

Blasphemy: A Return to "Imaginary Crimes"?¹

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At the beginning of the Revolution, France became the first nation in Europe to abolish the crime of blasphemy.² The Declaration of the Rights of Man of 1789, whose article 11 formally protected freedom of expression, and the first Penal Code of 1791 abolished what was described at the time as an "imaginary crime."³ We might think blasphemy had been consigned to a dusty corner of French legal history.⁴ But with the *Charlie Hebdo* attacks of January 2015 it became clear that blasphemy retained a far stronger tacit presence in France than had been imagined. Some people have internalized certain prohibitions made in the name of "respect for religion," even without necessarily consenting to them. Any form of "injury"—moral, intellectual, literary—is now viewed as intolerable, especially when directed at the Other's religion. For these people, the abolition of the crime of blasphemy is part of a "radical" conception of a secularized, *laïque* society.⁵

1 This article is based in large part on a lecture given at Sciences Po on March 7, 2017, which appears in *Les politiques du blasphème: une perspective comparée* (The Politics of Blasphemy: A Comparative Perspective), Paris: Karthala, 2017 (forthcoming).

2 Since the attacks of 2015, much has been written on the question of freedom of expression. On blasphemy in the strict sense of the word, see especially "Liberté d'expression et religion. Le point sur le droit applicable après les attentats de *Charlie Hebdo*," *Légicom* 55 (2015); Caroline Fourest, *Éloge du blasphème* (Paris: Grasset, 2015); Brigitte Basdevant-Gaudemet, "Histoire juridique du blasphème: péché, délit, liberté d'expression?" *RDP* 2 (2015), 309-318; and our own book: Jacques de Saint Victor, *Blasphème, brève histoire d'un crime imaginaire* (Paris: Gallimard, 2016).

3 In his *Rapport sur le projet de code pénal* (Report on the Draft Penal Code), the Constituant Louis-Michel Lepeletier de Saint-Fargeau asserted that it was necessary to "get rid of this host of *imaginary crimes* that swelled the old collections of our laws. You will no longer find the great crimes of heresy, divine lèse-majesté, sorcery, and magic ... for which in the name of heaven so much blood has stained the earth."

4 Even today, however, blasphemy is still a crime in many European nations, particularly Germany, Austria, Italy, and so on. Historical particularities mean it is still present in article 166 of the local law of Alsace-Moselle, which is inspired by the German penal code of 1861, although its abolition is well under way.

5 The expression comes from Charles Seignebos, who argued in 1921 that, in 1905, France had established a system of separation that was "unprecedented, the most radical in the world" (quoted in Philippe Portier, *L'Etat et les religions en France. Une sociologie historique de la laïcité* [Rennes: PUR, 2017], 314).

We need to recall, schematically, the many different forms this offense took during the Ancien Régime and the post-revolutionary period if we are to understand precisely what it meant, before and even after its abolition. For its meaning changed. With the Wars of Religion, crime against God gained contemporary relevance when it took on the new character of an "identity crime" (section 1). After the Wars of Religion it changed again; beginning in the seventeenth and eighteenth centuries, blasphemy was associated with a "disturbance of the public order." Except for a brief "liberal" period between 1789 and 1819, this approach was maintained until the law of 1881. The abolition of the crime of blasphemy in 1789, an indirect result of Voltaire's campaign against the execution of the Chevalier de la Barre, established a merely apparent principle of freedom of expression (section 2). It is only with the Law on the Freedom of the Press of 1881 that the principle of freedom secured a place in the legacy of the Enlightenment, and the idea of an "outrage to religious morality" was definitively rejected. But this crucial series of events lets us understand how prohibitions against blasphemy can reappear in unexpected legal forms (section 3). Since the 1980s, increased awareness of the issue of "injury to intimate convictions" has reopened the debate. Starting in 2000, French judges, who like their European counterparts had initially been extremely hesitant on these matters, refused to sanction this development, which was based on personality rights and which would have profoundly affected the principle of free expression. But the debate is far from fully settled, and the risk exists that this "imaginary crime" may regain its prominence in France after more than a century of absence. These new legal questions mark an undeniable regression in the name of keeping everyone happy (section 4).

