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AGAINST GOD AND SOVEREIGN

A STUDY OF

BLASPHEMY AND SUNDAY LAWS

A thesis
submitted in partial fulfilment
of the requirements for the Degree
of
Master of Law
in the
University of Canterbury
by
E. T. Higgins

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AIM: The aim of this manuscript is to show the historical development of blasphemy and Sunday laws, their relationship, their similarities and differences, their origins and justifications, their importance in the area of religious liberty.

The study addresses itself primarily to English and New Zealand law, with the law stated as at the 30th September 1990.
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INTRODUCTORY SUMMARY OF THIS MANUSCRIPT

Chapter 1

Traces the development of blasphemy as a crime, and laws regulating behaviour on Sunday, from their theological beginnings in ancient Israel, to the end of Tudor England. Although it covers many centuries, the resource material available is limited.

Both offences arose from Jewish religious laws which were subsequently adopted by the early Christian church, and institutionalised in later Roman law. The spread of Christianity led to these two subjects being recognised and applied by Anglo-Saxon law makers commencing with Ine, King of the West Saxons in the eighth century. The Norman conquest of England resulted in canon law also being established, recognised and applied in the ecclesiastical courts, which administered all religious laws including blasphemy and Sunday laws, the application and interpretation being by ecclesiastical lawyers in holy orders. By the end of the Middle Ages the supremacy of the Pope and the binding force of the canon law was recognised in England.

The Reformation brought great changes in mans' attitude to religious liberty, and this resulted in a search for justification for the laws restricting religious freedom; and so arose, the idea of Christianity being part of the law of England.
Chapter 2

This deals with the period 1603 to 1715, during the stormy religious controversies of the Stuarts. It saw the final victory of the crown to assume jurisdiction in matters of theology. This followed from the abolition of the Court of High Commission in 1640, and the gradual eroding of the ecclesiastical courts' jurisdiction. It was at this time that the "breach of the peace" argument was first used, and this argument has continued ever since as part of the raison d'être for particularly blasphemy and to a lesser degree, Sunday laws. The common law was being supplemented with statute law. Particularly important were the Sunday Observance Act 1677, and the Blasphemy Act 1697 both of which continued in force for decades. The idea of Christianity being part of the law of England was reinforced by cases, and commentaries, particularly after the Restoration.

Chapter 3

From 1714 to 1837. For much of this time there seems to have been little development of interest in either blasphemy of Sunday laws. The rather quiet era of the early Georges' is perhaps best summed up in the dicta of Lord Mansfield: "the common law of England, which is only common reason, or usage, knows of no prosecution for mere opinion." By mid century the courts were becoming increasingly reluctant to enforce religious rules, particularly when it would lead to ridiculous results. Nevertheless Christianity was regarded as part of the common law, and could accordingly be enforced by that law. It required a period of national crisis to trigger off a reaction to the rather enlightened
attitude of the age of reason. This was provided by the French Revolution and Napoleonic Wars. By *R. v Williams* (1797)¹ it was said that punishment of blasphemy was necessary to protect society, the crown and the established church. Civil societies were preserved by religion. This was really an argument of public policy, the same reasons given for upholding Sunday laws; viz: *Taylor v Phillips* (1802).²

By 1837 one could say that both Parliament and the courts regarded the mere expression of views critical or certain doctrines of Christianity, particularly of the Church of England, to be blasphemous, even when put forward soberly and sincerely without any evidence of abuse or scurrility; indeed the courts went further, so that no protection would be afforded to literary works which were regarded as religiously unorthodox, or critical of established religion. Similarly in Sunday laws it was the Anglican Church which received encouragement and protection, the laws were not made for the help of the non-conformists. The public interest was ultimately the all important test.

Chapter 4

In chronological terms, from 1837 to 1921. The judicial tests and interpretations remained similar to those of earlier times, but the most marked change was the lack of enforcement. In 1840 a bookseller, Hetherington who had been charged with selling blasphemous material, tried to suggest that the basis of the offence, i.e. Christianity as part of English law, was not in reality based on anything more substantial

¹ 26 St.Tr. 654.
² 3 East 155.
than certain obscure obiter dicta, but the justification was far too firmly established to be discredited. However with the gradual liberalisation of Victorian Britain, for example freeing of restrictions on non-conformists and Catholics, some change became inevitable. While the decided cases (for example R. v Bradlaugh and others (1883)) continued to take a relatively conservative approach, social conditions and attitudes were changing so rapidly that by the beginning of the twentieth century blasphemy and Sunday laws were becoming less relevant. Lord Coleridge defined blasphemy as "the wilful intention to insult and mislead others by means of licentious and contumelious abuse offered to sacred objects." A malicious and mischievous intention was necessary.

The turn of the century brought the first reported New Zealand case of blasphemy, as well as a host of prosecutions for Sunday breaking. But the case law in the Dominion is not important. No great legal principles and discussed, these being left to the courts of what was then regarded fondly as the "mother country". The cases turned primarily on their facts. By this time also there were two tests formulated for blasphemy - "intention to insult religious feelings of other" and "likelihood of a breach of the peace".

Chapter 5

Since the early years of the twentieth century the courts have more and more been prepared to leave the discussion of questions of religious doctrine, to those whose habits and education, are most likely to form correct conclusions. As much freedom of discussion in religious matters

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3 Cox C.C. 217.
as possible has been consistently recognised as is consonant with the prevailing social climate. A successful prosecution for blasphemy in 1978 prompted an appeal to the House of Lords in Lemon's case, but while the Law Lords carried out a further appraisal of the law, no new principles were enunciated, and the case may well be the last effort to enforce a little used law, rather than the beginning of a new popularity. Similarly with Sunday laws. These have become less and less important as the religious and social climate has changed, and what few prosecutions have proceeded have been primarily for labour rather than ecclesiastical reasons.

[1979] 1 All ER 898.
CHAPTER I

In The Beginning

According to Genesis 1:1 "In the beginning God created the heaven and the earth".¹ From this event, strange as it may seem, has stemmed both the concept of a holy day of rest, and the idea of restrictions on the way in which a person may discuss the Christian Deity. In essence these amount to Sunday worship and blasphemy. It is perhaps surprising that even in the late twentieth century these laws are still part of the criminal calendar. To understand why, it is necessary to look at the origins of both, and their relationship to social, historical, and religious events. While the outline of the study will be primarily chronological in form, at times because it is an historical approach there will be some displacement of material. A chronological attitude can lead to lack of flexibility, but it is hoped there can be a happy combining of historical with social, religious with legal, so that the essentially legal basis of this study is preserved.

One does not need to go into the origins of Jewish theology very far to discover that the ancient Israelites had their own laws, governing both blasphemy and a holy day which they called sabbath. According to Exodus 20:8–11 (traditionally ascribed to Moses the law giver of Israel):

Remember the sabbath day, to keep it holy. Six days shalt thou labour, and do all thy work: But the seventh day is the sabbath of the Lord thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates: For in six days

¹ King James Version – Authorised Version.
the Lord made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the Lord blessed the sabbath day, and hallowed it." 

This law of Israel can be traced as the basis of many laws relating to restrictions on worship, from early Christian times to our own day, and from the Roman Empire to modern New Zealand.

The fourth commandment as it is called, is preceded by this verse:

Thou shalt not take the name of the Lord thy God in vain; for the Lord will not hold him guiltless that taketh his name in vain.

From this sprang the Jewish laws relating to blasphemy, and ultimately Christian laws, which required men not to dishonour God.

Even a superficial reading of the New Testament, indicates that the two concepts of Sabbath and blasphemy had become firmly entrenched both in religion and law.

With New Testament times came a change in attitude on the part of some Jews towards the Sabbath. Christ taught a more positive approach. It was, he said lawful to do good on the Sabbath, and this typifies his general attempt to blow away the legal cobwebs which had ensnared the seventh day. The attitude to blasphemy did not however change very much, except that Jews and Christians each accused the other of being guilty of indulging in it.

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2 Authorised version.
3 The justification is of course completely theological.
4 Exodus 20:7 A.V.
Early Christian Attitudes

It is not clear from the New Testament that the earliest Christians were very strict about Sabbath observances. It is equally clear however that Sabbath observance probably meant worship on the Jewish Saturday. As time passed however, custom changed and a study of the early Christian fathers indicates that Christians in the earlier centuries after Christ did gradually turn to worship of God on Sunday, the justification being that it was a memorial to Christ's resurrection, which had been on the first day of the week.⁵

During this time blasphemy was viewed with abhorrence by Christians and Jews alike. A similar concept was also recognised by Greeks and Romans as applying to their religions. Thus while blasphemy has had an almost universal application to man's religions, Sabbath breaking has basically been of Judaic origin. It is interesting to note that while religions based on Jewish theology (e.g. Moslem, Christian) place great emphasis on a sacred day of worship, other religions have been free from such shackles.⁶

⁵ The apologists for this viewpoint referred to Revelation 1:10 where it states that John was in the Spirit on the Lord's Day, as being an early example of this change from Saturday to Sunday.

⁶ For a detailed treatment see Samuele Bacchiocchi From Sabbath to Sunday. (Rome: Pontifical Gregorian University, 1977), 132-165.
Constantine and After

By the time of the Emperor Constantine, Christianity was powerful enough to influence the civil powers into passing an edict, "commanding all judges and inhabitants of cities to rest on the venerable day of sun". This had followed an earlier "Edict of Toleration" A.D. 313 which granted "to Christians, and to all, the free choice to follow that mode of worship which they may wish".

The first Sunday law was meant by Constantine to provide unity in the Empire, to combine elements of Christianity whose adherents had for long worshipped on the "Lord's Day", as a weekly festival in honour of Christ's resurrection, and a powerful religious group commonly called "Mithraists" who worshipped the sun as a deity.

Although the law assisted Christianity, it was not a "Christian" one; it made no mention of "Lord's Day". It was not applicable to rural Romans, and carried no penalties for its breach. In July A.D. 321 Constantine decided to relax his earlier decree:

As it seemed unworthy of the day of the sun, honoured for its own sacredness, to be used in litigations and baneful disputes of parties, so it is grateful and pleasant on that day for sacred vows

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8 Ibid, 402.
9 The actual wording of the law proclaimed on March 7, A.D. 321, was "Let all judges and all city people and tradesmen rest on the venerable day of the sun; but let those dwelling in the country freely and with full liberty attend to the culture of their fields, since it frequently happens that no other day is so fit for the sowing of grain or the planting of vines; hence, the favourable time should not be allowed to pass, lest provisions of heaven be lost." - Code of Justinian, Book 3, Title 12, Law 3.
to be fulfilled. And, therefore let all have the liberty on the
festive day of emancipating and manumitting slaves, and besides
these things let not public acts be forbidden.\textsuperscript{10}

This seems to have been the ancestor of all later laws prohibiting
Courts from sitting on a Sunday. "Dies solis" or "day of the sun" should
not be used for litigation. Thus "Dies solis" became "Dies domini" or
"Lord's Day". It was not however until late in the fourth century that
the terminology "Lord's Day" first appeared in Roman law, in a decree of
the three co-emperors Theodosius, Gratianus and Valentinianus.\textsuperscript{11} This
and later laws were to show the state using Sunday laws, and law
prohibiting blasphemy, to ensure that all were obedient to Christianity
which in A.D. 380 became the official religion of the empire under
Theodosius. It was also about this time that non-Christians were being
prosecuted (persecuted would be a more appropriate term) for blasphemy,
because of their observance of their own faiths, rather than the official
religion, Christianity.

In A.D. 538 the Third Council of Orleans forbade rural work on a
Sunday, such as plowing, cultivating vines, reaping, mowing, threshing,
clearing away thorns, or hedging. The punishment was to be such as the
ecclesiastical authorities decided. This was followed in A.D. 585 by the
Second Council of Macon's decision threatening advocates with
cancellation of their privilege of pleading the cause if done on the

\textsuperscript{10} Code of Theodosius, Book 2, Title 8, Law 1.

\textsuperscript{11} "On that day of the sun, properly called the Lord's Day by our
ancestors, let there be a cessation of lawsuits, business, and
indictments; let no one exact a debt due either the state or an
individual; let there be no cognizance of disputes, not even by
arbitrators, whether appointed by the courts or voluntarily chosen. And
let him be adjudged notorious but also impious who shall turn aside from
an institute and rite of holy religion." - Code of Theodosius, Book 8,
Title 8, Law 3.
"Lord's Day", and the farmer was to be soundly beaten with whips, if he placed a "yoke on the neck of this cattle" on the "Lord's Day".

Charlemagne's Council of Mayence of A.D. 813 decreed that "Lord's Day":

shall be observed with all due veneration and that all servile work shall be abstained from and that buying and selling may be less likely to happen.\(^{12}\)

Anglo-Saxon Times

Thus by the time Christianity came to England, missionaries were imbued with a spirit to ensure the correct observance of worship. Even prior to Augustine landing in Kent in 597, canon law had laid down that all Sundays were to be observed as sacred, as well as other special days specified by the Church. The Latin phrase "Dies Non Juridici" comprehended the laws relating to enforcement of Sunday observance. Law were passed in the time of Edward the Elder, Canute, and Edward the Confessor, which strengthened the hand of the Church. That passed in the reign of Edward the Confessor is stated in these words:

And therefor now Dies Dominicus though it be in terms, is not dies juridicus.\(^{13}\)

One of the earliest codes to deal with regulation of worship is that contained in the ordinances of Ine, King of the West Saxons, from 688 - 725. The laws are partly civil and ecclesiastical, and provided amongst other things for penalties for the neglect to have a child baptised within thirty days after its birth, for working on Sundays, and

\(^{12}\) Council of Mayence.

for the non-payment of Church scot at Martinmass. At the same time King Wihtred of Kent passed similar laws relating to Sunday observance, and also regulation of what could be spoken and written of Christianity.\textsuperscript{14}

In the time of Aethelwulf the second King of all England, the decay of learning had led to a decline in religious standards. Aethelwulf in 840 was much troubled by both heresies, and the non-observance of Sunday. An Anglican priest had prophesised that unless men kept Sunday more strictly, and treated as sacred the ordinances of the Church, the pagans would waste the land with fire and sword. This led the king in concert with his advisors, Bishops Ealhstan and Swithun to ensure a stricter observance of the laws of Ine, and Wihtred. While the laws were on the statute books, they were practically unenforceable because of the lack of communications in the various Anglo-Saxon kingdoms.\textsuperscript{15}

Later Alfred the Great incorporated many of the laws of Ine into his new code of laws. The code contained both ecclesiastical well as civil laws, and commenced with a paraphrase of the ten commandments. From this, theologians and lawyers were to argue at a later date that Christianity was the edifice upon which the laws of England were built. Alfred's son Edward the Elder (902 - 924) followed his father's decree by a series of ecclesiastical laws, concerned with payment of tithes, and regulation of worship. Markets on Sunday, working on a Sunday, or holy festival, and disregard of a lawful fast were all punishable by fines. It was also decreed that until the holy day had passed no ordeal or compurgation was allowed, or the execution of criminals.


\textsuperscript{15} Ibid, 322.
William Hunt in Volume I of Stephen's History of the English Church states:

Every day the priest said mass, and on Sundays and festivals the service was performed with greater dignity. The observance of Sunday was strictly enforced by the civil law, and all work was forbidden both to freeman and slave, under heavy penalties. The Church taught that all men were to attend mass on that day, and this duty was to be performed even when a man was on a necessary journey. 16

The law went further, as with the freemen, the slave was ordered to rest of Sunday and Church festivals, and if his master forced him to work, a law of Ine gave him his freedom, though a later law punished his master with a fine only.

Heresy was normally used as a substitute for blasphemy at this time, because it was much easier to define and as a law covered nearly all spiritual misdemeanours.

The religious fervour of people and clergy alike was obviously a fluctuating thing in Anglo-Saxon times, for in the reign of Aethelred the Unready (987 - 1016). Dunstan, Archbishop of Canterbury, found it necessary to enforce the law relating to Sunday observance, blasphemy and heresy. 17 The Anglo-Saxon kings were strict about Sunday observance, as can be seen from ordinances of Edgar and Canute. The preface usually reads thus:

which King Eadgar has enacted... for the glory of God. 18

16 Ibid, 322.
17 Ibid, 323.
The ordinances included such provisions as:
"And every Sunday shall be observed as a festival from noonday on Saturday till dawn on Monday under pain of the penalty which the written (continued...)
Canon Law and Local Law

Canon Law was Church law. Legal rules which grew up within the structure of the Roman Catholic Church. By the ninth century the church hierarchy was attempting to enforce their ideas throughout Western Europe. This tendency was also present in England. When the Normans arrived in England, they brought with them a system of law which was permeated with the Canon Law of Rome. The Middle Ages show a successful welding of this with the Common Law of England. The Norman-French system of law relied heavily upon the Latin approach to the state and the people (i.e. that the state existed primarily as God's instrument on earth to regulate the political affairs of men).

Bracton defines the true relationship between Canon and secular law in this way:

the Pope... in spiritualibus super omnibus habet ordinariam jurisdictioinem (in spiritual things he has an ordinary jurisdiction over all men) just as the king had an ordinary jurisdiction over temporal things in his realm. 19

Often of course laymen were restless under these claims by the Canon Law, and eventually this was one factor in the Reformation. The dispute between Becket and Henry II is an example of the difficulties

18(...continued)

law prescribes; and every other feast-day according to the regulations appointed for it." - p.23.
In 1020 Canute published a proclamation which included:
"And further shall we admonish all men to keep and observe the Sunday festival with all their might from noon on Saturday till dawn on Monday...
"And all men, both rich and poor, shall attend their churches and make supplication for their sins, and zealously keep every prescribed fast, and diligently celebrate the saints days which the priests enjoin upon us." - Ibid, p.145.

over defining the boundaries of spiritual and temporal law. The benefit of clergy which resulted from this dispute shows how powerful was the Church. Ultimate appeal went beyond the boundaries of England, to Rome itself, where the Curia sat on appeal on ecclesiastical matters. For much of the Middle Ages the Common Law Courts enforced Papal legislation, and all aspects of Canon Law. This continued until the fourteenth and fifteenth centuries when the Common Law judges acted to issue prohibitions on ecclesiastical courts dealing with ordinary contracts and title to land. Appeals to Rome were finally abolished in 1533.

Thus after the Conquest the Canon Law was established by the ecclesiastical courts, and it became the duty of the ordinary courts to support the decrees of the Church courts. The law administered by the ecclesiastical courts was extremely wide, because Canon Law applied to all, whether members of holy orders or not. By the thirteenth century however the king and nobles were becoming restive under Church dominion, and were refusing to accept some of its claims; the period coincided with the end of appointments of priests and other clerics as judges. It is clear from a study of Bracton, and the Yearbooks that Sabbath breaking and blasphemy were exclusively within the jurisdiction of the ecclesiastical courts, but there was a tendency by the fifteenth century for the common law Courts to usurp this, particularly after the Reformation, when the sovereign became head of the Church, and they were the king's courts which administered the laws throughout the country.
In the Middle Ages

During the Middle Ages there seems a dearth of laws passed relating to Sunday and blasphemy. The authorities were content to rely upon Canon Law. Canon Law was recognised and applied by the civil courts. In a case of quare impedit, in the Year Book, 34H. 6 fo. 38 (1458), it was asked how far the ecclesiastical law was to be respected in a common law court:

It was proper for us to respect the laws which the members of the holy Church have in ancient manuscripts, because they are the general sources from which all laws are drawn. Thus, Sir, it is necessary for us to be acquainted with ecclesiastical law, and in like manner the judges of the ecclesiastical courts are obliged to understand our law; in consequence, Sir, if it can be shown to us that the ecclesiastical court has decided as a court of civil law would have done in the same case, then we ought to deem the judgement good; but if a civil law court would have decided otherwise, the judgement of the ecclesiastical court must be deemed erroneous.

This is also one of the first reported English cases, where an English judge groped towards the maxim "that Christianity is part of the law of England". The reason may be because the civil courts were prepared to recognise that the ecclesiastical courts usually had jurisdiction over such matters. William I in his "Episcopal Laws" had laid down clear divisions between lay and spiritual courts.\(^{20}\) This was the origin of the Bishop's Courts. William was careful however to ensure

\(^{20}\) Clause 2 of William's "Episcopal Laws" reads thus: "I therefore command and enjoin, by my royal authority, that no bishop or archdeacon shall henceforth hold pleas affecting episcopal jurisdiction in the hundred court, nor shall they bring forward any case which concerns spiritual jurisdiction for the judgment of laymen, but whoever has been summoned for some suit or offence which falls within the province of episcopal jurisdiction shall appear at the place appointed and named by the bishop for the purpose, and shall make answer concerning his suit or offence, and he shall make amends to God and his bishop, not according to the decree of the hundred court, but in accordance with the Canon Law and the laws established by the authority of the bishops." - A.J. Robertson, The Laws of the Kings of England. (Oxford: University Press, 1935), 235.
that execution of the judgment of religious courts stayed firmly in the hands of the king, or his agents, such as the sheriff. Initially the bishop could only inflict spiritual censures, but Magna Carta and later legislation enabled the ecclesiastical courts to have a more coercive role.

There also arose at this time what was termed a National or Provincial Council, and which became after the Reformation a Convocation. This was a type of ecclesiastical court, and both it and the church courts acted to suppress offences such as heresy, blasphemy, and Sabbath breaking. According to Stephen's "History of Criminal Law in England" the most important offences tried in connection with religion were:

heresy and blasphemy, neglect of church services, and ecclesiastical ceremonies, contempt of the clergy, and neglect by the clergy of clerical duty. 21

Reported cases of the proceedings of church courts are negligible, but some interesting material is to be found in Archdeacon Hale's "Criminal Precedents" published in London in 1847. In 1480 a priest, by name Ambrosius de Borageos was found guilty of saying contemptuous words of God, and Mary. He was ordered to offer a wax candle weighing two pounds to his church. If he was convicted again the penalty was fixed in advance at ten pounds of wax for his parish church. In the case of Draper 1587, it was reported that he did not accept the doctrine of the immortality of the soul, this was accepted as being blasphemy, and it was accordingly ordered that he should meet with three of the faithful in the parish church, who were to:

persuade him of the immortalitie of the soule, and to certifie under their own hands of his full persuasion of the immortalitie of the soule.\textsuperscript{22}

Sabbath breaking was also apparently a problem. In 1499:

Thomas Bern, in Chyklane, auctepts notalur quod violat sabbatum: et non audit divina, sed vadit aucupando tempore divinorum et est suspectus de heresi.\textsuperscript{23}

English Canon Law provided penalties, but these went no further than ecclesiastical censures, excommunication, deprivation of ecclesiastical benefices, and imposition of penance. It is interesting to note that Canon Law in the Middle Ages was dominated by the theory that the Roman Empire survived in Western Europe with the Holy Roman Empire.

**Attitudes of Rome**

When on studies the attitude of Rome to ecclesiastical violations, it is clear that violators of Sunday, and blasphemers were subjected to pressure. The pope decreed that rich men should be punished for sabbath breaking, with loss of half of their estates; and if they were obstinate they should be made slaves. The peasants were to suffer perpetual

\textsuperscript{22} Archdeacon Hale, *Precedents in Criminal Causes*. (London: Carlisle, 1847), 1, 193, 69.

\textsuperscript{23} Thomas Bern, in Chyklane, is noted because he violated the sabbath and did not hear the word of God, but went birdwatching at the time of the divine rites and is suspected of heresy. One interesting example of profane swearing (which came under blasphemy) is cited by Hale at p.213, that of Margaret Jones, "beings used to much swearing, so she layde violent hands and smote the vicar of the said parish reproving her for her swearinge, and followed him, swearinge most devilishly, from the one ende of the town to the other." (London: Carlisle, 1845), p.33.
banishment. Miracles were also brought in to support the church’s stand.  

Later, directions were given that the parish priest should admonish the violators of Sunday and wish them to go to church and say their prayers, lest they bring some great disaster on themselves and their neighbours. One ecclesiastical council brought forward the argument, that because persons had been struck by lightning while labouring on Sunday, it showed God's displeasure at men breaking the sabbath. "It is apparent" said the prelates "how high the displeasure of God was upon their neglect of this day". The council asked that priests, ministers, kings and princes:

use their utmost endeavours and care that the day be restored to its honour, and, for the credit of Christianity, more devoutly observed for the time to come.  

Rome on more than one occasion during Medieval Times besought the assistance of the secular power to enforce the ecclesiastical law, both in respect of Sunday observance and blasphemy. The latter however, never achieved the importance of the former. An interesting episode is described in Roger de Hoveden "Annals" concerning attitude of worship towards the close of the twelfth century. A zealous advocate of the purity of Sunday worship visited the churches in England. He brought with him a roll purporting to be from God, which contained commands for Sunday observance, and threats of punishment for the disobedient. This

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24 Thomas West, Historical and Practical Discourse of the Lord's Day:— "It was reported that as a husbandsman who was about to plow his field on Sunday cleaned his plough with an iron, the iron stuck fast in his hand, and for two years he carried it about with him, to his exceeding great pain and shame."

precious document was said to have been found in Jerusalem, upon the alter of St. Simeon in Golgotha. In fact its source was the pontifical palace of Rome. The role forbade labour between three o'clock on Saturday afternoon, till sunrise of Monday; its authority being declared by many "miracles".  

Scotland did not escape Sunday laws at this time, one kingly edict declared that:

Saturday from twelve noon ought to be accounted holy, and no man, from that time till Monday, shall engage in worldly business."

The basis of such laws, which extended ecclesiastical worship time, may not however have been religious at all. Some enlightened medieval kings who passed such laws, may well have been creating recreation time for their subjects, for the sake of physical wellbeing, rather than extra time for religious observance. If this was their motive, it would be an early example of justification of Sunday laws on the ground of resting from labour. In Scotland certain kings such as James I and James IV, encouraged religious observance with the avowed aim of giving their subjects the opportunity of increasing their health and wellbeing.

It appears therefore in summarising the Middle Ages, that because of the influence of the Canon Law, that the early laws relating to

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It was reported that persons labouring beyond the appointed hour were stricken with paralysis. A miller who had attempted to grind corn, saw, instead of flour, a torrent of blood issued forth; a woman who placed dough in the oven found it raw when taken out, though the oven was very hot. But another who had dough prepared for baking at the ninth hour, but who had decided to set it aside till Monday, found, the next day, that it had been made into loaves and baked by divine power. With such absurdly superstitious tales was Sunday observance advocated.

27 Ibid, 147.
religious observance and belief passed in the 4th, 5th and 6th centuries A.D. were applicable in England. The supremacy of the Pope and the binding force of the Canon Laws was recognised not only in England, but throughout Western Europe. Where the jurisdiction of the ecclesiastical courts was admitted, the state would automatically carry out the sentences imposed.

The Reformation

This traditional authority of the church was to bring upheaval and conflict in Reformation times, and one can trace efforts by the states to assert itself even earlier (e.g. The Sunday Fairs Act, 1440 [this is still in force]). It is fair to contend however that until the Reformation the church had almost exclusive jurisdiction to try offences relating to worship, the function of the state being limited to enforcing the decrees of the church. England recognised and obeyed the law of the church, which was the papal Canon Law. Both in medieval and Tudor times, the church and state were regarded from many points of view as being almost one society with similar objects.

According to Holdsworth:

The church must help the state to maintain its authority, and the state must help the church to punish non-conformists and infidels. The church was the church of the state, and membership of it was therefore a condition precedent for full rights in the state; the king was the supreme governor of the church; and the law of the church was the king's ecclesiastical law. But, if the church is thus regarded as an integral part of the state, if the church's law is as much the king's law as the law of the state, a fortiori

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26 For a full discussion see Holdsworth "A History of English Law", Volume 1, 588.
Christianity must be regarded as part of the law of England. In fact not only Christianity, but also that particular variety of Christianity taught by the Anglican church was part of that law.

It was clear that the church, the king, and Parliament were all part of the state, an integral section of the law of England. Thus the theory was that for a citizen to obtain the complete protection of the law, he had to live in conformity with the law, including obedience to ecclesiastical law. Before the Reformation the religious non-conformist faced severe penalties, even death; this was certainly the case with the write de haeretico comburendo.

The Tudor Period

With the period of the Tudors one can trace a gradual evolution of the doctrine that the monarch was the fountain head of English law. He became this by assuming the role of the head of the church. No longer did England rely upon Rome for its Canon Law; the king in concert with Parliament decided such issues. There was no change however in the attitude towards non-conformity in the exercise of religious worship, and the expression of opinion on religion. The church remained part of the state, the Anglican faith was protected and fostered by the law, just as earlier the Medieval church had received the same privileges. The difference was merely in the domicile of the head. It was from this time however that the ecclesiastical law more and more followed the common law, and not vice versa as had been the case in the Middle Ages.

