/538793/Shariah> (last visited Oct. 24, 2013).

⁸¹ *See* Jeremy Grunert, *How Do You Solve a Problem Like Sharia? Awad v. Ziriax and the Question of Sharia Law in America*, 40 PEPP. L. REV. 695, 705–06 (2013); Ann Elizabeth Mayer, *Law and Religion in the Muslim Middle East*, 35 AM. J. COMP. L. 127, 152 (1987).

the centuries have interpreted these sources to formulate elaborate legal codes.⁸² In the 1970s, as the world became increasingly connected as well as increasingly secular, Muslim states reacted by moving back toward traditional morals and values, incorporating portions of Sharia into the law of the state.⁸³ This process, labeled “Islamization,” became the official government policy of several Islamic states by the 1980s, such as Iran and Pakistan.⁸⁴ Islamization was a major driving force behind strengthened blasphemy laws.⁸⁵

The development of blasphemy laws in Islamic states follows a very different history than in the West. In states in which Islam is the predominant religion, Sharia runs the gamut from having no effect on the legal system except in familial and personal matters (Mali)⁸⁶, to a blended legal system in which Sharia influences the enacted code (Pakistan, Egypt, Sudan),⁸⁷ to nations in which Sharia law is the sole legal authority (Saudi Arabia).⁸⁸ In Islamic states, however, there is no separation of religion and state, regardless of Sharia’s official recognition, and Islamic principles and ideals play a large role in decision-making.⁸⁹ Thus, many of the core concepts of Sharia remain a fundamental part of most Islamic nations’ legal systems, explicitly or implicitly.⁹⁰

In most Islamic states, the offense of blasphemy rests on a rather straightforward interpretation of the Qur’an, interpreting “wage war” to include the verbal thrusts of those who blaspheme. The relevant passage reads as follows:

The only reward of those who make war upon Allah and His messenger and strive after corruption in the land will be that they will be killed or crucified, or have their hands and feet on alternate sides cut off, or will be expelled out of the land. Such will be their

⁸² See THE 500 MOST INFLUENTIAL MUSLIMS IN THE WORLD 14 (John Esposito, Ibrahim Kalin, Ed Marques & Ursa Ghazi eds., 1st ed., 2009).

⁸³ See Mayer, *supra* note 81, at 127–29.

⁸⁴ *Id.* at 156.

⁸⁵ See *id.* at 171.

⁸⁶ Mayer, *supra* note 81, at 138 n.23.

⁸⁷ *Id.* at 130.

⁸⁸ CAMPBELL CHRISTIAN, LEGAL ASPECTS OF DOING BUSINESS IN THE MIDDLE EAST 265 (2007); JAMES WYNBRANDT & FAWAZ A. GERGES, A BRIEF HISTORY OF SAUDI ARABIA 183 (2010).

⁸⁹ See Donna E. Arzt, *Heroes or Heretics: Religion Dissidents Under Islamic Law*, 14 WIS. INT’L L.J. 349, 352 (1996) (“No separation of ‘mosque and state’ exists in Islam; religion is pervasive.”).

⁹⁰ See *id.*

degradation in the world, and in the Hereafter theirs will be an awful doom.⁹¹

To garner popular support for “Islamization,” certain Islamic states have adopted “heavy punishments” for violation of these norms, including hand amputation, flogging, and death by stoning.⁹²

Pakistani blasphemy laws are probably the best known and most highly criticized currently in existence in Islamic states, in part because they may be the most vigorously prosecuted laws.⁹³ Pakistan’s legal system integrates Sharia into its civil and criminal codes.⁹⁴ Chapter XV of Pakistan Penal Code deals with “offences relating to religion.”⁹⁵ Blasphemy laws are written into this portion of the Pakistani Criminal Code.⁹⁶ We will take a look at the specific text of some of the most relevant Pakistani blasphemy laws:

295-B. Defiling, etc., of Holy Qur’an:

Whoever willfully defiles, damages or desecrates a copy of the Holy Qur’an or of an extract therefrom or uses it in any derogatory manner or for any unlawful purpose shall be punishable with imprisonment for life.

295-C. Use of derogatory remark, etc., in respect of the Holy Prophet:

Whoever by words, either spoken or written, or by visible representation or by any imputation, innuendo, or insinuation, directly or indirectly, defiles the sacred name of the Holy Prophet Muhammad (peace be upon him) shall be punished with death, or imprisonment for life, and shall also be liable to fine.⁹⁷

⁹¹ See Qu’ran 5.33, translated in THE GLORIOUS QUR’AN 106 (Mohammad M. Pickthall trans., 1983).

⁹² See Mayer, *supra* note 81, at 171.

⁹³ See Osama Siddique & Zahra Hayat, *Unholy Speech and Holy Laws: Blasphemy Laws in Pakistan—Controversial Origins, Design Defects, and Free Speech Implications*, 17 MINN. J. INT’L L. 303, 325–26 (2008).

⁹⁴ See Dobras, *supra* note 60, at 346–47.

⁹⁵ Pakistan Penal Code, No. 45 of 1860, PAK. PENAL CODE §§ 295, 297–98.

⁹⁶ See *id.*

⁹⁷ *Id.* Section 298-A is similar in composition to 295-C, extending protection to the sacred personages of Islam. See *id.* at §§ 295B–C, 298-A. (“Whoever by words, either spoken or written, or by visible representation, or by any imputation, innuendo or insinuation, directly or indirectly, defiles the sacred name of any wife (*Ummul Mumineen*), or members of the family (*Ahle-bait*), of the Holy Prophet (Peace Be Upon Him), or any of the righteous Caliphs (*Khulafa-e-Rashideen*) or companions (*Sahaaba*) of the Holy Prophet (Peace Be Upon Him) shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.”).

Several features of this blasphemy law merit comment. First, note the facial discrimination against minority religions. The Irish defamation law, a prototypical example of Western blasphemy laws, aims to protect individual participants of religions equally. By contrast, Pakistani laws specifically protect Islamic practice and sacred Muslim personages. The law's emphasis and intent is to protect the religion of Islam from any perceived attack, not to protect the general religious freedom of all. Pakistani law does not treat Christianity, Hinduism, Ahmadiyya, or Buddhism as equal with Islam, nor does it protect these other faiths from insult even though each of them has ample membership in Pakistan.⁹⁸ Instead, adherents of these are the minorities who are often prosecuted under blasphemy laws for insulting Islam.⁹⁹

The second observation is the severity of the punishments for defamation or blasphemy. In fact, by simply defiling the name of the Prophet Muhammed,¹⁰⁰ a person could face the death penalty.¹⁰¹ In stark contrast to the monetary fines of the Irish Defamation Act, Pakistan's corporal punishment underscores the seriousness and severity of any blasphemous actions. In fact, in Pakistani practice, the death penalty for defamation of Islam has remained a popular solution.¹⁰²

Finally, it is notable that any indictment under 295-A, which purports to protect a broad range of religions, is dependent on a "deliberate and malicious intention of outraging"¹⁰³ other persons. Thus, this law is only effectuated by public outrage. A silenced minority is unlikely to cause an outrage, but a vocal majority can garner an indictment by being "outraged." The law, as written, relies heavily on public outrage to determine whether blasphemy violations exist. Importantly, the vast majority of Pakistan's citizens—ninety-seven

⁹⁸ PAKISTAN CONST. art. 19; U.S. DEP'T. OF STATE, PAKISTAN: INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008 (2008) [hereinafter PAKISTAN: INTERNATIONAL RELIGIOUS FREEDOM REPORT].

⁹⁹ *Christians Often Victims under Pakistan's Blasphemy Law*, CATHOLIC WORLD NEWS (May 13, 2005), available at http://www.evangelizationstation.com/htm_html/Around%20the%20World/Pakistan/christians_often_victims_under_p.htm.

¹⁰⁰ Pakistan Penal Code, No. 45 of 1860, PAK. PENAL CODE § 295-C.

¹⁰¹ *Id.*

¹⁰² See *Pak SC Rejects Petition-Challenging Death as the Only Punishment for Blasphemy*, PAKISTAN NEWS (April 22, 2009), <http://www.pakistannews.net/story/492878>.

¹⁰³ Pakistan Penal Code, No. 45 of 1860, PAK. PENAL CODE § 295 ("Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of the citizens of Pakistan, by words, either spoken or written, or by visible representations insults or attempts to insult the religion or the religious beliefs of that class, shall be punished with imprisonment . . .").

percent—adhere to Islam.¹⁰⁴ Public outrage and vocal opposition is difficult, if not impossible, to establish for minority religions that comprise of only two percent of the population, and comprise significantly less per individual religion.¹⁰⁵

The most common fear and accusation by non-Muslims is that blasphemy laws resting on “outrage” allow for personal vendettas.¹⁰⁶ A victim may be accused of some blasphemous act, and if the accuser can incite any public, religious fervor over the incident, a prosecution occurs. A well-publicized example occurred in June 2009 when a Christian mother of five, Asia Bibi, went to fetch water for fellow field hands.¹⁰⁷ Some Islamic laborers refused to drink water from a Christian, calling her “unclean,” thereby sparking an argument.¹⁰⁸ This incident, coupled with an ongoing feud with a Muslim neighbor,¹⁰⁹ gave rise to a mob that threatened to kill Bibi. The police intervened, saving Bibi from the mob, but they arrested her and charged her with blasphemy over an alleged remark in the field.¹¹⁰ Though Bibi denied saying anything derogatory about Islam, she sits in prison as this Comment is written, convicted and sentenced to die for her alleged blasphemous remarks.¹¹¹

These defamation laws, although controversial and criticized internationally,¹¹² are firmly entrenched in the Pakistani legal landscape. Fierce resistance has met attempts and pleas to alter them. In November 2008,

¹⁰⁴ PAKISTAN: INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008, *supra* note 98.

¹⁰⁵ *See id.*

¹⁰⁶ Mohammed Hanif, *How to Commit Blasphemy in Pakistan*, GUARDIAN (Sept. 5, 2012, 3:00 PM), <http://www.guardian.co.uk/world/2012/sep/05/pakistans-blasphemy-laws-colossal-absurdity>.

¹⁰⁷ Rob Crilly & Aoun Sahi, *Christian Woman Sentenced to Death in Pakistan ‘for Blasphemy’*, DAILY TELEGRAPH (Nov. 9, 2010, 5:36 PM), <http://www.telegraph.co.uk/news/religion/8120142/Christian-woman-sentenced-to-death-in-Pakistan-for-blasphemy.html>.

¹⁰⁸ *Id.*

¹⁰⁹ Iman Sheikh, *Pakistan’s Anti-Christian Witch Hunt*, NAT’L POST (Aug. 21, 2012), <http://fullcomment.nationalpost.com/2012/08/21/iman-sheikh-pakistans-anti-christian-witch-hunt-seen-through-rifta-masih-arrest/>.

¹¹⁰ Crilly & Sahi, *supra* note 107.

¹¹¹ *Id.*; *see also Sentenced to Death for a Sip of Water*, N.Y. POST (Aug. 25, 2013), <http://nypost.com/2013/08/25/sentenced-to-death-for-a-sip-of-water/>.

¹¹² *See, e.g.,* Robert P. George, *As UN Meets, Apply Pressure Against Blasphemy Laws*, CHRISTIAN SCI. MONITOR (Sept. 20, 2013), <http://www.csmonitor.com/Commentary/Opinion/2013/0920/As-UN-meets-apply-pressure-against-blasphemy-laws>; Trudy Rubin, *Middle East Blasphemy Laws Empower Radicals*, REPUBLIC (Sept. 30, 2012), http://www.therepublic.com/view/local_story/Middle-East-blasphemy-laws-emp_13490453 77; Sheikh, *supra* note 111 (prosecution of an eleven-year-old child with a disability).

Pakistan's government appointed Shahbaz Bhatti as Federal Minister for Minorities and gave him cabinet rank.¹¹³ Bhatti promised that the government would review Pakistan's blasphemy laws with an eye towards change.¹¹⁴ In response, Bhatti was shot dead in early 2011.¹¹⁵ The Tehrik-e-Taliban, the Pakistani branch of the Taliban, claimed responsibility for the act to the BBC because Bhatti was a "known blasphemer."¹¹⁶ Despite these claims of responsibility, the government has prosecuted no one.¹¹⁷ Later in 2011, an attempt was also made by the Pakistani government to shift the responsibility for Bhatti's murder to "internal squabbles" among Christians.¹¹⁸ Immediately following Bhatti's death, the Pakistani government "devolved" the Ministry of Minorities, eliminating any chance of blasphemy law reform coming from that avenue.¹¹⁹

Pakistan stands among the most extreme Muslim nations in terms of blasphemy law enforcement and severity of punishment. The blasphemy laws as written, however, are typical of predominately Muslim nations. For example, Afghanistan,¹²⁰ Saudi Arabia,¹²¹ and Sudan.¹²² Each have Sharia-

¹¹³ *Shahbaz Bhatti, a Catholic, Is the New Minister for the Defense of Minorities*, ASIANEWS (Nov. 4, 2008), <http://www.asianews.it/news-en/Shahbaz-Bhatti,-a-Catholic,-is-the-new-minister-for-the-defense-of-minorities-13664.html#>.