1. BLASPHEMY, FROM OFFENSE AGAINST GOD TO IDENTITY CRIME

Originally considered an "outrage against the divine," the crime of blasphemy was punished by secular powers beginning with the Capetian dynasty. (We have no record of earlier royal interventions on the subject.) The Capetians wanted to avoid the blasphemer's "sin of the tongue" from attracting the wrath of God and so affecting the whole kingdom. This conception of the offense explains how loosely it was enforced. There were four royal ordinances from 1254; these limited punishments to fines and penance. St. Louis, pointing to Leviticus and the Code of Justinian, wanted to condemn blasphemers to death, but Pope Clement IV dissuaded him from doing so. There was a great deal of subsequent legislation—nearly eighty royal texts on blasphemy existed by 1789. This apparently indicates what the historian Jean Delumeau called a "civilization of blasphemy."⁶ From a simple fine, we move over the decades to corporal punishment—cutting off the lips and then the tongue—and finally, with the declaration of July 30, 1666, to the death penalty for "enormous blasphemies." The seriousness with which the

6 Jean Delumeau, *La Peur en Occident, XIVe-XVIIIe siècle* (Paris: Fayard, 1978), 400ff.

crime was taken may surprise us. In reality, however, it only confirms the second characteristic blasphemy took on after the Wars of Religion, and helps explain why it is so complex to deal with. It became an "identity crime."

It bears noting that, from the end of the Middle Ages, the repression of blasphemy began to be presented as part of the construction and increasing power of the modern state. This was at precisely the moment that the doctrine of the divine right of kings was being asserted, which made religion "a privileged instrument" of monarchical action.⁷ But it was with the religious schism that the question became extremely sensitive. The sudden appearance of Protestantism and the beginning of the Wars of Religion changed the nature of blasphemy, making it a political crime—that is, one of "identity." The criminalization of blasphemy became closely linked to confessional unrest. The nature of blasphemy changed. As Corinne Leveleux-Teixeira has written, it became a heresy, one that constructed an "unacceptable religious identity."⁸ "Bad speech" was easily associated with "bad belief" and was used to target the beliefs of the Other, whether Protestant or Catholic. It is worth dwelling for a few moments on this claim, which has a certain timeliness.

This "civilization of blasphemy" justified first of all a new "politics of language." Even simple cursing came to look suspicious to the men of the Renaissance. Invocations of the name of "God"—as in "par Dieu!" (by God!), "mort Dieu!" (God's death!), "je renie Dieu!" (I deny God!), and so on—had to be replaced with the words "di, dié, dienne, bleu," the origin of our own "pardi, parbleu, morbleu, sang-bleu!"⁹ Of course, these comical shifts in language, which left their imprint on our vocabulary for several centuries, were not meant to eradicate heresy. But they indicate a new state of mind that, from the sixteenth century onwards, detected within these largely unwitting offenses against the divine the risk of expressing an "unacceptable religious identity."

The "very great and execrable blasphemies that have heresy implicit in them," as the Paris Parliament called them in 1544, brought about a terrible spiral of repression.¹⁰ Protestants deliberately used blasphemy to provoke and defy the Catholics, eliciting brutal reactions; the most lucid minds of the time feared civil war. Étienne de la Boétie wrote soon after that the religious division bore within it the seeds of a "dismembered republic."¹¹

7 Jacques Krynen, *L'Empire du roi. Idées et croyances politiques en France (XIIIe-XVe siècle)* (Paris: Gallimard, 1993), 242.

8 Corinne Leveleux-Teixeira, "Injure à Dieu, outrage au roi. Le blasphème à la fin du Moyen Age et au début de l'époque moderne," in *Outrages, insultes, blasphèmes et injures* (Paris: L'Harmattan, 2008), 50.

9 The anecdote of Father Coton, Henry IV's confessor, has long been famous. To avoid the constant use of "jarnidie" ("je renie Dieu," I renounce God), Coton suggested to the king to change God's name and use his own. The resulting curseword, "jarnicoton," was very successful in the Béarnais court.

10 Elisabeth Belmas, "La montée des blasphèmes à l'âge moderne du Moyen Age au XVIIe siècle," in *Injures et blasphèmes*, ed. Jean Delumeau (Paris: Imago, 1989), 18.

11 See Étienne de la Boétie, *Mémoire inédit sur l'édit de janvier 1562* (Unpublished Memoir on the Edict of January 1562).