29 My emphasis.

Mr Justice McCarthy in a talk published in 1957\(^{31}\) states that English common law is based on the ancient Canon Law of Rome, which is itself based on Christianity, and hence the maxim "Christianity is part of the Law of England". This is correct so far as origins go, but as early as the Tudor period, the common law was quietly supplanting Canon Law. It is also interesting to note that it is from this time that one observes the rise of cases at law, which gradually built up the hierarchy of principles which now govern both blasphemy and Sunday laws. This is explicable both in religious and social terms. From the Reformation men were demanding liberty to worship, according to their conscience, and because of this were prepared to argue the rights of their new found liberty in the common law courts. The ecclesiastical courts were becoming, for the purposes of enforcing religious uniformity, like the bumble bee without its sting.

Henry VIII with the Six Articles 31 Hen. 8. c.14, 1539, provided penalties for heretics aimed at religious dissenters. It was important because it in great measure secularised ecclesiastical offences, by setting up a special Commission of Investigation.\(^{32}\)

This secular influence is seen in the Statute 5 - 6 Edw. VI, c.3, 1552 which ordained certain days including Sundays and "that none other day shall be kept Holy-day, or to abstain from lawful bodily labour." By Section 6, works of necessity were permitted on holy days. Sir Edward


\(^{32}\) Until this time all theories of law and government in Western Europe had proceeded on the premise that there were no such entities as national states, all nations were under God and His Holy Roman Church which had final authority in all matters, spiritual as well as political. Thus Christian principles were the law, and this received its most profound expression in the writings of St. Thomas Aquinas.
Coke speaking of this and other legislation said:

Dies juridici (except it be in assizes) are only in tearme. And their be also in tearme dies non juridici. As in all the four tearmes the Sabbath Day is not dies juridicus for that ought to be consecrated for Divine Service.\(^\text{33}\)

Coke comments that even earlier than this time the Judges themselves decided to set apart these days for the purposes of religion, no doubt in deference to the ecclesiastical authorities. This may be the origin of the observance by the courts of dies non juridici occurring in term time prior to the Statute of 5 – 6 Edw. VI, c.3.

When Mary I succeeded her brother she repealed many statutes passed in his and his father's reign. She also revived those acts relating to heresy. These latter statutes with others passed by Mary were formally abolished when Elizabeth ascended the throne. The statute I Eliz. c.1 (1559) gave jurisdiction for the trial of ecclesiastical offences to a Court of High Commission. At the same time by the Act of Uniformity 1558, the Prayer Book was revived, and punished any "ridicule or depraving of the book", with penalties, upon a third conviction, to imprisonment for life. It seems that this protection for the Prayer Book of Edward VI was necessary because the ordinary laws relating to blasphemy did not cover the situation; presumably because blasphemy normally related to the Bible, and prior to Tudor times not to ordinary religious books. At the same time punishment was provided for everyone who did not attend public worship in the prescribed form regularly, the penalty being 12 pence for every absence, and the censure of the Church. By 12 Eliz. c.1, S.5 (1581) the penalty for not going to church was

\(^{33}\) Institutes, Volume 4, p.13.
increased to 20 pounds per month.\(^4\) In 1593 an "Act to retain the Queen's Majesty's subjects in their due obedience" was passed. Any person who obstinately refused to go to church, and persuaded others to withstand the Crown's ecclesiastical authority, or persuaded another person not to attend church, was to be imprisoned until he conformed. If he did not conform within three months he had to abjure the realm, and if he did not then leave the realm, or returned to it without licence, he became guilty of felony, and was not entitled to benefit of clergy. The most famous example of the operation of this Act is that provided by the Puritans under John Robinson who fled England for Holland, and thence to New England. Their Christianity was not the sovereign's Christianity.

By the end of the Tudor era therefore, various temporal laws had been passed, primarily to enforce religious belief as to worship, and the dignity of worship. What was the legal basis on which king and parliament were able to regulate ecclesiastical affairs? No better apology can be found than in the writings of Sir Edward Coke. In the Fourth Part of his "Institutes of the Laws of England" under the heading of Ecclesiastical Courts, he states:

Where some may doubt, how we that profess the common law should write of ecclesiastical courts, which proceed not by the rules of the common lawes. To this we answer by good authority in our booke, that the kings lawes of this realme do bound the jurisdiction of ecclesiastical courts, and that the king is well apprised of all his judges which he hath within his realme, as well spiritual as temporal, as archbishops, bishops, and their officers, cleaves, and other ministers, which have spiritual jurisdiction. And that the popes collector or minister (so say our ancient books) had no jurisdiction with the realme.\(^5\)

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\(^4\) Holdsworth, Volume 8, p.403.

Coke then makes the following comment, with which no advocate of separation of church and state can argue:

And certain it is, that this kingdom hath been best governed, and peace and quiet preserved, when both parties, that is, when the justices of the temporal courts, and the ecclesiastical judges have kept themselves within their proper jurisdiction, without encroaching or usurpation one upon another; and where such incroachments or usurpations have been made, they have been the seeds of great trouble and inconvenience; for preventing and avoiding thereof, we have composed this treatise of the ecclesiastical courts of the realme. 36

Coke also mentions the case of *R. v Massy* 37 (undated) where the accused was charged with "giving unreverent speeches to the minister, and for carrying corn on holy days". The matter was originally before the Court of High Commission, but the Court of Common Pleas granted an injunction restraining the Court from dealing with the offences. It was stated that the case was one for the local diocesan court. It became clear that the Court of High Commission could not hear all ecclesiastical causes, and was subject to the common law courts. Coke also cites other cases which indicate that the court did not have jurisdiction to either fine or imprison. Such punishments were the exclusive province of the civil courts. Until this time the ecclesiastical courts seem to have had concurrent jurisdiction with the common law courts in respect of religious offences, but from this time it was the king's secular courts which gradually asserted their authority to deal exclusively with offences, particularly "public order" offences against the laws preserving the sovereign's peace.

The background to these laws is to be found in the history of the period. For example in 1579 there was much agitation in London

36 Coke, Ibid, 331.
37 Coke, Ibid, 332.
concerning a book by one Stubbs entitled "The Gaping Gulph", which was regarded as both libellous and blasphemous, and cost the author his right hand in punishment. Similarly in 1581 the bishop of Chester suggested to the Privy Council a series of proposals to be laid before Parliament. One of these, the prohibition of fairs on Sundays and of trading before morning prayer was to be referred to the legislature by the Council. The growth of Puritanism in the late sixteenth century led to efforts to regulate Sunday as a day of worship. The amusements and entertainment which had been regarded as harmless pastimes following the service, were diligently suppressed by zealots intent on ensuring that people worshipped in the strictest manner.

The common people were following the lead given by the gentry and nobility. For example at Hackness in Yorkshire, Lady Margaret Hoby who was a strict Protestant would, with her servants attend the round of Sunday services. In the evening on the Sabbath the main points of the sermon were repeated with pious zeal. Similarly it was some of the Puritan gentry who in the last Parliament of Elizabeth's reign introduced a bill against Sunday fairs, and a bill to enforce punishment against persons who wilfully absented themselves from church on Sundays, but it failed to pass the House of Commons, although it was a slender margin.

Thus by the end of the Tudor period the ecclesiastical prohibitions relating to blasphemy and Sabbath breaking were passing into the jurisdiction of the criminal law. The civil courts were gradually taking over many of the functions of the ecclesiastical courts. This can be seen as part of the general secularisation in the community resulting from the reformation. In one respect however the hand of the church had
been strengthened. This was by virtue of the Queen's High Commission in causes ecclesiastical set up under Statute I Eliz. c.1, by which the dignity and peace of the church was intended to be vindicated. What had formerly been canon law was to pass into the jurisdiction of this court. The powers of the High Commission were so wide as to include heresies, schisms, abuses, offences, contempts, and other forms of ecclesiastical orderings. The stage was set for the century to come, when the civil courts were to exercise great power in the religious sphere, while at the same time the Court of High Commission jealously guarded what remained of its jurisdiction. Both civil and religious courts were to be used for political purposes, but the justification remained nominally religious, e.g. trial of Archbishop Laud.

Was Christianity Part of the Law?

It is appropriate in dealing with blasphemy and Sunday laws at this time (i.e. early English and Medieval times) to discuss the question whether Christianity particularly by the Tudor period, formed part of the law of England. In Anglo-Saxon times it seems clear that kings and lawmakers alike often used scriptures on which to base their statutes. Slavish quotations from both the Old and New Testaments are liberally sprinkled throughout the statutes of such kings as Alfred, Edward the Elder and Canute. It is clear that until the Reformation the courts of the church had a monopoly over trial and punishment of ecclesiastical offences, and those so-called crimes which were really matters of church discipline and order.
The whole concept of relationships between church and state was dominated in Medieval times by the theory of the survival of the Roman Empire, namely in the phoenix-like creation of Charlemagne called the Holy Roman Empire. It was this "super state" which claimed dominion in Western Europe and Britain. The Roman emperor was supreme in matters temporal just as the Pope (who had crowned Charles the Great in 800) was regarded as ruler in all matters spiritual. During the tenth and eleventh century there was a revival in civil and canon law, and this concept of the supremacy of the papacy passed into English law.

W.S. Holdsworth in his "A History of English Law" submits that Christianity was part of the law of the land\(^3^6\) and he cites early writers such as Fortescue and St. Germain; certainly Fortesque, who wrote his treatise on law in the latter part of the reign of Henry VI, seems to assume that the common law was based on Christianity. He talks of the laws of the king being in conformity with the laws of the divine king.

Similarly the author of the book "Doctor and Student" cited by Holdsworth\(^3^9\) adopted the medieval point of view was basically that the world was governed by the law of God, and the law of nature. Man-made laws were of secondary consideration - this viewpoint was expressed by St. Germain who lived in the late fifteenth and early sixteenth centuries. It is clear that in equity the theory was that law was based on God's universal law. In the book "Doctor and Student" are found these views:

\(^3^6\) Ibid, Volume 4, p.278.

\(^3^9\) Holdsworth, Volume 4, 279.
For if any law made of men bind any person to anything that is against the said laws (the law of reason of the law of God) it is no law, but a corruption, and a manifest error ... When the law eternal or the will of God is knowne to his creatures reasonably by the light of natural understanding, or by the light of natural reason, that is called the law of reason; and when it is showed of heavenly revelation... then it is called the law of God. And when it is showed unto him by order of a Prince, or of any other secondarie gouvernoire, that hath power to set a law upon his subjects, then it is called a law of man, though originally it be made of God.40

This attitude is typical of the era, that is the government was ordained by God, so that the laws made by the state were also of divine origin. Princes ruled by divine rights, therefore their laws must also be impregnated with divinity. Medieval statecraft accepted this concept without question. Philosophers also accepted that princes were subject only to the Church, and Popes emphasised this by the way in which they treated even the most powerful rulers, e.g. the Emperor Henry I was kept waiting for hours in the snow at Rome, before the Pope would receive him, because of his earlier quarrel with the Church.

These comments were made at a time when common law and equity were regarded as part of one system of law. By the sixteenth century however, Chancery had developed its own system of principles, but with the proviso that "equity followed the law". Thus both common law and Chancery seemed to be based on the law of God, and indeed certain commentators suggested that all state laws should be in accordance with divine law. To quote again from "Doctor and Student":

It is an exception of the law of God or of the law of man, when theory, by reason of their generality, would in any particular case judge against the law of God or the law of reason, the which exception is secretly understood in every general rule of every positive law... wherefore it appeareth if any law were made by a man

without any such exception expressed or implied, it were manifestly unreasonable... for such case might come that he that would observe the law should break both the law of God and the law of reason. 41

One might ask whether there could be a reasonable law contrary to divine law, or a divine law which was unreasonable. Sweet reasonableness was a divine attribute and thus it was argued that laws based upon God's law must be perfect.

From Anglo-Saxon times the Church wielded dominant influence in England. The question is did it influence and mould the law? It certainly seems to have been used by the king, not only to assist his civil power, but also to bolster his position as divinely appointed from heaven. In pagan times the king was merely the head of the state, but in later Saxon times he was more and more regarded as the defender of the Church, representatives of the state, and Christ's deputy. There was however some confusion as to who had responsibility to punish crimes, was it the king's representatives of the Church? The early laws also show that kings were often attempting to enforce morality rather than penalising for wrong doing. Many Anglo-Saxon laws (for example those relating to Sunday and blasphemy) were honoured more in the breach than the observance. What is clear however is that the justification used by the state for their criminal and moral laws were based on Christianity. One has only to look at a collection of Anglo-Saxon statutes to see this.

One must also remember the relationship of Church and state, and the theories on which this relationship was based, both in the early and later medieval period, with the theory of the continuing survival of the Roman Empire, in the Holy Roman Empire. While Roman law surprisingly had

little influence on English common law, canon law was able to wield some degree of persuasion. In the realm of criminal law especially, canon law based on writings of Bernard of Pavia, who based his theories on Christian teachings, demonstrated some of the higher ethics of Christianity. This theory of the Holy Roman Empire held some authority even in the reign of Henry VIII. Until the Tudors, Church and state were still separate, and the argument appeared to be that Parliament could not legislate in the ecclesiastical field, because the Pope had exclusive jurisdiction in this field.

Sir Thomas More who had been Lord Chancellor under Henry VIII was impeached, and Roper in his "Life of More" states that on More being asked whether there was any reason why the judgment of the Court should not be passed according to law, replied:

Forasmuch as this indictment is grounded upon an Act of Parliament, directly repugnant to the laws of God and his holy church, the supreme government of which or any part thereof may no temporal prince presume by any law to take upon him... it is therefore in law among Christian men insufficient to charge and Christian.\textsuperscript{42}

This remained the Roman Catholic view until the twentieth century. John Henry Newman argued that no law was efficacious unless grounded upon the law of God.

An example of the way in which the common law gradually intruded upon and then assimilated ecclesiastical law is the development of defamation and blasphemy laws. By 3 Edward I c.34 (1275) (a statute entitled Scandalum Magnatum) the spreading of false or scandalous tales was prohibited. This was the first statute which was designed to

regulate the spoken word. Prior to this the Church had exclusive jurisdiction in such matters. One faces a problem in distinguishing which laws were enforced by ecclesiastical Courts, and those regulated by common law courts. The distinction is never very clear during the Middle Ages, because if the monarch was strong, his courts were powerful, if he was weak, the ecclesiastical courts were more independent and enlarged their jurisdiction piecemeal by encroaching on the common law. However the kings fought back with statutes giving jurisdiction to the common law courts. An example is an Act of Edward I which prohibited the spreading of false rumours about the clergy, this offence being punishable in the king’s courts. Over the years the jurisdiction of the Church was looked at enviously by the lay courts, but grudging recognition of exclusive power was given, e.g. Y.B.B., 12 Henry VIII where Fineaus C.J. made it clear that the secular courts would not arbitrarily take unto itself cases within the church courts’ jurisdiction. Relief would only be given if an abuse of power could be shown, thus Christianity within the law was protected by a theoretical division between Church and State. By the time of Henry VIII the common law courts were starting to assume jurisdiction in what till then had been an exclusively church matter. In the last year book, there was an action concerning a heretic, and the use of that term. It was held that the common law courts had concurrent jurisdiction with ecclesiastical tribunals over such matters.

Interesting enough, it is from this time that Parliament started taking an active interest in matters formerly exclusively ecclesiastical. For the first time the legislature debated bills relating to blasphemy

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44 Y.B. Henry VIII.
and Sunday keeping. It was left however to the Stuart era to see those topics pass onto the statute books.

The matter is succinctly summed up in the words of W.S. Holdsworth:

But, seeing that the church was subordinated to the state, we get, from this century (16th Century) onwards, a larger number of statutes upon ecclesiastical topics than in the medieval period.⁴⁵

BIBLIOGRAPHY - CHAPTER I


CHAPTER II

The Stuarts – A Century of Religious Controversy

Religious Non-Conformity

Throughout this period the law retained much of its medieval character in its attitude to religious non-conformity. Generally it was regarded as unlawful to promulgate any religious ideas other than those sanctioned by the established church. The time however saw the gradual transference of jurisdiction in safeguarding such matters from the ecclesiastical Courts to the ordinary Courts of law and equity. It was this development which brought a spate of legislation in religious matters from Parliament, and a number of decisions from the Courts on similar topics. The seventeenth century is rich in material in this field for the antiquarian. It was a century of religious controversy, which saw the final victory of the Crown to assume jurisdiction in matters of theology.

Cawdrey’s Case

From the commencement of the reign of James I in 1603 the Courts of Common Law were assisted by the ecclesiastical Courts and especially by the Court of High Commission. It is necessary at this stage to deal with a case, which although not on blasphemy or Sunday, is of very considerable importance in the effect it had on the relations between lay and ecclesiastical Courts. The case of Cawdrey’s, minister of Lyffingham
in Suffolk is reported by Coke, and was authority and philosophy for much of the reasoning behind the religious decisions in the years to follow.¹

Cawdrey had been suspended by the Bishop of London for refusing to take the oath ex officio, and the High Commission affirmed the decision of the Bishop. He then sued the new minister for trespass, and the jury found for the defendant, but only if the High Commission had power to deprive Cawdrey of his benefice. In his report Coke headed this report with "De jure regis ecclesiastico". Concerning the Court of High Commission it was said:

it was resolved that the said act (1 Eliz. c.1) was not a statute introductory of a new law, but declaratory of the old... so if that act... had never been made it was resolved by all the Judges, that the King or Queen of England for the time being may make such an ecclesiastical commission as is before mentioned by the ancient prerogative and law of England.²

Ecclesiastical Courts in the Early Stuart Era

From the above it seems that if a statute failed one had recourse to the monarchs' ecclesiastical law, and if there was no such law, the king and his commissioners could make it under the guise of declaring it.

It was the King's law, and the King's Court, and not the church which enforced legislation of religious conformity.

¹ 5 Co. Rep. 1.
This is interesting because it shows the residual jurisdiction of the monarch in all matters ecclesiastical being invoked. The authority had been inherited from the Pope, when Henry VIII assumed the papal mantle in England.
However this yielding up of jurisdiction by the ecclesiastics was not completed without a struggle. Early in the reign of James I (1606 or 1607) the judges and serjeants of Serjeant's Inn considered whether the Court of High Commission had power to imprison in ecclesiastical causes. It was this dispute over the power of punishment which eventually led to the abolition not only of the High Commission, but also of a number of minor ecclesiastical Courts as well. Not only did Serjeant's Inn decide that the High Commissioners had no power of imprisonment, but the same year, and in following years, the common law Courts released persons on writs of habeas corpus, who had been imprisoned by the High Commissioners. This led to a great debate upon the subject, reported by Coke.  

The Archbishop of Canterbury argued that the church courts had power to imprison by delegated authority of the King, and that as certain statutes gave the ecclesiastical Courts jurisdiction to fine and imprison, it followed that there was a general power of fine and imprisonment. Coke comments that such an interpretation "was absurd and against law and reason." He argued that no ecclesiastical judge might fine or imprison unless he had express authority so to do by act of Parliament.

The dispute obviously caused much acrimony, for James consulted the Lord Chancellor Egerton who not surprisingly (in view of equity's feud with the common law) supported the church. The judges and barons of the

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6 Co. Rep. 311.
6 Co. Rep. 311.
Ibid, 311.
King's Bench and Exchequer were divided on the question, but King James finally decided that the ecclesiastical Courts needed some limitations placed upon them, and he promised that the High Commission would be reformed, and its jurisdiction reduced. This was the first blow struck at the power of the church courts; gradually they were to suffer an erosion of authority.

The Court of High Commission

Unfortunately there was no immediate effect on the High Commission, and indeed it reached its greatest power between 1628 and 1640. The High Commission functioned as a court to ensure ecclesiastical conformity amongst both lay and clergy. Thus it concerned itself with amongst other things blasphemy and Sunday keeping. The Calendar of State Papers for 1633 to 1640 show variety in the type of case adjudicated upon.

Dennison's Case (1635) illustrates the attitude of the Commission towards blasphemy. The defendant was curate of a London church, which had a stain glass window depicting Abraham sacrificing Isaac. The curate described this in fairly scathing terms, was charged with blasphemy, and removed from office. The case of Ward of Ipswich (1634-5) involved both

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6 This was a time when Charles I was endeavouring to avoid Parliamentary authority; the church with its all pervading influence throughout the country, was used by the monarch as an agent for the royal will, the Crown and Church worked together to keep the sovereign's authority, for the Church's final authority was the King. It was in the interest of both great constitutional bodies that their autocracy should be unquestioned, and Christianity as political philosophy, and religious jurisprudence was both a weapon and a defence.

7 Cal. of State Papers, 105.

8 Ibid, p.329.
blasphemy and Sunday law breaches. Ward apparently spoke out against the prohibitions on Sunday activities. He was suspended, and required to recant. 9 One Moreland of Streud was charged with blasphemy, and profane oaths, 10 and on being found guilty was required to make acknowledgment at his parish church, and fined 500 pounds payable to the King.

It is clear from a study of the cases dealt with by the Commission that it was acting not only to punish ecclesiastical offences, but was also being used to serve political purposes, by regulating how a person should worship. Blasphemy and Sunday laws were all part of a much wider religious and political spectrum. Christianity was that form recognised and taught by the established church, grounded on the law of England, which itself was based on divine law. The spiritual significance of this meant that there must be unquestioned obedience by all to the divine ordinances, as interpreted by the King. God's representative on earth, divinely appointed, appointed by heaven, he could do no wrong, so went the current philosophy on regal power. Conformity of religion was to be in accordance with the established church. Puritans and Roman Catholics alike found themselves before the Commission for a variety of offences. It is interesting to observe that both blasphemy and the sanctity of Sunday were matters often in issue. For example on 18th February 1633, which was the day for mitigation of fines, a lengthy list is given of blasphemy offences and Sunday breaking. 11 Fines and excommunications were imposed, as well as imprisonment.

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11 Ibid, p.538.
The Court of High Commission went further. They not only heard cases but sought out offenders, and issued warrants for the apprehension of suspected persons. In April 1634 the commissioners issued a circular to all officers of the peace suggesting that they apprehend all non-conformists who endeavoured to worship on Sunday, and collect all religious material, such books being blasphemous, and deserving of destruction. The persons apprehended were then to be brought before the Commissioners. The warrants seem to have been wholly illegal, for not only did they provide for apprehension but also imprisonment without trial. By law the person arrested had to be brought before the Court of King's Bench and a writ "de excommunicato capiendo" issued.\textsuperscript{12} 

**Abolition of the Court of High Commission**

It was obviously as a result of this oppression that Parliament decided to dissolve the Court of High Commission. This was accomplished by 16 Char. 1, c.11 in 1640. By this time Parliament was filled with men intent on limiting the power of the Crown, and the Parliamentarians felt that the Court of High Commission was an agent of the King. It was also, significantly, felt to be an instrument of Archbishop Laud, who at this time fell from favour. The Act of 1640 forbade the erection at any time in the future of a similar court. At the same time section 4 enacted that no ecclesiastical judge should:

- award, impose, or inflict any pain, penalty, fine, imprisonment, or other corporal punishment upon any of the King's subjects.

\textsuperscript{12} The imprisonment imposed by the commission, appears to have been for non-payment of fines, or failure to give security; there does not appear to be any record of the imposition of a straight term of imprisonment.
During the period 1640 to 1661 there were no ecclesiastical courts, but following the restoration by 13 Char. 2, c.12, s.1, the act of 1640 was repealed except the provisions as to the abolition of the Court of High Commission.

Religious Non-Conformity and the Civil Courts in Early Stuart Times

The basis of the jurisdiction of the King’s Courts to interfere in religious matters, was settled on two grounds:

(a) because the sovereign was head of the Church and was therefore able to exercise powers of control over all things spiritual and (b) by the jurisdiction conferred on the Common Law Courts by acts of Parliament. These acts were justified upon the grounds that they were in fact the statutes of the King himself.

But there was also another jurisdiction. The secular Courts interfered to punish blasphemy, for the same reason as other libels, viz; in order to prevent a disturbance of the peace.¹³ The Crown would allege that blasphemous preaching and writing could lead to dangerous outbreaks of fanaticism, something affecting both church and state, as well as the Crown’s subjects. The State had therefore a real interest in its suppression. This was the point decided in R. v Traske (1618)¹⁴ in the Court of Star Chamber. Another important point about this case was that it concerned the question of Sunday as a holy day, and whether

¹³ This concept of “breach of the peace”, was later to become more important as a test of whether a person had committed a religious crime. The Crown was concerned with public order, and religion was a “public order” issue.

propagation of this belief was blasphemy. The defendant was a minister that held opinion that the Jewish Sabbath should be observed, rather than Sunday as a holy festival. Traske also believed that Christians should abstain from all manner of swine's flesh:

Being examined upon these things he confessed that he had divulged these opinions and had laboured to bring as many to his opinion as he could. And he had also written a letter to the King; wherein he did seem to tax his Majesty of hypocrisy, and did expressly inveigh against the Bishops High Commissioners, as bloody and cruel in their proceedings against him, and the Papal clergy.\(^\text{15}\)

The Court examined him, found him guilty, and sentenced him to fine and imprisonment. The report says he was not punished for his opinions:

(for these were examinable in the Ecclesiastical Courts and not here), but for making of conventicles and factions by that means, which may tend to sedition and commotion, and for scandalising the King, the bishops and the clergy.\(^\text{16}\)

Traske obviously had a following because "Traskites" are mentioned in a number of contemporary proceedings; the authorities were worried by the popular support for him.\(^\text{17}\)

Breach of the Peace Argument

What seems particularly worth of note is the justification for the proceedings against Traske, not for his beliefs, but because his actions could lead to a breach of the peace. The same sort of argument has often been used in this century. People are not being punished for their beliefs but because their actions upset the authorities. The phrase "breach of the peace" seems to have been one of the enduring legal

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\(^{15}\) Ibid, p.237.

\(^{16}\) Ibid, p.237.

fictions of the common law. It is not clear from the reports of this time whether there had to be a wilful intention to cause a breach of the peace, or to pervert, insult, or mislead others by blasphemy, but intention does not seem to have been a necessary element. Perhaps the Courts were so concerned with religious controversy that this blinded them to the principal of guilty mind.10

In the same year as Traske's case the matter of R. v Atwood (1618) is reported.19 The language complained of in this case sounds now pretty harmless, it was aimed chiefly at the prevailing mode of worship: "The religion now professed is but fifty years old: preaching is but prattling, prayer once a day is more edifying." The Court at first doubted that it had jurisdiction, as the words did not clearly define a breach of the peace. The Attorney-General, Sir Henry Yelverton, thought the case ought to go before the Ecclesiastical Court of High Commission. The King’s Bench decided that an indictment lay; "for those words against the state of our church and against the peace of the Realm, and although they are spiritual words, still they draw after them a temporal consequence — viz.: the disturbance of the peace."20

10 A man was presumed to intend the natural consequences of his conduct, so that in the seventeenth century at least, this presumption seems to have been rebuttable on evidence from the accused himself.

19 Croke, Jac., 421.

20 This justification tenuous as it seems, is the same sort of justification which is used in the twentieth century in respect of so-called "political offences". When the consequences were likely to be a breach of the peace, whether through religious or political upheavals, there was the same result, the Courts would intervene to uphold the King's peace. Much was heard in Stuart times of the "King's peace".
Throughout the early Stuart period the authorities were concerned to ensure that worship was strictly controlled, and that politics was also regulated. As a result certain statutes relating to Sunday observance were passed, which were applied for the same reason as the common law on blasphemy, i.e. to prevent a breach of the peace. The Traskites and others were causing problems to the authorities, and later in the reign of Charles I, and during the time of the Commonwealth, laws were enforced to strictly regulate what could, and could not be done on Sunday.

These legislative measures were changing the common law, in some ways radically. The common law did not prohibit the doing on Sunday of any act which otherwise would be lawful or render void such an act. Similarly the law allowed men to publish their opinions as to religion so long as such opinions were expressed in decent and non-offensive language. The law was however concerned if such language was likely to lead to a breach of the peace, however honestly the opinion might be held. At this time the Judges had apparently decided that they should set an example as far as Sunday Observance was concerned. Sir Edward Coke says:

As in all the four tenour the Sabbath Day is not dies juridicus for that ought to be consecrated for Divine Service.\(^{21}\)

Coke goes on to speak of these days as having been set apart by the Judges themselves for the purposes of religion, possibly in deference to the ecclesiastical authorities of the realm.