¹¹⁴ See Declan Walsh, *Pakistan Minister Shahbaz Bhatti Shot Dead in Islamabad*, GUARDIAN (Mar. 2, 2011), <http://www.guardian.co.uk/world/2011/mar/02/pakistan-minister-shot-dead-islamabad>.

¹¹⁵ *Pakistan Minorities Minister Shahbaz Bhatti Shot Dead*, BBC NEWS (Mar. 2, 2011), <http://www.bbc.co.uk/news/world-south-asia-12617562>.

¹¹⁶ Amanda Hodge, *Taliban Guns Down Pakistan MP Shahbaz Bhatti Over Blasphemy*, AUSTRALIAN (Mar. 3, 2011, 12:00 AM), <http://www.theaustralian.com.au/news/world/second-pakistani-mp-killed-over-blasphemy/story-e6frg6so-1226014973951>.

¹¹⁷ Aftab Alexander Mughal, *Al Qaeda Connections May Provide Impunity for Murder in Pakistan*, SPERO NEWS (July 2, 2011), <http://www.speroforum.com/site/article.asp?idCategory=33&idsub=122&id=56430&>.

¹¹⁸ *Id.*

¹¹⁹ See Tanveer Ahmed, *Devolution of Ministry for Minority Affairs*, DAILY TIMES (June 23, 2011), http://www.dailytimes.com.pk/default.asp?page=2011\06\23\story_23-6-2011_pg7_13; *Federal Government Minorities & Divisions*, PAKISTAN.GOV, <http://202.83.164.29/gop/frmDetails.aspx?opt=mislinks&id=38> (last visited Oct. 17, 2013) (showing that the Pakistan Ministry of Minorities is no longer listed on Pakistan's list of Ministries).

¹²⁰ U.S. DEP'T. OF STATE, AFGHANISTAN: INTERNATIONAL RELIGIOUS FREEDOM REPORT 2008 (2008), available at <http://www.state.gov/j/drl/rls/irf/2008/108497.htm>.

¹²¹ See Ty McCormick, *Why is Saudi Arabia Beefing Up its Blasphemy Laws?* FOREIGN POLICY (July 17, 2012, 12:21PM), http://blog.foreignpolicy.com/posts/2012/07/17/why_is_saudi_arabia_beefing_up_its_blasphemy_laws_0.

¹²² Law No. 125 of 1991 (Criminal Act of 1991) (Sudan) (prohibiting abuses, insults, feelings of contempt and disrespect to believers). The section includes as penalties: imprisonment, a fine, and up to forty lashes. *Id.*

based legal systems with laws that protect Islam from insult, hinging conviction on public outrage following the alleged blasphemy. The public outrage feature aims to protect the integrity of the Muslim community, while in distinction, the public outrage feature aims to protect individuals' rights in the West. Public outrage as a condition precedent to conviction differs greatly from classic Western common law policy considerations; instead of convictions following public outrage, laws and convictions are traditionally used to control and quench public outrage.¹²³ Part III will address this important shift.

The Pakistani style of blasphemy law is being increasingly pressed on the international stage. The Organization of the Islamic Conference (“OIC”), which consists of fifty-six Islamic nations, has continually presented the United Nations proposals for an international blasphemy law to protect specific religions.¹²⁴ Ban Ki-Moon, the current Secretary General of the U.N., has also vocally supported this formulation of blasphemy law internationally.¹²⁵ These laws are not confined to Islamic countries, but rather are in consideration at the highest international levels as solutions to discrimination and hate.¹²⁶ Dangerous blasphemy laws to support protection of religions are emerging in the international debate as relevant and viable.

II. BLASPHEMY LAW DEBATE IN THE UNITED NATIONS AND THE RECENT ATTEMPTS TO ESTABLISH AN INTERNATIONAL BLASPHEMY LAW

One of the largest proponents of blasphemy laws for the international community is the United Nations Human Rights Council (“UNHRC”). The preceding organization to the UNHRC, the United Nations Commission on Human Rights (“Commission”), was established in 1946 as a subsidiary of the United Nations Economic and Social Council.¹²⁷ Its purported purpose was the

¹²³ See, e.g., SANFORD H. KADISH, ET AL., *CRIMINAL LAW AND ITS PROCESSES* 79, 93–95 (Vicki Been et al. eds., 8th ed. 2007).

¹²⁴ Patrick Goodenough, *U.N. Adopts ‘Religious Intolerance’ Resolution Championed by Obama Administration*, CNS NEWS (Dec. 20, 2011, 5:32 AM), <http://cnsnews.com/news/article/un-adopts-religious-intolerance-resolution-championed-obama-administration>.

¹²⁵ Daniel DeFraia, *Muslim Nations Push for International Blasphemy Law*, GLOBALPOST (Sept. 25, 2012, 11:25 AM), <http://www.globalpost.com/dispatch/news/politics/120925/muslim-nations-push-international-blasphemy-law>.

¹²⁶ See *id.*; Goodenough, *supra* note 124.

¹²⁷ *Who We Are*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/AboutUs/Pages/BriefHistory.aspx> (last visited Oct. 17, 2013).

protection and promotion of human rights.¹²⁸ In the decades leading up to 2006, the Commission was increasingly criticized and disregarded internationally, primarily because egregious human rights violators sat on the Commission.¹²⁹ In reaction to criticism, the U.N. voted to replace the Commission with the UNHRC in March 2006.¹³⁰ The UNHRC has forty-seven members selected by region, who serve staggered three-year terms.¹³¹ The UNCHR investigates human rights abuses, and often votes on resolutions that, if passed, later move to the U.N. General Assembly for additional vote or enforcement action.¹³²

The Council has continually supported censuring speech when it abuts religious discrimination. In 2008, the UNHRC, amidst intense debate and support from members of the OIC, gave the Special Rapporteur on the Freedom of Expression a mandate “[t]o report on instances in which the abuse of the right of freedom of expression constitutes an act of racial or religious discrimination”¹³³ Critics decried the limiting of freedom of expression and also the turning of the Special Rapporteur’s duties to protect free speech “on [their] head” by mandating that she limit speech.¹³⁴ This move typifies the U.N. preference for the freedom of religion when it conflicts with free speech in the context of blasphemy laws.

¹²⁸ *Id.*

¹²⁹ See Editorial, *The Shame of the United Nations*, N.Y. TIMES (Feb. 26, 2006), http://www.nytimes.com/2006/02/26/opinion/26sun2.html?_r=3&n=Top2fOpinion2fEditorials20and20Op-Ed2fEditorials&oref=slogin&.

¹³⁰ *UN Creates New Human Rights Body*, BBC NEWS (Mar. 15, 2006, 7:49 PM), <http://news.bbc.co.uk/2/hi/europe/4810538.stm>.

¹³¹ *Id.*

¹³² *About: United Nations Human Rights Council*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> (last visited Dec. 29, 2013); see Eliane Engeler, *U.S., Europeans: Islamic Countries Want to Limit Free Speech at UN*, WORLDWIDE RELIGIOUS NEWS (Apr. 2, 2008), <http://wwrn.org/articles/28181/?&place=un>.

¹³³ Engeler, *supra* note 132; U.N. Human Rights Council Draft Rep., 7th Sess., Mar. 28, 2008, U.N. Doc. A/HRC/7/L.11/Add.1, at 67 (Mar. 28, 2008) (stating that “[t]o report on instances in which the abuse of the right of freedom of expression constitutes an act of racial or religious discrimination, taking into account articles 19 (3) and 20 of the International Covenant on Civil and Political Rights, and general comment No. 15 of the Committee on the Elimination of All Forms of Racial Discrimination, which stipulates that the prohibition of the dissemination of all ideas based upon racial superiority or hatred is compatible with the freedom of opinion and expression”).

¹³⁴ Engeler, *supra* note 132.

A. *History of the Defamation of Religions Resolution*

For over a decade, the U.N.'s OIC has repeatedly sought to codify the protection of religions, especially Islam, from being criticized or offended, an effort led by Islamic states.¹³⁵ From 1999 to 2010, the OIC delivered to the U.N. Commission on Human Rights, a defamation of religions resolution [hereinafter Defamation of Religions Resolution].¹³⁶ Resolutions issued by the UNHRC have no binding effect on the international community.¹³⁷ Rather, by continually passing resolutions and, in the process, garnering an international consensus on human rights issues, these efforts can lead to a resolution's inclusion in international legal norms and it becoming enforceable customary international law.¹³⁸ It is toward this aim that the OIC repeatedly sponsors the Defamation of Religions Resolution.¹³⁹

The first resolution was originally proposed in 1999 by Pakistan and entitled "Defamation of Islam."¹⁴⁰ Its content focused entirely on Islam and rising "Islamaphobia."¹⁴¹ After members of the UNHRC expressed concern over the Islamic-centric focus of the resolution, the resolution was widened to include all religions.¹⁴² However, the stated intent of the resolution remained to quench "Islamaphobia" and other forms of discrimination related to religious beliefs.¹⁴³ The OIC continually sponsored the Defamation of Religions Resolution from 1999 to 2010, developing and changing its content very little over this period.¹⁴⁴ Each year the resolution stated: (1) that religious discrimination threatens persons' internationally recognized human rights; (2) that "negative stereotyping of religions and manifestations of intolerance and discrimination" are present all around the world; (3) that the use of media in inciting violence, racism, intolerance, and discrimination is unacceptable; (4) that nations must fight the defamation of every religion, but especially Islam

¹³⁵ Goodenough, *supra* note 124.

¹³⁶ Dobras, *supra* note 60, at 341 n.5.

¹³⁷ See generally VALERIE EPPS, INTERNATIONAL LAW 5–23 (2d ed. 2009) (describing customary law and its interaction with the United Nations).

¹³⁸ See generally *id.* (describing customary law and its interaction with the United Nations).

¹³⁹ Dobras, *supra* note 60, at 341.

¹⁴⁰ L. Bennett Graham, *Defamation of Religions: The End of Pluralism?*, 23 EMORY INT'L L. REV. 69, 69 (2009).

¹⁴¹ U.N. C.H.R., U.N. ESCOR, 55th Sess., 61st mtg., U.N. Doc. E/CN.4/1999/SR.61 (Apr. 29, 1999).

¹⁴² *Id.* (listing German and Japanese representatives expressing concern about the draft resolution's narrow focus on Islam).

¹⁴³ See Goodenough, *supra* note 124.

¹⁴⁴ See generally Graham, *supra* note 140, at 70.

which is facing the utmost attacks; and (6) that the propagation of racist ideas aimed at any religion that lead to discrimination, hostility, or violence should be disallowed and condemned through all possible means.¹⁴⁵

In the first two years of the Defamation of Religions Resolution proposal, the UN Commission on Human Rights adopted the resolution without a vote.¹⁴⁶ However, following the 9/11 attacks, the conversation concerning Islam, Muslim extremists, and terrorism was thrust into the international spotlight. While certain media outlets sought to blame Islam, others came to its defense.¹⁴⁷ The Commission was not blind to this developing international conversation, and for the first time in 2001 and continuing into the next few years, the Defamation of Religion Resolution was submitted to a vote.¹⁴⁸ It, however, continued to pass with a strong majority through 2005.¹⁴⁹

In 2005, the blasphemy debate reemerged in a dramatic way. That September, Denmark's largest newspaper, *Jyllands-Posten*, published twelve satirical cartoons depicting the Muslim prophet Muhammad in a variety of less than unflattering ways.¹⁵⁰ The intention of the drawings was to spur "debate about self-censorship in the media at a time when freedom of expression seemed threatened."¹⁵¹ The publication certainly spurred not only debates,¹⁵²

¹⁴⁵ Dobras, *supra* note 60, at 339, 352; *see also, e.g.*, U.N. C.H.R. Res. 2000/84, U.N. ESCOR, 56th Sess., Supp. No. 3, E/CN.4/2000/167, at 336 (Apr. 26, 2000).

¹⁴⁶ U.N. C.H.R. Res. 2000/84, U.N. ESCOR, 56th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2000/167 at 336 (Apr. 26, 2000); U.N. C.H.R. Res. 1999/82, U.N. ESCOR, 55th Sess., Supp. No. 3, U.N. Doc. E/CN.4/1999/167, at 280 (Apr. 30, 1999).