François I initially thought he could arbitrate between the two religions. He was particularly interested in using a policy of "concord" to win over the German Protestant princes to his fight against Charles V. But he realized with "the affair of the placards" in 1534 that such an approach was unsustainable. The placards urged the destruction of "idolaters"—that is, Catholics. The campaign was conducted simultaneously in several towns, reaching all the way to the king's chamber door, and had required many conspirators. François considered this an offense against religion and, above all, a crime of *lèse-majesté*. He responded vigorously, ordering the harshest possible punishments for those who had created or sold the placards. Many Protestants were burned at the stake. The repression also affected the fledgling printing trade. On January 23, 1535, the king entrusted the Parliament of Paris with the task of appointing twelve people to decide which books were necessary "for the good of public affairs." The machinery of royal censorship had been set in motion. After François' death in 1547, the monarchy increased the number of ordinances aiming to repress heretical blasphemy which, according to the order of 1549, expressed the "desire to secede from the union of the Church."

There were only six royal edicts on blasphemy in the fourteenth and fifteenth centuries. By contrast, there were more than twenty edicts, ordinances, or royal declarations between the sixteenth and seventeenth centuries, which laid down ever more severe punishments.¹² The repressive logic of the blasphemous configuration is seemingly endless, because God himself is infinite, as Montesquieu understood perfectly: "If men's laws are to avenge an infinite being, they will be ruled by his infinity."¹³ The philosopher warned his readers that, setting out to repress blasphemy, legislators were necessarily committing themselves to an endlessly repressive logic: there would always be a fanatic who found some utterance or other blasphemous—and God would not be present to define blasphemy or to establish its limits.

2. THE DEVELOPMENT OF THE "BLASPHEMIC CONFIGURATION": FROM OFFENDING "PUBLIC ORDER" TO OFFENDING "RELIGIOUS MORALITY"

We do not have enough space here to emphasize the interplay between, on the one hand, the ruling power's annexation of the divine by affirming the "divine right of kings" and, on the other, the repression of blasphemy in the late sixteenth and seventeenth centuries. In particular, the seventeenth century saw the coronation of the Westphalian principle in 1648—*cujus regio, ejus religio* (whose realm, his religion). In France, the concrete manifestation

12 Belmas, "La montée des blasphèmes," 23.

13 Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, *The Spirit of the Laws*, ed. and trans. by Anne M. Cohler, Basia Carolyn Miller, and Harold Samuel Stone (Cambridge: Cambridge University Press, 1989), 190.

of this was the abolition of the Edict of Nantes. This put an end to the Wars of Religion and, paradoxically, meant the "blasphemous configuration" lost its crucial political dimension. Blasphemy no longer had an "identity dimension." But, from the seventeenth century onwards, it became an offense against public order which the king, with his divine right, had to suppress.¹⁴

In this ideological and political process we can see secular power resolutely freeing itself as discreetly as possible from religious power, by appropriating, so to speak, the divine right without the Church's support. We could speak instead of a "secular divine right." This was a crucial development, one that reinforced the sacredness of French royal authority. In the sixteenth and especially the seventeenth century, some architects of absolutist ideology stated without qualification that the divine right of kings was consistent "with the express word of God."¹⁵ On this doctrine, the king had his authority from God alone, "as the priest to whom he lends his status." By fully asserting his status as the bearer of divine right, and his corollary responsibility for his subjects' salvation, the French royalty made the state the "secular double of the Church," setting both at the same level of sacredness. The persistent opposition of Rome and the French clergy, particularly at the States General of 1614, meant that the monarchy did not dare make this a fundamental law of the kingdom as the Third Estate had asked. But everyone admitted the royal state had its place in the ecclesial mission of helping men find salvation. And, more prosaically, the state was now the only power able to root out heresy. Who else but secular authorities could prosecute the Protestants or the Jansenists? The Church ultimately gave up the right to prosecute blasphemy to the Most Christian Majesty, the king by divine right, particularly since the philosophical campaign in favor of freedom of expression had become even bolder with Spinoza.¹⁶ The repression of blasphemy became correspondingly more severe. As we have said, it was royal legislation under Louis XIV that established the death penalty for blasphemers.¹⁷

As Jules Simon writes, we can console ourselves that, surprisingly enough, in the West "it was politics rather than religion that made religion intolerant."¹⁸ This development was paradoxically affirmed in the eighteenth century, when the growing secularization of Enlightenment society threatened the established

14 Olivier Christin, "Le statut ambigu du blasphème au XVI^e siècle," *Ethnologie française* 22 (1992), 342.

15 Marie-France Renoux-Zagamé, *Du Droit de Dieu au droit de l'Homme* (Paris: PUF, 2003), 247ff.

16 The subtitle of the *Theological-Political Treatise* of 1670 states that "freedom to philosophize may not only be allowed without danger to piety and the stability of the republic but cannot be refused without destroying the peace of the republic and piety itself."