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\(^{21}\) Co. Litt. 1359.
Blasphemy Ordinances of 1648–9

Following the abolition of ecclesiastical Courts in 1640, the common law Courts took over such jurisdiction. In 1645 one Paul Best was accused before the House of Commons of asserting that Jesus Christ was a mere man. The accused was imprisoned, and a bill introduced for his punishment. Two months afterwards it was voted upon, and Best was ordered to be hanged for his offence. The proceedings altogether seem highly suspect; no ordinary Court was asked to determine the matter, it was one of the Courts of Parliament, the highest Court in the Land, and who could challenge its authority. As it happened Best was examined further, and although he avowed and maintained his opinions, a compromise was reached, and he appears to have been discharged.22

The case aroused Parliament, and a bill for the punishment of blasphemy and heresy was introduced, finally passing into law in May 1648. This provided that it was a felony punishable by hanging to maintain, publish, or defend, by preaching or writing certain religious opinions. These consisted of denials of the Trinity, of the divinity of Christ, denying that the Scriptures were the word of God, as well as denying a number of well recognised Christian doctrines, including Sunday keeping.23

These measures had been passed by a predominantly Presbyterian Parliament, but in 1649 when the Independents gained power a somewhat


23 The ordinance specified sixteen other errors which could also be punished.
less stringent statute was brought down. This Blasphemy Ordinance of 1649 was for the purpose of punishing "blasphemous and execrable opinions". The penalty for a first offence was six months imprisonment, and for the second banishment. The definition was so wide that almost any religious belief not shared by the majority came within its ambit.24 Clearly this was concerned as much with religious doctrines as attempting a legal definition of blasphemy. Indeed this definition went beyond what to that time appears to have been the common law, i.e. that there had to be a danger of a breach of the peace before the Courts would interfere. The ordinance appeared to punish for opinions held rather than opinions spread.25

However the law still seems to have been insufficient, for in 1656 one Naylor26 was brought before the House of Commons on a charge of blasphemy. Had the Blasphemy Ordinance been considered as giving jurisdiction the ordinary Courts would have dealt with Naylor, but like Best's case27 it was the House of Commons which assumed jurisdiction.

In Naylor's Case, the accused who was a Quaker and probably rather simple minded, reenacted the entry of Christ into Jerusalem, by entering

24 "For any person not distempered in the brains to affirm of him or himself, or that the crimes of uncleanness and the like are not forbidden by God; or that lying, stealing, and fraud, or murder, adultery, etc., are in their own nature as holy and righteous as the duties of prayer, preaching, or thanksgiving, or that there is no such thing as unrighteousness or sin but as a man or woman judges thereof."

25 It was fortunate that the law was soon abolished, for it clearly intended to punish people for their private beliefs, however reasonably advanced to others, indeed the offence was complete as soon as the person held a belief which was prohibited by the Act.

26 (1656) 5 St. Tr. 801.

27 Supra, p.47.
the town of Exeter in a rather similar way. He pretended to raise someone from the dead, and also affirmed that he was God. He seems to have been either insane or close to it.  

Parliament asked for a legal definition of blasphemy from the Lord Commissioner Whitlocke, and this was:

Blasphemy is crimen malitiae, a reviling the name and honour of God. Heresy was to be declared in particular, but blasphemy in this vote is general.

This definition seems brief, and to the point, in fact however "reviling the name and honour of God", can be very wide in its consequences. The "name" of God is clearly more than criticism of the word God, it includes, the Trinity, and the seventeenth century thought of the name of God in its theological meaning, which meant a God whose name was all powerful, and everywhere at all times. The "honour" of God also had a wide theological meaning. The blasphemy did not have to be specific, it could be in general terms, according to Whitlocke, and this meant that the definition could be used as a sword, to catch such things as Sunday breaking, rather than using the varied Sunday legislation, which had so many loopholes and problems over interpretation.

Parallel Development of Sunday laws

James I had early in his reign in Scotland passed a statute restricting Sunday activities. This was in 1579. Upon ascending the English throne, the existing English Sunday laws were prosecuted with  

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20 Parliament spent about 10 days investigating the matter; a vote to execute him was rejected by only 96 votes to 82. In the result he was condemned to be pilloried, whipped, burned in the face, and to have his tongue forced through with a red, hot iron. He was then to be imprisoned and kept to hard labour indefinitely.
alacrity, and the Judges sensing public opinion, interpreted the laws in a liberal construction. In the case of Macalley (1611)\textsuperscript{29} one matter put forward as a defence to murder was that the arrest was invalid, because it had been made on a Sunday. The reply was that no judicial act ought to be done on that day but ministerial acts may be lawfully executed on a Sunday.\textsuperscript{30}

The early part of the seventeenth century was a period of religious and political controversy. This is reflected in the state of blasphemy and Sunday laws. No lasting definition of either offence comes from this period, the only matter common to both, was that the Courts and Parliament seemed primarily concerned with ensuring that breaches of the peace did not occur. There seems to have been confusion as to what amounted to a breaking of the law, often the Courts and Parliament seem to have relied either on what the Bible said, or alternatively made new law to meet a new situation. Both Traske and Naylor's cases seem to be examples of this, while Macalley's case shows judge-made law, a recognition of a longstanding custom that judicial acts were not done on the Lord's Day. Part of the difficulty was that attitudes changed depending on who happened to be exercising sovereign power and this made it very difficult for the Courts to formulate any long-term definitions of offences against religion. One point was clear however, if they might lead to a breach of the peace, then they were to be discouraged.

\textsuperscript{29} 9 Co. Rep. 111.

\textsuperscript{30} Justified by "bonum est benefacere in Sabbatho", i.e. "it is lawful to do good on the Sabbath".
The Restoration 1660

At the restoration all laws of the Commonwealth were abolished. Thus in theory at least religious liberty should have prevailed. Certainly there were no ecclesiastical Courts, and no laws for the punishment of blasphemy, heresy, or profanation of the Sabbath, could be administered by the ordinary Courts. Natural disaster however was to lead to renewed agitation for religious conformity. In 1665 the Great Plague swept through Britain, followed in 1666 by the Great Fire of London. The result was a great increase in superstition and intolerance. In October 1666 a bill was introduced into the Commons to put down blasphemy, heresy, atheism, profaneness and Sabbath breaking; however it was killed in committee. The King was concerned to ensure that there were no ecclesiastical Courts with the power of fine, imprisonment and death, and the Crown seems to have been able to influence the Parliamentary committee.

In 1677 the Crown felt strong enough to act against church jurisdiction. By an Act of that year "all punishment of death, in pursuance of any ecclesiastical censure" was abolished. There was however a proviso that nothing in the Act should:

take away or abridge the jurisdiction of Protestant Archbishops or Bishops, or other Judges of an ecclesiastical Courts, in cases of atheism, blasphemy, heresy, or schism and other damnable doctrines and opinions, but that they may proceed to punish the same according to his Majesty's ecclesiastical law by excommunication, deprivation, degradation and other ecclesiastical censures not extending to death.

These powers were to extend well into Victorian times until abolished.
Christianity as Part of the Law of England

The Courts at this time seemed prepared to overlook honest mistakes, which might be regarded by some as blasphemy. The ignorant and unenlightened were excused, but those whom education and birth had rendered knowledgeable were prosecuted. Blasphemy was denying the divinity of the God head, and contumelious reproaches of Christ. Entwined with this was profane scoffing of the scriptures, included in which was of course the injunction concerning the Sabbath. By the Act of Uniformity 1662 the earlier Sacrament Act 1547, Act of Supremacy 1558, and Act of Uniformity 1558 were reinstated, and applied to the newer Book of Common Prayer.\(^{31}\)

At the same time various legal writers were emphasising that "Christianity is part of the law of England": Wingate in 1658 in his Maxims, and Sheppard in 1675 in his work "Religion". Hale in one of his legal treatises expressed the maxim thus:

Christianity is parcel of the laws of England.\(^{32}\)

This attitude towards religion and the law is shown by the case R. v Sedley (1663).\(^{33}\)

Sir Charles Sedley the poet and dramatist was prosecuted after becoming drunk at a tavern. He went out onto the balcony, stripped himself naked, and according to the report, "preached blasphemy to the

\(^{31}\) By legislation of the Commonwealth these statutes relating to blasphemy and uniformity of worship, seem to have been abolished.


\(^{33}\) 17 St. Tri. 157.
people". Some of his political enemies found out, and laid a charge of criminal blasphemy not under statute but at common law. He was subsequently tried before Hyde L.C.J. at Westminster Hall, and fined 500 pounds. The report does not give the blasphemous words used, and the decision seems based mainly on an offence against Christianity in general. Thus while reinforcing the concept of Christianity as part of the law of England, Sedley's case can hardly be regarded as adding anything to understanding the meaning and interpretation of blasphemy.

Taylor's Case

The next reported case is that of R. v Taylor (1675).\textsuperscript{34} The accused was charged with using the words: "that Jesus Christ was a bastard, an imposter, and a cheat", and that he, the defendant, "feared neither God, nor Devil". Lord Hale found that such words were blasphemous, although the report gives no reasons for the decision. The Court was careful however to draw a distinction between intemperate language and reasonable arguments against the Christian religion. Thus even at this time it does not seem that to attack Christianity in peaceable and temperate language was regarded as a crime.\textsuperscript{35} Was this blasphemy, or punishment for sedition? One cannot really be sure, but as so often happens, when the Government steps in to punish for political reasons these are obscured in the legal verbiage of the surroundings.\textsuperscript{36}

\textsuperscript{34} Vent. 293.

\textsuperscript{35} Taylor himself was pilloried.

\textsuperscript{36} Religion was so important in this era, and theories of life and government were so intrinsically religious.
The Religious Background

It was a period of bitter religious controversy, and this conflict is reflected in the legal history of the time. It appears that the Puritan element in the English character was dominant, and was reflected in Sunday worship, an example being the Sunday Observance Act in 1677. The controversy was between those who felt religion should play a greater part in the lives of men and women, and those who took a more liberal attitude. The conflict can be seen in the blasphemy cases of the period, where political considerations were influenced by religious rivalries, but the differences are best typified by the Restoration attitude to the keeping of Sunday.

To the Puritan the return of Sunday reminded him that the day was God's gift to mankind. On it he engaged in a series of unrelenting number of services. Mr Justice Ridley in 1909 made this observation of Sunday in Restoration times:

I come to the conclusion that at common law Sunday was not a dies non. In Chitty's Statutes there is a note by the editor under 3.6 of the Sunday Observance Act 1677, saying that before this statute, ministerial acts done on a Sunday were lawful. That could not be true if Sunday were a dies non.

Clearly by 1677 the social and religious conditions were such in England that Parliament felt able to consider legislation to enforce Sunday Observance. Until 1677, although certain statutes did prohibit some activities on Sunday, it was this Act which laid the foundation not only for much similar legislation, but also led to dozens of prosecutions.

37 Evelyn commented "the religion of England is preaching and sitting still on Sundays" - The Christian Directory V.1, p.471.

for Sabbath breaking. To some extent the Act of 1677 was also a political statute, for it regulated what people might do on a Sunday, for both religious and political reasons. It was aimed at the non-conformist and Catholic alike, it forced people to act in a certain way on a particular day of the week, few other laws expected so much positive adherence; a person could not merely ignore it or pretend it did not exist, they had to keep it in the forefront of their minds for a whole day. It amounted to a massive prohibition on most activities on a Sunday, activities which on any other day of the week would have been perfectly lawful. The only justification was religious. It was ethnocentric in that it was peculiarly English in scope while being justified by reference to ancient Jewish religious and legal codes.

By 20 Car. 2, c.7 (1677), it was enacted that "No tradesmen, artificer, workman, labourer, or other person whatsoever, shall do or exercise any worldly labour, business or work of their ordinary callings upon the Lord's Day, or any part thereof (works at necessity and charity only excepted)."

There is then a very lengthy outline of what could and could not be done on a Sunday, together with penalties (fine, forfeiture, public stocks, distress), as well as an outline of procedure. To ensure prompt prosecution, a ten day limit on commencing prosecutions was set. A further provision enacted that no civil process was to be served or executed on Sunday.

39 It is significant that it was at this time that Parliament was going through the accusations and counter-accusation of Titus Oates and other agitators. Antipopish factions were concerned that England might fall prey to Rome or Louis XIV.
The Sunday Observance Act 1677 was the most comprehensive legislation relating to religious observance enacted by Parliament up to that time. It is interesting to note that even at the time of the passing of the Act, the supporters of the bill were saying in justification that it would be of great benefit to mankind by ensuring that all rested from their labours at least once a week. This perennial argument has been one of the mainstays used by those who have advocated Sunday prohibitions down through the centuries. The Act of 1677 was an attempt by the legislature to make sure Sunday was kept as strictly as the Jews kept the Sabbath in Old Testament times. Like blasphemy those in favour of the Act were ready to defend it on the basis that anything which assisted in fulfilling man's obligation to God was to be applauded.

Blasphemy Act 1697

With the Glorious Revolution in 1688, one would have thought that there would be greater religious tolerance. In fact there was little change. In 1697 Parliament passed the Blasphemy Act. Why was it considered necessary? This is difficult to answer. The common law offence of blasphemy seems to have been sufficiently defined, without the addition of a statute, yet the legislation is an attempt at some sort of comprehensive definition of blasphemy. Perhaps it was the very attempt at indicating what blasphemy was which led to the Act never being used. The common law was more flexible and less dogmatic, thus lending itself to development. The Act of 1697 recognised the offence of blasphemy at common law, but it was not clear at that stage whether it superseded the common law offence or whether it existed alongside it. Where a statute prescribes a particular punishment to the offence, then unless the Act
has an express saving clause, the only mode of proceedings is under the statute. Yet since 1697 the Blasphemy Act has never once been used. The definition of blasphemy in the Act was very wide. It included denying any aspect of the Christian religion as understood by the established Church. The doctrines of the Trinity and divine inspiration of the Bible were particularly stressed. The offence could either be written or spoken.

The provisions relating to denial of the Trinity were later repealed by an Act of George III in 1812-13. The Act itself lay dormant, until it was eventually repealed in 1967. It is surprising that the statute was never used, the only use to which it was put was to serve as a definition of blasphemy in various cases at common law.

In *R. v Whiston* (1711)\(^4^0\) one sees the judiciary wrestling with the problem of whether a person could still be fined or imprisoned by the ecclesiastical courts. The accused was formerly a presbyter of the Church of England, and professor of mathematics at Cambridge University, but was expelled because of his teaching on such things as the Trinity, and the Creeds. The Convocation of Canterbury, an ecclesiastical court complained to Queen Anne, about the activities of the defendant. The difficulty was that the ecclesiastical courts could not punish Whiston. The civil judges to whom the problem was referred, felt that while the convocation had powers of dismissal of clergyman of the established church, the ecclesiastical courts no longer had the power of fine or imprisonment.

\(^{40}\) 15 St. Tr. 703.
The Scottish Position

The position in Scotland at this time was much more serious. Indeed blasphemy was a capital crime, and remained so until 1813. An example is *R. v Aikenhead (1696).*

Thomas Aikenhead was a young student of 20 years, the son of an Edinburgh surgeon. He was charged with blasphemy, the facts being that he had somewhat loosely talked about Ezra and Mahomet, and "crude anticipations of Materialism". No counsel appeared for him, and after a speedy trial he was condemned to the gallows. The sentence was carried out on January 8, 1697, he was buried beneath the scaffold, and all his moveables were forfeited to the Crown.

The Court stated that to constitute the offence there had to be "an intention to insult or offend believers - actus non facit reum, nisi mens sit rea".

Two other persons were prosecuted at about the same time but neither was convicted; in the case of the first, Kinninmouthe, the prosecution never proceeded, while the second defendant, Borthwick, fled the country. At the same time the Scottish legislature had taken steps to tighten the regulation of Sunday activities, by an act of 1690. This statute confirmed the earlier act of 1579. Prohibitions were placed on

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42 Thus a test of intention to "insult or offend believers" was necessary, but this was expressed in such wide terms that it meant that Scotland for the next hundred years faced the use of the offence of blasphemy to cover many types of religious non-conformity.
buying, selling, or labouring of any kind on a Sunday. Such stringent provisions relating to both Sunday worship, and blasphemy, show the importance placed on such subjects by the Scottish Presbyterians, to whom most of the legislation can be attributed. The attitude of the times is typified by the complaints against Aikenhead, who although facing a charge of blasphemy was also accused of levity on the Lord's Day. An increase in interest in blasphemy is paralleled by the legislation of Sunday laws.

Later Stuart Legislation

During the time of William III, further provisions restricting Sunday activities were passed. These were 10 and 11 Will. 3, c.24 and 11 and 12 Will. 3, c.12, and dealt with such trivial questions as whether selling fish on Sunday was legal (it was not), and the hire of hackneys and chairs (these were legal). Obviously the extra provisions were to cover loopholes in the original legislation of 1677.

Certain Sunday Cases

This continuing development in legislation was accompanied by a number of cases which defined and enlarged not only the common law but also the statute law. Most of the cases concerned the question of whether judicial processes could be executed or served on a Sunday. In each instance the Court ruled that execution and service could not be effected on the Lord's Day.\footnote{Asmole v Goodwin (1699) 2 Salk. 624, Allen v Brookbank (1699) 2 Salk. 625, Hales v Owen (1703) 2 Salk. 625, Parker v Sir William Moor (1703) 2 Salk. 626, Harvey v Broad (1704) 2 Salk. 626, Davies v Salter} However in one case where the writ had to
be attached to a church door at service time it was held to be valid: *Allen v Brookbank (1699).*"""" 

Religious Non-Conformity

At the time when the statute of William III against blasphemy was passed, the king issued a proclamation against "immorality and profaneness", primarily various breaches of Sunday laws, which were regarded as blasphemous. Christianity was "established by the law of England" and should be protected and encouraged. Religious non-conformity was however given some relief by the Toleration Act 1689 (1 W & M c.18). This statute was primarily passed because of assistance rendered by non-conformists to the accession of William III. As a result non-conformists were allowed to worship, but not behind closed doors. It became an offence to disturb a place of worship. While relief was given to Protestants and Quakers, it did not extend to Roman Catholics or to Unitarians. It was also withheld from those religious groups which worshipped in different ways to the majority. Thus Seventh Day Baptists were prosecuted for worshipping on a day other than the Lord's Day."""" In Scotland the Covenantors also faced tests of loyalty for their faith.

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(1704) 2 Salk. 626, and Walgrave v Taylor (1702) 1 Ld. Raym. 706.

44 2 Salk. 625.

45 Harvey v Broad (1704) 2 Salk. 626.

46 See R.J. Thomsen "Seventh Day Baptists" 16.
Christianity and English Law

The legal reporter Ventris in his report of Taylor's Case said blasphemies:

are... a crime against the laws, State, and government and therefore punishable in this Court... Christianity is parcel of the Law of England. 47

At about the same time Sir Henry Finch in his text book "Common Law commented:

Holy Scripture is of sovereign authority... to such laws as have warrant in Holy Scripture over law giveth credence. 48

Such authority was used by Sir Matthew Hale as Chief Justice of the King's Bench to clarify the law relating to blasphemy. The general theory behind this religious ferment and legislation seems to have been that as the church taught the divine right of Kings and obedience of the subject, then the monarch should reciprocate by protecting and enforcing the doctrines of the church. W.S. Holdsworth comments:

Church and king must thus act together to make their own standards of political and theological orthodoxy and conditions precedent for full citizenship. 49

47 L. Vent. 293. (no date).


49 "History of English Law", Volume 6, p.197. See for example the following legislation:
The Corporation Act 1661
Act of Uniformity 1662
Test Act 1672
Toleration Act 1688.
Ecclesiastical Law

It has been mentioned that the High Commission of Archbishop Laud was abolished in 1641, and it was not restored with the other ecclesiastical courts in 1660. In 1677 the ecclesiastical courts had lost their right to inflict capital punishment, the same year that the Sunday Observance Act passed. The suspension of the writ relating to heretics was with the express proviso that its abolition was not to take jurisdiction away from the church courts in cases of blasphemy, schism, or heresy. This gap in ecclesiastical jurisdiction was filled by the Common Law courts, who says Holdsworth:

took over the jurisdiction of the Star Chamber as a "censor morum", and punished gross indecency, ribaldry, and blasphemy on the same principles as those on which the Star Chamber had proceeded. They also took over some part of the jurisdiction of the ecclesiastical courts, and punished the expression of infidel opinions, both on the ground that they tended to sedition and commotion, and on the ground that it was contrary to law to attach the foundations of the Christian faith.50

The attitude of the times is perhaps typified by the remarks of Holt who was counsel in the case East India Co. v Sandys (1684).51

This is grounded upon the case that the government hath, or ought to have, by the constitution of the government itself, of the Christian religion, which I conceive is the main end of government. The profession and preservation of it supersedes all law; if any law be made against any point of the Christian religion that law is ipso facto void.

Thus the Courts as agents of the government, as agents of the sovereign ruling by divine favour were protecting the very base upon which the state rested. The relation of Church and State was based on the theory of Christianity as the touchstone of English law, the fundamental point being that religious non-conformity was not only a

50 "History of English Law", Volume 8, p.407.

51 10 St. Tr. 374-5.
crime against God, but also against the State. Such behaviour against the Deity could only lead to disaster for England, and moral condemnation was reinforced not only with legislative penalties, but judicial pronouncements. Blasphemy and Sunday observance were but two aspects of a much wider religious problem of the time. How to achieve religious conformity?

One cannot ignore the jurisprudential theories of government at this time. At the apex of a great pyramid was God (meaning the Trinity), below that came either King or Pope, with the divine right of Kings being a logical way of looking at the sovereignty vested in the all-powerful prince. But inexorably sovereignty was passing to Parliament, and so this body feeling its religious way, felt obliged to enforce uniformity of worship (purely as advisors of the King, so the argument went).

Below the prince came the nobles, the yeomen, the emerging middle class, and at the base were the common people. At each stage of the pyramid, the people recognised, the right of those above to enforce God's laws and ordinances. There was however a minority who felt unable to accept the religious view of the majority, and it was to be primarily these people who in the next two centuries strove for religious liberty.
BIBLIOGRAPHY - CHAPTER II


CHAPTER III

A Century of Conflict 1714 to 1837

Religious Controversy in the Age of Reason,

and the Aftermath

Introduction

One turns with relief from the religious controversy of the
seventeenth century to the quieter and more mellow age of the Georgian
Kings. Deceptively for some years after 1714 the law seemed little
interested in either Sunday laws or blasphemy. This lack of material is
also reflected in the absence of religious persecution by the English
Government. Some initial interest in blasphemy was followed by a period
of quiet, until the last two decades of the century, when an increase in
prosecutions for blasphemy and Sabbath breaking coincided with the
unsettled period leading up to the French Revolution. The justification
for the law interfering appears to have remained the same, i.e. to stop
breaches of the peace, and for the regulation of the laws relating to
public order. The state and religion stood together as allies to
preserve the social order, so that offences against religion were
punished by the state as crimes against the nation. Chief Justice Hale
remarked in R. v Taylor:

To say that religion is a cheat is to dissolve all those obligations
whereby the civil societies are preserved... Christianity is parcel
of the laws of England, and therefore to reproach the Christian
religion is to speak in subversion of the law.¹

¹ Vent. 293 (no date, early 18th century).
The actual offences which come within the ambit of state regulated crimes consisted according to Hawkins in blasphemies against God, impostures in religion, profane scoffings at the scriptures, lewdness, and offences of a seditious nature reflecting on the established church, or tending to subvert morality or religion. These latter offences were ones which might lead to a breach of the peace, and thus the Courts had justification for punishing any type of religious non-conformity, so long as there was some evidence that the exercise of non-conformity had led or could lead to a breach of the peace. "Christianity", said Blackstone "is part of the laws of England", therefore non-conformity to the established Church was a breach of such law. The common law courts were careful to distinguish between a mere holding of religious opinions and the broadcasting of such opinions, for as Lord Mansfield commented:

the common law of England, which is only common reason, or usage, knows of no prosecution for mere opinions.

Attacks on Christianity

Yet not withstanding Lord Mansfield's dicta, the judges were very quick to condemn attacks upon Christianity, so that in the case of Woolson the court laid it down that any attack upon Christianity irrespective of the way it was expressed must be prohibited on the basis that Christianity was part of the law of England, and thus an assault upon Christianity, or its doctrines was an attack upon the law itself.

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2 P.C. Book 1, C.S.
3 Comm. 4. 59.
4 Evans v The Chamberlain of London 3 Merv. 375. (no date).
5 (1729) 2 Strange 832.
As the eighteenth century progressed great interest was displayed in the relations between Man and God, being the so-called "Age of Reason", writers were agitating for greater freedom in what they were allowed to publish and discuss publicly. On the one hand philosophers were encouraged to enter upon discussions concerned with religion, for the purpose of advancing truth, but if the writer strayed outside certain defined limits he was liable to be compensated for his pains by a term of imprisonment. An author did not need to have an intention to mislead, it was sufficient if his heretical opinions were published.

The Courts were prepared to deal with both the mundane matter of whether baking bread on Sunday was wrong, and the more esoteric question of libel on the Trinity.  

It appears that there was also still some dispute as to whether the spiritual courts were entitled to deal with blasphemy or offences against religion and morals in general. This point was argued in R. v Curle (1727) where the defendant was charged with blasphemous libel and was convicted in the Kings Bench. A motion was then filed on his behalf stating that the case was one only for a spiritual and not a temporal court. The motion alleged, "whatever tends to corrupt the morals of the people, ought to be censured in the Spiritual Court, to which properly all such causes belong." The judges however after hearing argument decided it was punishable by the Kings Bench.

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6 Unreported case of R. v Hall (1721) Starkie 206.
7 17 St. Tr. 15.
8 From this time one hears little of the ecclesiastical courts interfering in common law religious offences. Curle was applying for a transfer to a spiritual Court because there was no power of imprisonment.
The principle of "whatever tends to corrupt the morals of the people", was recognised in one of the leading cases: *R. v Woolston (1729).* Mr Woolston, who was a fellow of Sidney College, Cambridge published a series of pamphlets and articles which ridiculed in "very course and offensive language" many of the Biblical narratives, including those of the miracles of Christ. His argument was that he was criticising to prove that the narratives were in reality allegorical representations of important religious doctrines. It appears that Woolston was sincere, if a little unbalanced.10

The Court stated that it was not concerned with disputes between men on controversial points, but was concerned with "general and indecent attacks". It also ruled that it would not allow to be debated, whether to write against Christianity was punishable in the temporal courts at common law, it having been settled so to be in Taylor's case, and in the case of *R. v Hall.*11 It was also stated that the Courts did not wish to interfere in disputes between learned men upon "particular controverted points." Woolston was duly found guilty.12 The Court decided that on

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9 2 Strange 834.

10 Dean Swift portrays the sale of Woolston's tracts thus: "Here's Woolston's tracts, the twelfth edition; They've read by every politician; The country members, when in town, To all their boroughs send him down. You never read a thing so smart, The courtiers have them all by heart."

11 Supra, p.66.

12 He was fined 25 pounds for each of his four discourses, sentenced to a year's imprisonment, and to enter into bonds for good behaviour for life. He could never find the sureties for this, and so remained in prison for life.
the authority of Taylor's case, the Christian religion was established in England and therefore they "would not allow any books to be writ which would tend to alter that establishment."

*Lord Raymond, C.J. laid it down that:*

Christianity *in general* is parcel of the common law of England; and therefore to be protected by it. We do not meddle with any differences in opinion; we interpose only when the very root of Christianity itself is struck at; as it plainly is by this allegorical scheme.\(^{13}\)

The Court made it clear that it was concerned with condemning "general" attacks upon Christianity, and not with mere differences of opinion over a particular doctrine. The judges seemed content to apply the dictum of Sir Matthew Hale in Taylor's case, and accept that Woolston's language was both scurrilous and contumelious, but they went much further in laying down a general prohibition of attacks against Christianity, no matter in what way they were expressed, so long as they were expressed against Christianity. Presumably this meant Christianity as interpreted and promulgated by the established Church. Woolston's case assumed the importance of a leading case in subsequent prosecutions for blasphemy, it was quoted with approval, and applied, often rigidly as punishing all denials of Christianity, however inoffensively expressed. It became criminal merely to question the truth of Christianity.

This attitude of the common law, towards persons who either by words or by deeds (however inoffensively) questioned Christianity, was tested in *R. v Brotherton* (1727).\(^{14}\) This case was decided before

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\(^{13}\) 2 Strange 836.

\(^{14}\) Starkie 543.
Woolston, but it shows the authorities attempting to establish a similar rule to Sunday keeping. This was an indictment for exercising the trade of a butcher on a Sunday. It was argued for the defence that it was no offence at common law, and was not within the statute 29. Car. 2, c.7. The Court however decided otherwise, although not really coming to a conclusion as to whether statute or common law applied. If the same principle as Woolston had been applied, then the butcher would have been convicted, as acting against Christianity.