¹⁴⁷ *See* Melanie Phillips, *Suicide of the West: Denial is No Longer a River in Egypt But a British Pathology*, NAT'L REV. ONLINE (Aug. 18, 2006), <http://www.nationalreview.com/articles/218507/suicide-west/melanie-phillips> (criticizing public figures who refuse to blame Islam for terrorism).

¹⁴⁸ U.N. C.H.R. Res. 2004/6, U.N. ESCOR, 60th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2004/127, at 41 (Apr. 13, 2004); U.N. C.H.R. Res. 2003/4, U.N. ESCOR, 59th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2003/135, at 34 (Apr. 14, 2003); U.N. C.H.R. Res. 2002/9, U.N. BSCOR, 58th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2002/200, at 56 (Apr. 15, 2002).

¹⁴⁹ U.N. C.H.R. Res. 2005/3, U.N. ESCOR, 61st Sess., Supp. No. 3, U.N. Doc. E/CN.4/2005/135, at 21 (Apr. 12, 2005); U.N. C.H.R. Res. 2004/6, U.N. ESCOR, 60th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2004/127, at 41 (Apr. 13, 2004); U.N. CHR Res. 2003/4, U.N. ESCOR, 59th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2003/135, at 34 (Apr. 14, 2003); U.N. C.H.R. Res. 2002/9, U.N. ESCOR, 58th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2002/200, 56 (Apr. 15, 2002); U.N. C.H.R. Res. 2001/4, U.N. ESCOR, 57th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2001/167, at 47 (Apr. 18, 2001).

¹⁵⁰ Dan Berkowitz & Lyombe Eko, *Blasphemy as Sacred Rite/Right: "The Mohammed Cartoons Affair: and Maintenance of Journalistic Ideology*, 8 JOURNALISM STUD., 779, 779–80 (2007).

¹⁵¹ *Id.* at 779.

¹⁵² James Harkin, *Free Speech: Is It an Illusion?* GUARDIAN (Feb. 24, 2006), <http://www.guardian.co.uk/world/2006/feb/25/muhammadcartoons.comment>.

republications, and discussions of the cartoons in Europe,¹⁵³ but also worldwide protests in Islamic countries in the following months.¹⁵⁴ Danish Muslims compiled a forty-three-page booklet, including the twelve cartoons, and distributed it at an Islamic Conference Organization meeting.¹⁵⁵ This dossier full of cartoons, and the angry imams encouraging riots triggered the worldwide Islamic extreme anger and protests that caused hundreds of deaths.¹⁵⁶ Following the distribution of this inflammatory dossier, the OIC and the Arab League called for a U.N. General Assembly resolution¹⁵⁷ banning attacks on religious beliefs.¹⁵⁸

However, the violent Islamic reaction to these cartoons and the continued demands for the Defamation of Religions Resolution to become customary international law backfired. The United States had consistently opposed the Defamation of Religions Resolution.¹⁵⁹ When it became apparent from the strong reaction to the Danish cartoon controversy that the OIC's agenda opposed American First Amendment jurisprudence, the United States became involved.¹⁶⁰ Through "diplomatic negotiations and bilateral conversations" the United States, citing the defense of traditional concept of free expression, brought the first serious international debate to the UNHRC.¹⁶¹

Despite United States opposition, the Defamation of Religions Resolution, brought each year by a member nation of the OIC, continued to pass, although

¹⁵³ Julia Day, *Russian Paper Closes After Publishing Cartoons*, GUARDIAN (Feb. 21, 2006), <http://www.guardian.co.uk/media/2006/feb/21/cartoonprotests.race>.

¹⁵⁴ See, e.g., Amelia Hill & Anushka Asthana, *Nigeria Cartoon Riots Kill 16*, GUARDIAN (Feb. 18, 2006), <http://www.guardian.co.uk/world/2006/feb/19/muhammadcartoons.amelihill>.

¹⁵⁵ Daniel Howden, David Hardaker, & Stephen Castle, *How a Meeting of Leaders in Mecca Set Off the Cartoon Wars Around the World*, INDEPENDENT (Feb. 10, 2006), http://news.independent.co.uk/world/middle_east/article344482.ece.

¹⁵⁶ *Id.*

¹⁵⁷ General Assembly resolutions, similar to UNHRC resolutions, are not binding international law. See SERGEI A. VOITOVICH, INTERNATIONAL ECONOMIC ORGANIZATIONS IN THE INTERNATIONAL LEGAL PROCESS, 94-95 (1995). Rather, they are a stronger indicator of whether a legal idea or norm has reached the level of customary international law.

¹⁵⁸ P.K. Abdul Ghafour & Abdul Hannan Faisal Tago, *OIC, Arab League Seek UN Resolution on Cartoons*, ARAB NEWS (Jan. 30, 2006), <http://www.arabnews.com/node/279660>.

¹⁵⁹ Martin Sieff, *U.N. Religious Hate Vote Alarms Liberty Groups*, UNITED PRESS INT'L (Dec. 19, 2008), http://www.upi.com/news/issueoftheday/2008/12/19/UN_religious_hate_vote/UPI-29281229711881/ (discussing continued U.S. opposition in 2008).

¹⁶⁰ Graham, *supra* note 140, at 71-72.

¹⁶¹ *Id.* at 72.

the gap gradually narrowed.¹⁶² From 2008 to 2010 the resolution only passed by a plurality; there were more “no” votes and “abstentions” than “yes” votes.¹⁶³ In this plurality, the tally of “yes” votes also continued to decline steadily, until it reached the point at which the OIC saw the Defamation of Religions Resolution doomed as it was written.¹⁶⁴

The OIC resolutions were met with increasingly strong opposition, largely because nations were increasingly educated on the implications of an international blasphemy law that focused on protecting religions at the expense of free speech.¹⁶⁵ On June 29, 2007, the Parliamentary Assembly of the Council of Europe in Strasbourg adopted, *Recommendation 1805* on blasphemy, religious insults, and hate speech against persons on grounds of their religion.¹⁶⁶ This Recommendation set a number of guidelines for member states of the Council of Europe in view of Article 10 (freedom of expression) and Article 9 (freedom of thought, conscience, and religion) of the European Convention on Human Rights.¹⁶⁷ Specifically, the Assembly noted that blasphemy’s status as a criminal offense should be reviewed by member states.¹⁶⁸

The Venice Commission, the Council of Europe’s constitutional advisory committee, also noted in a 2008 report that blasphemy laws protecting religions ought to be abolished.¹⁶⁹ It noted that such laws are “neither necessary nor desirable to create an offence of religious insult,”¹⁷⁰ and can

¹⁶² See G.A. Res. 62/154, 62d Sess., U.N. Doc. A/RES/62/154 (Dec. 18, 2007); G.A. Res. 61/164, 61st Sess., U.N. Doc. A/RES/61/164 (Dec. 19, 2006).

¹⁶³ G.A. Res. 63/171, U.N. Doc. A/RES/63/171 (Dec. 18, 2008); U.N. GAOR, 63rd Sess., 70th plen. mtg. at 17–18, U.N. Doc. A/63/PV.70 (Dec. 18, 2008).

¹⁶⁴ See Goodenough, *supra* note 124. The resolution received a dwindling number of votes each year, with the margin of success falling from fifty-seven votes in 2007 to nineteen in 2009 and just twelve in 2010. *Id.*

¹⁶⁵ See, e.g., *Human Rights Council Discusses Reports on Freedom of Religion and Belief, and Human Rights and International Solidarity*, UNOG (Sept. 13, 2007), [http://www.unog.ch/unog/website/news_media_archive.nsf/\(httpNewsByYear_en\)/80257631003154D9C1257355003CA0D6?OpenDocument](http://www.unog.ch/unog/website/news_media_archive.nsf/(httpNewsByYear_en)/80257631003154D9C1257355003CA0D6?OpenDocument).

¹⁶⁶ Eur. Parl. Ass., *Blasphemy, Religious Insults, and Hate Speech Against Persons on Grounds of Their Religion*, 27th Sess., Rec. No. 1805 (2007).

¹⁶⁷ See generally *id.*

¹⁶⁸ *Id.*

¹⁶⁹ Eur. Comm’n for Democracy through the Law, Venice Comm’n, Oct. 17–18, 2008, *Report on the Relationship Between Freedom of Expression and Freedom of Religion: The Issue of Regulation and Prosecution of Blasphemy, Religious Insult, and Incitement to Religious Hatred*, paras. 62–63, CDL-AD(2008)026 (Oct. 23, 2008).

¹⁷⁰ *Id.* para 89(b).

conflict with other human rights.¹⁷¹ After international debates and conversations such as these, blasphemy laws modeled in the style of Pakistan's penal code became increasingly recognized as unacceptable—not only to the United States and Britain, but throughout the democratic world.¹⁷² Protecting religions at the expense of free speech is an unacceptable balance inherent to blasphemy laws.

B. Comment 34 and the U.N. Shift from Blasphemy Laws that Protect Religions to Blasphemy Laws that Protect Individuals

By 2011, the United States and many other Western democratic nations had created an impasse with the OIC and its Defamation of Religions Resolution. In fact, many human rights groups and democratic nations thought that they had finally quashed the matter, convincing enough nations that repressive regimes use blasphemy laws to restrict free speech and even imprison or execute religious minorities and dissidents.¹⁷³ However, in March 2011, the UNHRC, supported by the OIC, shifted its previous position on blasphemy laws from support of blasphemy laws that specifically protect religions to blasphemy laws that protect individuals.¹⁷⁴ The Defamation of Religions Resolution was originally drafted from 1999 to 2010 to protect religions from defamation.¹⁷⁵ The Defamation of Religions Resolution altered the language that directly spoke to religions and Islam in particular: “*Stresses* the need to combat effectively defamation of all religions, Islam and Muslims in particular”¹⁷⁶ The new 2011 language instead emphasized the protection of persons: “*Expresses* deep concern at the continued serious instances of derogatory stereotyping, negative profiling and stigmatization of *persons* based on their religion or belief”¹⁷⁷ This modification represents an ideological

¹⁷¹ *Id.*

¹⁷² See Graham, *supra* note 140, at 80–83.

¹⁷³ Hannah Allam, *Limits on Speech to Get U.N. Hearing: Speakers May Revive Debate on Blasphemy*, SPOKESMAN–REVIEW (Sept. 23, 2012), <http://www.spokesman.com/stories/2012/sep/23/limits-on-speech-to-get-un-hearing/>.

¹⁷⁴ See generally ICCPR, *supra* note 33, art. 1.

¹⁷⁵ See, e.g., G.A. Res. 62/154, U.N. GAOR, 62d Sess., U.N. Doc. A/RES/62/154 (Dec. 18, 2007); Brett G. Scharffs, *International Law and the Defamation of Religion Conundrum*, 2 REV. OF FAITH & INT’L AFF., 66, 67–69 (Mar. 1, 2013).

¹⁷⁶ Comm’n on Human Rights, Econ. And Social Council, Mar. 14–Apr. 22, 2005, U.N. Doc. E/2005/23, Supp. No. 3 (2005).

¹⁷⁷ H.R.C. Res. 16/18, *supra* note 17, at 2 (emphasis added).

shift from support of laws like the Pakistani blasphemy law to support of laws like the Irish Defamation Act.

The ironic catalyst behind this change in approach was the United States. In September 2009, the United States and Egypt together drafted a resolution backing the freedom of expression as supported by the International Covenant on Civil and Political Rights (“ICCPR”), and while expressing concern over international discrimination, also focused their attention on persons as opposed to religions.¹⁷⁸ It is not clear why the United States chose to negotiate this change. However, the change in position likely accompanied the ideological paradigm shift in the United States executive branch with the 2008 election of President Obama. Recall that Obama’s policies on the traditional American freedom of speech standards are enigmatic at best and openly hostile to traditional American freedom of speech standards at worst.¹⁷⁹

The negotiated 2011 resolution states that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”¹⁸⁰ is condemned, recognizing that “the promotion by certain media of false images and negative stereotypes of vulnerable *individuals or groups of individuals*” is at issue.¹⁸¹ The resolution’s recognition and protection of individuals’ rights, as opposed to the OIC’s sponsored protection of religions, illustrates the compromise.

This negotiated resolution would become the basis for General Comment 34 on Article 19 of the ICCPR (“Comment 34”). Article 19 strongly protects traditional freedom of expression, stating unequivocally: “Everyone shall have the right to freedom of expression.”¹⁸² This freedom is only qualified by “respect of the rights or reputations of others” and “the protection of national security or of public order (*ordre public*), or of public health or morals.”¹⁸³

¹⁷⁸ See U.N. H.R.C. Res. 12L.14, 12th Sess., U.N. GAOR 64th Sess., A/HRC/12/L.14/Rev.1 (Sept. 30, 2009).

¹⁷⁹ See Publius, *supra* note 50.