17 Two declarations officially sanctioned the death penalty in such cases, those of September 7, 1651, and July 30, 1666. The preamble of one of these texts expressly affirms: "We would consider ourselves unworthy of the title of Most Christian Majesty that we bear if we did not take every possible care to suppress such a detestable crime, which offends and attacks directly and above all the divine Majesty." See Françoise Hildesheimer, "La répression du blasphème au XVIII^e siècle," in Delumeau, *Injures et blasphèmes*, 67.

18 Jules Simon, *La Liberté de conscience* (Paris: Hachette, 1867), 406.

religious order. For royal jurists, blasphemy became a "disturbance of the public order" and therefore a concern—in a rather inconsistent way—of royal jurisdictions. In his famous *Répertoire de jurisprudence* of 1776, the jurist Joseph-Nicolas Guyot testified to this development by affirming that magistrates must no longer seek to avenge God: "But if we pay full attention to the fact that the punishment of blasphemy is necessary for society only as a matter of example and *not in order to avenge God*, who is above humanity's petty outrages, blasphemy should only concern the public ministry insofar as the impiety ... is serious and scandalous."¹⁹

We can see the indirect influence of Montesquieu and Voltaire here. As Jean Joseph Dareau-Laubadère noted, "we are not permitted to encroach on the sacred rights God has reserved for himself." In general, judges made rather enlightened use of the tools they had been given to combat blasphemy, so that before the case of the Chevalier de La Barre, even Voltaire regarded royal legislation as rather "wise and human."²⁰ In reality, these provisions were not as "human" as they seemed, because the offense of blasphemy was part of a system that legitimized denunciation. By its very nature, blasphemy is a crime without a direct victim: God cannot take legal action. To begin proceedings it was therefore necessary for the offense to come from a denunciation by a third party. Accusations of blasphemy became a convenient weapon for the unscrupulous, especially in cases involving family matters. If one had run out of arguments, one could accuse one's opponent of blasphemy. Judges were generally not taken in.

But a tense political or social context could bring about a rapid change in the approach of enforcement authorities, and could instantly condemn a blasphemer to be burned at the stake. Such was the case at Abbeville in 1765-66, where a young man, the Chevalier de La Barre, was executed for an act of blasphemy that a few years earlier might only have earned him a fine.²¹ Voltaire stirred up Europe, which was shocked by this famous affair, in which the son of a well-to-do family was executed in atrocious conditions, his head cut off and his body burnt at the stake for blasphemy. This was a "trial too far," and led France to be the first to abolish the crime of blasphemy in 1789.

But the question was far from definitively settled. While the Revolution and the Empire never reversed this abolition, the Restoration silently reintroduced the crime. Still, we must be careful not to confuse blasphemy and sacrilege. A familiar example of the priestly faction's offensive is the law of April 20, 1825, which made profanation of chalices and consecrated hosts punishable by death. This comically extreme text was in fact never used, and was abolished with the revolution and the law of October 11, 1830. It was, paradoxically, an originally liberal law on the press, presented in 1819 by Count Pierre-François Hercule de Serre, at the time Keeper

19 *Joseph-Nicolas Guyot, Répertoire universel et raisonné de jurisprudence* (Paris: Dorez, 1775-1783), vol. 6, 212. My emphasis.