Profane Language

The period from Woolston's case, until the Jacobite Rebellion in 1745-6, seems relatively quiet, but Parliament had another look at blasphemy in 1746. In that year an Act was passed prohibiting profane cursing and swearing. When introduced it was mentioned that the existing common law was not sufficient to cover oaths and language directed against the Deity of Christianity. One would have thought the principle in Woolston had been expressed widely enough to include profanity. The law seems to have been no more than regulatory in intention and scope.

The eighteenth century was generally characterised in England itself by peace, but it is interesting to note that prosecutions for religious non-conformity would often coincide with times of national crises, when cries were heard to punish persons guilty of sedition and those who were out-spoken not only in political but in religious views as well. In few branches of the law has there been more change in the policy of prosecution, and the views of the judges themselves, than in blasphemy, and other laws governing religious unorthodoxy.
In 1756 just ten years after the passing of the Profane Swearing Act one Ilive was charged with publishing a profane or blasphemous libel: *R. v Ilive (1756).* The actual charge was that the accused did "vilify and subvert the Christian religion, and to blaspheme by representing Jesus Christ as an imposter, to scandalise, ridicule, and bring into contempt Christian doctrine, and to cause the Christian religion to be disbelieved and totally rejected." The attack by Ilive was obviously upon particular Christian doctrines, and the Court held that it was blasphemy, particularly when the purpose was to expose such doctrines to ridicule and contempt.

**Christianity, the Common Law, and Opinion**

With the case of *R. v Cox (1759)* it becomes obvious that the Courts were endeavouring to keep clear of enforcing religious rules, particularly where it would lead to ridiculous results. Cox, a baker was charged with baking on a Sunday. The Court held that to make a finding of guilty would lead to hardship; it was an exception under the statute 29 Car. 2, c.7. The Judges seemed prepared to go only so far, in enforcing ecclesiastical rules. When convenience intruded, they were prepared to justify exceptions by suggesting necessity. The Courts were not concerned with the ecclesiastical implications; they were not interested in whether Cox had broken a law of the Church, but only in whether there had been a breach of statute. While Christianity was part of the law of England, it was not necessarily enforceable as part of that law.

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15 Starkie 586.
16 2 Burr. 786.
The prosecution of one Annet was for an expression of opinion as to the Christian religion, yet four years later Lord Mansfield was to say that there could be no punishment for mere opinion.

In Harrison v Evans (1767):

There never was a single instance, from the Saxon times to our own, in which a man was ever punished for erroneous opinions concerning rites and modes of worship, but upon some positive law. The common law of England, which is only common reason or usage knows of no prosecution for mere opinions. For atheism, blasphemy, and reviling the Christian religion, there have been persons prosecuted and punished upon the common law.

This clearly gives protection to one religion only, Christianity; presumably one could be as scathing and critical as one liked in describing any other faith. Analysing the dicta, it is possible to argue that even most forms of Christianity were not protected either, only the Church of England, established by law, and sustained by a law which the judges of the common law courts said was based on Christianity. Yet the judges tried not to suggest they were only protecting and upholding the established church. Lord Mansfield goes on to say in the Evans Case (defining blasphemy):

The essence of the crime consists in the publication of words concerning the Christian religion so scurrilous and offensive as to pass the limits of decent, controversy, and to be calculated to outrage the feelings of any sympathiser with Christianity.

Thus the protection appears to be all Christian religions, but in practice it applied only to the Anglican faith. Blackstone when he published his "Commentaries" a few years later reiterated the notion that "Christianity is part of the law of England". In volume four of his commentaries he says:

17 R. v Annet (1763) 1 Wm. B. 395.
18 Quoted in Shore v Wilson 9 Cl. & F. 335, at 338.
19 Ibid 338.
the fourth species of offences before, more immediately against God and religion, is that of blasphemy against the Almighty, by denying his being or providence; or by contumelious reproaches of our saviour Christ. Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule. These are offences punishable at common law by fine and imprisonment, or other infamous corporal punishment: for christianity is part of the laws of England.²⁰

Lord Mansfield commented further in 1767, "that the essential principles of revealed religion are parts of the common law."²¹

This doctrine was extended to include sedition in R. v Wilkes (1770).²² Wilkes had been charged with publishing and printing a "seditious and scandalous libel" (the North Briton, No. 45), and "an obscene and impious libel" (an Essay on Woman). It was alleged that the libels might cause a breach of the peace, and that the accused should be restrained from creating civil and religious disorder. It was held that the accused was guilty of "unchristian and blasphemous" libels and he was outlawed.²³

Lord Mansfield had a further opportunity to deal with religion and the law in a case on Sunday observance: Crepps v Durden (1777).²⁴ In this and another case²⁵ on Sunday observance he construed the statute strictly, so that unless the charge was properly proved, and was adequately covered either by common law or statute, it would fail. At

²⁰ 4 Comm. 59.
²¹ Ibid, 58.
²² 4 Burr. R. 2527.
²³ Ibid 2528.
²⁴ 2 Cowp. 640.
²⁵ Swann v Broome (1764) 3 Burr. 1595.
the same time it did seem once proof had been tendered in accordance with the law, one could not mitigate the effects. Lord Mansfield commented that anciently the courts of justice did sit on Sundays. However with the introduction of canon law with William I, and confirmed by Henry II, Sunday became a day on which the Courts did not sit. He decided that Courts could neither sit on a Sunday, or give judgment on a Sunday.26 If tradesmen and others could not do their work on the Lord's Day, then the Courts should not set a bad example. This custom of the Courts not sitting on Sunday, in fact had only grown up during Tudor times, but had now attained the force of law. What was the justification for it? The same as that advanced for blasphemy; both were breaches of Christianity. Christianity was part of the law of England, and failure to enforce such laws would result in breaches of the peace.

Sunday Observance Act 1780

Apparently the authorities had been having problems with religious meetings, leading to breaches of the peace.27 The Act was aimed at "any house, room or other place opened or used for public entertainment, to which persons were admitted on payment",28 and such places were deemed to be "a disorderly house".29 The act also prohibited public dancing on a Sunday, and any form of entertainment in a public place. A provision

26 Ibid 1595.

27 See recital to the Sunday Observance Act 1780, "debates have frequently been held on the Lord's Day, concerning divers texts of Holy Scripture, by persons unlearned and incompetent to explain the same, to the corruption of good morals, and to great encouragement of irreligion and profaneness".

28 S.1 Sunday Observance Act 1780.

29 Ibid S.1.
of the statute allowed, indeed encouraged common informers who if a prosecution was successful obtained a reward.

Why was the statute passed? Because Parliament was attempting to stop the unlimited use of Sunday for public entertainments, plays, and particularly because it was encouraging irreligion, profanity, and breaches of the peace. Another reason was that the existing situation was leading to "the corruption of good morals". No one would gainsay that sometimes the law must step in to protect the liberty of some, by restricting the liberty of a few, but one cannot avoid the conclusion that the Act of 1780 was blatant religious discrimination. It was passed to protect the Anglican way of keeping Sunday, it was enforced by a judiciary who could only be members of the established church, and was justified because it was necessary for the good of the community.

The Historical and Social Background

The 1780 legislation was passed at a time when there was widespread dissatisfaction with the government, in 1768-9 there had been the Wilkite Riots, followed in 1775 and after, by anti-war agitation about the North American war. In 1780 itself the Gordon Riots occurred, which left London in tumult for days. They were dangerous times and Parliament was taking steps to restrict public meetings, the use of religion as a justification and excuse was one method. It was a time of rising discontent, with a reaction against the Age of Reason, and some philosophers advocating revolution.
For almost twenty years however there are few judicial decision of any consequence either in blasphemy or Sunday law. The principle that the law was based on Christianity was accepted without demur, and it was not until the late nineties that certain cases are reported, and even some of these establish no new principle.\(^{30}\)

By this time Britain was in the throes of agitation over the French Revolution. Whenever dangers face a State, one of the first freedoms to go, is that of liberty of discussion. The extent of the right to liberty of discussion depends upon the view which is taken of the relation of rulers to their subjects. Erskine in his defence of Thomas Paine had argued while other liberties are held under government, the liberty of opinion keeps governments themselves in due subjection to their duties.\(^{31}\)

George III had attempted to go against the flood by increasing his personal power, this had produced bitter criticism, and by the end of the eighteenth century, there was much talk of reform in the law of libel and public discussion. Until 1792 the judges ensured that in all libel cases the jury had no right to make a general verdict, they were only entitled to make a finding on publication, and the truth of the innuendoes. In 1792 however, as a result of Fox's Libel Act, the legislature gave juries the right to give a general verdict. This applied not only to ordinary libels, but also to blasphemous libel. The last decade of the eighteenth century was one of revolution and war in Europe. Britain was also

\(^{30}\) See: Morgan v Johnson (1791) 1 M. Bl. 626, Atkinson v Jameson (1792) 101 E.R. 14, and R. v Younger (1793) 5 Term Rep. 449.

involved, and in constitutional law the Courts were concerned with the protection of the subject against arbitrary arrest and imprisonment.32

William's Case

The common law would step in, where the liberty of the subject was threatened, by oppressive or arbitrary rules of government, but unfortunately the results were not always favourable to the accused. The case of R. v Williams (1797)33 is particularly important for the lucid explanation of religion and the law given by counsel Mr Bayley (later to be a judge of the Kings Bench). The subject of the prosecution was "The Age of Reason" by Thomas Paine, the first and second parts of which purported to be an investigation of "True and Fabulous Theology". The prosecution was instigated by the "Society for carrying into Effect his Majesty's Proclamation against Vice and Immortality".

The first point made by Bayley in his opinion was that blasphemy was a crime against God and man:

There is no doubt that the pamphlet alluded to may be prosecuted at Common Law as a libel on the religion of the state. It was decided in Taylor's case34 that blasphemy was not only an offence against God and religion, but a crime against the laws, state and government, and therefore punishable by indictment.35

The argument used by Bayley indicate that legal minds considered

32 A good summary of this period is contained in Volume X of Holdsworth's H.E.L. at pp.658 to 672. See also Erskine's speech in R. v Paine (1792) 22 St. Tr. 417, and Entick v Carrington (1765) 19 St. Tr. 1073.

33 26 St. Tr. 654.

34 Undated 1. Ventris 293.

that punishment of blasphemy was necessary to protect society, the crown and the established church. To say that religion was a cheat, said Bayley was to dissolve all those obligations whereby civil societies are preserved; and to reproach the Christian religion was to speak in subversion of the law. Bayley argued that R. v Curl laid down that every publication that reflected on religion, was punishable by indictment. He felt however that Woolston's case was decisive. There it will be recalled, the Court would not allow it to be debated as to whether to write against Christianity in general was an offence. Bayley emphasised that Lord Raymond in that case had said that "Christianity in general, is parcel of the common law of England, and therefore is to be protected by it." Thus Bayley argued that whatever strikes at the very root of Christianity tends manifestly to a dissolution of the civil government, so that to say an attempt to subvert the established religion is not punishable by those laws upon which it was established, is an absurdity.

From a reading of Bayley's opinion it is clear that the law would not quibble over mere differences of opinion. However the law apparently would interfere where the very root of Christianity itself was struck at. For example if at that time a writer denied the divinity of Christ, and condemned the New Testament as an allegorical he would probably have

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36 Ibid 655.
37 Undated Strange 789.
38 Supra p.67.
39 Ibid 656.
faced prosecution.\footnote{Mr Bayley showed some wisdom in his recommendation, for he asked whether it was prudent to prosecute? Would it not increase the circulation of the book? Might it not be better to allow the book to die a natural death?} Mr Bayley's argument in Williams case is probably more important than the actual trial. Lord Kenyon the trial judge made it clear where his sympathies lay,\footnote{For example at the first witness reading from the "Age of Reason", the judge remarked, "To me, who am a Christian, to be sure it is shocking, perfectly shocking!"} and the jury instantly brought in a verdict of guilty.

Several prosecutions followed against Paine's book, its impact being so influential that it provoked over forty works in reply. In each case the authority of Woolston was relied on, though the ratio in it was extended - like the statute of 1696 - to all denials of Christianity, however inoffensively expressed. To reproach Christianity was a libel on the religion of the state and therefore punishable at common law. Lord Kenyon in Williams case said in his direction to the jury that:

It is a matter of public policy that if blasphemy occurred, then it is punishable by the king's courts.\footnote{Ibid 656.}

The Influence of Public Policy

Public policy has always played some part in judicial pronouncements, particularly in attempting to discover what is the generally accepted standard of right and wrong. Lord Ellenborough C.J. also quoted "public policy" as justification in a Sunday law case: Taylor v Phillips (1802)\footnote{3 East 155} Certain court processes had been served on a Sunday, and it was argued for the defendant that such service was
contrary to 29 Car. 2, c.7, which prohibited service or execution on a Sunday. Lord Ellenborough C.J. said:

That it was a matter of public policy that no proceedings of the nature described in the statute should be had on a Sunday.\(^{44}\)

Thus "public policy" was used for perhaps the first time, as a justification. In some ways it is only another way of saying that society condemns actions which are against commonly accepted standards of right and wrong. Presumably it was a matter of public policy that the Lord's Day should be protected. Public policy was also used by Lord Eldon L.C. involving religion.\(^{45}\) Public policy was also highly influential in the changing attitude to Sunday laws. Originally justified on religious grounds, the Courts and legal writers were starting to justify them on grounds of convenience, or custom. Such an attitude is typified by Sir William Blackstone in his commentaries.\(^{46}\)

Lord Ellenborough again used public policy in a case involving blasphemy in 1812: *R. v Eaton.*\(^{47}\) The accused published another of Paine's works, which denied the divinity of Christ, and denied that Christianity had a divine origin. In his direction to the jury the judge commented that where religion depended on doctrines derived from sacred writings, to deny the truth of the book which was the foundation of the Christian faith, was certainly not permitted.\(^{48}\)

\(^{44}\) Ibid 156.

\(^{45}\) Walcon v Walker (1802) 7 Ves Jun. 1. See also R. v Moxon (1841) 4 St. Tr. 694 (N.S.), and Murray v Benbow (1822) 4 St. Tr. (N.S.) 1409.

\(^{46}\) Commentaries 276. (1803). Also Roberts v Monkhouse (1807) 8 East 547.

\(^{47}\) 31 St. Tr. 927.

\(^{48}\) Ibid 928.
Something of the same approach is displayed in the case of *Drury v Defontaine* (1808).\(^9\) Public policy certainly played a part in the decision, which was concerned with Sunday keeping. The actual question was whether a contract made on a Sunday was valid, but the judge and counsel seemed more concerned with the religious aspects. The contract involved the sale of a horse. For the defendant it was maintained that the sale was illegal both by 29 Car. 2, and also at common law. Lord Mansfield in the course of his decision said:

The preamble of 27 H.6, c.5 speaks with reprobation of the abominable injuries and offences done to Almighty God because of fairs and markets upon high and principle feasts, and of the people withdrawing themselves and servants from divine service. The stat. 29 Car. 2 is expressed to be made "for the better observation of the Lord's-day."... The ten Jewish statutes are all related by St. Paul, Rom. 13:9, therefore in Christianity as well as in Judaism, the fourth commandment is retained and that which is an offence against it when committed by a Jew is equally such when committed by a Christian. But the stat. Car. 2 expressly avoids this sale.\(^9\)

Lord Mansfield was clearly not happy about the plaintiff's case, but he reluctantly found that the law had not gone as far as to say that every contract made on a Sunday was void. He then went on to discuss Coke's dictum that Christianity is part of the common law, and then decided regretfully that he had to find that the contract made on a Sunday was valid. His comments are worth quoting in full, for they show how the Courts by this time regarded the doctrine that Christianity and the law were intertwined, to be of great antiquity:

It is said by Lord Coke that the Christian religion is part of the common law, and such a sale certainly is directly contrary to the practice of those religious duties which it was the purpose of the legislature to enforce, as expressed in the preamble of the Stat. 29 Car. 2, namely, "that every person whatsoever shall on the Lord's day apply themselves to the observation of the same, by exercising

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\(^9\) 1 Taunt. 131.

\(^9\) Ibid, 133.
themselves thereon in the duties of piety and true religion."... it is to be lamented, the sale must be held good.\textsuperscript{51}

Perhaps one should pause here, to see exactly where the concept of Christianity and the law is going. Lord Mansfield obviously accepted the doctrine as binding, and of great antiquity. Public policy seemed to demand that there should be no trading on Sunday, yet legally the judge reluctantly had to conclude that the contract in question could not be invalid merely because it was against Christian doctrine. Thus the law did not always protect the Church. Christianity might be part of the laws of England, but not all laws were Christian in origin, nor was all Christianity legal, as the non-conformists knew. There may seem a great difference between Sunday trading and blasphemy, but the law used the same principle to justify its attitude to the two topics. Working at one's trade on a Sunday was contrary to Christianity, contrary to the fourth commandment mentioned in Exodus. Blasphemy was also condemned, because it was contrary to the third commandment in Exodus. Man was assisting in stamping out what God had condemned.\textsuperscript{52}

This religious bigotry may seem peculiar in the twentieth century, but it was clearly a very strong argument in the eighteenth and nineteenth centuries. England was governed along lines which men felt had the sanction of God. The system of king, lords, and commons need never be changed, blessed as it was by the sanction of the Church of England. Yet it was at this point that the system was being shaken by radicals, and the reverberations of the French Revolution. Religion, and

\textsuperscript{51} Ibid, 133.

\textsuperscript{52} Exodus 20:7 (Jerusalem) "You shall not utter the name of Yahweh your God to misuse it, for Yahweh will not leave unpunished the man who utters his name to misuse it."
laws enforcing it was to be the subject of attack in the next few decades.

Returns for Blasphemy and Related Offences

A return for blasphemy and related offences was carried out for the years December 31, 1812, to December 31, 1822. The study was published on 11th July, 1823, and concerned all individuals prosecuted either by indictment, information, or other process, for public libel, blasphemy, and sedition in England, Wales and Scotland.

There were the following prosecutions:

In Scotland the numbers were:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1817</td>
<td>3</td>
</tr>
<tr>
<td>1819</td>
<td>4</td>
</tr>
<tr>
<td>1820</td>
<td>5</td>
</tr>
</tbody>
</table>

In England and Wales:

<table>
<thead>
<tr>
<th>Year</th>
<th>K.B.</th>
<th>Other Courts</th>
</tr>
</thead>
<tbody>
<tr>
<td>1813</td>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>1814</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>1815</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>1816</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
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<td>35</td>
<td>3</td>
</tr>
<tr>
<td>1818</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>1819</td>
<td>61</td>
<td>38</td>
</tr>
<tr>
<td>1820</td>
<td>25</td>
<td>25</td>
</tr>
<tr>
<td>1821</td>
<td>34</td>
<td>7</td>
</tr>
<tr>
<td>1822</td>
<td>4</td>
<td>9</td>
</tr>
</tbody>
</table>
The numbers of information filed by the Attorney General from 1st January 1821 and 26th March 1834 against persons accused of blasphemy and sedition were:

<table>
<thead>
<tr>
<th>Year</th>
<th>Type</th>
<th>Libel</th>
</tr>
</thead>
<tbody>
<tr>
<td>1821</td>
<td>seditious</td>
<td>3</td>
</tr>
<tr>
<td>1822</td>
<td>blasphemous</td>
<td>2</td>
</tr>
<tr>
<td>1823</td>
<td>blasphemous</td>
<td>2</td>
</tr>
<tr>
<td>1829</td>
<td>seditious</td>
<td>2</td>
</tr>
<tr>
<td>1833</td>
<td>seditious</td>
<td>1</td>
</tr>
</tbody>
</table>

The number of convictions from 1st January 1821 to April 132 was — for blasphemy 73; sedition 27. Many of these cases were decided on the basis that every attack on Christianity was illegal. In a country whose constitution and government rested upon the Christian religion, an attack upon it, was both a crime and a misdemeanor. In R. v Williams (1797) Ashurst J. felt that attacks on Christianity were crimes in as much as they tended to destroy those obligations whereby civil society is bound together. The Courts seemed prepared to define blasphemy in very wide terms indeed, for example failure to attend church on a Sunday could come within the definition of blasphemy. There was some confusion however between what was sedition and what was blasphemy. Both offences were used by the government during the Napoleonic Wars, and also the unsettled period which followed. Yet there must have been some liberal tendencies at this time, for it was in 1812 that the old Blasphemy Act 1697 was repealed.

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33 26 St. Tr. 654.
The Napoleonic Era

It will be recalled that some of the provisions of the old Act provided penalties for denying the Trinity. In 1812 part of the problem was the difficulty of Unitarians, who accepted God only, and denied the Trinity. While the law allowed then with "due gravity and propriety", to contend that the Christian religion or part of the Bible was untrue, it did not allow the Unitarian to publicly preach against the Trinity. Thus at a time of national crisis, when Britain stood against both Napoleon and the continental system, as well as the United States, the amendment was passed to strengthen national unity. There were at that time many important Unitarians who were also Members of Parliament. But even M.P.'s were not necessarily immune from prosecution. In 1813 one Creavy an M.P. was charged in respect of a speech which he had made in Parliament. He had subsequently had the speech printed and distributed. The prosecution alleged it was blasphemous. It was held that if the speech contained libellous matter he could be convicted, even though it was a correct report.54

By about 1817 the judges alone decided whether any particular aspect of Christianity was capable of being enforced by the temporal courts. The justification was of course that Christianity was part of the law of England, and what might amount to blasphemy or Sabbath breaking, depended partly on the test of whether it would cause a breach of the peace, and partly on the judges' own morality. The judges generally said the test was whether it tended to excite disaffection, or

54 See R. v Creevy (1813) 1 M. & S. 273, particularly Bayley J. at p.273. See also Southey & Sherwood (1817) 2 Mer. 435 involving the poem "Wat Tyler" by Southey.
was calculated to offend the morals of the people.\textsuperscript{55}

In 1819 a case involving blasphemy declared that a published account of a blasphemy trial might itself be an offence by the publisher. One Richard Carlile had been charged with blasphemy,\textsuperscript{56} and his wife published an account of his trial, giving full details of the defence including Carlile's own "blasphemous and indecent" comments.\textsuperscript{57} It was decided that it was lawful to publish the proceedings of Courts of Justice, but what was contained in the publication must be neither defamatory of an individual or tending to disaffection, or calculated to offend the morals of society. Thus a rather ingenious and cunning device to overcome prohibition of blasphemy in a book was stopped.\textsuperscript{58}

The Test in Burdett's Case

Less that a year after Carlile the judge in that case, Best J. formulated a test which the common law could use, in deciding on liberty of discussion and the press:

My opinion of the liberty of the press is, that every man ought to be permitted to instruct his fellow subjects; that every man may fearlessly advance any new doctrines, provided he does so with proper respect to the religion and government of the country.\textsuperscript{59}

The problem however with this test is that it is expressed in such

\textsuperscript{55} See however R. v Horne (1817) unreported where the breach of the peace test was not applied, and where it was held that there was no intention to ridicule the established religion.

\textsuperscript{56} R. v Carlile (1819) 3 B. & al. 161.

\textsuperscript{57} R. v Mary Carlile (1819) 2 B. & Ald. 501.

\textsuperscript{58} See also Wright v Shawcross (1819) 2 B. & Ald. 501.

\textsuperscript{59} R. v Burdett (1820) 4 B. & Ald. 132.
wide terms that the Courts could use it as a weapon as well as a shield to protect the citizen's liberty of discussion and religion. The Courts struggled with this paradox for years, but at least the law was flexible, so that when society demanded punishment for blasphemy they could act, and when more liberal attitudes developed in the community, the Courts could follow suit. The problem in 1820 was that England was still a country which expected all to conform to one religion, namely Christianity. Those who failed to conform to the established religion could be charged with profanity, blasphemy, Sunday breaking, or heresy. Thus the Unitarian could be charged with blasphemy for his failure to acknowledge the Trinity.\(^{60}\) The Seventh-day Baptist could be charged with Sabbath-breaking,\(^ {61}\) and the Roman Catholic with heresy.\(^ {62}\)

Unorthodox Religious Beliefs

Judges at this time even took the view that a witness who admitted not believing the Bible, must throw great doubt on the veracity of his testimony, as a result.\(^ {63}\) Similarly an accused who in the course of defending himself uttered aspersions on religion could be fined, for reviling Christianity.\(^ {64}\) Christianity quite clearly remained part of the law of the land, protected by the sovereign's courts. In 1822 Mr Justice Bayley in sentencing a prisoner charged with blasphemy, in reply


\(^{63}\) O'Connor v Waring (1817) R.W. Greene, Dublin 1817.

\(^{64}\) R. v Davison (1821) 4 V. & Ald. 329.
to an assertion that Christianity was not part of the law stated:

the subject had been carefully considered in the time of Lord Hale, and the doctrine then laid down had been invariably acted on till the present hour. 45

Christianity was part of the law. Whatever section for example of the decalogue was cited, could be shown to be enforced throughout England. The offence of blasphemy in particular was the usual means to punish religious non-conformity. At this time non-conformists faced restrictions in many aspects of their lives. They could not marry in the Church of England, they could not attend the universities, or the public schools. The Jews and Roman Catholics were not to be emancipated for a further ten years. Conservatism was reacting to the excesses of the Napoleonic era, it was the time of the Peterloo massacre (1819), the beginning of Chartism, the agitation over the Corn Laws, and the extension of the franchise, resulting in the Reform Act 1832. The entrenchment of Christianity as a bulwark of the law, is shown by the long and reactionary tenure of Lord Eldon in the Chancellorship until 1827, whose pronouncements on matrimonial matters demonstrate the inflexibility of his religious upbringing in the established church. 46 It had been Lord Eldon who had instigated many of the trials for religious offences in the latter part of the eighteenth century when as Solicitor-General he had to act against the unrest of that period. 47 It was not until after his resignation from the Chancellorship that such important reforms as the Catholic Emancipation Act 1829, the Religious Disabilities of Protestant Non-conformists Removal Act 1828, and the

45 R. v Tunbridge (1822) 1 St.Tr. 1368 (N.S.).
Great Reform Act was passed.\(^68\)

Notwithstanding this legislation, the common law remained fairly rigid in its concept of Christianity and the law. This is demonstrated by the dicta of Bayley J. in \textit{R. v Wright (1823)}.\(^69\) It had been contended that Christianity was not part of the law of the land, but the judge replied:

\begin{quote}
I will show you it is not our assertion, but the solemn decision of former judges, that Christianity is parcel of the English law, and we cannot permit that point to be argued now.\(^70\)
\end{quote}

These cases demonstrate in fact religious discrimination. The Anglican faith was protected to the exclusion of all others, and particularly against atheism or non-Christian religions. The principles adopted by the Courts were plainly based on the attitude that Christianity should be enforced and encouraged by the state. The times were peculiarly suited for such ideas. The nostalgia for things pre 1789 was part of the general reaction throughout Europe to things Napoleonic or revolutionary. The reaction was protected and fostered by the judges of the king's courts. The fact that they were a self-perpetuating oligarchy meant that conservatism was the moving spirit smothering reform. Lord Eldon in 1822 refused to protect the copyright of a book because the general tenor of the work was irreligious\(^1\) and this was a

\(^{68}\) 10 Geo IV. c.7, 9 Geo IV, c.17, 2 and 3 Will IV c.7.

\(^{69}\) 1 St. Tr. 1370 (N.S.).

\(^{70}\) Ibid 1370.

See also \textit{R. v Waddington (1822)} IB. & C. 25 dealing with blasphemous libel. Also Murray v Benbow (1822) 4 St. Tr. (N.S.) 1409 in which Lord Eldon refused to protect a publication "Cain" by Lord Byron because it was a "travesty of the book of Genesis". Lord Eldon stated, "This Court like other courts of justice in this Country, acknowledges Christianity as part of the law of the land".

\(^{71}\) Lawrence v Smith (1822) Jac. 471.
fairly typical reaction. Nevertheless the times were starting to change, and part of the liberalisation came first from Sunday law cases. However before perusing some of these, it is helpful to look at a contemporary writer of the time on religion and the law.


In the 1828 edition of Hawkins it is stated that all offences against God are to be tried at common law. These included all offences of blasphemy against God, denying of Christ, all profane scoffing at the Holy Scriptures. It also covered imposters in religion, those falsely pretending to have communication or commissions from God. Indecency and obscenity was also covered by Christian prohibitions. Particularly important are Hawkins' references to sedition and religion:

Seditious words in derogation of the established religion are indictable, as tending to a breach of the peace... offences of this nature, because they tend to subvert all religion or morality, which are the foundations of government, are punishable by the temporal judges.72

Thus sedition included words derogatory towards the established religion, any words apparently which the judges thought might go beyond the bounds of reasonable criticism, the test being whether the words are likely to lead to a breach of the peace. The other interesting observation is that the foundation of government is religion or morality, bringing one back to the concept that Christianity is part of the law or constitution, the binding which holds the legal framework in place. It is of course very easy to suggest that this is a superficial summary of the English constitution, but it was one held for centuries by the common law. It is not part of this study to determine the truth or otherwise of

whether government is founded on religion or morality, but from the
vantage point of the late twentieth century it now appears clear that the
judges confused morality and theology with community standards.