¹⁸⁰ U.N. Human Rights Council, Res. 12/16, Rep. of the Human Rights Council, 12th Sess., Sept. 14–Oct. 2, 2009, U.N. GAOR, 65th Session Supp. No 53, A/65/53, para. 4 (Oct. 12, 2009).

¹⁸¹ *Id.* (emphasis added).

¹⁸² ICCPR, *supra* note 33, art. 19.

¹⁸³ *Id.*

General Comment 34 is in large part the UNHRC's reinterpretation of the first qualification.¹⁸⁴

The UNHRC was not acting without precedent when it extended Article 19's exceptions. Article 20 of the ICCPR allows for restriction of the freedom of speech under conditions that "constitute[] incitement to discrimination, hostility or violence."¹⁸⁵ Recognizing this potential to abuse the freedom of speech at the expense of incitement and public outrage, when the U.S. Senate approved presidential ratification of the ICCPR, it only did so with a specific reservation against Article 20's affront to free expression: "Article 20 does not authorize or require legislation or other action by the United States that would restrict the right of free speech and association protected by the Constitution and laws of the United States."¹⁸⁶ Though Article 20 of the ICCPR could be interpreted to only limit expression such as hate speech and fighting words, it is drafted broadly, enabling nations to interpret practically any speech they desire as "incitement." As illustrated below, the Human Rights Committee in Comment 34 takes advantage of similar loose drafting in Article 19 to limit free speech while instead promoting religious freedoms.

In response to this new international support for blasphemy laws, even though it was not specifically tailored to protect religions, the OIC agreed to drop the Defamation of Religions Resolution in March 2011.¹⁸⁷ In its stead, Pakistan, after diplomatic talks with the United States, omitted reference to "defamation" of religions and instead called for protection of individual believers in its 2011 resolution.¹⁸⁸ In July 2011, the Human Rights Committee moved quickly to publish Comment 34, which rejected blasphemy laws that focused their protection on religions and belief systems.¹⁸⁹ Comment 34, instead of reaffirming freedom of speech international norms focused its attention on expanding traditional speech exceptions. It stated that, "restrictions on the right are permitted, which may relate either to respect of the rights or reputations of others," defining "others" as persons who "may, for

¹⁸⁴ Human Rights Comm, *General Comment No. 34: Article 19: Freedoms of Opinion and Expression* para 28 U.N. Doc. CCPR/C/GC/34 (Sept. 12, 2011) [hereinafter ICCPR Comm. 34].

¹⁸⁵ ICCPR, *supra* note 33, art. 20.

¹⁸⁶ Multilateral Treaties Deposited with the Secretary-General, Status as of Dec. 1994, at 117, 118, U.N. Doc. ST/LEG/SER.E/13, U.N. Sales No. E.95.V.II (1995).

¹⁸⁷ Robert Evans, *Islamic Bloc Drops U.N. Drive on Defaming Religion*, REUTERS, Mar. 25, 2011, <http://in.reuters.com/article/2011/03/24/idINIndia-55861720110324>.

¹⁸⁸ *Id.*

¹⁸⁹ See ICCPR Comm. 34, *supra* note 184, para. 48.

instance, refer to *individual members of a community defined by its religious faith or ethnicity*.”¹⁹⁰

In addition to Comment 34, the United States was instrumental in passing a new resolution in the U.N. General Assembly entitled Resolution 16/18.¹⁹¹ The UNHRC adopted that resolution, which purports to condemn “stereotyping, negative profiling and stigmatization of persons based on their religion.”¹⁹²

This shift to protecting persons instead of religions, emerging in Resolution 16/18 and Comment 34, should attract more attention than it has. Comment 34 is the result of negotiations that the United States and other like-minded states should never have made. Comment 34 does not facially reject the freedom of speech, even demanding defenses to defamation, such as truth, subjectivity, and error.¹⁹³ Comment 34 notes that “[d]efamation laws must be crafted with care to ensure that they comply with [Article 19] paragraph 3, and that they do not serve, in practice, to stifle freedom of expression.”¹⁹⁴ Comment 34 should still be opposed for two reasons. First, Islamic nations still receive international protection against critique and insulting speech (albeit in the guise of protection of individuals instead of religions). Islamic nations can still convict persons under blasphemy laws by merely citing blasphemy offenses against individual Muslims instead of offenses against Islam. The alteration from religions to persons does little to contravene current, oppressive blasphemy laws. Second, free speech is at greater risk of censure in international law under Comment 34’s interpretations of Article 19. Blasphemy laws that protect individuals (like the Irish Defamation Act) still pose a grave threat to free speech rights.

Despite the Comment’s facial support of free speech, it condones and perpetuates a hierarchy of rights: “[A] State party complied with the test of necessity when it transferred a teacher who had published materials that expressed hostility toward a religious community to a non-teaching position in order to protect the right and freedom of children of that faith”¹⁹⁵ This

¹⁹⁰ *Id.* paras. 21, 28 (emphasis added).

¹⁹¹ H.R.C. Res. 16/18, *supra* note 17; Helle Dale, *Cairo Embassy Statement in Tune with Obama U.N. Resolution*, HERITAGE FOUND.: THE FOUNDRY (Sept. 13, 2012, 1:56 PM), <http://blog.heritage.org/2012/09/13/cairo-embassy-statement-in-tune-with-obama-u-n-resolution> (stating that the United States was instrumental).

¹⁹² H.R.C. Res. 16/18, *supra* note 17.

¹⁹³ See ICCPR comm. 34, *supra* note 33, para. 47.

¹⁹⁴ *Id.*

¹⁹⁵ ICCPR Comm. 34, *supra* note 184, para. 33.

example taken from the text of Comment 34 illustrates its support of enigmatic “rights against hostility” over and above traditional freedom of speech rights. This denigration of freedom of speech is an unacceptable human rights violation.

Additional examination of Comment 34 reveals the falsity of the lip service to freedom of speech it provides. Comment 34 reinterprets the content of Article 19, allowing nations wide latitude to limit freedom of speech as they see fit.¹⁹⁶ In fact, while purporting to protect freedom of speech rights, Comment 34 emphasizes that the loosely drafted textual reference to defending the “rights or reputations of others” gives alternate rights (notably freedom of religion and opinion) a priority over the freedom of speech if it is deemed “necessary,” which is at the sole discretion of the UNCHR.¹⁹⁷

Further taking advantage of Article 19’s relevant exception “[f]or respect of the rights or reputations of others,”¹⁹⁸ Comment 34 advocates for a broad interpretation of the exception.¹⁹⁹ It acknowledges a State’s right to enforce criminal blasphemy laws when “necessary,” “proportionate,” or “legitimate.”²⁰⁰ In circumstances where a State desires to create blasphemy laws, it is difficult to think of critical or insulting speech that could not be punished under a broad interpretation of the words “rights of reputations of others” as defined by Comment 34.

Despite Comment 34’s broad interpretation of Article 19 in condoning blasphemy laws, its nod to freedom of speech was enough to break this acrimonious contest over blasphemy laws in the U.N. The traditional coexistence of freedom of religion and freedom of speech was disregarded in the rush to protect religious and personal sensitivities against insult and critique.

¹⁹⁶ Compare ICCPR, *supra* note 33, art. 19, para. 3 (providing that freedom of speech can be restricted when necessary for the respect of the rights or reputations of others), with ICCPR comm. 34, *supra* note 184, para. 28 (interpreting “others” to include individual members of a community defined by its religious faith or ethnicity).

¹⁹⁷ See ICCPR Comm. 34, *supra* note 184, paras. 28, 33; *see also id.* para. 50.

¹⁹⁸ ICCPR, *supra* note 33, art. 19, para. 3.

¹⁹⁹ ICCPR Comm. 34, *supra* note 184, paras. 33–34.

²⁰⁰ *Id.*

C. *Islamic Shift Back to Demand Protection of Religions, not Individuals*

For a time the OIC set aside its demand for international legal protection of Islam from critique and criticism in favor of individual protection. In recent months, blasphemy laws have once again become a focal point of an international debate. The debate reemerged following the September 2012 controversy involving the alleged blasphemous film, *Innocence of Muslims*, which negatively depicting the Islamic prophet Mohammed.²⁰¹ The resulting riots occurred just prior to the United Nations Security Council meetings in September 2012, and became a natural talking point.²⁰² International media has again focused its attention on Islam as the progenitor of terrorist actions, mass protests, and mob violence in response to alleged blasphemous actions taken by others.²⁰³ These international riots have led to cries for the arrest and punishment of the creator of the film stemming from the incitement and public outrage the video has caused.²⁰⁴ Indeed, the countries with either the Pakistani or the Western version of blasphemy laws could punish the creator because it resulted in communal condemnation and unrest.

Illustrating this point, Nabil Elaraby, President of the League of Arab States, declared in response to the alleged blasphemous video and the scrutiny of Islam in international media coverage, “[t]he League of Arab States calls for the development of an international legal framework which is binding . . . in order to confront insulting religions and ensuring that religious faith and its symbols are respected.”²⁰⁵ This is finally the voiced intent behind the negotiated Islamic support of Comment 34 and Resolution 16/18, still to protect Islam from insult.

Further proving that the calculated shift in recently negotiated international blasphemy legislation did nothing to change the OIC’s original intentions, the OIC stated it would return to its 1999 plan of repeatedly submitting an Islamic-

²⁰¹ Lizzy Tomei, *UN Security Council Talks Syria, Israel, Blasphemy Laws During High-Level Meeting on Security in the Middle East*, GLOBALPOST (Sept. 26, 2012), <http://www.globalpost.com/dispatch/news/regions/middle-east/120926/un-security-council-holds-high-level-talks-security-the-mid>.

²⁰² *Id.*

²⁰³ See, e.g., Greg Risling & Linda Deutsch, *Man Behind Anti-Muslim Film Sentenced to Prison*, ASSOCIATED PRESS, Nov. 7, 2012, <http://bigstory.ap.org/article/hearing-set-calif-man-behind-anti-muslim-film>.

²⁰⁴ *Id.*

²⁰⁵ Tomei, *supra* note 201.

centric defamation of religions resolution to the UNHRC.²⁰⁶ The media backlash to the Islamic response of *Innocence of Muslims* has revealed the OIC's fervor for an international blasphemy law protecting religious sensitivities.²⁰⁷ To the surprise of free speech supporters,²⁰⁸ United Nations Secretary-General Ban Ki-Moon supported the OIC, suggesting limitations to freedom of speech when it is "used to provoke or humiliate."²⁰⁹ Ban further stated,

We are living through a period of unease. We are also seeing incidents of intolerance and hatred that are then exploited by others. Voices of moderation and calm need to make themselves heard at this time. We all need to speak up in favor of mutual respect and understanding of the values and beliefs of others.²¹⁰

Free speech activists are concerned with the OIC's re-found intent to make blasphemy against religions, particularly Islam, an internationally recognized criminal offense. Noting that new tensions and factions on the issue are inevitable, Courtney Radsch, a program manager for the Global Freedom of Expression Campaign, said in the *Spokesman-Review*, "I expect that we'll regress to where we were a couple of years ago."²¹¹

III. THE FUTURE OF BLASPHEMY LAWS AND NORMATIVE ARGUMENTS AGAINST INTERNATIONAL CUSTOMARY LAW LIMITING FREE EXPRESSION

A. *What Does the Future Hold?*

As previously discussed, blasphemy laws have come into vogue in recent years with an increasing number of democratic countries enacting versions of these laws. The main tension that the creation of an international blasphemy laws causes is between Article 18 (freedom of religion) and Article 19 (freedom of speech) of the ICCPR.²¹² Blasphemy laws, while supporting religions and freedom from fear of agitation and discrimination against those

²⁰⁶ DeFraia, *supra* note 125.

²⁰⁷ See Allam, *supra* note 173.

²⁰⁸ See *id.*

²⁰⁹ See *id.*

²¹⁰ DeFraia, *supra* note 125.

²¹¹ See Allam, *supra* note 173.

²¹² ICCPR, *supra* note 33, arts. 18–19.

religions, undeniably restrict a portion of free speech.²¹³ Blasphemy law advocates contend that this speech restriction is justified because the restriction unreasonably infringes on persons' Article 18 rights to religion and personal opinion.²¹⁴ Article 18 of the ICCPR, representing customary international law, states that: "Everyone shall have the right to freedom of thought, conscience and religion."²¹⁵ These freedoms are only limited by laws "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."²¹⁶ Article 19 notes that the "right to hold opinions without interference"²¹⁷ is only limited "[f]or respect of the rights or reputations of others" or "[f]or the protection of national security or of public order (ordre public), or of public health or morals."²¹⁸ These limitations create an obvious tension since both rights, freedom of religion/opinion (Article 18) and freedom of speech (Article 19), *can* be disregarded when another human right is in jeopardy.