20 On these points, see Saint Victor, *Blasphème*, 45ff.

21 On the legal dimension of this famous case, see Dominique Holleaux, "Le procès du chevalier de La Barre," in *Quelques Procès criminels des XVIIe et XVIIIe siècles*, ed. Jean Imbert (Paris: PUF, 1964).

of the Seals in Élie Decazes's ministry, which introduced a crime of contempt of public *and religious* morality into positive law. This reinstated a crime of opinion which closely resembled that of blasphemy. The text of May 17, 1819, which was made even stronger in 1822, treated blasphemy as an offense against public order, and was used to reinforce moral order and prosecute offenses against religion, particularly from the Second Empire onwards.²² Liberals like Benjamin Constant and Pierre Paul Royer-Collard, who was close to the minister (De Serre), opposed the amendment, which indirectly reinstated the crime of blasphemy. Constant argued that it risked transforming the courts into "arenas of metaphysics." And that is precisely what happened under the Second Empire when, in a new climate of prudishness inspired in part by the *Syllabus of Errors*, those like Charles Baudelaire, Gustave Flaubert, Pierre-Joseph Proudhon, and Eugène Sue faced prosecution. It was only with the Law on the Freedom of the Press of 1881 that the indirect prohibition on blasphemy disappeared once and for all from the legal arsenal.

3. THE VICTORY OF FREEDOM OF EXPRESSION

To grasp the startling complexity of the recent debate in France, we have to recall some of the discussions that led to Law on the Freedom of the Press of July 29, 1881. In the general debate of the law that opened in the House on July 5, 1881, Eugène Lisbonne, who had introduced the bill, expressed his support for getting rid of all "crimes of opinion," and particularly those of outraging public and religious morality. The right pretended to agree with this, thinking it detected here signs of a growing anarchy that, it hoped, would allow it sooner or later to regain control. A few months earlier, on February 14, 1881, during a discussion on crimes against the state, several right-wing deputies had protested against Georges Clemenceau's demand for the removal of the crime of outraging religious morals. Speaking for the radicals, Clemenceau had argued that it was necessary to allow "everything to be said, everything to be criticized, however lively the criticism." It was then that one of the right's most famous orators, Bishop Charles-Émile Freppel, Deputy and Bishop of Angers, protested, raising *avant la lettre* the question of hate speech. "The fact is the expression of the idea," he declared, arguing that the spoken or written word amounted to "an action, according to the adage consecrated by English legislation, the most liberal of all: *scribere est agere* (to write is to act)." An outrage to religious morality "harmed" believers. It

22 Initially, the ministry had not planned to repress "outrages against religious morality." It was a parliamentary amendment proposed during the general debate that opened on April 17, 1819, which completely changed the situation of this discussion, considered one of the great moments of the Restoration. Balzac refers to it several times, particularly in *Illusions perdues*. To protect religion from the "excesses" of freedom of expression, a royalist deputy, Charles-Louis Texier d'Hautefeuille, suggested adding to "public morality" the words "*and religious*." See Jean Gaultier, *Un Délit d'opinion: le délit d'outrage à la morale publique et religieuse, 1819-1881*. Thesis in Law (Paris: Rousseau, 1923).

is interesting to note that it was Bishop Freppel, in France, who anticipated the approach to ordinary language of contemporary philosophers like John Searle or John Langshaw Austin, the author of *How To Do Things With Words* (1962), from which the concept of the "performativity" of discourse has developed.²³ This criminalization of "hate speech" was used by the ultra-Catholic right in 1881 to defend the charge of blasphemy. For Bishop Freppel, the deep "injury" suffered by believers had to be compensated.²⁴ He protested against the refusal to protect God, according to him "the most august and sacred thing in the world." Clemenceau's dry retort has become famous: "God will defend himself perfectly well; he doesn't need the Chamber of Deputies to do so!"²⁵

The law of 1881 abolished the crime of outraging public and religious morality. The system of liberties established by the Republic was, in Romuald Szramkiewicz's words, "the most open in the world." It did not get rid of every "crime of the press." The two main ones remaining were slander and defamation. For nearly a century, this new system established the main French principles of freedom of expression, especially in religious matters. This is a freedom "within limits." The law distinguishes between *ideas* (the religion itself) and *people* (the believers). The ideas associated with religious beliefs must be open to even the most ferocious free critical debate; otherwise, ideologies or political agendas can no longer be discussed and freedom of expression would be meaningless. At the same time, such debate must not devolve into slander or defamation: the freedom to believe or not to believe is one of the great freedoms defended by the law. Believers are protected. Belief is not.