Then one has the old test of "tending to lead to a breach of the
peace". This presumably was an objective approach and one to be left to
the judge of fact. Such a concept is so wide in its meaning that it
could quite easily lead to a person having their religious liberty
interfered with. The Courts could arbitrarily make rules abridging a
person's freedom because the exercise of such freedom might lead to a
breach of the peace.73 Equally however, because the Courts had some
residual discretion at common law on religious standards, they were able
to keep up with changing community standards, and this gave some
flexibility in the area of Sunday laws.

Flexibility and the Practical in Sunday Observance

On the one hand the Courts took the view that a carrier working at
his trade on a Sunday was in breach of the statute 20 Car. 271, but
equally where a crooked horse dealer attempted to gain protection by
using the same statute the Court was able to distinguish the
applicability of the Act.74 In 1826 Bayley J. had a similar case of
horse dealers trading on Sunday. The judge found that the principle of
the statute 29 Car. 2, c.7, was to advance the interests of religion, "to
turn a man's thoughts from his worldly concerns, and to direct them to

73 Cooke v Hughes (1824) 1 Ry. & M. 122 example of Court's arbitrary
approach.

74 Smith v Sparrow (1827) 4 Bing. 84.
the duties of piety and religion". 75 Thus dealings on a Sunday could not be protected, just as blasphemous poetry and other publications could not be protected. In Doe v Doe (1826) 76 the plaintiff attempted to obtain a judgment following service of the writ on a Sunday. It was held however that service on a Sunday was invalid, and judgment was accordingly refused. On the other hand in Sandiman v Breach (1827) Lord Tenterden C.J. was prepared to circumvent the Sunday Observance Acts, the practicalities of Sunday transport demanded some relaxation of the rigid rules of the Caroline age. 77

An interesting case with judicial comments is R. v Inhabitants of Whitnash (1827). 78 On a Sunday a pauper was offered by his father to one Cook, of the parish of Whitnash, on the 12th October 1817, as a waggoner’s boy, and was hired by Cook on that day for a year. The question was whether a hiring on a Sunday was a valid hiring or not by the statute 29 Car. 2. It is clear from reading this case that the Court felt that it should carry out the intention of the legislature, that is to recognise every work or business on the Lord’s day to be illegal. But Bayley J. also felt that not every moment of every Sunday should be devoted to religious exercises. 79 It was lawful for man to do good on the Sabbath, and thus the Court was prepared to countenance the settlement of hiring which was in dispute. It is a commentary on the

75 Bloxsome v Williams (1824) 3 B. & C. 232.
76 Flennell v Ridler (1826) 5 B. & C. 406 at 407.
77 5 B. & C. 764.
78 7 B. & C. 96.
79 4 Bing. 598.
79 Ibid p.599.
times, that no comment was made about the condition of the pauper, who became little better than a slave. The presiding judge had commented that a "man may consider his own condition". But having done so, the atheist, the freethinker, the non-conformist could not practice his beliefs as he wished. The God of the Bible was exclusively for members of the established church, and legal rules ensured strict conformity. Sometimes exceptions were made, but only for convenience, the overriding consideration remained, that of acknowledgment of the Deity as supreme.81

*Phillips v Innes (1837)*82 is a case dividing the Regency from the Victorian era. It concerned the question of whether one was entitled to insist that one's apprentice work on a Sunday. An apprentice to a barber in Scotland, bound by his indentures not to absent himself from his master's business on holiday or weekday, late hours or early, without leave, went away on Sunday without leave, and without shaving his master's customers. The boy stated that he could not work on a Sunday, because his conscience told him that he should be at church on that day.

It was held by the House of Lords (reversing interlocutors of the Court of Session), that the apprentice would not be lawfully required to attend his master's shop on Sundays for the purpose of shaving the customers, and that the work and all other sorts of handicraft were

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80 Ibid p.599.

81 See Harrison v Smith (1829) 9 B. & C. where comments on religious uniformity were made, particularly Sunday as a "dies non juridicus". Also Williams v Paul (1830) 6 Bing 653; Begbie v Levie (1830) 1 Cr. & J. 180.

82 4 Cl. & Fin. 234 H.L.
illegal, in England as well as Scotland, not being works of necessity, or mercy, or charity. The appellants relied upon Scot's statute which stated that all ordinary or every day labour was expressly prohibited on a Sunday.

By Phillips v Innes then, religious unorthodoxy was mixed with questions of justification and excuse. The test of necessity had always been applied but in the course of one hundred years it had been extended to cover such occupations as bakers, carriers, and possibly horse dealers. The concept that Christianity was part of the law of England was stronger than ever. The Courts applied the maxim so often that it was taken for granted, it was beyond argument. Non-conformity and dissent was not to be encouraged, and Christianity meant only the established church of the sovereign.

The social conditions of the age were another factor which assisted in a continuation of this attitude. The stratification of society meant that there had to be some ultimate authority which could justify such a condition, and Christianity was twisted for this purpose. The somewhat conservative legal system seemed happy to perpetuate the system, and like so many judicial structures, preferred to follow rather than lead.

It may no doubt be argued that blasphemy and Sunday laws share an uneasy alliance during the period, but both arose out of the same social conditions during the religious fervour of restoration times, and in legal terms their justification was excused in religious terms, particularly the ancient phrase that "Christianity was part of the law of England". Throughout 1715 to 1837 there were many unsettled periods, the
causes of which were partly religious. Such difficulties as the two Jacobite uprisings, the Seven Years War, the social disturbances in England of the 1780's, and the French Revolution were at least partially influenced by religious factors. The same justification was used for the punishment of blasphemy and breaking the Lord's Day, i.e. that religious non-conformity was to be discouraged. Both were concerned with protecting the doctrines of the Anglican Church, and demonstrated a substantial degree of discrimination against other religions, particularly on questions such as the Trinity doctrine, and a day of worship. Religions such as Quakers, Unitarians, Roman Catholics, and Seventh Day Baptists, seem to have been particularly subject to persecution.83

Both Parliament and the Courts seem to have regarded the mere expression of views critical of certain doctrines of Christianity, particularly of the Church of England, to be blasphemous, even when put forward soberly and sincerely without any evidence of abuse of scurrility. This was certainly the case with Thomas Paine, and the Courts went further, so that no protection would be afforded to literary works which were regarded as religiously unorthodox, or critical of established religion, and this was so notwithstanding that Lord Mansfield in Harrison v Evans stated that there was no prosecution for mere opinions. Not only were there prosecutions but there was no protection for the unorthodox. Similarly in Sunday laws it was the Anglican Church which received encouragement and protection, the laws were not made for the help of non-conformists. However when it came to the point where the rich required fresh bread and pastries on the Sabbath, the Courts seemed willing to concede an exception.

83 1 Camb. L.J. 132-3.
The public interest was paramount, and what amounted to the public interest was what the Courts had to interpret. It was not in the public interest to criticise Christianity in cogent and outrageous terms, or attack it indirectly, by abstaining from work on the Lord's Day. It was this justification of the *public interest* which was to particularly develop as a doctrine during the next hundred years. What had been religious laws were to become labour laws, what had been blasphemy became what was "in the public interest". By 1837 England was no longer a static society; the industrial revolution was breaking the power of the landed aristocracy. The colonies were developing their own laws, admittedly modelled on the common law, but local variations were flexible in their approach, and the bulwark of Christianity as the foundation of the law was shortly to crumble. All of these changes were to affect blasphemy and Sunday laws, but a traveller from the nineteenth to the twentieth century would have noticed little difference in the way these offences were expressed by the law, the major surprise would be in the lack of enforcement of such laws.
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CHAPTER IV

A Study in the Change in Justification
for Both Blasphemy and Sunday laws,
from Sacred to Secular

Introduction

The year 1837 is rather an arbitrary date which has been chosen because it effectively marks the end of the Regency era, and the beginning of the Victorian age. In terms of this study it means very little, but over the decades of the nineteenth century the common law gradually brought many changes in the understanding of blasphemy, Sunday laws, and religious non-conformity. The early part of the century had seen a liberalising of laws relating to non-conformists, Roman Catholics and Jews. Prior to this time no protection at all was given by the law to aspersions against these religions, they were discouraged by non-recognition, particularly in the field of education, and politics. Odgers on Libel had said in one of its earlier editions:

It is the malicious intent to insult the religious feelings of others by profanely scoffing at all they hold sacred, which deserves and receives punishment.¹

This formerly applied only to the established Anglican Church, and not to any other religious body, but by the beginning of Victoria's reign, attitudes were changing. A case illustrating this transitional period is R. v Gathercole (1838).² Here Alderson B. said:

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¹ Odgers on Libel 2nd ed., 402.
² 2 Lewin C.C. 234.
a person may, without being liable to prosecution for it, attack any sect of the Christian religion, save the established religion of the country; and the only reason why the latter is in a different situation from the others, is because it is the form established by law, and is therefore a part of the constitution of the country. In like manner and for the same reason any general attack upon Christianity is the subject of criminal prosecution, because Christianity is the established religion of the country.\(^3\)

He directed the jury to acquit the prisoner if they thought the libel "was merely an attack upon the Roman Catholic Church".

This ruling while it clearly states the grounds on which the law against blasphemy was supported, shows with equal clearness how one-sided was its operation. It was decided by the jury that it was a crime to write of a Roman Catholic nunnery that it is a "brothel of prostitution", for this is an aspersion on the characters of the nuns in general, though none are singled out by name.

A similar change is evident in two cases under the statute 20 Car. 2, c.7. In *Scarfe v Morgan (1838)*\(^4\) the judges gave a restrictive interpretation of the statute. This involved a contract made on a Sunday, by which the service of a mare by the defendant's stallion was to be made on Sunday. It was not unnaturally held that the Sunday law statute only had in its contemplation the case of persons exercising trades on that day. In *Hughes v Budd (1840)* argument centred on whether service of a notice to produce documents, made on a Sunday was valid.\(^5\)

\(^3\) Ibid. 235.

\(^4\) 4 M. & W. 270.

\(^5\) 8 Dowl. P.C. 315.

The Court of first instance accepted it was proper, but on appeal Patteson J. at p.317 decided that service was irregular as being on a Sunday, and was thus against the constitutional laws of England, as intimated both in the common law, and by statute.
Hetherington's Case

In 1840 there occurred a case which is one of the leading authorities on blasphemy libel. The case became important because the accused (who defended himself) was prepared to attack the whole basis on which the common law doctrine was founded i.e. that Christianity is part of the law of England.

The case was R. v Hetherington (1840). The defendant stated that the work was not blasphemous: "In the whole work the work was not intended as a scurrilous attack, but as an inquiry into the effects of the usages of society, founded upon the Old Testament".

However more importantly Hetherington launched an attack upon the doctrine "that Christianity is part of the law of England", and cited a long passage from Thomas Jefferson:

I was glad to find, in your book, a formal contradiction, at length, of the judiciary usurpation of legislative powers; for such the judges have usurped in their repeated decisions that Christianity is part of the common law. The proof to the contrary which you have adduced is introvertible; to wit, that the common law existed while the Anglo-Saxons were yet Pagans; at a time when they had never yet heard the name of Christ pronounced, or knew that such a character had ever existed. But it may amuse you to show when, and by what means, they stole this law in upon us. In a case of quare impedit, in the Year Book, 34 H.6 fo. 38 (1458), a question was made, how far the ecclesiastical law was to be respected in a common law court? And Justice Prisot gives his opinion in these words:- 'It is proper for us to respect the laws which the members of the holy Church have in ancient manuscripts, because they are the general source from

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6 4 St. Tr. (N.S.) 565. The facts were that Haslams "Letters to the Clergy of all Denominations" was sold at the defendant's shop, and his name appeared on the title page. The Bible was described as "a disgrace to ourang outang", and its authors described as "random idiots".

7 The arguments are set out in full, because they form an excellent summary of materials against the doctrine, that Christianity was part of the law of England.
which all laws are drawn. Thus it is necessary for us to be acquainted with ecclesiastical law, and in like manner the judges of the ecclesiastical courts are obliged to understand our law; in consequence, if it can be shown to us that the ecclesiastical court has decided as a court of civil law would have done in the same case, then we ought to deem the judgment good; but if a civil law court would have decided otherwise, the judgment of the ecclesiastical court must be deemed erroneous."

Finch, in his first book, c. 3, is the first afterwards who quotes this case, and mis-states it thus.

"To such laws of the Church as have warrant, in holy scripture our law giveth credence," and cites Prisot, mistranslating 'ancient scripture' into 'holy Scripture'"; whereas Prisot palpably says, "To such laws as those of holy Church have in ancient writing it is proper for us to give credence;" to wit, to their ancient written laws. This was in 1613, a century and a half after the dictum of Prisot. Wingate, in 1656, erects this false translation into a maxim of the common law, copying the words of Finch, but citing Prisot. Wingates' Maxims, 3; and Sheppard, lit. 'Religion', in 1675, copies the same mistranslation, quoting the Year Book, Finch, and Wingate. Hale expresses it in these words: "Christianity is parcel of the laws of England," but quotes no authority. By these echoings and re-echoings from one to another, it had become so established in 1728 that in the case of R. v Woolston the Court would not suffer it to be debated, whether to write against Christianity was punishable in the temporal courts at common law. Wood, therefore, ventures still to vary the phrase, and says, 'that all blasphemy and profaneness are offences by the common law', and cites 2 Strange. Then Blackstone, in 1763 IV, 59, repeats the words of Hale, that 'Christianity is part of the law of England', citing Ventriss and Strange; and finally Lord Mansfield, with a little qualification, in Evan's case in 1767, says, 'that the essential principles of revealed religion are parts of the common law', thus engulfing Bible, Testament, and all, into the common law, without citing any authority. And thus we find this chain of authorities hanging link by link upon another, and all ultimately one and the same book; and that, a translation of the words 'ancient Scripture', and by Prisot... Here I might defy the best-read lawyer to produce another scrap of authority for this judiciary forgery; and I might go on further to show how some of the Anglo-Saxon priests interpolated into the text of Alfred's laws, the 20th, 21st, 22nd and 23rd chapters of Exodus, and the 15th of the Acts of the Apostles, from the 23rd to the 29th verses."

As a result of this blistering attack the Attorney-General used his right of reply. He proceeded to use the cases cited by Jefferson to prove that Christianity was indeed part of the law of England. It was

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decided by Lord Denman L.C.J. that blasphemy as a crime was not a point which could be debated. The publication of a blasphemous libel was in itself a criminal act; the only question was whether the particular case was blasphemy.  

This case was a high point in the development of blasphemous libel. It was the final attempt to show that Christianity was not necessarily part of the law of the England, but a judicial misapprehension and mistake. The doctrine of precedence was far too firmly entrenched, for poor Hetherington to convince Lord Denman otherwise.  

Even if the defendant was right in his allegations, it is unlikely that the Courts would have been prepared to upset such a longstanding doctrine.

When one analyses the publication complained of, the language although intemperate, would today not have been regarded as criminal, and this demonstrates the changes in public opinion. The question of whether the words complained of were blasphemous was a question for the jury, but this was also dependant upon whether Christianity was part of the law of England. Lord Denman dismissed Hetherington's submissions so summarily it is difficult not to conclude that the Court was more concerned to exclude argument.

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9 Without even retiring the jury instantly returned a verdict of guilty, and Hetherington was later sentenced to four months in the Marshalsea.

10 Only a layman could have had the audacity to suggest it. See also R. v Cleave (1940) and R. v Haywood (1940) as further examples of blasphemous libel. They are in Starkie on Libel, 3rd ed. 302, 306.
In the case of Moxon (1841)\textsuperscript{11} instigated by an aggrieved Hetherington, the publication in question was "Queen Mab" by Shelley. Lord Denman L.C.J. seems to have changed his views. In Moxon he suggested that blasphemy should be met by reason and argument, rather than prosecution.

Comments of Equity on the Doctrine of Christianity being part of the Law of England

Almost one hundred and forty years before, a Lady Hewley by deeds, executed in 1704 conveyed estates to trustees, upon trust for certain religious and charitable purposes. In 1842 in the case of Shore \textit{v} Wilson\textsuperscript{12} the Courts had to decide on the validity of the trusts.

Under the deeds the trustees were to pay of the rents such sums to such poor and godly preachers, "for the time being of Christ's gospels, and for other charitable purposes for the Protestant religion." At the date of the deed all religious sects tolerated by law believed in the Trinity; but in time the estates became vested in trustees of whom the majority were Unitarians, and they applied the rents for the benefit of Unitarians.

The Attorney-General in argument:

It has long been settled that to deny the truth of the Christian religion is a civil offence; the Christianity is parcel of the law of England, and therefore to speak in subversion of the law.\textsuperscript{13}

\textsuperscript{11} 4 St. Tr. 694 (N.S.)

\textsuperscript{12} 9 C. & F. 355.

\textsuperscript{13} Ibid 438-9.
He then went on to draw a distinction between attacking Christianity in general, and decently investigating any doctrine of the Christian faith. The common law of England knew of no prosecution for mere opinions. In the result the presiding judge found that at the date of Lady Hewley's deed those who denied the Trinity were by the legislative denounced as guilty of blasphemy.\textsuperscript{14}

No prosecution for Mere Expression of Opinion

About the time of this case, George Jacob Holyoake the well-known agitator was charged with blasphemy.\textsuperscript{15} The actual offence was "oral blasphemy". Holyoake was challenged about his lack of belief in God, and replied that he did not believe that there was a God, and then commented:

"I would have the Deity served as they serve the subalterns—place him on half-pay." The surrounding crowd became very upset. The verdict was guilty.

It would appear that had Holyoake limited his remarks to merely denying the deity, no prosecution would have followed, it was his further comments which were placed by the judge into the consideration of the jury. Lord Denman was probably right when he commented in Hetherington's case that no man was prosecuted for arguments or opinions expressed in temperate or decent language. This is certainly some change from cases up to about 1837, because until Moxon and Hetherington any expression of a view contrary to the beliefs of the established church seem to have been punished by the Courts following Woolston's case. Society would not

\textsuperscript{14} Consequently the charity could no longer be administered by Unitarians, for this was outside the terms of the original trust.

\textsuperscript{15} R. v Holyoake (1842) Odgers 390.
however tolerate public exhibitions showing an intention to insult or annoy, and likely to cause a breach of the peace. An offence against public order and religion was punishable. So too in the case of the established church's views on Sunday keeping. The Anglican view naturally permeated the courts, because only Anglicans could at the time hold high judicial office.

Trend to Liberalisation of Sunday Law Interpretation

From about this time one starts to notice a slight trend in the Courts to be a little more liberal in their interpretation of Sunday laws. The laws were strictly interpreted, so that technical defects and the like were used as a means of dismissing informations. In Calder & Hebble Navigation Co. v Pilling and Others (1845) the proprietors of a public navigation company passed a regulation prohibiting the use of the navigation on Sunday, except in cases of necessity, or to get to and from divine worship. It was argued that such a rule was ultra-vires the company, as being a matter for the legislature only. The decision was on the narrow ground that the company had acted ultra-vires, but the full report makes it obvious that the Court was searching for a method by

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16 Witness the case of Carson in 1840. Here C stood in Yarmouth Square challenging God to kill him, if God existed. He stood trial for blasphemy.

17 An example is Williamson v Roe (1845) 3 D. & L. 328. Here judgment had been obtained on an affidavit which had been sworn on a Sunday. On a summons to set aside the judgment as void, Patteson J. commented p.330 that since the Courts do not sit on Sundays, jurat was defective.

18 14 M. & W. 76.

19 M. & W. 76-79.
which to avoid too many restrictions on Sunday.\(^{20}\)

Similar liberalising can be seen in the equity case of *Shrewsbury v Hornby (1846)*,\(^{21}\) which contrary to *Shore v Wilson*\(^{22}\) decided that a bequest to Unitarians (non believers in a Trinity) was valid.\(^{23}\) Thus, there was some liberalising by the Courts, but on common sense grounds. Nevertheless some inroad had been made into what until then had been an impregnable fortress of complete prohibition. The social fabric of Victorian England was changing rapidly, and blasphemy and Sunday laws reflected this change. Increasing secularisation was to bring a further breach in the walls. In *R. v The Justices of Middlesex (1848)*\(^{24}\) there is a full discussion of how far the Courts should go in protecting Christianity, particularly on question such as procedural rules forbidding the service of processes on a Sunday. In *Wolton v Gavin (1850)*\(^{25}\) it was held that an army recruiting officer was not restricted by the provisions of 29 Car. 2 c.7.

Thus various reasons were being put forward by the Courts for what was really unconscious liberalisation. The times were changing, society

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\(^{20}\) The year was 1845, a time of marked public agitation, the repeal of the corn laws, the Irish potato famine, the Chartist unrest, and the Courts were concerned to not appear too restrictive on personal liberty. One cannot divorce this trend of liberalisation, from public events which continually influence the attitude of the Courts.

\(^{21}\) 5 Hare 406.

\(^{22}\) Supra 102–103.

\(^{23}\) See also *Rawlins v Overseers of West Derby (1846)* 2 C.B. 72, *Colvill v Lewis (1846)* 2 C.B. 60, *Rawlins v Ellis (1846)* 16 M. & W. 172.

\(^{24}\) 3 New Sess. Cas. 152.

\(^{25}\) 16 Q.B. 48.
was no longer static, it was the age of the railways, and people expected some relaxation of the commandments of Christianity. This was in some ways going back to an earlier era, before England experienced a Puritan conscience. Apparently in *Rowberry v Morgan (1854)*, it was argued that in ancient times the court of Exchequer sat on a Sunday, in those days the Sabbath was not a "dies non" for the Court of Exchequer. For religious reasons however a change was wrought in Elizabethan times. The Courts were even allowing the normal justifications for criminal offences to be put forward in blasphemy. Insanity was pleaded in *R. v Pooley (1857)*, and although blasphemy was proved, the accused was found insane and released. A somewhat different experience to Woolston or Naylor.

**The Irish Experience**

While some progress was made in England, Ireland continued to provide examples of religious prejudice of the worst kind. In *R. v Petcherini (1855)* Baron Green in his address to the jury had suggested that any publication or conduct tending to bring Christianity of the Christian religion into disrespect, or to expose it to hatred or contempt, was an offence not only against God, but also the common law of the land.

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26 9 Exch. 730.

27 18 M. & W. 36.


29 7 Cox, C.C. 79.
This is probably stating the rule too widely, even for Ireland. The words "tending to bring Christianity or the Christian religion into disrespect", if applied in Victorian times, would have meant the indictment of Darwin four years later in 1859 when he published the "Origin of Species", or Lyell for his "Principles of Geology" some years before. The prosecutions tended in England to be selective, in the type of person charged, and the kind of publication. If you were a small-time publisher, a member of a religious minority, or inclined to be regarded as a religious crank, and expressed yourself in rather intemperate language, assuming a respectable member of a society noticed it and was upset, you could expect to be indicted.

Petcherini was found not guilty, but some interesting observations by Cardinal Wiseman in the Dublin Review, 30 criticised the Crown for bringing the charge. He suggested religious motivation, and argued that the Crown should more properly investigate the increasing secularisation in England which was leading to real blasphemy. This problem of secularism, a product of the industrial revolution was to become greater, until it would finally engulf the whole concept of religious restrictions. Cardinal Wiseman forecast that this would occur, unless a religious reformation took place. 31

In Bridgman and other similar prosecutions, it is quite obvious that religious prejudice must have played a large part. The offence of blasphemy could quite easily be used as a gag to stifle opposition to the


31 Paul O'Higgins – 23 M.L.R. 161-2 discusses a similar case: R. v Bridgman (1852) where a Catholic brother was charged with burning Protestant literature, the charge being blasphemy.
preaching of what was then the established church in Ireland, viz the English Church. Thus blasphemy was being used not as a shield to protect Christians from unseemly attacks on their faith, but rather a sword to sustain an offensive against the Roman Catholic church.

While Ireland certainly reacted strongly against liberalisation, in England the Courts were more and more accepting the old ruled as either inadequate, or reinterpreting them to suit modern conditions. In *Ex parte Simpkin (1859)* it was held that Sunday was the same as any other day at common law, statute only could alter the position.

**Reaction Against Liberalisation.**

There was some reaction to the rising tide of liberalism. For example in *Re Eggington (1853)* it was held that the stature 29 C2, c.7 applied to an arrest made on a Sunday. But often the application of the act was in fact to protect a subject rights, for example in Eggington it was to ensure that habeas corpus could issue. Generally the Courts were endeavouring to protect the liberty of the subject.

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33 Peacock v R. (1858) 4 C.B. N.S. 264 - Innkeeper allowed to open on Sunday.

33 2 E. & E. 392.

34 Also Hughes v Griffiths (1862) 8 C.B. (N.S.) 324; Inhabitants of Asprell v Justices of Lancashire (1852) 16 Jur. 1067.

35 2 E. & B. 717.

36 See also Stafford v Great Western Railway (1862) 2 B. & S. 419; and R. v Inhabitants of Leominster (1862) 2 B. & S. 391.
Religious Liberty, Non-Conformists Recognised and Protected

An important landmark in religious liberty was achieved in Baxter v Langley (1868).\(^{37}\) It should be remembered that the established church still wielded great influence, particularly in restriction the activities of non-conformists. Meetings were being held on Sunday evenings in a hall duly registered for that purpose as a place of religious worship. The proceedings of the meeting consisted of the performance of sacred music and the delivery of an address, which was sometimes of a religious tendency, sometimes neutral, but never profane. Admission to the hall was gratuitous, but tickets were sold and money taken for admission to reserved seats. The object of the persons who held the meetings was not pecuniary gain, and they honestly intended to introduce religious worship, though not according to any established or usual form.

A charge was later laid under the act 21 Geo. 3, c.49, which prohibited public gatherings on a Sunday for which persons paid or were admitted by ticket. The act had been passed to ensure the better observances of the Lord's Day, and was thought to apply to any entertainment or amusement.

Byles J. had no difficulty in concluding that the organisers were not in breach of the act, which did not apply to religious gatherings, otherwise nearly all non-conformists could be affected. The act rather, applied to disorderly houses, and gatherings which might lead to a breach of the peace. This latter phrase was still being used as some sort of test by the Courts.\(^{38}\)

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\(^{37}\) L.R. 4, C.P. 21.

\(^{38}\) See also Sangster v Noy (1867) 16 L.T. (N.S.) 157 application of Sabbath restricted. Also Triggs v Lester (1866) L.R. 1 Q.B. 259.
While this doubtless shows a more liberal spirit, the more reactionary approach is exemplified by for example: *Cowan v Milbourn (1867).* The defendant contracted to let rooms to the plaintiff; afterwards discovering that they were intended to be used for the delivery of lectures maintaining that the character of Christ was defective, and generally adopting an atheistic tone, he refused to allow the use of them. It was held in an action for breach of contract that such doctrines were blasphemy, and that therefore the purpose for which the plaintiff intended to use the rooms was illegal, and the contract one which could not be enforced by law. This judicial approach can also be found in some of the contemporary definitions of blasphemy of the time, which talk about speaking blasphemy against God, or reproachfully against religion with intent to subvert a person's faith in God. This was regarded as "impious acts against the Almighty". It was clear that religious non-conformity would be punishable only if it could be shown to affect the peace and good order of civil society. It was then that such acts would be properly cognisable by municipal laws. The Courts were not seeking to redress or avenge insults to a supreme and omnipotent Creator, but rather ensuring that such insults did not weaken and undermine the basis of the law. It was those acts which were likely to lead to be insults to those who believed in Christian doctrines. The temporal courts could fine and imprison because offences tended to subvert "religion and morality, which are the foundation of government". The example of judicial oaths is taken by Starkie as an

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39 2 L.R. Ex. 230.
40 Starkie on Libel and Slander 583.
41 Ibid 584.
42 Ibid 584.
illustration in which the Deity acts as almost a superintendent of justice. Thus Christianity and the Bible are the fabric which bind society together. Starkie comments:

To remove therefore so solemn and weighty an obligation, would be to overthrow, or at least to weaken, that confidence in human veracity which is necessary for the purposes of society, without which no question of property could be decided, and no criminal brought to justice. 43

It was argued that the punishment for blasphemous, profane, and immoral publications were founded upon the dangerous temporal consequences likely to proceed from the removal of religious and moral restraints, without any view to the spiritual correction or amendment of the offender. Blasphemy then was denying God, his being, or providence, contumelious reflections upon the life and character of Jesus Christ, and in general scoffing, flippant, and indecorous remarks and comments upon the Scriptures, were offences at common law. Reflections on the Trinity if put in a scoffing or flippant manner could amount to blasphemy.