Thus, the question becomes whether the protection of one human fundamental right (religion or opinion) is a necessary, proportionate, and justified defense to limiting a separate fundamental human right (speech).²¹⁹ In determining the legal scope of a religious right, some prescribe a two-part method: (1) an analysis of the text granting the right (or restricting limitation of the right); and (2), a look at whether the language identifies situations that may give rise to a permissive limitation on that right.²²⁰ Traditional limitations to constitutionally protected free speech in the West include contempt of court,²²¹ treason,²²² and accomplice liability for certain rare circumstances of

²¹³ Maxim Grinberg, *Defamation of Religions v. Freedom of Expression: Finding the Balance in a Democratic Society*, 18 SRI LANKA J. INT'L L. 197, 203 (2006).

²¹⁴ See ICCPR, *supra* note 33, art. 20; Stuart Braun, *Europe's Fight Over Free Speech Flares Up Again*, USA TODAY (Oct. 19, 2012), <http://www.usatoday.com/story/news/world/2012/10/05/europe-blasphemy-laws/1613057/>.

²¹⁵ ICCPR, *supra* note 33, art. 18(1).

²¹⁶ *Id.* art. 18(3).

²¹⁷ *Id.* art. 19(1).

²¹⁸ *Id.* art. 19(3).

²¹⁹ See generally T. Jeremy Gunn, *Permissible Limitations of Religion or Belief*, in RELIGION AND HUMAN RIGHTS: AN INTRODUCTION 254, 259–66 (John Witte, Jr. & M. Christian Green eds., 2012).

²²⁰ T. Jeremy Gunn, Introduction, *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief: A Comparative Perspective*, 19 EMORY INT'L L. REV. ix, x (2005).

²²¹ See, e.g., FED. R. CRIM. P. 42; 18 U.S.C. §§ 401–03 (2006); Contempt of Courts Act, 1981, c. 49 (U.K.).

²²² See, e.g., 18 U.S.C. § 2381 (2006).

incitement²²³ or fighting words.²²⁴ However, incitement to violence²²⁵ and fighting words are only criminal in the United States if violence is imminent and immediate.²²⁶ These traditional limitations of speech focus on the mode of delivery, not on the message.²²⁷ The message itself is not restricted, regardless of its racial, ethnic, political, religious, etc., implications or agenda.²²⁸ Rather, it is the imminent incitement, the fervent mode of speech *causing immediate action*, that is criminal.²²⁹ In contrast, blasphemy laws focus on the alleged blasphemous message that, possibly, sparks communal outrage, and not on the mode of expression. Thus, while the traditional limitations suppress free speech to protect people from imminent violence, blasphemy laws suppress free speech to protect another human right, the freedom of religion/opinion without insult or harassment.

Recently, the United States has not been as concentrated on extending its domestic legal standards to the international community. However, new American ideals, at least those heralded by the Obama Administration, have set the tone for what to expect moving forward. The United States is considered the most important party in this conversation for a few important reasons. First, the United States holds a permanent seat on the U.N. Security Council, the only council with power of enforcement in the U.N.²³⁰ Second, and more importantly, the United States is unique among other nations in its devout adherence to the constitutional freedom of speech doctrine.²³¹ Therefore, when the executive leader of a country with these qualifications speaks in favor of

²²³ See, e.g., *Hicks v. United States*, 150 U.S. 442, 442 (1893).

²²⁴ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942); Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 319, art. 1.

²²⁵ *Bradenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (holding that the convicting Ohio statute was unconstitutional because “the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.”) (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961)).

²²⁶ *Id.*; Adam Liptak, *Hate Speech or Free Speech? What Much of the West Bans is Protected in U.S.*, N.Y. TIMES (June 11, 2008), <http://www.nytimes.com/2008/06/11/world/americas/11iht-hate.4.13645369.html?pagewanted=all>.

²²⁷ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393 (1992) (“[T]he reason why fighting words are categorically excluded from the protection of the First Amendment is not that their content communicates any particular idea, but that their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey.”).

²²⁸ *Id.*

²²⁹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

²³⁰ *United Nations Security Council, About: What is the Security Council?*, UN.ORG, <http://www.un.org/en/sc/about/> (last visited Jan. 31, 2014).

²³¹ See U.S. CONST. amend. I; *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011).

limiting speech internationally, the world takes note. In 2011, the Obama Administration did just that when it jointly proposed Resolution 16/18 and championed Comment 34.²³²

Following the nearly unanimous passing of both Resolution 16/18 and Comment 34, the international community now faces a decision regarding blasphemy laws. It is dangerously poised to accept blasphemy laws that protect individuals' freedom of religion rights at the expense of some other individuals' freedom of speech rights. The only obstacle is the OIC, which recently began reinsisting on protecting Islam instead of protecting individuals' religious rights, and the few nations with staunch traditional free speech, like Britain and the United States (the laws of which remain firm despite the Executive's wavering).

The following sections explore arguments for and against an international blasphemy law. Section A will posit the arguments used in favor of establishing some sort of international blasphemy agreement in international law. Section B will then explain why international blasphemy laws in any form are an inherent human rights violation and should be immediately condemned. Though blasphemy laws protect freedom of individuals to practice religion as they see fit without insult or unjust attack, blasphemy laws also inherently limit the freedom of speech. Freedom of religion/opinion and freedom of speech/expression must coexist. Section B will examine this major concern while considering human rights' precedence.

B. Proponents of Blasphemy Laws

1. Religiously Zealot Proponents of Blasphemy Laws

Proponents of blasphemy laws fall into two groups: religious extremists and human rights proponents, which will be discussed below. The first group consists of religious extremists whose support comes from a sense of spiritual and cultural duty. The modern phenomenon of blasphemy laws to protect deities, religious objects, and sacred characters is largely restricted to the Islamic bloc of nations. Hinduism does not recognize blasphemy as a traditional concept;²³³ the tenets of Buddhism reject the concept of punishable

²³² H.R.C. Res. 16/18, *supra* note 18; ICCPR Comm. 34, *supra* note 184.

²³³ See JOHN R. DE LINGEN, AN INTRODUCTION TO THE HINDU FAITH 2 (Pahlad Ramsurrun ed., 2008) (1937).

blasphemy.²³⁴ Western Christianity accepts criticism and insult as part of the international cultural and religious paradigm despite violently suppressing blasphemy and heretical teachings in the past.²³⁵

In contrast, a large portion of Muslims internationally have made no attempt to hide their distaste toward those who insult Islam, often advocating for, and even rioting in pursuit of severe corporal punishments for offenders.²³⁶ Recently, a mob attacked a school in Lahore, Pakistan after hearing rumors that a teacher insulted the prophet Muhammad in a note.²³⁷ The Pakistani government responded to the mob by arresting the principal of the school.²³⁸ It is these unbalanced reactions to perceived blasphemy that describe the religiously radical nature of the first group of blasphemy law proponents.

This first group points to the rise in “Islamaphobia” on the international stage as reason for enacting blasphemy laws that will protect their religious beliefs.²³⁹ Noting comparisons to anti-semitism and Holocaust denial laws that protect Jewish persons in Europe, advocates believe that specific laws should similarly protect Islam.²⁴⁰ A Muslim Brotherhood spokesman presented this sentiment following the September 2012 French publication of a Muhammad caricature when he said, “[i]f anyone doubts the Holocaust happened, they are imprisoned, yet if anyone insults the prophet, his companions or Islam, the most [France] does is to apologise in two words. It is not fair or logical.”²⁴¹

²³⁴ *Blasphemy Definition*, NEW WORLD ENCYCLOPEDIA (Jan. 5, 2009), <http://www.newworldencyclopedia.org/p/index.php?title=Blasphemy&oldid=894861>.

²³⁵ See, e.g., CARTER LINDBERG, *THE EUROPEAN REFORMATIONS 250–59* (2d ed. 2010).

²³⁶ For example, *South Park*, a satirical American cartoon, regularly portrays Jesus Christ, Krishna, and Buddha in episodes. Dave Itzkoff, ‘*South Park*’ Episode Altered After Muslim Group’s Warning, N.Y. TIMES, Apr. 23, 2010, at C3. However, in April of 2010, when *South Park* attempted to portray the character of the prophet Muhammad, radical Muslims internationally responded with death threats and violence directed toward the show’s writers. *Id.*

²³⁷ Taha Siddiqui, *Mob Burns Girls’ School in Pakistani City Over Alleged Blasphemy*, CHRISTIAN SCI. MONITOR (Nov. 1, 2012), <http://www.csmonitor.com/World/Asia-South-Central/2012/1101/Mob-burns-girls-school-in-Pakistani-city-over-alleged-blasphemy>.

²³⁸ *Id.*

²³⁹ Mark Durie, *Sleepwalking into Sharia: Hate Speech Laws and Islamic Blasphemy Strictures*, Paper Presented at The Sun Rises in the West: The Rule of Law Together with Property Rights—Foundation of Western Law and Liberty Conference in Perth, 5 (Oct. 7–8, 2010), available at <http://www.hudson.org/files/documents/DURIE-Author%20Version-1%20doc.pdf>.

²⁴⁰ Graham, *supra* note 140, at 74.

²⁴¹ Kim Willsher, *France Prepares for Backlash to Magazine’s Cartoons of Muhammad*, GUARDIAN (Sept. 19, 2012), <http://www.guardian.co.uk/world/2012/sep/19/france-backlash-magazines-cartoons-muhammad>.

In response to the rising media aggression and critique against Islamic dogma, the first group believes that their religion, religious personages, and adherents deserve special protection against those who insult and criticize.²⁴² Elevating critique and insult to the level of hate speech and blasphemy in order to protect their religious faith and sentiment internationally is the ultimate goal to these religious zealots.²⁴³ The group comes from a firmly entrenched religious paradigm whose doctrine tells it to violently and fiercely protect Islam against those who would attack it.²⁴⁴ Consequently, it is not only difficult to understand religious radicals, but it is even more difficult to debate with them.

Religious zeal and continual outcry over the depiction and criticism of Islam and its sacred personages, coupled with the domestic blasphemy laws in predominantly Islamic countries aimed at protecting the Islamic faith, shed some light on the OIC's continual pursuit of an international law condemning the Defamation of Religions. Despite the OIC's recent stipulation to protect individuals instead of religions in Resolution 16/18 and Comment 34,²⁴⁵ the Islamic states still desire to place Islam in a category of complete protection.²⁴⁶ Any international human rights concerns are thinly veiled desires of Muslim states to move their religion beyond criticism and beyond any perceived insult. In fact, the OIC attempted to resubmit a Defamation of Religions Resolution explicitly protecting Islam in the U.N. until October 2011.²⁴⁷ When that resolution failed to gain sufficient support, the OIC called for domestic leaders to apply existing international and domestic hate speech laws against insults to Islam.²⁴⁸ Thus, the ultimate goal of the first group of proponents of blasphemy laws—religious zealots—is not only banning defamation of all religions, but more specifically banning critique of and insult to Islam.

²⁴² See, e.g., *id.*; Tom Heneghan, *West's Free Speech Stand Bars Blasphemy Ban—OIC*, REUTERS (Oct. 15, 2012), <http://www.chicagotribune.com/news/sns-rt-us-islam-blasphemybre89e18u-20121015,0,6227067.story>.

²⁴³ See, e.g., Susan Brooks, *Shouting 'Fire' in a Crowded World: What Blasphemy Law Debate Can Mask*, WASH. POST (Sept. 24, 2012), http://www.washingtonpost.com/blogs/guest-voices/post/shouting-fire-in-a-crowded-world-what-the-un-blasphemy-law-debate-can-mask/2012/09/24/b45e9322-06b6-11e2-a10c-fa5a255a9258_blog.html; Heneghan, *supra* note 254.

²⁴⁴ See Dobras, *supra* note 60, at 348–50.

²⁴⁵ See H.R.C. Res. 16/18, *supra* note 18; ICCPR Comm. 34, *supra* note 184.

²⁴⁶ See Durie, *supra* note 239, at 10.

²⁴⁷ Heneghan, *supra* note 242.

²⁴⁸ *Id.*

2. *Human Rights Proponents of Blasphemy Laws*

The second group of blasphemy law proponents does not rely on religious arguments, but instead focuses on human rights concerns. The central issue of the debate is whether free speech can ever violate another's human rights. The second group argues that speech can violate another's freedom of religion. This view emphasizes the natural pitting of the freedom of speech against the freedom of religion. Despite the unanswered questions concerning which human right, if any, takes priority, the second group is gaining international support at a high rate. The new defamation laws in countries such as Ireland²⁴⁹ and rejuvenated laws such as Finland's blasphemy law²⁵⁰ aim to protect individuals from religious insult.