This drive towards freedom characterized the French debate on religious matters until the 1980s. Despite some excesses at the outset, it shaped the distinctive French approach to discussing matters of the City.²⁶

A century after the passing of the 1881 law, however, there was an imperceptible, unpredictable change in the sensitivities of certain groups about these questions of "religious morality." This was connected partly to greater awareness of "injury to intimate convictions" as a result of growing individualism; partly to a

23 It is true that this idea was already inscribed in the discourse of some Renaissance jurists like Charles Dumoulin. See Ian Maclean, *Interpretation and Meaning in the Renaissance: The Case of Law* (Geneva: Droz, 2016), 161ff.

24 Note that hate speech had already been instrumentalized several times in the nineteenth century by conservative forces in order to criminalize labor or socialist discourses. The law of September 9, 1835 punished the "provocation of hatred between different social classes," and the law of August 18, 1848 condemned any speech "exciting citizens' contempt and hatred."

25 In the Senate, only a right-wing Senator, De Gavarnie, opposed the project. Pelletan replied: "Public morality as well as religious morality is above all attack; you weaken rather than strengthen it by believing such attacks can diminish the respect in which it is held" (National Assembly, meeting of June 18, 1881).

26 Of course, this says nothing about the issue of anti-Semitic discourse in the 1930s, which was more racist than religious. A decree-law of April 21, 1939, called the Marchandau Decree, modified article 32 of the 1881 law to crack down on "exciting hatred," partly anticipating the Pleven Law of 1972.

"return of the religious," which was sometimes just recourse to the religious; and, finally and indirectly, to the latitude the Pleven law (article 48-1 of the law of July 1, 1972) gave French associations—which were becoming increasingly communitarian²⁷—to file complaints in court.²⁸

4. THE QUESTION OF "INJURY" AND THE RETURN OF BLASPHEMY

In the early 1980s, fundamentalist Catholic associations opposed film posters, caricatures, or advertisements—*Ave Maria*, *Hail Mary*, *The Last Temptation of Christ*—that they considered "ungodly," demanding "respect for their beliefs."²⁹ Legally, the question was very complex. These associations invoked certain texts, like article 1 of the 1905 law ("The Republic guarantees freedom of conscience and guarantees the free exercise of religion"), article 1 of the 1958 Constitution ("the Republic respects all beliefs"), and article 10 of the 1789 Declaration of the Rights of Man, on freedom of conscience.

We need to understand the somewhat subtle legal arguments here because it has direct political consequences. If I am very religious and, walking down the street, I pass a poster that "injures my intimate convictions," I can argue that I myself am injured. As Gérard Cornu has written, Catholic jurists argued that freedom of conscience provided for "the right of each person to be protected against abusive attacks on their religious or philosophical convictions." One might think there existed a "conflict of freedom" between two things of equal value: the respect due to freedom of expression based on article 11 of the 1789 Declaration, and the respect for freedom of conscience, based on article 10, which includes "respect for belief."³⁰ But it is a historical—and, in all likelihood, philosophical—mistake to associate "injury with intimate convictions," however painful, and with the violation of one's freedom of conscience. While as a believer I may be sincerely shocked by an "impious" advertisement or offensive caricatures, this "injury" does not in any way challenge my "freedom of conscience." Rereading the debates around article 10 of the 1789 Declaration, which deals with the free

27 This may require a certain awareness on the part of the courts, and a change in the case law, particularly regarding certain associations' right to act. Fighting against racism, the Pleven law aims to defend the idea of membership of the human race. But some associations who insist too much on the community of belonging tend to confine humanity within differences of identity, culture, or religion. Faith-based associations do not always have the same goals as genuine anti-racist associations. It is true, however, that the wording of the Pleven law does not make the job any easier.

28 I will not deal here with European case law, which is rather hesitant and leaves a wide margin of discretion to national judges. See Nathalie Drouin, *Les Limitations à la liberté d'expression dans la loi sur la presse du 29 juillet 1881. Disparition, permanence et résurgence du délit d'opinion* (Paris: LGDJ, 2010).

29 For more details on these lawsuits, see Jean Boulègue, *Le Blasphème en procès 1984-2009* (Paris: Nova Editions, 2010).