Cases Illustrating the Change in Public Opinion

While one can notice some liberal trend by the Court in interpreting statutes relating to religion, generally the Victorian Courts took things very slowly. This illustrated by R. v Ramsay (1867)44 where a man had been arrested on a Sunday under warrant. There was no dispute about this, but the constable had then brought him before a magistrate, who required him to give sureties for good behaviour, otherwise he would be imprisoned. All of this took place on a Sunday, and the defendant subsequently challenged it on appeal. For the constable it was

43 Ibid 584.
44 16 W.R. 191.
argued that it was a work of necessity, but the Court ruled that it was a judicial act on a Sunday, and therefore caught by the act of Charles II.

A similar case, but showing the changing attitude of the Courts is *R. v Silvester and Anor (1864)*. Here one Peter Cleworth had worked at haymaking on the Lord's Day. He was a self-employed farmer, and the question was whether he came within the statute 29 Car. 2, c.7, s.1.

Lord Cockburn C.j. had no hesitation in concluding that the farmer did not come under the restrictions of the Act. The enactment applied to two classes of persons only, viz employers, and employed. The first consisted of tradesman only, and under the second came artificers, workmen, and labourers. *Ejusdem generis* a farmer could not come within these categories.

Public opinion had a part in the attitude of the Courts, and at times the Courts clearly stated that their view of Lord's Day observance was governed largely by prevailing mood of public morality. If a person had acted in such a way that public morality. It a person had acted in such a way that public opinion was outraged, or if there had been a breach of the peace, the judiciary would interfere to protect society, just as in blasphemy the justification was to protect society. With both offences the laws were considered for the greater good of all, and to enhance respect for the Deity. In *Duffell v Curtis (1877)* Lord

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45 10 Jur. N.S. 360.

46 Lord Cockburn applied a similar approach to a butcher in the case of Small v Bickley (1876) 40 J.P. 119 D.C.

47 35 L.T. 853.
Coleridge C.J. had commented that observance of the Lord's Day Act was enforced or neglected according to the public opinion at the time, or to the zeal of informers. ⁴⁸

Some Australian Comments

A few years after Duffell v Curtis the same question arose in Australia in Ex parte Rogerson (1888). ⁴⁹ The appellant had been convicted of selling a newspaper on a Sydney street, on a Sunday, in breach of both the statute Charles II, and also a local Act the Police Act (4 Will. IV, No. 7). The Chief Justice of New South Wales was in no doubt that the statute 29 Car. 2, c. 7 was in force in the colony, and that the local Act had been passed because it was felt that the earlier act was not stringent enough. "It is said that such a law is obsolete, antiquated, and not in accordance with the opinions of the present day. Perhaps so; but these are considerations for the legislature, and not for the Court". ⁵⁰ The Chief Justice's comments show that he would have liked to have been a little more reasonable, and in line with public opinion. The dissenting opinion of Owen J. makes it clear that while the Act may have served a useful purpose in 1833 when perhaps greater stringency in the law was required, it was no longer relevant to the needs of the late eighties.

Thus flexibility was becoming evident in the approach of the Courts if they could avoid the more strongly worded statutes. If the Act in

⁴⁸ Ibid p. 853.
⁴⁹ (1888) N.S.W.R. 30.
⁵⁰ Ibid 34.
question could not be circumnavigated, then the judiciary while applying it, would voice views on possible changes by the legislature.\textsuperscript{51}

The Highwater Mark of Blasphemy

Two cases in the eighteen-eighties became of great significance, not only in Victorian times, but well into the twentieth century. The first of these related to a charge against the well-known parliamentarian agitator and atheist Charles Bradlaugh. It was Bradlaugh who had been refused his seat in the House of Commons unless he swore an oath of allegiance on the Bible. In the particular case\textsuperscript{52} Bradlaugh was indicted with two others on charges of publishing blasphemous libels in a newspaper called "Freethinker". The first count alleged that the three accused "with intent to asperse and vilify Almighty God, and bring the Holy Scriptures and the Christian religion into contempt among the people, on the 26th day of March 1882, did compose, print, and publish certain "scandalous, impious, blasphemous and profane libels of God, the Holy Bible, or Scriptures, and the Christian religion", in the following words, depicted in the Bible "with a character more bloodthirsty than a bengal tiger, or a Bash-Boozuk. He is credited with all the vices and scarcely any of the virtues of a painted savage. Wanton cruelly and heartless barbarity are his essential characteristics. If any despot at the present time tried to emulate, at the expense of his subjects, the misdeeds of Jehovah, the great majority of Christian men would denounce

\textsuperscript{51} See also Sydney Newspaper Co. v Muir (1888) 9 N.S.W.R. 375

\textsuperscript{52} R. v Bradlaugh and others (1883) Cox C.C. 217.
his conduct in terms of indignation.\textsuperscript{53} There were thirteen other similar counts. Mr Bradlaugh himself admitted that they were blasphemous in the legal sense, but he argued that he was not responsible for the publication and was thus acquitted by the jury.

The question was whether publications discussing with gravity and decency, and in an argumentative way, questions as to Christian doctrine or statements in the Hebrew scriptures, were to be deemed blasphemous. It appeared from Bradlaugh's case that publications which in an indecent and malicious spirit, assailed and aspersed the truth of Christianity, or of the Scriptures in language calculated and intended to shock the feelings and outrage the belief of mankind, were properly to be regarded as blasphemous libels.

\textbf{Lord Coleridge's Definition of Blasphemy}

Lord Coleridge C.J. formulated a test for blasphemy in these terms:

The wilful intention to insult and mislead others by means of licentious and contumelious abuse offered to sacred objects, or by wilful misrepresentations or wilful sophistry, calculated to mislead the ignorant and unwary, is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as in morals - a state of apathy and indifference to the interests of society - is the broad boundary between right and wrong.\textsuperscript{54}

Then applying this test to the case he concluded:

They are, in my judgment, in any view of the law blasphemous libels. It is not merely that they question particular portions of the Hebrew Scriptures, they asperse the doctrines of Christianity,... it is a question, first of all, whether these things are not in any point of view blasphemous libels, whether they are not calculated and intended to insult the feelings and the deepest religious

\textsuperscript{53} Ibid, 218.

\textsuperscript{54} Ibid 226.
convictions of the great majority of the persons amongst whom we live; and if so they are not to be tolerated any more than any other nuisance is tolerated. We must not do things that are outrageous to the general feeling of propriety among the persons amongst whom we live. 55

The test set out by Lord Coleridge is one with very wide ramifications if applied to religion and worship. This very wide definition was fortunately not applied, but even today it has never been specifically overruled, merely neglected or overlooked. There seems to have been no doubt in the Chief Justice's mind that Christianity must be protected, but in his enthusiasm to guard it, his judgment seems to have been expressed in unduly far-reaching terms.

However in a later case in the same year presided over by Lord Coleridge, he also came to grips with the concept of Christianity as part of the law: R. v Ramsay and Poote (1883). 56 The case involved blasphemy. From an analysis of the case it is clear that the mere denial of the truth of the Christian religion, or the scriptures, is not enough per se, to constitute a writing of blasphemous libel. However indecent and offensive attacks on Christianity, or the scriptures, or sacred persons or objects, calculated to outrage the feelings of the general body of the community, will constitute blasphemy - the idea of breach of the peace again. Lord Coleridge mentioned the relationship of Christianity and the law in his summing up to the jury:

Now, according to the old law, or the dicta of the judges in old times, these passages would undoubtedly be blasphemous libels, because they asperse the truth of Christianity ... I think that these old cases can no longer be taken to be a statement of the law at the present day. It is no longer true in the sense in which it was true when these dicta were uttered, that "Christianity is part of the law of the land" ... I have no doubt, therefore that the mere

55 Ibid, 226.
56 Cox C.C. 231.
denial of the truth of Christianity is not enough to constitute the offence of blasphemy. 57

First Reported New Zealand Case

In 1894 there occurred the first reported New Zealand case involving Christianity and the law. The case involved a charge of profane language addressed to members of the Salvation Army, who were holding a meeting in a public place: Armstrong v Moon (1894). 58 Following conviction it was argued on appeal that while language might be described as blasphemous, it was not profane. Profanity involved the taking of the name of God in vain. It was also suggested that the old case such as R. v Taylor proceeded on the ground that Christianity was the law of the land, but in the colonies Christianity had never been part of the law of the land.

Mr Justice Richmond avoided this problem of whether Christianity had come to New Zealand with English law by ignoring it completely. His judgment dealt with the offence purely as a factual matter, and did not comment on the defence submission. Whether Christianity was part of the law was still a matter of speculation.

The second point raised by the defence, that the Salvation Army's own actions had led to a danger of, or an actual breach of the peace, was also avoided by the Court.

57 Ibid p. 234.
58 13 N.Z.L.R. 517.
It was almost certainly the law in New Zealand from 1840 that Christianity was not part of the law, yet it was the justification for much of the common law and this remained as an important factor in this country's law. The justification for the doctrine in England was that Christianity was the religion of the Church which was established in the land by law. In the colonies blasphemy and Sunday laws were still enforced not because Christianity was necessarily part of the law (it might include Christian principles) but because the state would step in to suppress words and conduct which endanger the peace and good of society. Obviously important was the fact that in the colonies no particular church was established or supported, and hence the state was not cast in the role of assisting one of its own institutions. The substance of the "words or conduct" seemed to be immaterial, the state was only concerned with the political consequences.

Thus the Sunday and blasphemy laws do not take the Deity under their protection. It does not attempt to "avenge the insult done to God". The offender was punished for his offence against his fellow-men not his offence against God. It is therefore fair comment that not judge and jury ever tried a man for a sin that was not also a crime. As Erskine J. said, in sentencing G.J. Holyoake in 1842: "The arm of the law is not stretched out to protect the character of the Almighty; we do not assume to be the protectors of God, but to protect the people."39

Even in England by this time the justification for the old blasphemy and Sunday laws was clearly changing. It was the "intent to insult the religious feelings of others", and the "likelihood of a breach of the peace" which were the tests.

39 Supra, 103.
Two Tests

Thus one had "intention to insult religious feelings of others", and "likelihood of a breach of the peace", as two recognised tests. The view was becoming more consonant with contemporary ideas of universal toleration and religious equality. It no longer placed any barrier in the way of free enquiry, and allowed therefore some freedom in the intellectual and spiritual spheres. It was prepared to permit some frankness and advocacy of religious views, what the law continued to prohibit was not the expressions of opinions however unorthodox, but the expression of such views with intent to insult or outrage the religious feelings of others.

Liberalisation continued both in blasphemy cases, and Sunday laws. In 1871 there was an amendment to the Sunday Observance Act 1677, so that prosecution could only be commenced after consent in writing by the local chief of police.60

Freedom of Discussion in Religious Matters

Thus by about 1900 the law was taking a much more liberal stance on matters concerning the relations between God and man. Starkie in his 4th Edition on Libel inclined to the view that prudence suggested that it might be better to leave the discussion of questions of religious doctrine, to those "who, from their habits and education, are most likely

to form correct conclusions". The Courts seemed prepared to allow as much freedom of discussion in religious matters as was possible in the social climate of 1900. Men could publish their opinions, so long as they were expressed temperately and in decent language, however outrageous those opinions might be. It was apparently felt that this liberalisation could only be for the benefit of religion, for it would place it upon a firm and stable foundation, and one in which men and women could range freely in their search for truth. A far cry indeed from the earlier ages of persecution. The law seemed happy for men to speculate freely for intelligence would be stimulated and society generally would improve by this great upsurge in honest religious endeavour. Where in all of this glorious framework of liberty could Sunday laws and blasphemy find a place?

The justification for retention of these laws restricting freedom, seems to have been that the law had to protect, it was granting liberty to the majority by restraining a minority. Men and women who wished to express themselves strongly and perhaps intemperately (but not obscenely) on religious issues could not do so, and Sunday laws were a continual reminder that the laws of England were built on Christianity. The laws remained, but their execution and enforcement had declined, and this decline was to continue into the new century.

Typically by this time blasphemy was rapidly becoming a dead issue, and the few prosecutions which occurred were unsuccessful. An example is R. v Boulter (1908)\(^2\) where it was clearly set forth that the mere

\(^{61}\) p. 599.

\(^{62}\) 72 J.P. 188.
denial of the truth of the Christian religion, or of the scriptures, is not enough per se to constitute a speech of blasphemous libel. Nor could argument against Sunday as a day of rest be actionable, if expressed in decent and temperate language. The important point was whether there was a wilful intention to pervert, insult and mislead others, particularly those who might be ignorant and unwary. The summing up of Coleridge L.C.J. in R. v Ramsey and Foote was quoted with approval by Phillimore J.

Unfortunately while the Courts interpreted more liberally, the restrictive laws still remained at common law, and by statute, avoided perhaps, but not forgotten; available to be used if necessary to persecute and abuse minority opinion. The laws also discriminated against non-Christian religions such as Jews and Moslems, and even certain Christian groups which held different views on the Trinity; the Jew was restricted in the activities he could participate in on a Sunday, even though Sunday was not his day, similarly he had to be careful in spreading his ideas on Saturday as being a Sabbath, in case he was charged with blasphemy. Seventh Day Adventists could also feel discrimination: they would not trade on a Saturday, and could not trade on a Sunday. If their views were expressed publicly, and people became so upset by them that a breach of the peace occurred, then the organisers could be liable, for causing a breach of the peace. The Buddhist and Moslem too was forced to keep a low profile, because to actively proselytise could bring a charge of blasphemy.

Nevertheless religious liberty was starting to be interpreted in a

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very wide sense, even during wartime, so that cases started to
demonstrate a refreshing approach of giving as much freedom to worship,
as possible, compatible with the public welfare. Small religious
groups were not quite so likely to get into trouble with the authorities
because of their beliefs. No longer was there quite the danger, that to
preach doctrines of a kind incompatible with popular Christianity of the
Protestant persuasion would lead to prosecution.

Christianity Not Part of the Law of New Zealand

It was not until 1917 that the New Zealand judiciary at last
considered fully the question of religion and the law in this country.
This was in the leading case (indeed one of the few cases of the Supreme
Court or Court of Appeal involving religion) of Doyle v Whitehead. A certain City Council had established golf links, which happened
by chance to be adjacent to a Presbyterian Church. The Council passed
by-laws prohibiting the playing of golf on a Sunday. The respondent was
charged with breach of this by-law and was acquitted. The Magistrate
found that the playing of golf in contravention of the by-law, involved
no danger to the public, and held that there was no other reasonable
ground for the by-law than to enforce Sunday observance.

On appeal on a case stated on a point of law, the Court held that
the by-law existed only to enforce Sunday observance, and was void under
s. 347(c) of the Municipal Corporations Act 1908, as being concerned only

64 P. v Isherwood (1916) 11 M.C.R. 127.
with the breach of a religious rule. The state was not prepared to enforce a religious obligation, particularly as it involved discriminating in favour of a particular religion namely the Presbyterian faith. What of the maxim that Christianity was part of the law? This had certainly been ignored in New Zealand, and Stout C.J. felt that the state should not intervene to offer protection:

I am of the opinion it is clear that the breach of the by-law was only the breach of a religious rule - namely, playing the game on a Sunday. That the Magistrate was warranted in coming to the conclusion is, I think clear. There is a statement that appears in the case - namely, that the Corporation was waited upon by the Minister's Association and clergymen of the Presbyterian Church, who objected on religious grounds to the playing of games on Sunday, and to the influence it might have on the pupils of the Presbyterian Orphanage which is situated near the grounds.\textsuperscript{66}

These judicial comments indicate the sort of social background of the times, in which the Courts had to interpret the law.\textsuperscript{67}

Chapman J. commented that where the sole motive for a by-law was to observe Sunday observance, it was ultra vires the Council.

It is quite obvious that this case makes it clear that Christianity was not part of the law of New Zealand. If religious laws were passed, they could only be valid if authorised by the king in Parliament. By-laws without statutory backing were ultra vires if attempting to enforce a religious rule. The comments of Stout C.J. emphasise the secular reasons for Sunday observance... prohibiting work, to assist people. Yet if the state was neutral in religion, why have the laws of Sunday

\textsuperscript{66} Ibid 313.

\textsuperscript{67} Stout C.J. at p.314 went on: "it seems to me therefore that the Court is driven to the conclusion there is no reason or suggestion that the by-law was aimed at anything else but what the Magistrate states... namely, to enforce Sunday observance - and that it was with that object that the by-law was passed and the information laid... Considering that the state is neutral in religion, is secular, and that the state has provided for Sunday observance only so far as prohibiting work in public or in shops."
observance, why blasphemy? If the state was neutral in religion, why did New Zealand still recognise and enforce English legislation protecting the Protestant religion?

A case in point was *R. v Rua*, 68 decide in 1916. This concerned the much misunderstood and maligned Maori Leader Rua, who had led his people back to the land. He had been arrested at his settlement of Maunga Pohatu, by police and soldiers, executing a warrant of imprisonment on a Sunday. The common law allowed a retaking after arrest, on a Sunday, but the Sunday Observance Act 1677, prohibited an actual arrest. Chapman J. ruled that the U.K. statute was in force in this country, and that consequently Rua had a right to resist, and call for help from his sons and kainga. Rua of course is a technical decision, but it still shows the almost schizophrenic attitude of the New Zealand Courts to the "old country" legislation. Presumably a person breaking the Sunday laws of England, could be charged in New Zealand even with blasphemy, if they attempted to publicise the reasons why they had broken the law. 69 However, it was not becoming obvious that Christianity was starting to lose the battle with encroaching secularism, even the judges could see that the public's attitude was changing, people wanted some trading on Sunday, just as they were much more liberal in their views of how far a person could go in criticising religion, without risking a prosecution for blasphemy. 70


69 See now however S.9 Crimes Act 1961.

70 See also for Sunday cases: *Munro v Swan* [1918] N.Z.L.R. 382, and *P. v Cox & Collie* (1915) 10 M.C.R. 82.
Thus the justification for religious laws was changing, the labour aspects were being emphasised, and the religious aspects played down; New Zealand seemed to want to untie itself from English apron-strings, but did not know what to do with the Christian threads running through the law. This faltering attitude was also starting to show in England itself.

English Attitudes to Religious Laws

In a case in 1915\(^1\) it was made clear that the Sunday Observance Act of 1677, was of limited application, and did not apply to the selling of food on Sunday, this was a necessity. Only eight years before in *Connor v Quest* (1907)\(^2\) the same Court had held that the Act was to be construed strictly, and could apply to any shopkeeper who opened on the Lord's Day. This was followed in *Billingham v Menhinick* (1909)\(^3\) where the appellant had been selling sweets. In 1914 a case from Wales decided that while an eating house could sell food on a Sunday, cigarette sales were forbidden on that day.\(^4\) The pendulum swung the other way in 1916, for an appeal in the same Court,\(^5\) the Court held that selling food on a Sunday by a refreshment housekeeper, or his assistant was contrary to the Sunday Observance Act 1677, but mens rea was held to be essential to the offence.

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\(^1\) Amorette v James [1915] 1 K.B. 124.

\(^2\) 96 L.J. K.B. 28 D.C.

\(^3\) 73 J.P. 384.

\(^4\) Ibid 385.

\(^5\) Chivers v Hand (1914) 84 L.J. K.B. 304 D.C.
This attitude indicates the varying way in which the judges approached the concept that "Christianity was part of the law of England". If it still was, then surely Sunday laws would have been interpreted strictly, and blasphemy would have been recognised, rather than ignored. It is obvious that by this time, the secular march of the twentieth century, was creating serious inroads into the doctrine. A similar trend can be even more readily detected in New Zealand.

In *Hawke v Stirling*, there was an attempt to extend immunity from prosecution, beyond food vendors, to "amusement caterers". It had been convicted of working on Sunday at his trade as an amusement contractor; he endeavoured to show on appeal that he was not covered by the restrictions of 29 Car. 2, c.7. Darling J. however was quick to point out that Sunday observance was to enable people to "apply themselves to piety and true religion", and he held that the appellant's activities could not be recognised as an exception.

It was in a case involving the selling of ice cream on the Lord's Day, that Darling J. had some very revealing comments on the whole nature of Sunday legislation. In 1916 in *Slater v Evans* he commented:

> With regard to the cases which were cited to us, I think it is plain that many judges not liking this kind of legislation, - I do not like it myself - have tried to get out of the statute by holding or suggesting that all kinds of things might be "meant" although they were not. That is not an effective way of getting rid of the statute. In my opinion the best way to attain that object is to construe it strictly in the way the Puritans who procured it would have construed it; if that is done it will very soon be repealed. The appeal must be dismissed.

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76 Fairburn v Evans [1916] 1 K.B. 218 D.C.

77 [1918] 1 K.B. 63 D.C.

78 [1916] 2 K.B. 403, also *Willesden v Morgan* [1913] 1 K.B. 349 it was clear that automatic vending machines were not subject to 29. Car., c.7.
The Courts were coming to the view that a healthy religious atmosphere could only be created by freeing Christianity from the laws which were supposed to protect it. But if this occurred how could Christianity still remain part of the law? This problem arose in a most cogent form in *Bowman v Secular Society Ltd.*, [79](1917) A.C. 406, decided by the House of Lords in 1917.

**Bowman v Secular Society**

The Secular Society Ltd. was registered as a company limited by guarantee. According to the Memorandum of Association some of the principle objects of the company were: "to promote, in such ways as may from time to time be determined, the principle that human conduct should be based upon natural knowledge, and not upon supernatural belief, and that human welfare in this world is the proper end of all thought and action."

In addition the society according to its memorandum wanted religious tests and observances abolished from legislature, executive, and judiciary. The abolition of state patronage of religion, and secularisation of Sunday schools and marriage. Thus it aimed at many of the things which Christianity held as sacred, and incapable of secularisation.

Charles Bowman left the residue of his estate to the society and the question for determination was: whether the gift to the respondent society was a gift for an illegal purpose.

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[79](1917) A.C. 406.
Amongst other things the House of Lords decided that assuming that the objects of the company involved a denial of Christianity, then it was held: that it was not criminal in as much as the propagation of anti-Christian doctrines, apart from scurrility or profanity, did not constitute the offence of blasphemy.

It was regarded for the appellants that offences against religion were originally within the exclusive jurisdiction of the Ecclesiastical Courts, to which all were amenable, and this jurisdiction was taken over by the Courts of common law. It followed therefore that an attack upon Christianity, however it might be expressed, was an attack upon the law itself and the law itself and the sovereign, and was therefore unlawful.

For the respondents it was suggested that Christianity was not part of the law of England in the sense that a denial of the truth of Christianity constituted a legal offence. Certainly contumeliously to attack Christianity had always been an offence at common law, but the view of what amounted to contumely varied from time to time. The test of whether it might lead to a breach of the peace was also mentioned. Upon the authorities it could not be said that the common law treated as blasphemy a mere denial of the Christian faith. Scurrility was essential to the doctrine. Then a comment on the Blasphemy Act. "there was an offence of blasphemy at common law, but the Blasphemy Act did not indicate what the offence was... its object was primarily political, and it had nothing whatever to do with the common law." The question of whether blasphemy included a breach of the peace, or was likely to lead to a breach, and whether it included dishonouring was also discussed.

These differing arguments present in summary form the conservative and liberal approaches to the whole doctrine of Christianity being part of the law of England. Thus both said Christianity formed an essential part of English law, but one argued that the mere denial of the Christian faith was not actionable, the other said that any attack upon Christianity, however expressed was illegal. God had to be protected. One can see that if the latter argument succeeded, the slow and seemingly inevitable growth of liberalisation over almost two hundred years would be stifled and snuffed out. The doctrine applied to all aspects of the Christian faith, which formed part of the social life of the country, church going, baptism, weddings, observance of such things as the ten commandments, of the thirty nine articles, the Westminster Confession. It is not hard to see why the House of Lords could not accept the argument for the appellants. To have done so would have encouraged a new age of Puritanism. The attitude of the law lords also shows the vast change in the common law, from the days when one could be executed for blasphemy and sabbath-breaking e.g. Aikenhead's case - 1697, the change had been gradual; a slow development of common law doctrines, with occasional legislative sorties, and variations of penalties. Lord Findlay L.C.:

In my opinion the appellants have failed to establish that all attacks upon religion are at common law punishable as blasphemous. There are no doubt, to be found in the cases many expressions to the effect that Christianity if part of the law of England, but no decision has been brought to our notice in which a conviction took place for the advocacy of principles at variance with Christianity, apart from circumstances of scurrility or intemperance of language ... I think we must hold... that the crime of blasphemy is not constituted by a temperate attack on religion in which the decencies of controversy are maintained.\textsuperscript{81}

\textsuperscript{81} Ibid 422.

\textsuperscript{82} Ibid 423.
Lord Buckmaster in his comments made it clear that the common law of England did not render criminal the mere propagation of doctrines hostile to the Christian faith. The crime consisted in the manner in which the doctrines were advocated.  

Lord Parker formulated a test which has since become the major test for blasphemy:

In my opinion to constitute blasphemy at common law there must be such an element of vilification, ridicule, or irreverence as would likely exasperate the feelings of others and so lead to a breach of the peace.  

Thus the breach of the peace argument. While none of the judicial comments were out of step with prevailing social conditions, they are in direct conflict with the Blasphemy Act 1697, and the Sunday Observance Act 1677. Both of these Acts penalised for failure to observe certain Christian doctrines. The Blasphemy Act of "denying the Holy Trinity", and "denying the Christian religion" or "denying the Holy Scriptures"; while Sunday Observance was enforced throughout England, and indeed New Zealand, with the only justification being religious, despite a half-hearted recent attempt to justify by reference to labour law. Yet Bowman v Secular Society cannot be ignored, it became the yardstick by which to measure most cases involving religion, for decades thereafter.

With blasphemy reasonably clearly defined in Bowman it was not hard for the Courts to decide whether in any case blasphemy had been committed. This is clear in one of the last reported cases in England, R. v Gott (1921).

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93 Ibid 470.
94 Ibid 446.
95 16 Cr. App. R. 87.
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CHAPTER V

The Aftermath to Bowman, and the Modern Approach to Blasphemy and Sunday laws

By the nineteen twenties it was clear that blasphemy could be committed by written as well as spoken words. The essence of the crime consisted in the publication of words concerning Christianity so "scurrilous and offensive" as to pass the limits of decent controversy and to be calculated to outrage the feelings of any sympathiser with Christianity. In considering whether those limits had been passed the circumstances in which the words were published were to be taken into account. The limits of decent controversy would certainly be passed if the circumstances in which the words were published were such that publication was likely to lead to a breach of the peace. Thus Christianity would be protected but only if there might be a breach of the peace. Gott's case makes it clear that if the publication of the libel is calculated to provoke a breach of the peace then it is indictable.¹

Just one year later a somewhat similar case was decided in this country, R. v Glover.² This was a prosecution for blasphemy because of the publication of certain works of Seigfried Sassoon, the war poet. Since this is the only reported case in New Zealand which involved blasphemy, some details of the remarks of Hosking J. to the jury are

¹ per Avory J. at 88.
outlined, the only judicial comment we have:

In order that the crime of blasphemy may be constituted you must have what is recognised as a religious and sacred subject — a subject that is in the community well known to be treated with respect and reverence. It is for you to determine whether the subjects dealt with by this poem come within that category and if we went to the common law of England for instruction upon the subject we should find in the common law of England that the topics which are referred to in this poem are most decidedly within the law as to blasphemy. But as I say, we are not governed by that, and it is for you to determine from your own knowledge on matters of fact. Our law is confined to published matter — that is something that goes forth to the public in printing or writing... It is because printed matter gives a durability and a deliberation that blasphemous publications have been retained on the statute book as objects of restraint, whilst blasphemous language has been relegated to some other portion of the criminal book... The law imposes no limit on the freedom of thought in matters religious, it is not a question of the freedom of thought... the object of the law of blasphemy is to prevent disorder in the community who have reverence and respect for certain religious and sacred subjects, it is desirable that provocation of and any outrage of those feelings should be prevented.3

This argument of Mr Justice Hosking explaining the raison d'être for blasphemy, can be applied as justification for any religious law; if breaking the law might lead to a breach of the peace, then the law was desirable to stop public disorder. The New Zealand dictum is very wide; it may apply to any religion, and not just Christianity. Thus the Christian religion is no longer a part of the law, in the fledgling dominion.

This much wider definition was already recognised in the Police Offences Act, which was revised in 1927. S. 4B of the Act provided that it was an offence to use any "profane, indecent, or obscene language" in any public place. The section was wide enough to include spoken blasphemy.

