



# Three Forgotten Reasons to Mind Your Manners in Canada

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*"To wander through the present [Criminal] Code is to stare into the faces of the ghosts of all the social evils thought, at one time, to threaten the very fabric of Canadian Society."*

*V. H. Del Buono, "Toward a New Criminal Code for Canada, 1986*

This article describes three largely forgotten and rarely prosecuted crimes in the *Criminal Code* of Canada. They were enacted in the late 1800s or so, during a more socially conservative time. All three remain the most serious form of crimes (indictable), and contain broad, archaic wording which

makes their criminal application and enforcement difficult as well as controversial today. Arguably dormant and obsolete in practice, all three occasionally re-assert themselves. Blasphemous libel, defamatory libel, and corrupting children are three crimes which seem to not fit with our current age and conceptions of what is criminal and what is not. Yet each remains on the books.

### Blasphemous Libel

Blasphemy has been a crime in Quebec since the 1600s, prior to the *Criminal Code* and the import of the common law system into Canada. Early on, the crime was a mechanism for social control. It was used to restrain verbal altercations, rather than protecting the church from blasphemy. Records show blasphemy prosecutions in only 15 instances from 1665 to 1752. Punishments for criminal blasphemy were modest, usually a fine or a period of public humiliation.<sup>1</sup>

There were a few cases of blasphemy in Ontario up to Confederation, although none appeared to progress to sentencing. This may have been due to the difficulty of proving verbal blasphemy. Eventually, blasphemy became more concerned with not *what* was said but *how* it was said. One could argue against religion as long as one did so in a nice way! The crime of blasphemous libel (written as opposed to verbal) was first introduced into the *Criminal Code* in 1892. Today, section 296 of the *Criminal Code* reads as follows:

296. (1) Every one who publishes a blasphemous libel is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.
- (2) It is a question of fact whether or not any matter that is published is a blasphemous libel.
- (3) No person should be convicted of an offence under this section for expressing in good faith and in decent language, or attempting to establish by argument used in good faith and conveyed in decent language, an opinion upon a religious subject.

The crime has been prosecuted five times, all between 1901 and 1935. Four prosecutions ended in conviction, with three fines and one 60-day jail term.<sup>2</sup>

There is no guidance in the *Criminal Code* or in any judicial interpretations as to what “publishes,” “decent language” or “a religious subject” mean, or generally, what constitutes blasphemous libel. This may explain why no one has been charged with this crime since 1935.

In 1978 a temporary injunction was placed against the book *Les Fees Ont Soif* (*The Fairies are Thirsty*) after backlash from religious groups. The crime of blasphemous libel was apparently a factor in the judge’s decision.<sup>3</sup>

What is interesting here is that the “matter published,” the essence of the indictable crime, may be completely true. It is the publication itself by “caus[ing it] to be read or seen” (s. 299) any matter “that is likely to injure the reputation of any person” that constitutes the crime, unless the accused can prove that the matter is true and the publication was for the public benefit (s. 311).

In 1980, the Canadian distributor for the Monty Python film, *Life of Brian*, was charged with blasphemous libel. The charge was later dropped.<sup>4</sup> A poem in a controversial book, funded by the Alberta government was also criticized as being criminally blasphemous in the late 1990s.<sup>5</sup> Recently, as Great Britain was repealing its blasphemous libel law, the existing Canadian crime was the subject of public criticism.<sup>6</sup>

S.296 (3) of the *Criminal Code* attempts to preserve free expression. Today any prosecution for blasphemous libel in our contemporary, pluralistic society would meet with, and not likely survive, a freedom of expression challenge under the *Charter of Rights and Freedoms*.

## Defamatory Libel

Defamatory libel dates back to 1275 in England, and sought to prevent false rumours which could escalate into a disturbance. Since few people were literate, defamation referred mainly to speech.<sup>7</sup> Libels increased with the invention of the printing press and developed into a common law crime in the 1600s.

Defamatory libel found its way into the first version of the *Criminal Code* in 1892. Today, it is spread over 20 sections in the *Code* (sections 297 through 317) and enjoys more legal definition than blasphemous libel. The definition of defamatory libel in section 298 is the most important:

298. (1) A defamatory libel is matter published, without lawful justification or excuse, that is likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published.

(2) A defamatory libel may be expressed directly or by insinuation or irony

(a) in words legibly marked on any substance; or

(b) by any object signifying a defamatory libel otherwise than by words.

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Numerous amendments have since softened the crime. One may avoid conviction if one, on reasonable grounds, believes the defamatory matter to be true and it “is relevant to any subject of public interest” (s. 309), was a “fair comment” (s. 310) or was “in good faith for the purpose of seeking remedy or redress for a private or public wrong” (s. 315).

Police and prosecutors, despite the crime remaining on the books, leave defamatory libel to be dealt with by the tort of defamation in civil court.

The crime of defamatory libel has rarely been prosecuted in Canada, perhaps because libel is only tenuously (and mostly historically) a criminal matter. Crimes are reserved for the most serious public wrongs. Defamatory libel attacks the reputation of a specific *person*; which is difficult to view as a *public* wrong. The federal Law Reform Commission noted that this violated the principle of crime as last resort – that crimes should exist and be prosecuted in only the most serious cases.