Article 18 of the ICCPR protects global freedom of religion as a core human right, while Article 19 protects freedom of speech in the same manner.²⁵¹ The core of the second group's argument is that blasphemous statements are an attack on human dignity.²⁵² It is not a justifiable critique of religions—that is, theological debate, academic study, or even simple disagreement—that the second group seeks to quash through law. These conversations would still fall under the umbrella of protected free speech.²⁵³ Rather, the second group seeks to restrict speech that “incites” others.²⁵⁴

The rationale this group most frequently uses to condemn incitement is akin to the “yelling fire in a crowded theater” argument.²⁵⁵ The goal of traditional incitement laws is to protect immediate public safety.²⁵⁶ However, in the age of mass global media, a statement online, like the *Innocence of Muslims* YouTube video, can cause international shockwaves and “incite” across the world in ways previously unimagined.²⁵⁷ In response, the second group of proponents has attempted to redefine the argument, moving away

²⁴⁹ See generally Defamation Act 2009 (Act No. 31/2009), pt. 5, para. 36 (Ir.).

²⁵⁰ KGS, *supra* note 62.

²⁵¹ ICCPR, *supra* note 33, at arts. 18–19.

²⁵² Brooks, *supra* note 243.

²⁵³ Matthew Brown, *News Analysis: Experts Say Blasphemy Laws Are the Undercurrent of Unrest in Middle East*, DESERET NEWS (Sept. 27, 2012), <http://www.deseretnews.com/article/865563337/Experts-Blasphemy-laws-are-undercurrent-of-unrest-in-Middle-East.html?pg=all>.

²⁵⁴ *Id.*

²⁵⁵ Graham, *supra* note 140, at 76–77.

²⁵⁶ *Id.* at 77.

²⁵⁷ See Brooks, *supra* note 243.

from immediacy. Rather than pursuing international blasphemy laws per se, these proponents are “[c]ombating intolerance, negative stereotyping, and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief.”²⁵⁸ To them, blasphemy laws are simply one way to protect persons from harmful discrimination. Even if these laws extend traditional speech restrictions, the protection of human dignity is just more valuable than traditional speech rights.

The recent alteration of the OIC’s defamation resolution, turning it into Resolution 16/18 for the protection of individuals as opposed to religions, is the exact typology of law that the second group is pursuing. These laws purport to adopt traditional Western standards of free speech, while simultaneously prosecuting actions that offend or oppress religious belief systems.²⁵⁹ The validity and efficaciousness of these laws necessarily rests on two key concepts: (1) the ability to identify speech that is formed for the purpose of incitement, and (2) the ability to separate the insult or hatred of ideas and belief systems from the insult or hatred of persons.²⁶⁰ Thus far, the U.N.,²⁶¹ the Obama Administration (as previously discussed, in variance to traditional American standards),²⁶² and many others proclaim that these delineations are possible and that an international blasphemy law condemning those who incite and attack individuals is the best method for combating hatred globally.

C. Arguments Against an International Blasphemy Law

Restricting free expression at the expense of the freedom of religion is a needless sacrifice; blasphemy laws will cause more harm to human rights than good. In fact, for the past half-century, the two freedoms have coexisted peacefully and without incident in many democratic nations including the United States and Britain. Anti-blasphemy laws advocates are, in large part, strong supporters of the traditional Western democratic perspective on free speech. Their opposition too stems from a belief paradigm. To this group, free speech is an unimpeachable human right, even if that speech offends, insults, or incites others. In past centuries, the Western world has continued to develop

²⁵⁸ H.R.C. Res. 16/18, *supra* note 18.

²⁵⁹ *See* Brown, *supra* note 253.

²⁶⁰ *See* Durie, *supra* note 239, at 7.

²⁶¹ DeFraia, *supra* note 125.

²⁶² *See* Brown, *supra* note 253.

a tolerance for the beliefs and statements of others. Today, diverse people across the Western world live in an environment of general peace and mutual respect, no matter their color or religious affiliation. In large part, these sociological advancements have come through the development of human rights legislation and increased human rights education. There is no legitimate reason why freedom of religion and freedom of speech cannot continue to coexist in the same paradigm and legal system. Many nations in the past century, including the United States, have proven that freedom of speech need not be restricted by religious concerns to protect human dignity. Incidents of religious violence are far less extreme in both frequency and severity in the United States and Britain where no blasphemy laws exist.²⁶³ To sacrifice one right for the other would be to needless regress in our hard fought human rights developments.

Those who oppose international blasphemy and defamation laws use five key arguments: (1) scope;²⁶⁴ (2) protectionism; (3) blasphemy as submission to mob pressures and violence; (4) the efficacy of existing blasphemy laws; and (5) the nature of religions.²⁶⁵

1. The Problem of Scope in Blasphemy Laws

First, there is the immediate difficulty of scope, which many people say is insurmountable.²⁶⁶ The problem of scope deals with the inability to internationally define blasphemy. Traditional defamation laws rest on the concept that speech must be harmful and untrue. A hurtful, damaging, and inciting statement, if true, cannot be prosecuted.²⁶⁷ Blasphemy, as a legal term, does not have such bright line rules. Its definition varies widely by interpretation, culture, context, and perception.²⁶⁸ It is impossible to justly punish persons for a crime without a clear definition. No one has the authority or qualifications to decide what to “blasphemy” against a specific religion or individual belief is, especially when the societal and cultural differences and

²⁶³ Kiley WidELITZ, *A Global Blasphemy Law: Protecting Believers at the Expense of Free Speech*, 6 PEPP. POL'Y REV., May 27, 2013, at 4.

²⁶⁴ See, e.g., Goodenough, *supra* note 124.

²⁶⁵ See generally WidELITZ, *supra* note 263.

²⁶⁶ See Goodenough, *supra* note 124.

²⁶⁷ Durie, *supra* note 239, at 7.

²⁶⁸ Compare Defamation Act 2009 (Act No. 31/2009), pt. 5, para. 36 (Ir.), with Pakistan Penal Code, No. 45 of 1860, PAK. PENAL CODE §§ 295, 298 (noting the differences between the Irish defamation law discussed in Section I.A.2 and the Pakistani blasphemy law discussed in Section I.A.3).

disagreements of an international jurisdiction make interpretation problems greatly exacerbated.²⁶⁹ People would undoubtedly be subjected to different standards concerning different religions.

Acknowledging the difficulty in defining what blasphemy is, certain States like Pakistan have defined blasphemy laws in terms of words concerning religion that “incite” or “wound” a person’s feelings toward religion.²⁷⁰ These incitement laws, however, rest on a different but equally inadequate foundation. The viability of an incitement law inherently resides on the reaction of persons. If a person’s obvious, harmful, and egregious blasphemy fails to incite or wound anyone’s feelings, then there can be no indictments or prosecutions for the act under certain statutes.²⁷¹ However, if an innocuous remark or an ill-timed joke is misunderstood, misinterpreted, or unnecessarily offensive to a group of people, then the law has been broken, and a prosecutory “blasphemy offense” has occurred.

In Sudan, in early November 2007, enraged and vocal parents demanded, and received, the arrest of a British teacher, who at the request of her Muslim students, named the class teddy bear Muhammad.²⁷² It is this type of innocent mistake that has proved that incitement laws are unpredictable and dangerous. The ambiguity and unpredictability, both to the international community watching and to the specific offender, of what “incites,” breaks down these “fire in a theatre” arguments. These blasphemy laws and the governments’ ability to use them are at the mercy of public reaction—always a precarious reliance.

A parallel issue of definition dwells on the difference between “insult to religions” and “just criticism.” The distinction is too subjective to justify international blasphemy laws. In one persons’ mind, a public comment could be a needed critique of an action commonplace among adherents of a certain religion. Certain members of that religious sect, however, could take that same comment as a personal, religious insult.

²⁶⁹ See Graham, *supra* note 140, at 69.

²⁷⁰ See Pakistan Penal Code, No. 45 of 1860, PAK. PENAL CODE §§ 295, 295-A, 298.

²⁷¹ *Id.*

²⁷² ‘Muhammad’ Teddy Teacher Arrested, BBC NEWS (Nov. 26, 2007), <http://news.bbc.co.uk/2/hi/africa/7112929.stm>.

In times past, critiques against Christianity-supported slavery could have been seen as insult to adherents. Today, it is undoubtedly accepted that these abolitionist critiques were necessary and instrumental in driving positive cultural change. When religious critiques, even if it appears to be insult, are silenced, the risk of halting social progress is real. Only future generations can define the scope of whether or not a critique is necessary and just, or merely a prosecutory insult under blasphemy laws.

Blasphemy laws of both the Pakistani and Irish models contain this controversial incitement language. However, those most aligned with the U.N.'s Resolution 16/18 and Comment 34 would prefer not to define laws in terms of traditional "blasphemy," but rather, in terms of "offense,"²⁷³ "abuse,"²⁷⁴ or contempt, revulsion, and ridicule.²⁷⁵ This legal methodology and terminology is crafted with the intention to wipe out racial and religious hatred.²⁷⁶ It does not focus solely on incitement language, but also looks to perceived offensive content. While, in theory, these blasphemy laws could effectively wipe out unsolicited hatred against individuals, they also run into issues of free speech and just critique. Western freedoms we now enjoy are a direct result of intensive, and, at first, inciting dialogue.

A strong example of stifled religious conversation is the case *Islamic Council of Victoria Inc. v Catch the Fire Ministries, Inc.*²⁷⁷ Australia's Commonwealth of Victoria in 2001 passed the Racial and Religious Tolerance Act, which states:

A person must not, on the ground of the religious belief or activity of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.²⁷⁸

Essentially, the Australian act followed the modern blasphemy law trend in democratic states, redefining vilification as "incitement," opening up

²⁷³ See, e.g., Penal Law, 5737-1977, 1 LSI 61, 170, 173 (1978) (Isr.).

²⁷⁴ Defamation Act 2009 (Act No. 31/2009), pt. 5, para. 36 (Ir.).

²⁷⁵ Racial and Religious Tolerance Act 2001 (Vict.) s 8 (Austl.).

²⁷⁶ See Durie, *supra* note 239, at 6.

²⁷⁷ *Catch the Fire Ministries, Inc. v Islamic Council of Victoria, Inc. (Vic)* [2006] 15 VSCA 284 (Austl.); *Islamic Council of Victoria, Inc. v Catch the Fire Ministries, Inc.* [2005] VCAT 1159 (Austl.); *Islamic Council of Victoria v Catch the Fire Ministries, Inc.* [2004] VCAT 2510 (Austl.); *Islamic Council of Victoria, Inc v Catch the Fire Ministries, Inc.* [2003] VCAT 1753 (Austl.).

²⁷⁸ Racial and Religious Tolerance Act 2001 (Vict.) s 8 (Austl.).

prosecution for any person who might create “contempt” for another person. Shortly after September 11, 2001, Catch the Fire Ministries sponsored a seminar in Melbourne, Australia led by Dan Scot, a Pakistani Christian pastor.²⁷⁹ In a morning session that discussed jihad, members of the Islamic Council of Victoria took offense at some of Scot’s statements and filed a complaint with the Victoria Equal Opportunity Commission.²⁸⁰ Scot’s alleged offense came from paraphrasing portions of the Qur’an to make a religious point, in a “mocking tone,” that “elicit[ing] laughter from [the] audience.”²⁸¹

Following a lengthy trial, the Victorian Civil and Administrative Tribunal (“VCAT”) upheld the complaint and convicted Scot on the basis of the Racial and Religious Tolerance Act 2001.²⁸² The attorneys who succeeded in gaining a conviction before VCAT made two frightening statements: (1) summarized by Brind Woinarski, Queen’s Counsel for the Islamic Council of Victoria, “[i]f one vilifies Islam, one is by necessary consequence vilifying people who hold that religious belief,”²⁸³ and (2) quoting Debbie Mortimer, Queen’s Counsel for the Islamic Council of Victoria, “Truth is not a defence, it’s irrelevant to contravention of the Act.”²⁸⁴

Although the Victoria Supreme Court eventually overturned Scot’s conviction,²⁸⁵ the danger of laws of the type seen in Victoria was evidenced. The trial court, as well as many proponents of these laws, failed to admit any distinction between ideas and people who hold these ideas.²⁸⁶ Scot, who was criticizing the Islamic belief system, became subject to criminal action because, in the opinion of the Islamic Council of Victoria, his speech was made for the purpose of critiquing and insulting Islamic individuals.²⁸⁷ The perceived offense to certain Muslims in Victoria, therefore, became a criminal offense. It made no difference that Scot spoke the truth in his morning session on jihad. Under traditional defamation laws, the truth would have been a defense, but under the Racial and Religious Tolerance Act 2001 only the

²⁷⁹ Durie, *supra* note 239, at 7–8.

²⁸⁰ *Id.* at 8.

²⁸¹ *Id.*

²⁸² *Id.* at 9.

²⁸³ *Id.* at 8 (quoting the official transcript of the hearing before VCAT).

²⁸⁴ *Id.* at 9.