30 See Emmanuel Derieux, "Liberté d'expression et respect des croyances et des croyants dans la jurisprudence française et de la cour européenne des droits de l'homme," *Légicom* 55 (2015), 71ff.

exercise (the "manifestation") of religion, freedom of conscience is understood as freedom of worship. Only authoritarian acts that *disturb* the believer—the arbitrary closing of places of prayer, threats, abusive punishments, and so on—constitute such an attack. An offensive advertisement or caricature may upset me deeply, but my freedom of conscience remains intact. By claiming the opposite these associations extended freedom of conscience, something already attempted in the 1880s by some Catholics who opposed school reforms—maintaining that the mandatory schooling established by Jules Ferry was a "violation of freedom of conscience"!

These jurists sought to have the believer's distress compensated, or even to put an end to it, on the basis of the Civil Code, bypassing the act of 1881. They argued that any damage should be compensated in the name of article 1382.³¹ The question was legally important as there was a great danger of transforming the courts into "arenas of metaphysics," as Benjamin Constant had prophesied in 1819, opening the way to "blackmail by injury." Worse, admitting such penalties by means of the Civil Code effectively voided the freedom of expression enshrined in the act of 1881. Indirectly, it amounted to an indirect return, via civil law, to the law of 1819 and the old crime of outraging religious morality. Bishop Freppel got his posthumous revenge. The Court of Cassation eventually became aware of this and, on July 12, 2000, the Plenary Assembly reasserted that the 1881 Act predominates in all matters relating to freedom of expression, arguing that "the abuses of liberty of expression provided for and punished by the law of July 29, 1881 cannot be dealt with on the basis of article 1382 of the Civil Code." Simply pointing to damage done was no longer enough. It now had to be shown that the distress involved a *direct* injury or defamation of an individual because of their religion.

This "revolution of the right of freedom of expression," as the lawyer Henri Leclerc described it, indirectly announced the spirit of the coming decisions in the Michel Houellebecq case of 2002 and the Charlie Hebdo case, where the Parisian Tribunal de Grande Instance declared that in France, "a secular and pluralist society, respect for all beliefs goes hand in hand with the freedom to criticize religions There is no sanction against blasphemy, whether it offends a divinity or a religion."³²

But this well-established legal situation has been challenged theoretically by challenges from certain "communitarian" groups or intellectuals, often trained in English-speaking countries, who have taken up the discourse of "injury," drawing new conclusions from it. For example, an anthropologist at UC Berkeley who, with her colleagues, wants to develop a stimulating "critical conception" of freedom of

31 Art 1382 of the Civil Code states that "any act whatsoever by a person that causes damage to another obliges the one by whose fault it occurred to provide compensation."

32 TGI, March 22, 2007. Muslim associations were too late to benefit from the jurisprudential indecision of the 1990s, which sometimes benefited fundamentalist Catholics. For some, this could seem to reinforce the legend of the "double standard."

expression, says that she was "impressed by the pain that many practicing Muslims personally felt and expressed" about the *Charlie Hebdo* caricatures.³³ It would be a difficult matter to deny the reality of this claim to injury, which allows her to affirm that "blasphemy against the image of Mohammed is an offense against the status of person within Islam," associating caricature with racism.³⁴ This discourse of injury begins to confuse the individual suffering that can be caused by these caricatures with an intention behind these cartoons to marginalize certain categories of people. Such a discourse can become intimidating, as in the nineteenth century, and so limit freedom of expression, caricature, and the press. The media attention received by this sort of argument, which seems to give an Islamic version of the nineteenth-century Catholic reaction, foretells the possible resurgence, in the France of the twenty-first century, of the "imaginary crime" that was abolished in 1789. An increasing number of people in the twenty-first century have difficulty grasping Alexis de Tocqueville's remark in *Democracy in America*, one widely quoted during the debates over the Law on the Freedom of the Press of 1881:

I admit that to freedom of the press I do not bring that complete and instantaneous love that is given to things supremely good by their nature. I love it much more from consideration of the evils it prevents than for the good things that it does.

If someone showed me an intermediate position where I could hope to stand firm between complete independence and total subservience of thought, I would perhaps take my position there; but who will find this intermediate position?³⁵

33 See Talal Asad, Wendy Brown, Judith Butler, and Saba Mahmood, *Is Critique Secular? Blasphemy, Injury and Free Speech* (Berkeley, CA: University of California Press, 2009), 89.

34 *Ibid.*, 95.

35 Alexis de Tocqueville, *Democracy in America* (Indianapolis: Liberty Fund, 2010), vol. 2, 289-90.