3 Ibid, 186-7.
Wider Application in New Zealand of Christian Precepts

The same Police Offences Act, contained a provision relating to Sunday Observance, in S. 18. This provided that a person was liable to a fine, who "on Sunday, or in view of any public place", worked at his trade or calling, or sold goods, or exposed goods for sale. There were however exceptions. Concerts and entertainments authorised by the local authority were exempt. Similarly the provision did not apply to "works of necessity or charity", or the driving of livestock, or a host of other exceptions, such as dairys, railways and other transport. The Act did not apply to the selling of refreshments, including meals, but excluded intoxicating liquors. No reasons are given in the section justifying the law, but the same provisions go back to the earliest laws enacted in New Zealand. This section was much wider than similar English provisions, for it included those other than tradesmen, and artificers. This is clear from Fryer v Steele and Jones.4

Earlier in 1922 a theatre proprietor was fined for opening on a Sunday, in Westport, even though the local authority had given him permission.5 Until 1927, which gave refreshment houses exemption from Sunday laws, proprietors of such establishments who opened on the Lord's Day were liable, and example being P. v Little.6

4 [1923] N.Z.L.R. 720. This was a prosecution for showing moving pictures in a theatre, on a Sunday. The prosecution was brought under S. 17 of the Police Offences Act 1908, which had first been enacted in 1884, in substitution for the Sunday Observance Act (29 Car. 11, c.7). Adams J. commented that the New Zealand section was much wider, and the appellants had been properly convicted, although not in, or in sight of a public place.

5 P. v Wilde (1922) M.C.R. 38.

6 20 M.C.R. 70.
Like blasphemy, these Sunday laws remained on the statute books in the dominion, expressed in somewhat wider terms than in Britain. Religion remained the justification for them, and the law remained discriminatory, assisting one group of people, to the detriment of the rest of the community. While it was no longer likely that someone would be prosecuted for denying the Trinity, those who trampled underfoot the Lord's Day, by opening their theatres, would certainly be punished. If a carpenter repaired a bay window in his house on a Sunday but in view of a public place he was not liable, but a Chinese market gardener working in his fields on a Sunday was in breach of the Act. The Courts were however interpreting fairly strictly, and it was mainly the Magistrates Courts, in New Zealand, who had to deal with the problem. A petrol station was allowed to be open on a Sunday, so long as repairs were also carried out.

In Britain the Courts attitude to Sunday observance varied in different parts of the country, and just as blasphemy was falling into abeyance, so it was being suggested that Sunday laws were outmoded.

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7 P. Johns (1926) 21 M.C.R. 22.
8 P. v Kwong Hing (1926) 23 M.C.R. 98.
9 P. v Gibbs (1929) 24 M.C.R. 104 where selling a newspaper on a Sunday held not to be trading.
10 P. v Crawford (1929) 22 M.C.R. 140.
11 London County Council v Gainsborough (1923) 2 K.B. 301. See also Clifton v Holborn 142 L.T. 160 D.C. In New Zealand, delivering milk to an icecream factory, on a Sunday was held to be a breach of Sunday laws: P. v Munroe (1926) 21 M.C.R. 50.
Whether Mens Rea Applies

What of the concept actus non facit reum nisi mens sit rea? It clearly applied to blasphemy, which was an offence at common law and by statute, but the Sunday legislation seems to have been more repressive and the mere doing of an act on a sacred day, would lead to retribution by the Courts. The intent to shock and insult Christian believers was an essential element in blasphemy, while no such intention was necessary with Sunday breaking, the mere doing of an act being apparently sufficient. With blasphemy the best evidence of intention was usually found in the work itself, so it was not hard for the jury to find when the work was so full of scurrilous and opprobrious languages on sacred subjects that it was offensive and blasphemous. Where however the work was free from all offensive levity, abuse and sophistry, and was in honest and temperate language, then it was not blasphemous libel. The sabbath could be broken quite unintentionally, no violence or offensiveness was necessary. Both sets of laws were negative, in that they prohibited certain actions, they did not force people to do anything, but the object in respect of both crimes, was to ensure that people were reverent and serious, either in religious argument, or on a particular day. The case of New Zealand Assn. of Rationalists v Hogan\[12\] illustrates that mens rea is not necessary for violating Sunday laws. This was concerned with a section in the Municipal Corporations Act 1920, which amongst other things prohibited concerts or entertainments on a Sunday, without express permission of the Council. The defendant association without any such permission held a meeting on a Sunday, in a picture theatre. No admission charge was made. Herdman J. held that

mens rea was not an essential ingredient of the offence, and he then went on to consider the justification for such statutory provisions:

It was designed for the purpose of compelling people to observe with respect certain days in the year.13

The following year,14 in Auckland the Labour Party was charged with Sunday breaking, in that they held a political rally coupled with a film, on a Sunday evening. Such a meeting was held to be an "entertainment", and use of the Sabbath for secular purposes. Delivery of petrol on a Sunday was held to be a necessity,15 while a furniture removal contractor was within the prohibition on Sunday work.16 Flying an aeroplane for hire was not within Sunday observance,17 as was driving fat lambs to a freezing works on a Sunday,18 but a carrier who took bobby calves to a freezing works on a Sunday, was convicted.19

Religious Laws Discriminating in Nature

The discriminatory nature of these laws seem to have been overlooked completely. The crime of blasphemy protected Protestant Christianity alone.20 Those who were non-conformists or Catholic found

13 Ibid 912.

Similar cases include: Clewer v Edwards (1925) G.L.R. 175, R. v Seagar (1931) 28 M.C.R. 40.

15 P. v Buckleton (1923) 28 M.C.R. 68.

16 P. v Baker & Beavan (1927) 22 M.C.R. 45.

17 P. v Brake (1931) 26 M.C.R.

18 Gregor v Chapman (1930) 26 M.C.R. 54.

19 R. v Hendry (1933) M.C.R. 27.

20 But note the wide definition in R. v Glover [1922] Supra. 132-133.
little cause for consolation and non-Christian religions such as Muslim, Buddhism, and Hinduism were likely to be charged, if their broadcast views were expressed too strongly, and thus might lead to a breach of the peace. Even the Christian could find himself in trouble if he promulgated his ideas too strongly, and these did not happen to coincide with orthodox Anglicanism. Similarly Sunday laws were also discriminatory. They weighed most heavily on members of religious groups who worshipped on a day of the week other than Sunday, these would include Moslems, Seventh day Adventists, and Jews. Thus Seventh Day Adventists by their beliefs abstain from work from sunset on Friday to sunset on Saturday, but in addition Sunday laws prohibit them from carrying out many types of labour on a Sunday. Non Christians in many occupations were required by statute to refrain from work on certain Christian festival days including Sundays, and while this might be good from a health view, what legal justification could be made for these religious restrictions? Formerly the answer would most certainly have been that Christianity was part of the law, but this was no longer so in New Zealand, and such a justification was becoming increasingly rare even in England. Could a question of health or labour be used, for this would certainly gain the support of the labour movement, and the unions? In fact this is what did happen.\(^2\) An interesting case in Canada in 1936 highlights the fact that in Canada, it was not just a particular religion, or belief which was protected, but a "religious subject", rather than Divinity of Christianity. This is much less discriminatory

\(^2\) P. v List 29 M.C.R. 99, P. v List 30 M.C.R. 10, see also the English cases of Kitchener v Evening Standard Co. Ltd. (1936) 1 All E.R. 48, Green v Berliner (1936) 2 K.B. 477, Green v Kursall (1937) 1 All E.R. 732, Tarling v Rome (1936) 52 Times L.R. 220. The justification of labour and rest was gradually removing the offence from the religious to the labour arena.
than most other common law jurisdictions, and indicates a greater appreciation of what constitutes blasphemy by the Canadian law. The test of breach of the peace is also retained. In R. v Rahard the question being considered was what constituted criminal libel? The answer expressed in general terms by the Court was, the expression in writing of an opinion upon a religious question in bad faith and in language offensive and injurious to the religious convictions of those who do not share those convictions and of such a nature that it may lead to a disturbance of the public peace, constitutes blasphemous libel.

The indictment was that the accused while an Anglican Minister had published upon posters, a writing constituting a blasphemous libel. The question was whether the defendant's posters on the Roman Catholic Church amounted to blasphemous libel. Catholic priests were likened to Judas, and the Roman church to a den of thieves. These were some of the things on the posters which were in full view of French Canadian Roman Catholics. The posters were admitted, and the only question remaining was whether these were blasphemous. The code stated:

provided that no one is guilty of a blasphemous libel for expressing in good faith and in decent language, or attempting to establish by arguments in good faith and conveyed in decent language any opinion whatever, upon any religious subject.\(^\text{33}\)

The Chief Justice Perrault commented that in Canada the Code spoke of a religious subject and not only of Divinity or of Christianity in general. It was thus permitted to express any opinion whatever upon a religious subject in a public document if the opinion was expressed in good faith and in decent language, since anyone might support his opinion.


\(^{33}\) Ibid 238.
by arguments expressed in good faith and in decent language.

Gradual Decline in Enforcement of Religious Laws

Throughout the British Commonwealth during the twentieth century there was a decline in the enforcement of religious laws. For example in Australia in 1907 the Court acted to protect the sanctity of Sunday, while by 1914 the same Court with almost the same bench was attempting to circumvent the application of the English Sunday legislation in Australia. Certain judges obviously deplored this trend, but were increasingly a minority. For example in the case of Spence v Ravenscroft (1914) Isaacs J. commented:

On the whole I can see all sorts of inconsistencies in introducing judicially a test the legislature has not thought fit to insert, and I see also a great danger of breaking down a law that by common Australian sentiment has been enacted for general rest on Sunday.

New Zealand was following a similar trend as the rest of the British Empire, and in Britain the Sunday laws were receiving a restrictive interpretation.

Thus by 1939 the whole concept of religion in society was changing. The Courts, reflecting the current attitude that religious observances should be a matter of private morality, rather than public laws. Where the Courts would still interfere however, was if a breach of the peace

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24 Stott v Lawsey (1907) C.L.R. 132.
25 Spence v Ravenscroft (1914) 18 C.L.R. 349.
26 Ibid 360.
was a likely or probable consequence of conduct, thus was particularly so with blasphemy, yet there had been no prosecution for blasphemy in England since 1921 in Gott's case, and in New Zealand since R. v Glover in 1922. The nineteen twenties and thirties had been a fruitful era for prosecutions for Sabbath breaking, but even these were tapering off, particularly as the Courts more and more sought to avoid enforcing laws which no longer seemed to have the support of the majority of people. This avoidance was by legitimate means such as interpretation, and strict compliance with the rules of evidence. The statutes remained on the legislature book, unrepealed because whichever political party was in office were not prepared to interfere in the religious field for fear of alienating voters, without gaining any votes; thus Christianity remained an inherent part of the law without really trying, the result being isolated prosecutions in the years to come; but by the nineteen nineties it has become patently obvious that the laws are ignored and unknown by most people, and their presence on the statute books a potential weapon for the use of any petty religious tyrant, much as that seems unlikely in the twentieth century.  

The situation in England is much the same as New Zealand, but the English statutes relating to Sunday Observance give some recognition to minority beliefs, just as the common law approach to blasphemy has become more and more flexible, not only reflecting contemporary attitudes, but also in an endeavour to protect those who are not Christians, but who wish to spread their own gospel or creed. In England members of the Jewish or Seventh Day Adventist faith are exempt from restrictions on

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29 No so unlikely when one considers recent events in Northern Ireland, Iran, the Sudan and the Phillipines, to name only a few places where religious controversy is endemic.
trading on a Sunday, so long as their beliefs are honestly and sincerely held. In practice the legislature has provided that a certificate from the London Committee of Deputies of the British Jews, or the British Union Conference of Seventh Day Adventists is sufficient. Similar provisions give the same protection to Moslems, but strangely not to faiths holding some other day sacred, such as Monday to Thursday.

What then is the present situation of the two offences which have been studied?

Blasphemy by Statute in New Zealand

In New Zealand blasphemy is covered by S. 123 Crimes Act 1961, which provides:

1. Everyone is liable to imprisonment for a term not exceeding one year who publishes any blasphemous libel.
2. Whether any particular published matter is or is not a blasphemous libel is a question of fact.
3. It is not an offence against this section to express in good faith and in decent language, or to attempt to establish by arguments used in good faith and conveyed in decent language, any opinion whatever on any religious subject.
4. No one shall be prosecuted for an offence against this section without the leave of the Attorney-General, who before giving leave may take such inquiries as he thinks fit.

S. 150 Crimes Act 1908 allowed prosecutions for blasphemy without the leave of the Attorney-General who was not mentioned. The offence is confined to written blasphemy.

S. 48 Police Offences Act 1927 (now replaced by the Summary Offences Act 1961) provided that it was an offence punishable by fine or imprisonment to use: "any profane, indecent, or obscene language in a
public place." The section was wide enough to include spoken blasphemy. The new Summary Offences Act 1981 has provision in s. 4 (1)(c)(i) which could cover the situation of a person grossly insulting another's religion, in a public place. That provides: "Every person is liable to a fine not exceeding $500.00 who, ... in or within hearing of a public place, - (i) Uses any threatening or insulting words and is reckless whether any person is alarmed or insulted by those words." There has been no reported case of blasphemy since 1921 with Glover's case, but in 1968 there was heated controversy in the news media, because of an article published in the Massey University Capping Magazine "Mass Kerade".  

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30 The Christchurch Star, May 12 1968. The "Mass kerade" article was headed "Priest Acquitted on Charges of Cannibalism", and was in the form of a Court report in which a priest was charged with eating the actual body and drinking the actual blood of a dead Jew, said to be one J. Christ. The Roman Catholic Newspaper "Tablet" criticised it, and there were other complaints against a parody of the Eucharist. The "Tablet" commented that if a young labourer or apprentice had stood in the street and said some of the things said they would have been locked up. "We see no reason to extend tolerance to students who not only do not give a damn for the feelings of other people, but who deliberately go out of their way to mock and attack those feelings and beliefs in the most disgusting terms... New Zealand was a Christian country with a Government supposed to be Christian, the least it could do was to refer the item to the Crown Law Office." The Crown Law Office gave an opinion to the Attorney-General that there should not be a prosecution. This is the only recent publicised incident involving suggested blasphemy.

See now the Human Rights Commission Act 1977 which provides remedies against unlawful discrimination, including discrimination on religious grounds.
Sunday Laws in New Zealand Today

Sunday laws involve a multiplicity of Acts, particularly:

(1) S. 377 Crimes Act 1961 - the taking of a verdict on a Sunday, or other proceedings of the Court shall not be invalid. Formerly at common law Sunday was a "dies non juridicus".

(2) S. 203 Summary Proceedings Act 1957 - no warrant or summons issued under the Act, shall be executed or served on a Sunday, however there are numerous exceptions.

(3) S. 603 Local Government Act 1974 - Deals with entertainments on Sunday, Good Friday, or Christmas Day. No entertainments of any kind which is open to the public, whether by the purchase of tickets or otherwise, can be given on the above days without the consent of the territorial authority of the district in which the entertainment is held or given. Reasonable conditions may be imposed as part of the consent, and the territorial authority shall not arbitrarily or unreasonably withhold consent.

(4) S. 69 Sale of Liquor Act 1962 - this section which deals with booth licences, does not allow for booth licences on a Sunday.

(5) S. 4 Acts Interpretation Act 1924 - defines "holiday", which includes Sundays, Christmas Day, New Year's Day, Good Friday, and any day declared by any Act to be a public holiday, or proclaimed by the Governor-General as set apart for a public fast or
thanksgiving or as a public holiday.

(6) Shop Trading Hours Act 1977 — S. 11 forbids shops from opening between 9 p.m. and 7 a.m. or on Saturdays, Sundays, or public holidays. However a shop may be open at any time if all restricted goods (and the schedules to the Act have a large range) in it are then out of sight of the public or kept in a part of the shop that is closed off. S. 18 does enable the occupier of a shop to apply to the Commission (set up under the Act) for an order that it be authorised to open at specified times on specified days. A similar provision allows a majority of shops in an area to apply for exemption in the same way.

(7) The Summary Offences Act 1981 — replaces the Police Offences Act 1927, and has no provisions relating to Sunday, although S. 37 has an offence of disturbing public meetings which includes disrupting any congregation.

By S. 18 Police Offences Act 1927 (now repealed) as amended in 1952, 1955 and 1965 — every person was liable to a fine who worked on Sunday, in or in view of any public place, traded, worked at his trade or calling for gain or reward, or dealt, transacted business, sold goods, or exposed goods for sale. There were however numerous exceptions. Theses included concerts or entertainments authorised by a local authority, works of necessity or charity, driving of livestock, sale of medicine or of surgical or medical appliances, or anything required in connection
with sickness or accident. A case involving the Sunday question under the Act treated the subject as essentially a labour question.

**The Position in Britain**

**Blasphemy**

Blasphemy is still an offence at common law, and indictable misdemeanour, punishable by fine and/or imprisonment.

Today in Britain it is difficult to know what would still constitute blasphemy. The opinions of judges changed on what were the essential elements of the offence. Certainly the gist of the offence is not now considered to be in holding an opinion contrary to the general tenets of Christianity, or the particular doctrines of the Church of England, which may be heretical but in the mode of expressing it, and this is where the breach of the peace argument comes in as well.

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31 The following were also exempt:
Milk deliveries and sales; hairdressers or barbers before 9 a.m.; persons driving any public or private motor car; persons employed on railway trains, tramcars, cable lines, steamers, vessels or boats; persons engaged in the work of a motor garage, service station or in the retail sale of motor spirits, petrol, or motor oils; livery stable keepers; hiring of boats; persons employed in post or telegraph; printing, publishing or selling of newspapers; persons working with aircraft or aerodrome; any person employed or carrying on business of a shop within the Shops and Office Act 1955 (now repealed); persons engaged in taking photographs; selling of refreshments, including meals, beverages, ice cream and confectionary; the sale of fresh fruit and vegetables and flowers, if sold from the place where they were grown.

That was certainly the position into the seventies, but recently
blasphemy has once again been considered in England, this time by the
House of Lords in *R. v Lemon, R. v Gay New Ltd.* [1979]. The
appellants, the editor and publishers of a newspaper for homosexuals,
published in the newspaper a poem accompanied by a drawing illustrating
its subject matter which purported to describe in explicit detail acts of
sodomy and fellatio with the body of Christ immediately after his death
and to ascribe to Him during His lifetime promiscuous homosexual
practices with the Apostles and with other men. The appellants were
charged with the offence of blasphemous libel. The particulars of the
offence alleged that the appellants unlawfully and wickedly published or
caused to be published a blasphemous libel concerning the Christian
religion, namely "an obscene poem and illustration vilifying Christ in
His life and in His crucifixion" and that it was not necessary for the
Crown to prove an intention other than an intention to publish that which
in the jury's view was a blasphemous libel. The appellants were
convicted. They appealed to the Court of Appeal contending that a
subjective intent on the part of the appellants to shock and arouse
resentment among Christians had to be proved by the prosecution and that
the judge had misdirected the jury. The Court of Appeal dismissed their
appeal and they appealed to the House of Lords.

The issue in the appeal was not whether the words and drawing were
blasphemous; that had already been decided by the jury. The only
question on appeal was whether in 1976 the mental element or mens rea in
the common law offence of blasphemy was satisfied by proof only of an
intention to publish material which in the opinion of the jury was likely

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[1979] 1 All E.R. 898, A.C.
to shock and arouse resentment among believing Christians or whether the prosecution had to go further and prove that the accused in publishing such material in fact intended to produce that effect on believers, or although aware of the likelihood that such effect might be produced, did not care whether it was or not, so long as the publication achieved some other purpose that constituted his motive for publishing it.

At the trial the judge held that the offence was one of strict liability. The ruling made irrelevant (and therefore inadmissible) any evidence by Mr Lemon, the editor of Gay News, about his own intentions in publishing the poem and drawing. The Court of Appeal dismissed the appeal, but certified that a point of law of general public importance was involved:

Was the learned judge correct (as the Court of Appeal held) first in ruling and then in directing the jury that in order to secure the conviction of the appellants for publishing a blasphemous libel (1) it was sufficient if the jury took the view that the publication complained of vilified Christ and His life and crucifixion (2) it was not necessary for the Crown to establish any further intention on the part of the appellants, beyond an intention to publish that which in the jury’s view was blasphemous libel?  

Basically the task of the House of Lords was to give the offence of blasphemy some certainty, and to do so in a form that would not be inconsistent with the way the general law as to mental element in criminal offences had developed. Lord Diplock in his dissenting judgment referred particularly to the definition of blasphemy as outlined by Lord Coleridge C.J. in *R. v Ramsay and Foot*, to see whether mens rea was an ingredient of the offence:

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34 Ibid 901.

35 Ibid per Lord Diplock at 901.
The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentation or wilful sophistry, calculated to mislead the ignorant and unwaried is the criterion and test of guilt. A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals - a state of apathy and indifference to the interest of society - is the broad boundary between right and wrong. 36

This statement clearly required intent on the part of the accused himself to produce the described effect on those to whom the blasphemous matter is addressed, and this means mens rea is an important element of the actus reus. This was suggested by Lord Diplocks as being in accordance with the cases from Ramsay and Foote to Gott in 1921, and that for the House of Lords to decide the offence was one of absolute liability would be a retrograde step. It was this question of whether mens rea applied which was one of the most important determined by their Lordship's.

Viscount Dilborne in a long dissertation on blasphemy 37 suggests that mens rea was never an ingredient of the offence, and that all that had to be proved was (a) whether there was publication and (b) whether it was blasphemous. He cites Fox's Libel Act of 1792 in support of this proposition and there seems little doubt that mens rea was not an essential ingredient before about 1800. The Victorian cases while talking of a "wilful intention to insult and mislead others", were only concerned with publication and whether it was blasphemy; and this is certainly arguable, primarily because nearly all the reported directions of the trial judges to juries on the subject seem to omit reference to intention as essential for guilt. Finally Viscount Dilborne concluded:

36 (1883) 15 Cox. C.C. 231 at 236.
37 Ibid 906-911.
Guilt of the offence of publishing a blasphemous libel does not depend on the accused having an intent to blaspheme but on proof that the publication was intentional, and that the matter published was blasphemous.  

It is clear that during the time that the actus reus of blasphemy was constituted by the mere denial (however decently expressed) of the basic tenets of Christianity, or, later, the couching of that denial in scurrilous language, there was no necessity to explore the intention of the accused, for his words were regarded as revealing in themselves what that intention was. The question in 1979 was whether that was still the law. Lord Edmund-Davies in another dissenting judgment suggested that to treat as irrelevant the state of mind of a person charged with blasphemy "would be to take a backward step in the evolution of a humane code." He cited R. v Bradlaugh and R. v Ramsay and Poote. He also exhaustively covered most of the cases reported on blasphemy from about 1800, and cited a comment of Kenny made in 1922, with approval where he: urged that the penalties of blasphemy should be limited to cases where the offender intended either to insult sacred subjects by contumelious language or to mislead his readers by wilful misrepresentation." and Kenny's conclusion was: "in criminal proceedings, guilt can only arise where the offensive matter was published with full knowledge of its contents and with readiness to offend." "Wilful intention," as Professor Starkie said, "is the criterion and test of guilt."  

Another important argument for the appellants was that for an offence to have been committed, it was essential that there be established an objective test of breach of the peace. However the Court's view was that the true test is whether the words are calculated  

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30 Ibid 911.  
39 (1883) 15 Cox. C.C. 217.  
40 (1883) 15 Cox. C.C. 231.  
to outrage and insult the Christian's religious feelings; and that in modern law the phrase "a tendency to cause a breach of the peace" is really a reference to that test. But it was a reminder that it was in an area of law where there was sought some safeguard to public order and tranquillity.

The justification for the strict interpretation by the Court of the subjective intention of the author as being irrelevant, seems to have been threefold:

(1) By reason of the fact that, as until Fox's Libel Act 1792 it was for the judge (and not the jury) to decide whether a publication was blasphemous, he was relieved of any necessity for directing the jury as to intention.

(2) By reason of the doctrine of vicarious responsibility.

(3) That although the Criminal Evidence Act 1898 allowed accused persons to give evidence on their own behalf, it was not sufficient merely for an accused to deny an intention to insult or offend, quaero: a man is presumed to intend the natural and probable consequences of his conduct?

Interestingly enough the mens rea applicable to Sunday law offences is very similar. The prosecution need to establish the actus reus, but the accused's intention is quite irrelevant; it is sufficient to show a breach of the law has occurred.
Lord Scarman in his judgment made certain comments about blasphemy, and the standard of proof, particularly its discriminatory nature. He also made it clear that the issue was really one of the legal policy in the society of today.

It seems therefore that mens rea in blasphemy (and I would argue Sunday laws) requires the offender to intentionally or knowingly publish material, which the jury find to be blasphemous in that it is likely to outrage Christians (the Sunday offender similarly commits the actus reus, intention is irrelevant for the judge of fact). The jury in fact have to form without the assistance of evidence, an opinion which is really a value judgment i.e. whether the publication complained of is likely to cause outrage to Christians - a fairly difficult test to apply. It is not really an offence of strict liability because if the jury come to the view that the material complained of is something likely to outrage, then that finding presumably includes a judgment on the intentions of the accused, however worthy his motives. A further point to come out of the case is that while the preservation of public order was originally an essential part of the offence, this is now no longer so, since a threat

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42 At p.921, "My Lords, I do not subscribe to the view that the common law offence of blasphemous libel serves no useful purpose in the modern law. On the contrary, I think there is a case for legislation extending it to protect the religious beliefs and feelings of non-Christians. The offence belongs to a group of criminal offences designed to safeguard the internal tranquillity of the kingdom. In an increasingly plural society such as that of modern Britain it is necessary not only to respect the differing religious beliefs, feelings and practices of all but also to protect them from scurrility, vilification, ridicule and contempt."

When nearly a century earlier Lord Macaulay protested in Parliament against the way the blasphemy laws were then administered, he added: 'If I were a judge in India, I should have no scruple about punishing a Christian who should pollute a mosque.' When Macaulay became a legislator in India, he saw to it that the law protected the religious feelings of all. "In those days India was a plural society; today the United Kingdom is also."
of public disorder is not required. G.F. Orchard in a recent article argues that the content of the crime is excessively uncertain and its restriction to the abuse of Christian feelings indefensible. Professor Smith, however, points out that it would be wrong to extend it to protect all religious feelings for it may be an excellent idea that some religious notions should be ridiculed and vilified: for example, the idea that adulterers should be stoned to death or the hands of thieves amputated.

It is obvious from a consideration of Lemon's case that blasphemy is still very much alive in Britain, the gist of the offence is not now considered to be in holding an opinion contrary to the general tenets of Christianity, or the particular doctrines of the Church of England, which may be heretical, but at least partly in the mode of expressing it.

In addition to the common law, there were a number of statutes which touched on blasphemy. The Sacrament Act 1547 now repealed, provided punishment for "irreverently speaking against the sacrament of the Body and Blood of Christ". The Act of Uniformity 1558 and 1662, provided punishment for "declaring or speaking anything in the derogation, depraving or despising the Book of Common Prayer".

These provisions relating to heresy and the like were repealed by the Statute Law (Repeals) Act 1969 and the Church of England (Worship and

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44 See also recent commentaries on blasphemy - Buxton [1978] Crim. L.R. 673.

Doctrinal Measure 1974. The old 1697 Blasphemy Act was repealed by the Criminal Law Act 1967.

The Burial Laws Amendment Act 1880 provides restrictions and punishment on persons who in a churchyard or graveyard, "wilfully endeavour to bring into contempt or obloquy the Christian religion or the belief or worship of any church or denomination of Christians, or the members of any minister of any such church."

The provision in The Libel Act 1843 does not apply to blasphemous libel, and a justification of the blasphemy cannot be pleaded, nor is argument as to its truth permitted. Similarly The Law of Libel Amendment Act 1888 which gives a qualified protection to a newspaper reports of judicial proceedings, contains a proviso that nothing in that section shall authorise the publication of any blasphemous matter.

Sunday Laws in Britain

The Sunday Observance Act 1677 makes contracts made by tradesmen and artificers on Sundays in the ordinary course of their business unenforceable by them. The Courts do not approve of the conduct of those who invoke the Act in order to avoid payment, and construe the Act very narrowly.

The Sunday Observance Act 1780 makes it an offence to use a place for public entertainment or amusement on Sundays on admission for money, unless it is a licensed performance of films at a cinema or a musical entertainment falling within the scope of a music licence granted by a
local authority or justices of the peace. The Shop Act 1850 prohibits Sunday trading, except for certain exceptions. Local authorities may also grant exemptions.

Some Recent Attitudes on Blasphemy and Sunday Laws

New Zealand

(1) Indecent Publications Act 1963
It was thought in New Zealand when this statute was passed that it might have some applicability to blasphemy, but a close reading of its provisions indicates this is not the case. The nearest one gets to religious topics is section two which talks about the "public good" and defines amongst other things the word "indecent", as expressing, or otherwise dealing with matters of sex, horror, crime, cruelty or violence in a manner which is injurious to the public good."