²⁸⁵ *Catch the Fire Ministries, Inc. v Islamic Council of Victoria, Inc. (Vic)* [2006] 15 VSCA 284 (Austl.).

²⁸⁶ Durie, *supra* note 239, at 8.

²⁸⁷ *Id.* at 8–9.

perceived “ridicule” of certain persons mattered.²⁸⁸ International laws similarly crafted and interpreted could easily lead to unprecedented restrictions on speech.

2. *Blasphemy Laws as Protectionist of Religions*

The *Catch the Fire Ministries* case also leads directly into the second argument against international blasphemy laws. Blasphemy laws tend to be protectionist of religions. In essence, these laws suppress speech concerning religions that is offensive and oftentimes damaging to that religion, even if the speech was directed at persons adhering to the religion, not the religion itself. This is a fine and difficult distinction to draw. Indeed, the VCAT in *Catch the Fire Ministries* would not, or could not, differentiate between an attack on Islam and an attack on Muslim peoples.²⁸⁹

There is no doubt that the distinction between religions and religious adherents is a fine one that is blended in the minds and speech of many. However, in the age of terrorism, another issue arises: When religions (or factions of religions) are directly responsible for human rights violations, oppression, violence, and international terrorism, there must be an avenue to fight back through public speech. There is a direct need for offenders and offenders’ religions, if those religions drove the violence, to be criticized and critiqued on a global scale. Blasphemy laws that protect religions from insult and criticism naturally hinder this important conversation. If adherents kill under the tenets of their religion, the world cannot stand idly by and refuse to insult or critique that religion for fear of prosecution.

The importance of internal and external critique as a method of religious growth, reform, and advancement cannot be understated. Two examples from the history of Christianity will put this point into perspective. Perhaps the most famous example of critique leading to growth and change in religion is that of reformer Martin Luther.²⁹⁰ Prior to Martin Luther’s *95 Theses* and split from Rome, the Catholic Church was rife with corruption, including immorality among the clergy, nepotism, simony, and indulgences.²⁹¹ Luther’s critique of

²⁸⁸ *Racial and Religious Tolerance Act 2001* (Vic) s 8 (Austl.).

²⁸⁹ *Catch the Fire Ministries, Inc.*, [2006] 15 VR at 207.

²⁹⁰ See LINDBERG, *supra* note 235, at 56.

²⁹¹ *Id.* at 39. Simony is the practice of selling ecclesiastical offices. *Id.* An indulgence is a salable penance for the sins of both the living and the dead that was available from the Catholic Church. *Id.* at 70–71.

Catholic corruption, hypocrisy, and theology led directly to the establishment of Protestantism.²⁹² His teachings not only led to advancements in law, society, and education in Europe,²⁹³ but also to the Catholic Counter-Reformation and the Council of Trent.²⁹⁴ Though the Council of Trent reaffirmed Catholic dogma, it addressed and corrected many of the former abuses and inadequacies that had plagued the Catholic Church.²⁹⁵ It was Luther's public critique on a Wittenberg church door that rocked the Christian world, a critique still felt today.²⁹⁶

Second, the famed Jesuit priest and scholar, John Courtney Murray, spent his professional life dedicated to critique and changes aimed at his own Catholic Church.²⁹⁷ Through Murray's efforts in the Second Vatican Council, the Church promulgated *Dignitatis Humanae*,²⁹⁸ acknowledging freedom of religion and initiating a strain of ecumenism that began to heal many latent divisive wounds traced back even to the Reformation era.²⁹⁹ Murray's ideas that "the truth to which customarily refer [sic] by saying in Lincoln's words 'that this is a nation under God'—that political life has a premise beyond itself, a premise that is theological, the existence of God,"³⁰⁰ helped to unite the entire Christian community, Protestants and Catholics alike.

This look into the history of Christianity reveals the foundational growth process that religions must experience. Both internal and external critiques

²⁹² *Id.* at 72.

²⁹³ See JOHN WITTE JR., LAW AND PROTESTANTISM, THE LEGAL TEACHINGS OF THE LUTHERAN REFORMATION 87, 257 (2002); JOHN WITTE JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 47–48 (2d ed. 2012).

²⁹⁴ LINDBERG, *supra* note 235, at 321.

²⁹⁵ *1545 The Council of Trent Begins*, CHRISTIAN HISTORY (Oct. 1, 1990), <http://www.christianitytoday.com/ch/1990/issue28/2842.html>.

²⁹⁶ LINDBERG, *supra* note 235, at 72.

²⁹⁷ See generally JOHN COURTNEY MURRAY AND THE AMERICAN CIVIL CONVERSATION (Robert P. Hunt & Kenneth L. Grasso eds. 1992); Claire Wolfteich, *The American Experiment: Religious Liberty, Roman Catholics, and the Vision of John Courtney Murray*, 2 J. HUM. RTS. 31 (2003).

²⁹⁸ FATHERS OF THE SECOND VATICAN COUNCIL, *DIGNITATIS HUMANAЕ* (Dec. 7, 1965), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651207_dignitatis-humanae_en.html.

²⁹⁹ *Id.*; See also FATHERS OF THE SECOND VATICAN COUNCIL, *UNITATIS REDINTEGRATIO* (Nov. 21, 1964), available at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decree_19641121_unitatis-redintegratio_en.html (endorsing ecumenism).

³⁰⁰ *The Catholic Hour: The American Proposition* (NBC television broadcast Jan. 8–15, 1961), available at <http://woodstock.georgetown.edu/library/murray/1961a.htm> (interviewing Father John Courtney Murray, S.J.).

reveal inadequacies and abuses that may have developed over time. Reformations and counter-reformations are part of the maturation and improvement process of both society and religions. Blasphemy laws represent a clear danger to necessary critique. Murray's ecumenical message or Luther's theology of *sola scriptura* could easily fit within the parameters of that which "incites public outrages" or "insults" sixteenth-century religious dogma. Without these "blasphemers," however, Christianity would never have grown and accepted changes now universally recognized as positive.

3. *Are Blasphemy Laws Submission to Violence and Mob Pressures?*

The third argument against blasphemy laws has emerged from recent international events.³⁰¹ This argument looks beyond the actual blasphemy laws and seeks to understand the logic behind their creation. President Obama, addressing an oft-purported reason for enacting blasphemy laws, stated that his desire is to "reject[] efforts to denigrate the religious beliefs of others."³⁰² This echoed a statement by the U.S. Embassy in Egypt: "We condemn the continuing efforts by misguided individuals to hurt the religious feelings of Muslims."³⁰³ Again, recall that after *Innocence of Muslims* triggered violence around the globe causing at least seventy-five deaths and hundreds of injuries, parties called for the creator Nakoula's arrest because he "incited violent protests across the Middle East."³⁰⁴

The same general arguments were broadcast following the Danish cartoon crisis, namely that blasphemy laws justly punish those who create offensive speech and provoke violent members of the Muslim community.³⁰⁵ The victims are those Muslims who are unnecessarily insulted and roused to violence.³⁰⁶ Backward from common notions of equity, under Pakistani laws and those similarly crafted, it is the mob reaction that makes arrest for

³⁰¹ Berkowitz & Eko, *supra* note 150, at 786.

³⁰² Dave Tombers, *Obama Accused of 'Sanctioning' Blasphemy Laws*, WND (Sept. 12, 2012), <http://www.wnd.com/2012/09/obama-accused-of-sanctioning-blasphemy-laws/>.

³⁰³ *Id.*

³⁰⁴ Michael R. Blood, *Players Behind Anti-Muslim Film that Incited Protests in Mideast Linked by Anger Toward Islam*, ASSOCIATED PRESS, Sept. 15, 2012, available at <http://news.yahoo.com/players-behind-anti-muslim-film-incited-protests-mideast-225011636.html>.

³⁰⁵ See, e.g., Philip Hensher & Gary Younge, *Does the Right to Freedom of Speech Justify Printing the Danish Cartoons*, GUARDIAN (Feb. 3, 2006), <http://www.guardian.co.uk/media/2006/feb/04/mainsection.garyyounge>.

³⁰⁶ *Id.*

blasphemy prima facie and legitimate.³⁰⁷ If there were no mass reaction to *Innocence of Muslims*, there could be no arrest. Thus, the violent outbursts to the video are permissible, even encouraged. Rather, it is the speech triggering the violence that is criminal.³⁰⁸

Many current blasphemy laws, both those of democratic countries and those of Islamic States, rest on the “incitement” language. The blasphemous speech must be intended to incite offenders.³⁰⁹ Delving deeper into the purpose of an “incitement clause” draws out some troubling conclusions. With the inclusion of an “incitement clause,” are nations simply concluding that violent reactions will inevitably take place following blasphemous speech? If blasphemy laws are meant to halt these violent reactions by halting blasphemy, are these laws condoning violence as the inevitable, or far more troubling, as a justified response to blasphemous speech?

As a consequence of these questions, to some observers, blasphemy laws appear to be a submission to mob violence. Pakistan’s blasphemy laws in particular have been condemned as perpetuating and even encouraging mob violence through continual arrests made in deference to mob reactions and mob demands.³¹⁰ Even democratic nations using blasphemy laws, though less concerned with domestic violence, demonstrate fear of reaction.³¹¹ These laws seek to punish speech that does no bodily damage to listeners in favor of the feared violent reaction inflicted by the Muslim mob. Viewed in this light, blasphemy laws take the distinct hue of an act of self-censorship coming from fear, not a protection of some human right not to be insulted for one’s beliefs.

This conversation also brings us back to general criminal law policy considerations. Both Western and Islamic blasphemy laws often hinge on public outrage and incitement.³¹² Traditional policy considerations for criminal

³⁰⁷ See Pakistan Penal Code, No. 45 of 1860, PAK. PENAL CODE § 298.

³⁰⁸ *Id.*

³⁰⁹ See, e.g., STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 13, 1998, BUNDESGESETZBLATT [BGBl] 3322, as amended, §166 (Ger.).

³¹⁰ See EUROPEAN CTR. FOR LAW & JUSTICE, RELIGIOUS FREEDOM IN PAKISTAN 2–3 (2012), available at <http://eclj.org/PDF/eclj-upr-pakistan-2012.pdf>.

³¹¹ Tom Henegan, *Dutch Blasphemy Law to Fall, Irish One May Follow*, JAKARTA GLOBE (Dec. 1, 2012), <http://www.thejakartaglobe.com/international/dutch-blasphemy-law-to-fall-irish-one-may-follow/559242>.

³¹² See, e.g., Defamation Act 2009 (Act No. 31/2009), pt. 5, para. 36 (Ir.); STRAFGESETZBUCH [StGB] [PENAL CODE], Nov. 9, 1998, BUNDESGESETZBLATT [BGBl] 1, as amended, §166 (Ger.); Pakistan Penal Code, No. 45 of 1860, PAK. PENAL CODE § 298.

law, however, cite quelling public or community outrage via the avenue of the due process as an effective and efficient way to control public reaction.³¹³ Laws that use public outrage as a precedent or measuring stick of outrage prior to conviction fly in the face of this long-standing public policy norm. In fact, by codifying outrage or incitement as an avenue for conviction, blasphemy laws are encouraging public unrest and mob violence; the louder the “outrage,” the more sure the indictment of the alleged offender.

Blasphemy law advocates understandably want to protect communities from insult and hate. However, by using outrage and incitement as a trigger for conviction or indictment, advocates are placing other individuals at risk of physical harm—both the alleged blasphemers and mob participants themselves. Mob violence is a powerful and unpredictable force. Laws that encourage physical mob behavior to garner an arrest for an act of speech can only be viewed as dangerous, short-sighted, and unacceptable.

4. *Arguments Against the Effectiveness of Current Domestic Blasphemy Laws*

With blasphemy laws serving the distinct object of suppressing social unrest and protecting human rights, the effectiveness of these laws is another concern. In fact, an August 2011 report by the Pew Forum on Religion & Public Life found that blasphemy and defamation against religions laws actually have the opposite effect on social unrest.³¹⁴ The report concluded that: “Globally, countries that have laws against blasphemy, apostasy or defamation of religion were more likely to have high government restrictions or social hostilities than countries that do not have such laws.”³¹⁵ Pew researchers found that among the fifty-nine countries globally whose laws contain anti-blasphemy, apostasy, or defamation of religions bans, events of “high or very high” social hostility or restrictions against religion directly stemming from religious issues occurred in an astounding fifty-nine percent of them.³¹⁶ Events of “moderate social hostility or restrictions against religion” occurred in an additional 22.5 percent of countries.³¹⁷ In contrast, in the 139 countries with no such blasphemy/apostasy/defamation laws, only seventeen percent had a

³¹³ KADISH, ET AL., *supra* note 123, at 79, 92–95.

³¹⁴ LAWS AGAINST BLASPHEMY, *supra* note 24.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

“high” hostility rating, and only twenty-four percent more had a “moderate” rating.³¹⁸

Not only does the evidence from the Pew Forum illustrate that hostilities and restrictions against religion are much more frequent in countries with blasphemy laws, it also points to a trend. In those fifty-nine countries with blasphemy laws on the books, from mid-2006 to mid-2009, hostilities have increased at a dramatically higher rate than in the 139 countries that have no such laws. In roughly twenty-eight percent (fourteen) of those countries hostilities against religion increased, and only decreased in 3.4 percent (two) of those fifty-nine countries.³¹⁹ In the 139 countries globally without blasphemy laws, hostilities only rose in six percent (nine), but hostilities also decreased in seven percent (ten).³²⁰

Generally, lumped statistics rarely tell the whole story. In this case, however, they do “suggest that the two phenomena often go hand-in-hand: Governments that impose laws against blasphemy, apostasy or defamation of religion also tend to have higher restrictions on religion”³²¹ and higher instances of social unrest stemming from religious issues. If blasphemy laws are not achieving their purposes of suppressing and reducing incidents of violence, outrage, and offense, the justifications for their international establishment and continued existence are nullified.

5. *Argument Concerning the Nature of Religions and Religious Debates*

The fifth and final argument against blasphemy laws deals with the nature of religions. Under the most palatable versions of blasphemy laws to Western democratic nations, a person can still be prosecuted if his speech is for the intentional purpose of defamation or incitement.³²² Blasphemy laws in democratic countries typically do not allow truth or a lack of damages as a

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.*

³²² *See, e.g.*, Defamation Act 2009 (Act No. 31/2009), pt. 5, para. 36 (Ir.). Traditional U.S. defamation laws, for a conviction, must satisfy four elements: (1) “a false statement purporting to be fact concerning another person or entity”; (2) “publication or communication of that statement to a third person”; (3) “fault on the part of the person making the statement amounting to intent or at least negligence;” and (4) “some harm caused to the person or entity who is the subject of the statement.” *Defamation*, CORNELL LAW SCHOOL – LEGAL INFORMATION INSTITUTE [LII], available at, <http://www.law.cornell.edu/wex/defamation>.

defense.³²³ Due to this alteration from original defamation law, the final argument notes that this type of law is unworkable in dealing with religion. Blasphemy laws may stifle opinion and debate within religious groups, eliminating traditional religious conversation, choice, and change.

A hallmark of many large religions, including Christianity and Islam, is fluidity and uncertainty. While the large concepts of these religions may have reached consensus among adherents centuries upon centuries ago, disagreements on more minor interpretations rage on. Religion is unique in this way from actions, events, or facts. Defamation is usually by definition an untrue statement.³²⁴ However, an untrue statement concerning religion is difficult and, at times, impossible to define.

Theological debates are often spurious, with one side accusing another of blasphemy and defamation.³²⁵ Disagreements on the interpretations of holy texts and theological principles are commonplace. For example, a Pentecostal Christian minister would preach from his Sunday morning pulpit that Mary, the mother of Jesus, following Jesus' birth, had sexual relations with Joseph, thereby producing additional children. A Catholic priest, on the other hand, preaching the doctrine of perpetual virginity, would call those who claimed that Mary ever had sex or children other than Jesus blasphemers and defamers.

Doubtlessly, Pentecostals and Catholics are both, by definition, Christians. These theological beliefs concerning Mary, however, could be condemned by the other sect as an "insult" or even an "incitement." Prosecuting Pentecostals because they believe that Jesus had a half-brother, born of Mary and Joseph's union, is an absurd suggestion. While some may consider this an academic debate, others undoubtedly view the Pentecostal preacher's words as an affront, insult, and inciting remark made about a sacred Catholic personage, Mary. This example illustrates the stifling of internal religious conversation and debate that blasphemy laws could bring. Theological debate and belief,

³²³ See, e.g., Defamation Act 2009 (Act No. 31/2009), pt. 5, para. 36 (Ir.); *Racial and Religious Tolerance Act 2001* (Vic) s 8 (Austl.); Libel Act, 1843, 6 & 7 Vict., c. 96, § 6 (Eng.).

³²⁴ See *Defamation Definition*, LEGAL INFO. INST. (CORNELL), <http://www.law.cornell.edu/wex/defamation> (last visited Oct. 17, 2013); but see Defamation Act 2009 (Act No. 31/2009), pt. 5, para. 36 (Ir.); *Racial and Religious Tolerance Act 2001* (Vic) s 8 (Austl.) (truth is not a defense).

³²⁵ See, e.g., *Do Jewish Blasphemy Accusations Against Jesus Prove He is God?* MUSLIM DEBATE INITIATIVE (Dec. 23, 2012), <http://www.muslimdebate.org/theological-arguments/christianity/73-do-jewish-blasphemy-accusations-against-jesus-prove-he-is-god> (demonstrating one occurrence where Jewish arguments about Jesus being blasphemous devolved into a defamation of those Jews).

inherent in most world religions, would be in grave danger of becoming a prosecutable offense.

Inherent in the freedom of religion, now universally recognized as customary international law,³²⁶ is the right to choose one's own belief system. Belief system is not defined as traditional, commonplace, or even currently in existence. Rather, the core of religious freedom is the ability to have whatever opinion, spiritual or otherwise, a person desires. A parallel issue is proselytism and the traditional free speech right to share beliefs with others in an attempt to convert them.

Consistently, international documents, the very ones that laid the foundations for modern international religious freedom norms, affirm the idea that no religion or ideas have the right to be frozen or protected from change. The 1948 Universal Declaration of Human Rights affirmed that: "Everyone has the right to freedom of thought, conscience, and religion; *this right includes freedom to change his religion or belief . . .*"³²⁷ The text of the ICCPR also stresses that the personal nature of this choice, "shall include freedom to have or to adopt a *religion or belief of his choice, and freedom, either individually or in community with others and in public or private . . .*"³²⁸ Additionally, Article 27 of the ICCPR guarantees to religious minorities "the right . . . to enjoy their own culture [and] to profess and practise their own religion . . ." ³²⁹ The 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief also repeated this same "choice" language of the ICCPR.³³⁰

One scholar noted that "discriminatory licensing or registration provisions on proselytizing faiths are a prima facie violation of the religious rights of the proselytizer—as has been clear in the United States since *Cantivell v. Connecticut* and in the European community since *Kokkinakis v. Greece*."³³¹ Proselytism too has long been recognized as an inherent human right.³³² A

³²⁶ See, e.g., ICCPR, *supra* note 33, art. 18.

³²⁷ Universal Declaration of Human Rights, *supra* note 32, art. 18 (emphasis added).

³²⁸ ICCPR, *supra* note 33, art. 18 (emphasis added).

³²⁹ *Id.* art. 27.

³³⁰ MALCOLM D. EVANS, RELIGIOUS LIBERTY AND INTERNATIONAL LAW IN EUROPE 227–88 (1997); Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. Doc. A/RES/36/55 (Nov. 25, 1981).

³³¹ John Witte, Jr., *A Primer on the Rights and Wrongs of Proselytism*, 31 CUMB. L. REV. 622, 627 (2001).

³³² *Id.*

tenet of nearly every world religion is conversion and the right to speak freely to others about your personal religious choices.

Demands for blanket protections for any particular religion contradict the freedoms of choice and openness that have emerged from international debate and cooperation over human rights in the last century. The assumption of these international documents promulgating religious freedom is that no religion has the power to force its beliefs on persons. Rather, a person has the power to choose her own belief paradigm. Proselytism and change are core religious concepts. Choice of belief also supports the fluid and diverse nature of religions. "Christian," as we have seen, may describe both a Catholic and Pentecostal that disagree on issues of core dogma. Blasphemy laws present the unique danger of disintegrating the freedom of opinion that exists, not only in choosing which religion one believes, but also in religious debate and choice within a religious community. Blasphemy laws, therefore, have the potential to take away the very religious freedoms they are intended to protect.

CONCLUSION

The difficulties inherent in blasphemy laws have no solution if the belief in the equal human rights freedom of religion and freedom of speech are also maintained. The best solution is also the most obvious one: Freedom of religion and freedom of speech can, and have been proven to, co-exist in the same society without restrictions.³³³ Simply put, the human rights, practical, and sociological problems with enacting and enforcing blasphemy laws far outweigh their potential human rights benefits. Blasphemy laws, both those protective of religions and those protective of individuals, are untenable.

Blasphemy laws have a multitude of evils accompanying them: (1) They lack authority and ability to define the offense, the problem of scope; (2) the protectionist nature of blasphemy laws when certain critiques and criticism of religion are necessary; (3) the submission to fear and violence that may be behind the enactment of blasphemy laws; (4) the statistics that reveal that blasphemy laws have an inverse effect on social hostilities relating to religion; and finally, (5) the danger of limiting and vilifying religious sects.

³³³ This is essentially the American model. Freedom of speech and freedom of religion, both with minimal restrictions, coexist with social or religious disagreement.

Because these difficulties exist within blasphemy laws, the reasoning behind their increasing enactment in recent years is difficult to define. One half of this equation, however, is relatively easy to answer. Ideologically, the member states of the OIC have revolted against outside, secular influences. This re-emphasis trenching on the Islamic faith in these countries, notably in the Middle East and Northern Africa,³³⁴ directly correlates with the enactment of blasphemy laws in their criminal codes. The OIC would limit freedom of speech internationally in order to protect their Islamic faith.

The second half of this equation, the blasphemy laws promulgated by Western democratic countries, proves the more difficult portion to explain and understand. Though these countries have traditional and current laws protecting the freedom of speech as an inherent human right, they limit this right in expanding circumstances. The desire to protect persons from undue attack and incitement on the basis of their religious beliefs makes sense on a variety of levels. However, the danger of these laws rest in the interpretations of “incitement” and “offense.” These laws lay open avenues of conviction for speech, debate, and the free-flow of ideas that is necessary in a democratic society. This danger played out in the Australian *Catch the Fire Ministries* case, where criticism of Islam’s jihad led to one Christian minister’s prosecution.³³⁵

The explanation for these blasphemy laws rests on changing norms. The freedom of speech right to insult, right to criticized, and right to disagree is falling by the wayside with rapidity. Rising sensitivities to personal religious choices have created a right to not be offended.³³⁶ The age of completely protected speech, exemplified in the United States by the *Joseph Burstyn, Inc. v. Wilson* case, may be drawing to a close internationally.³³⁷ The U.N. is placing the right of a person to live and worship in any way he or she sees fit

³³⁴ See LAWS AGAINST BLASPHEMY, *supra* note 25 (reporting that sixty percent of the countries in North Africa and the Middle East have some form of blasphemy/defamation of religions law); see also *supra* note 83 and accompanying text.

³³⁵ *Catch the Fire Ministries, Inc. v Islamic Council of Victoria, Inc. (Vic)* [2006] VSCA 284 (Austl.); *Islamic Council of Victoria, Inc. v Catch the Fire Ministries, Inc.* [2003] VCAT 1753 (Austl.); *Islamic Council of Victoria, Inc. v Catch the Fire Ministries, Inc.* [2005] VCAT 1159 (Austl.); *Islamic Council of Victoria, Inc. v Catch the Fire Ministries, Inc.* [2004] VCAT 2510 (Austl.).

³³⁶ See John W. Whitehead, *The Right Not to be Offended: The Supreme Court and Religion*, HUFFINGTON POST (Mar. 22, 2011), http://www.huffingtonpost.com/john-w-whitehead/the-right-not-to-be-offen_b_508513.html.

³³⁷ *Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

as more important than his or her traditional right to express herself as he or she pleases. Blasphemy laws are a natural outgrowth of this skewed belief paradigm.

Perhaps best encapsulating the immediate danger free speech faces on the international stage, law professor Jonathan Turley noted:

Around the world, free speech is being sacrificed on the altar of religion. Whether defined as hate speech, discrimination or simple blasphemy, governments are declaring unlimited free speech as the enemy of freedom of religion. This growing movement has reached the United Nations, where religiously conservative countries received a boost in their campaign to pass an international blasphemy law.³³⁸

This modern trend is dangerous. A free society remains free through knowledge. For the transfer of knowledge, free speech is obligatory and crucial. Restrictions on freedom of speech destroy this interchange of ideas, even if this sharing critiques. Both freedom of religion and freedom of speech can coexist without restricting one another unnecessarily. Before blasphemy laws strip away long-standing international human rights, a stand for the importance and fundamental nature of free speech must be made.

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³³⁸ Jonathan Turley, *Just Say No to Blasphemy: U.S. Supports Egypt in Limiting Anti-Religious Speech*, JONATHAN TURLEY BLOG (Oct. 19, 2009), <http://jonathanturley.org/2009/10/19/just-say-no-to-blasphemy-u-s-supports-eygpt-in-limiting-anti-religious-speech/>.

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