(2) Labour Relations Act 1987
S. 187 of this New Zealand legislation deals with the forty-hour, five day week, and makes clear, endeavours are to be made so that no part of the working period falls on a Saturday or Sunday.

(3) New Zealand Draft Bill of Rights
There has of course been much public discussion about this. It includes two provisions relating to freedom of religion:
6. "Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold
opinions without interference",

8. "Manifestation and belief."

"Every person has the right to manifest that person’s religion or belief in worship, observance, practice or teaching, either individually or in community with others, and either in public or in private."

If one compares these provisions with the breach of the peace test in blasphemy, or the person who observed a day other than Sunday as their sacred day of worship, it can readily be seen that if the existing provisions of the Bill of Rights became law, then some judicial clarification of both blasphemy and Sunday laws would be required.

(4) A recent amendment to the Broadcasting Act allows Sunday advertising on television.

Australia

(1) Blasphemous Libel in New South Wales

The common law rules clearly apply in New South Wales and are ably summarised by Ray and Parnell:

It was an indictable offense at common law to speak or publish any matter blasphemous of God (for example, by denying His existence or providence), or contumeliously reproaching Jesus Christ, or vilifying or bringing into disbelief or contempt or ridicule Christianity in general or any doctrine of the Christian religion, or the Bible, or the Book of Common Prayer. Nowadays in order to constitute blasphemy at common law there must be an element of vilification, ridicule or irreverence as would be likely to exasperate the feelings of others and so lead to a breach of the peace, or to deprave public morality generally, or to shake the fabric of society, or to be a cause of civil strife. A temperate and respectful denial of the existence of God is not an offence against the law which does not render criminal the mere propagation of doctrines hostile to the Christian faith. The crime consists in
the manner in which the doctrines are advocated, and whether, in each case, this is a crime is a question for the jury."46

Clearly it is not blasphemy to vilify any non-Christian religion.

Added emphasis to the common law is found in S. 574 of the Crimes Act 1900 (N.S.W.):

No person shall be liable to prosecution in respect of any publication by him orally or otherwise, or words or matter charged as blasphemous, where the same is by way of argument or statement, and not for the purpose of scoffing or reviling, nor of violating public decency, nor in any manner tending to be a breach of the peace.

There has been no recent case since 1922.

(2) The Australian Constitution provides guarantees for the free exercise of religion, subject obviously to such provisions as blasphemy.

Canada

(1) Blasphemy

S. 260 of the Canadian Criminal Code deals with blasphemous libel as follows:

1) Everyone who publishes a blasphemous libel is guilty of an indictable offence and is liable to imprisonment for two years.

2) It is a question of fact whether or not any matter that is published is a blasphemous libel.

3) No person shall be convicted of an offence under this section for expressing in good faith and in decent language, or

46 Watson Ray and Howard Parnell: Criminal Law in New South Wales Volume I p.630.
attempting to establish by argument used in good faith and
conveyed in decent language, an opinion upon a religious
subject.

Clearly the justifications are similar throughout common law
jurisdictions. The Canadian provisions seem to give protection to
non-Christian religions.

(2) Sunday Observance

There are in the various provinces laws restricting certain
activities on a Sunday. Conflict has occurred when these are
placed beside the provisions relating to religious freedom
contained in the Charter of Rights and Freedoms (Constitution Act
1982). S. 2 of this Act guarantees freedom of conscience and
religion, and an important question in recent cases has been the
effect of the Charter on Sunday Observance legislation.

A leading case is **R. v Big M Drug Mart Ltd. (1985)** where the accused,
a retail store, was charged with carrying on its business on a Sunday,
Provincial Court acquitted the accused, holding that the Act was ultra
vires the Parliament of Canada, and also was contrary to the accused's
right to freedom of conscience and religion guaranteed under s.2(a) of

The Alberta Court of Appeal in a judgment reported (1984), 49 A.R.
194, dismissed the appeal. By a majority decision it held, that the
Lord's Day Act infringed the freedom of conscience and religion
fundamental right guaranteed by the Charter.

47 (1985) 53 N.R. 81 Supreme Court of Canada.
The Supreme Court of Canada dismissed the appeal, holding that the purpose of the Lord's Day Act was religious in character, and that since it compelled the observance of the Christian Sabbath it infringed the freedom and conscience provisions of the Charter, and accordingly was of no force and effect; and was not saved by the reasonable limits provisions of s.1 of the Charter. It further held that freedom of conscience and religion meant that government could not coerce individuals to affirm a specific religious belief for sectarian purposes, and the right to freedom of conscience and religion was not restricted to those persons who could prove a genuinely held religious belief.

It had been argued that the Lord's Day Act was saved by s.1 of the Charter because of the value and need of a universal day of rest and recreation, but it was held that Parliament could not rely upon an ultra vires purpose under the Charter. At the same time the Supreme Court discussed, without deciding, whether Christianity formed part of the common law, but since in Canada all crimes come under statute, it was not necessary to come to any decision on the point.

Interestingly enough the Court made the point that if the purpose of the Lord's Day Act was not religious, but in fact secular to enforce a uniform day of rest from labour, then the provincial courts could still consider such purposes under the Constitution Act.

Judge Stevenson in the Provincial Court had considered the question of whether Christianity had ever been part of the common law and came to the conclusion that there was serious doubt that it ever had, and that even if at one time it was part of the common law of the realm its
influence on criminal law had been virtually eliminated by changed social conditions and attitudes. Without the moral grounds which the common law may have provided, there was no evil or menace which needed to be suppressed by the Lord's Day Act.

In summary, Judge Stevenson had recognised that the purpose of the Lord's Day Act was to give certain Christian churches the benefit of legislative protection of their day of rest, whereas the Canadian Charter does not recognise or prefer any particular denomination over that of another, and hence the Act was inconsistent with the Charter.

In a wide ranging judgment, the Supreme Court of Canada considered not only the contemporary issue of the Lord's Day Act and the Charter, but also the historical basis of Sunday observance, stretching back in the Anglo-Canadian tradition to such Anglo-Saxon laws as that of Ine, King of Wessex from 688-725, and through the first major piece of legislation, The Sunday Fairs Act, 1448, 27 Hen VI, c.5, to the well-known Sunday Observance Act of 1677, on which the first Canadian legislation (An Act to Prevent the Profanation of the Lord's Day, commonly called Sunday, 1845, 8 Vict. c.45 (U.C.)) was modelled. It also considered such leading cases as the Hamilton Street Railway, where the Privy Council seems to have held that the primary object of Sunday Observance was the promotion of public order, safety, and morals, and not the regulation of civil rights as between subject and subject.

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48 Supra, p.11.

Another important decision referred to was Henry Birks & Sons (Montreal) Ltd. v City of Montreal [1955],\(^5^0\) where at issue was a Quebec statute purporting to authorize municipal councils to pass by-laws for the closing of stores on certain Feast Days. In that case Kellock J. said at p.823:

While Sunday is often and popularly referred to as the Sabbath, the original Sabbath was, of course, not that day at all. Blackstone long ago pointed (Vol. 4, p.63) that Sunday became a special object of the attention of Parliament not only because the keeping of one day in seven 'as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution'. No such twofold significance attaches to any of the six days mentioned in the present legislation. Their significance is based entirely on their religious aspect. To citizens of a faith other than Christian or of no faith, they have no significance. Accordingly, the enforcement of their observation as such by legislation of the character here in question can only be from the standpoint of the religious faith of those citizens to which they have such significance and legislation from that standpoint or for that purpose is, in my opinion, competent only to Parliament.

An interesting feature of this sort of Canadian comment is the way in which it contrasts with the United States' attitude on the justification for Sunday law, which seems to be entirely secular in purpose, providing a regular day of rest and recreation. Obviously the no-establishment principle of the Constitution has a lot to do with this approach.\(^5^1\) Accordingly the Canadian Supreme Court found that the Lord's Day Act has a religious purpose, in compelling sabbatical observance, it also suggested that if a person is a Jew or a Muslim, or a Sabbatarian, the practice of their religion implies a right to work on a Sunday if they wish. Any law which being purely religious in purpose,


\(^{51}\) J.A. Barron "Sunday in North America" (1965) 79 Harv. L. Review 42.
which denies that right, must surely infringe religious freedom.\textsuperscript{52}

An excellent moral and philosophical justification of freedom of religious belief is provided by Dickson J.\textsuperscript{53}

...the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophical traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided inter alia only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief, and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the Charter. Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion. For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.

An important argument made by the Attorney General for Canada were submissions on what was termed the "secondary principle\textsuperscript{54}" underlying Sunday observance legislation, namely the labour provision for a weekly day of rest, and the submissions in support of this cited numerous statutes of this kind in Great Britain, Australia, and New Zealand. However this rather plausible argument was rejected on the grounds that while a secular justification for a day of rest is acceptable, the real difficulty was that it asserts an objective which was never the motivation of the legislation. Accordingly the appeal was dismissed.

\textsuperscript{52} R. v Big M Drug Mart, Ibid p.109.
\textsuperscript{53} Ibid p.113.
\textsuperscript{54} Ibid p.116.
In the course of argument in the Big M Drug Mart case, reference was made to one of the leading America Sunday law decisions: *Sherbert v Verner, et al. (1963)*, and it was one of the authorities relied upon by Dickson J. in his decision. In the Sherbert case, the appellant, a Seventh Day Adventists was discharged by her employer for her refusal to work on Saturday, the Sabbath Day of her faith, and was refused employment compensation by the South Carolina Employment Security Commission on the ground that her refusal to work Saturdays, causing the employers to refuse to hire her, disqualified her for failure to accept suitable work. The case went on appeal to the Supreme Court where by a majority verdict it was held 1) the denial of unemployment compensation benefits to the Seventh-Day Adventist restricted the free exercise of her religion, 2) the state's interest in preserving the unemployment compensation fund from dilution by false claims, and in not hindering employers from scheduling necessary Saturday work did not justify the state's restriction of the Seventh-Day Adventist's religious freedom, and 3) the extension of unemployment compensation benefits to Sabbatarians in common with Sunday worshippers does not foster the establishment of the Seventh-Day Adventists religion in South Carolina.

Brennan J. made an interesting observation on freedom of religion, and the indirect burden on exercise of religion:

If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterised as being only direct.*

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55 374 U.S. 398.

56 Ibid p.91.

57 *Sherbert v Verner* 374 U.S. 398 at p.404.
In 1981 the Law Commission of Great Britain published Working Paper No. 79 dealing with offences against religion and public worship. It gives an excellent, short history of blasphemy in the United Kingdom, as well as other legal systems, and also covers such lesser offences as profanity and disturbing places of public worship. The aim of the working paper was to review the offences, to ascertain whether they ought to be retained, whether they ought to be substituted for new statutory offences embodying the common law, or whether some completely new approach should be considered.

A brief summary is given of past attempts at law reform, particularly the efforts made to establish blasphemy as a common law offence. As far back as 1885 Professor Kenny had attempted to introduce a bill repealing both the statutory and common law offences of blasphemy, and replacing them with a statutory offence for intentional insults to religious feelings, modelled somewhat on the Indian Penal Code first drafted by Macauley. This was dropped in 1889 in favour of a bill abolishing all laws relating to blasphemy, which was unsuccessful. Further unsuccessful attempts were made in 1914, 1923, 1925 and 1966. Finally the Blasphemy (Abolition of Offence) Bill, was introduced in the House of Lords in 1978 and provided for the abolition of the common law offences of blasphemy, profanity and blasphemous or profane libels, but


60 Author of "The Evolution of the Law of Blasphemy" (1922) 1 Cambridge L.J. 127.
failed to get a second reading when it was announced that the Law
Commission was to examine the law.

One of the points made by the Commission was that there would be
very little argument over abolition of the offence of blasphemy if there
was some complete overlap between conduct penalised by blasphemy and
conduct penalised by other offences. However, although there is overlap,
it is not complete. The Commission accordingly looked at various
arguments for the maintenance of criminal sanctions, under four headings:
1) the protection of religion and religious beliefs, 2) the protection of
society, 3) the protection of individual feelings, and 4) the protection
of public order. The strongest aspect seemed to be the protection of
individual feelings, particularly where insulting attacks upon matters
held sacred by religious believers cause injuries to the feelings of a
unique kind. Although the Commission thought there was room for the
view that if the predominant purpose of the publication is to insult the
feelings of believers than arguably criminal sanctions should follow,
nevertheless, on balance it did not indicate that intervention by the
criminal law was warranted. In summary the concern was with public
insults intentionally aimed at religious beliefs whose predominant
purpose is to cause distress to believers in relation to their faith.

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61 Ibid 65.
62 Ibid 114.
63 Ibid 115-6.
As to possible new offences, three were suggested.\textsuperscript{14}

A An offence of publishing insulting matter likely to provoke a breach of the peace by outraging the religious convictions of others.

B An offence of incitement to religious hatred.

C An offence of publicly wounding or outraging the feelings of religious believers.

Nevertheless the Commission came to the view that on balance the common law offences of blasphemy and blasphemous libel should be abolished, and that because of the difficulties over precisely defining the offence, there should be no statutory replacement. It was also suggested that there could be possible non-criminal remedies such as the provisions of the Race Relations Act 1976, and parallel provisions of the Sex Discrimination Act 1975.

The research paper also dealt with profanity and disturbing in a place of public worship. The Commission considered that references to profanity in old legislation should be repealed, since prosecutions could more easily be brought under more recent legislation including the Public Order Act 1936. In relation to disturbances in places of public worship it was recommended that in place of s.2 Ecclesiastical Courts Jurisdiction Act 1860, there should instead be a new offence penalising anyone who, with intent to wound or outrage the feelings of those using the premises concerned, uses threatening, abusive or insulting words or behaviour at any time in any place or worship of the Church of England, or any other certified place of religious worship, churchyard, or burial

\textsuperscript{14} Ibid 117.
ground. Such an offence to carry a penalty of up to one year's imprisonment and a fine.

Appraisal - 1989

Apart from Lemon's case, there have been no reported cases of blasphemy in Britain or New Zealand since 1921. Thus the wheel has come almost full circle since the middle ages, when laws resulting to blasphemy and Sunday laws existed, but were generally not enforced, to the latter half of the twentieth century when a similar situation seems to pertain. The age when the Crown was concerned about these doctrines, lasted from Tudor times almost to our own, and much of the reasoning behind this situation lies in the philosophy behind the monarchy, sovereignty, and English law.

In the legislative area in Britain, attempts have been made to alleviate the quite discriminatory nature of the law of blasphemy, but no such attempt has been tried with Sunday laws, probably because the latter now come within the general ambit of labour laws, and politically it is uncertain what reactions might be provoked by tampering with laws which by and large give some relief from work, at least one day in every week.

65 Ibid 166-7.
66 See Chapter 1.
68 See Supra 163-165.
It is clear what now constitutes blasphemy, the actus reus can be defined with precision, the problem is, what is the necessary degree of mens rea? It does seem that if a defendant intended to publish the blasphemous words, then he may well be guilty. Whatever the position, the common law, as well as the New Zealand attitude (which only reflects the common law) make it clear that no argumentative attack upon Christianity is now criminal unless it contains (in Lord Parker's words in Bowman's Case) "such an element of vilification, ridicule, or irreverence, as will be likely to exasperate the feelings of others and so lead to a breach of the peace." But this rule falls far short of protecting every person against an insult to the religion dear to them. A person may, for example without being liable to prosecution, attack Judaism or Buddhism. This attitude is not peculiar to England and New Zealand, but is held throughout the common law countries.⁶⁹ Typical is the decision in The People v Ruggles (1811)⁷⁰ where Chancellor Kent recognised and followed the common law doctrine that it is indictable to revile Christianity with malicious contempt. But he added that it could be no crime to make "the like attack upon the religion of Mahomet or the Sabbath of the Jews... The morality of this country is engrafted upon Christianity and not upon the doctrines... of those imposters... The imputation of malice could not be inferred from any invectives upon superstitions equally fake and unknown." Thus the doctrine of Christianity being part of the law of the land.

⁶⁹ But see Canadian Experience Supra 157-158.
⁷⁰ 5 Amer. Dec. 335.
In Ireland blasphemy is still elastic enough to be used to protect the established religion of Roman Catholicism. Over the years, one is able to trace a slow liberalisation of the common law in the state and religious non-conformity. Thus the old theories upon which the relations of State and Church were based, and consequently both the old doctrine as to Christianity and the law and the technical rules which depended upon that doctrine, have been swept away. Clearly public opinion has had much to do with this shift in judicial opinion, and the resulting greater legal toleration (quaere Lemon's case). This liberal approach is of course general throughout the criminal law, and will last so long as society does not regard the liberty so given as endangering it.

Lord Sumner most ably summarised the matter in these words:

the words, as well as the acts, which tend to endanger society is stable or insecure in fact, or is believed by its reasonable members to be open to assault. In the present day meetings or processions are held lawful which a hundred and fifty years ago would have been deemed seditious, and this is not because the law is weaker or has changed, but because, the times having changed, society is stronger than before. In the present day reasonable men do not apprehend the dissolution or downfall of society because religion is publicly assailed by methods not scandalous. Whether it is to undermine fundamental institutions of our society, may come to be criminal in themselves, as constituting a public danger, is a matter that does not arise. The fact that the opinion grounded on experience has move one away does not in law preclude the possibility of its moving on fresh experience in the other; nor does it bind succeeding generations, when conditions have again changed. After all the question whether a given opinion is a danger to society is a question of the times, and is a danger to society is a question of the times, and is a question of fact. I desire to say nothing which would limit the right of society to protect itself by process of law from the dangers of the moment, whatever that right might be, but only to say that experience having proved dangers once thought imminent to have now passed away, there is nothing in the general rules as to blasphemy and irreligion, as known to the law, which prevents us from varying their application to the particular circumstances of our time in accordance with that experience.

71 V. 23 M.L.R. 151-166 O'Higgins.

72 Bowman v Secular Society (1917) A.C. at 466-7.
Clearly the Christianity upon which the State and the law were once founded has become a willow bending to the wind of every theological debate, and no longer able to be the rock upon which the state is anchored. Articles written shortly after Bowman's case felt moved to warn that the liberty given by that case might lead to anarchy if the authorities were not careful. That such a licence to propagate views and theories at variance with Christian morality, might well have political effects, and lead to a form of modified political anarchy such as was believed to exist in Soviet Russia at the time.\textsuperscript{73}

This has not occurred, but it is now clear that the fundamental principle of English law, that the regulation of public worship was a matter of public concern, is outmoded, and all legislation which encourages the old outlook should be repealed; it no longer reflects present day attitudes. This seems at last to be recognised in New Zealand, where the new Crimes Bill, which has been introduced to Parliament, to replace the Crimes Act 1961, makes no mention of blasphemy. The offence is ignored, except that it will be repealed with the coming into force of the proposed Act. The old attitudes still however persist, with many Protestants and Roman Catholics wanting police enforcement of the remaining religious laws, and such bodies as the Society for the Protection of Community Standards in New Zealand, and the Lord's Day Alliance concerned to make private morality a matter of public concern. One publication talks of "protecting God from insults, and imposing religious observance of Sunday".\textsuperscript{74}

\textsuperscript{73} Holdsworth 36 L.Q.R. pp.357-8.

\textsuperscript{74} Louis Venillot "The Liberal Illusion", p.347.
In fact prohibition of blasphemy, and Sunday observance show a form of union of church and state, they discriminate against the non-Christian and freethinker alike, and are inconsistent with the claim that there is religious liberty in New Zealand\textsuperscript{76} or Britain. The common law has always had a somewhat ambivalent attitude to the question. At sometime during the Anglo-Saxon era, the common law absorbed Christianity, but laws enforcing Christian principles and observances originated much earlier. For example Hefferman J. in People v Ramsey (1926)\textsuperscript{76} said:

By common consent Sunday is a day set apart for cessation from all secular employment by the Christian world. It is among the first and most sacred institutions of that religion. Viewed merely from a legal standpoint, it is a day of rest. Sunday legislation is more than 15 centuries old. It originated in Rome A.D. 321, when Constantine the Great passed an edict commanding all judges and inhabitants to cities to rest on the venerable day of the sun... At common law no judicial act could be done on Sunday.

The Canadian case of Attorney General for Canada v Hirsh (1960)\textsuperscript{77} gives a very full account of the history of Sunday laws, both legislative and at common law, and it is in such places as Ireland, parts of Canada, the U.S.A. and Australia that the laws restricting religious freedom are still given prominence. Blasphemy is still an offence in Ireland, Canada, and Australia, and in Virginia, Connecticut, Massachusetts and some other eastern states of the United States. There so-called "blue laws" were enacted at the same time as Sunday worship laws, indeed, some definitions of blasphemy include reference to Sabbath breaking.\textsuperscript{78} The question with all of these laws is whether a State can impose criminal sanctions on those who, unlike perhaps the Christian majority, worship on

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\textsuperscript{76} 217 N.Y. Supp. 799.

\textsuperscript{77} 24 D.L.R. 33.

\textsuperscript{78} New Haven Code 1656.
a different day, or do not share the religious scruples of the majority, or who may express their own different viewpoint in very strong terms, terms which the majority might think to be unreasonable or even blasphemous.\(^79\) The nature of those laws indicates the absurdity of attempting to enforce religious beliefs in a secular society. Should not the obligation be left with the enlightened conscience of the individual, so that there is not coercion. After all Christianity cannot be part of the law of the land, when it no longer forms part of the usual beliefs of the majority of society. It was earlier the very universality of belief which ensured that in large measures the laws were obeyed. There is now no longer uniformity of conduct on a Sunday, nor is there uniformity of Christian belief. Even the justification of custom or morality is not very convincing.

What then could be put in place of these religious laws? There seems no need for any placement, it would be sufficient if there were complete abolition of all laws which had as their justification some tenet of the Christian doctrine. This would not apply to those laws enforcing rules of morality which although having a Christian background are universally acknowledged as being necessary for the wellbeing of society, e.g. murder, theft; thus offences such as blasphemy, Sunday breaking, disturbing a place of worship and other laws of a doctrinal type should be relegated to the refuse heap of abolished statutes.

Of course it is easy to talk of abolition of Sunday laws and blasphemy, but recent events show just how difficult and controversial this may be.

\(^79\) Douglas J. in McGovern v Maryland 366 U.S. 420.
In the case of Sunday there has been much debate in both Britain and New Zealand on the relative virtues of such laws, with certain groups enthusiastically endorsing such laws (mainly religious and trade union supporters), and other (often commercial interests) seeking their abolition. For example in New Zealand a group calling itself "Save our Sunday" campaign (S.O.S.) has recently asked "Christians, trade unionists, community leaders, family organisations and 'ordinary New Zealanders'" to join forces to protect Sunday "as we know it". The National co-ordinator, Tom Quayle, is also general secretary of the Temperance Alliance, and has the support of the Distribution Workers Federation.

In July 1988 an advisory committee studying the Shop Trading Hours Act suggested three reasons for the Sunday Trading provisions: shop employees and their unions benefited by it, retailers who did not wish to open at all times were protected, and Sunday was preserved as the day of Christian observance and kept as free as possible of commercial concerns. Nevertheless the committee also felt that the Act was riddled with anomalies, was unfair, and ineffectively enforced.

In an editorial comment on Sunday trading the Christchurch Press said:

Rules that prevent some trading on Sundays but allow other forms of commerce are stifling. Why should it be proper for one store to sell sheepskin jackets to tourists, but not proper for another store to sell a pair of pyjamas to a local person? What is the sense in a law that allows people to buy magazines on Sundays, but ensures that they cannot buy a Bible?

It suggested:

in essence,... freedom for all parties is all that is proposed: the freedom for shop owners to open, for shoppers to shop, and for shop assistants to work, or not, as they choose. Any number of factors might play a part in which decision an individual makes, but the time should be long past when the State presumes to make the decisions for everyone, regardless of circumstance.  

Retailers seem prepared to defy the present law, and open on Sunday, considering that the trading generated is worthwhile, and that the Shop Trading Hours Act is worth challenging. In Britain too there is currently a debate over the virtues of Sunday trading. The controversy and legal wrangling over Sunday shopping is apparently just as intense in Britain as New Zealand. The British government wishes to compromise by allowing half-day opening, and is expected to test public opinion on the issue, before committing itself to changes in the law. The Consumers Association in Britain is in favour of change, and rather than total de-regulation suggests half-day Sunday trading as an acceptable compromise, pointing out that in any event in Scotland shops are allowed to open throughout the day. Political commentators suggest that legislation may be introduced within the next twelve months.

In the field of blasphemy the Salman Rushdie Affair has highlighted both the inconsistencies in the present law, and the need to change. Once of the most important legal matters arising from the controversy has been the demand by British Muslims for the blasphemy laws to be extended to cover their religion. What has not always been so clear to the protagonists is that the blasphemy offence strictly protects the

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established Anglican church only, although its wide definition certainly seems in fact to cover most forms of Christianity. The Archbishop of Canterbury responding to the affair suggested the blasphemy laws should be extended to other faiths, but as Richard Dawkins writing in the New Statesman Society commented:

Our whole society is soft on religion. The assumption is remarkably widespread that religious sensitivities are somehow especially deserving of consideration – a consideration not accorded to ordinary prejudice. Without being religious, we may find all sorts of things offensive. If somebody finally murdered Esther Rantzen on the grounds that they found her deeply offensive, would they receive respectful "sympathy" and "understanding of their sincerely held beliefs" from religious and civic leaders? No, because their prejudice happens not to be religious prejudice... let somebody's religion be offended and it's another matter entirely... the whole point of religious faith, its strength and chief glory, is that it does not depend on rational justification... The trouble is that faith, by the very nature of its vaunted detachment from objective reality, is a weapon that can be arbitrarily turned on any target.  

Dawkins concluded that the best way to deal with the problem was education, particularly education in the secular scientific world-view. Of course this has not stopped many Muslims from wishing to take legal action against Rushdie, and blasphemy has been the mooted crime. They have even, recently been able to obtain counsel's opinion that blasphemy can protect the Muslim faith, and have made application to court for a ruling. The resulting legal discussion promises to add a further chapter to the long and fascinating windings of blasphemy.

Summing Up

One has seen that through the centuries the sacred thread of Christianity has been part of the fabric of the common law. Brought in as something essentially extraneous and not Anglo-Saxon, it succeeded in

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becoming so much a part of the common law that some commentators, notably Hale in the eighteenth century and Blackstone, regarded it as the rock upon which the whole of the English law was based. The ten commandments were God’s law, and these had been adopted by the great jurists as part of the law of England; the kings legislated using many Bible principle of conduct, the Church enforced the rules in their Courts, and at the time of the Reformation, the sovereign’s Courts took over these functions. Today we still have Christianity as part of the law of both England and New Zealand. The effect of laws prohibiting blasphemy, and encouraging Sunday observance is the same; they have a tendency to foster and encourage the Christian religion. If there is to be true religious freedom, and absence of religious discrimination, such laws should be abolished. The existing laws may also be used to persecute minorities, or those whose religious views are out of favour with the majority. The Rev. Ormond Edward Burton summed it up in these words:

In a small way but at a great moment of history it is my privilege to bear witness to the great tradition of the Christian Church that she must be free to preach the whole of the gospel and live the whole of her life. No doubt you will be supported in your sentencing of myself by the majority elements of the Church that are moving fast — as in Germany — to be the decent ornaments of a Fascist State but the living elements of the Church can live and indeed find new life in the gaols — and even, when your fear grows to a certain intensity, in front of your firing squads. Therefore, Sirs, I am prepared to receive you sentence without bitterness and indeed even with cheerfulness because I know the good future lies with those who dare to keep the Faith and to prove true a Christian freedom in a world gone insecure through fear.65

Strong words no doubt, but it demonstrates what may happen when the views of the majority are different to the minority and under privileged. Perhaps Ormond Burton was also right when he suggested that Christian ideas are the most revolutionary the world knows; if so then they

certainly do not need the authority of the State to spread them. Dr. Richard Lawson writing from Britain mentions a recent Court of Appeal decision:

The secularisation of the United Kingdom, so long recognised de facto, has now been recognised de jure. In the Court of Appeal, a tenant pleaded a verse from Deuteronomy: 'And every seven years these shall grant a release.' Well, the learned Judges considered the evidence, and concluded that the Bible is not part of the law of the land, thus confirming what we had all along suspected. Of course, if Professor Hart and his rules of recognition still present a tenable view, there never was any problem. The Bible has not passed both Houses nor received the Royal Assent. Thus it would not be law. There is no reason, though, why the Ten Commandments should not constitute a Code of Practice under, say the Health and Safety of Work Act.66

Christianity is gradually drifting out of the law; it has become needless flotsam, needless because while Christianity remains part of the law there cannot be true religious freedom. To have a religious content in the law can only weaken religion, while granting legal protection to religion may well weaken the law.

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