The idea that mere defamatory words can lead to jail in Canada today seems unwarranted in a liberal democratic society which places high value on free speech. Police and prosecutors, despite the crime remaining on the books, leave defamatory libel to be dealt with by the tort of defamation in civil court.

In *R v. Lucas*, the Supreme Court of Canada in 1998 dealt with a Saskatchewan couple charged with carrying signs containing defamatory remarks about a police officer outside his headquarters. The Court did not strike down the crime, but shaped it to require the Crown to prove that the accused knew the written material was a false “grave insult,” intended to defame, and seen by third parties. The couple was acquitted. This rare charge of criminal libel was brought and prosecuted through the Supreme Court of Canada to protect the reputation of a police officer.

It also criticized the crime of defamatory libel for “redundancy and confusion, excessive detail, legal fictions, gaps, uncertainty, and inconsistency.” The *mens rea* (intent) for the crime is unclear. Freedom of expression and other *Charter* rights may be violated by this crime. The Law Reform Commission recommended its repeal. There are defences to the tort of defamatory libel that are not available for the crime, so that tort law suffices for defamation claims.

## Corrupting Children

The third quirky crime highlighted in this article is not a libel, but is instead a corruption.

First legislated in 1918, section 172 of the *Criminal Code* prohibits endangering the morals of children in a home where one “participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice.” The section states:

172 (1) Every one who, in the home of a child, participates in adultery or sexual immorality or indulges in habitual drunkenness or any other form of vice, and thereby endangers the morals of the child or renders the home an unfit place for the child to be in, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

(3) For the purposes of this section, “child” means a person who is or appears to be under the age of eighteen years.

The lowest threshold to criminal liability under s. 172 is “any ... form of vice [which] renders the home an unfit place for the child to be in.” Vices and ‘unfitness of place’ are not readily defined and include both passive and active behaviour – such as drug use. It might also include persistent name-

calling, uncleanness, profane language, laziness and neglect, loud music, insalubrious visitors parading through the house, raised parental voices, smoking, madcap religious instruction, too much television or other screen time, and poor nutrition.

Even in relatively permissive societies, it seems trite that children should not be exposed to “habitual drunkenness” and “adultery or sexual immorality.” Yet the practical outworking of this crime is not easy. Morals are relative and ever-changing. Today, criminal prohibitions against prostitution and polygamy are currently being tested in the courts. Alcoholism is characterized as a legal disability justifying reasonable accommodation. Many parents today are not married to each other. Much of what used to be considered “adultery or sexual immorality” is taking place nightly in the bedrooms of the nation. It is not socially scorned today, much less viewed as criminal behaviour.

However, the corruption of children, at least in the abstract, remains a (politically) sensitive subject, which is why this crime endures. In the 1997 Ontario case of *R. v. L.E.*, the accused, charged under section 172(1) for engaging in sexually immoral activity, challenged the crime under the *Charter* section 7. The judge, dismissing his appeal, stated

Citizens who want to partake in otherwise legal activities should be free to do so, but if the said conduct may adversely affect the children in their own home so as to corrupt the morals of the children, then I feel that citizens can be prescribed by a law for the greater good of a free and democratic society.

Provincial child protection departments throughout Canada have for decades possessed both the mandate and authority to intervene to protect children. Other than in extreme cases, most “vices” will never be reported to authorities. This explains why a charge of this crime cannot proceed without the consent of the Attorney General, “a recognized society for the protection of children or by an officer of a juvenile court.” The language setting out the crime of endangering the morals of children is too vague and outdated to interest prosecutors.

## Conclusion

These three crimes, having once occupied an important role in social control and categorized as among the most serious, have since lost their effectiveness. They are largely unknown, and so grounded in a long bygone era that they serve no deterrent purpose today.

Non-specific language broadly targeting behaviour viewed as unobjectionable in contemporary society, and probably not criminal in the sense of public wrong, means that these three crimes will rarely (if at all) be prosecuted any more. If they are, they may meet up with a newer social construct – the *Charter of Rights*.

## Notes

- 1 J Patrick, “Blasphemy in Pre-Criminal Code Canada: Two Sketches” (2010) 22 *St. Thomas L. Rev.* 341.
- 2 J Patrick, *Not Dead, Just Sleeping: Canada’s Prohibition on Blasphemous Libel as a Case Study in Obsolete Legislation* (2008) 41 U.B.C. L. Rev. 193 (2008).
- 3 “Judge Orders Copies of Play Withdrawn” *The Globe and Mail* (5 December 1978) at p. 18.
- 4 WA McMaster, “Film Censorship Bypasses the Courts, Reader Says” *The Globe and Mail* (23 May 1980) at p. 7.
- 5 K. Torrance, “Hold Your Nose and Pay” *Alberta Report* (15 September 1997) at p. 10.
- 6 D. Driver, “Pakistan Turmoil Should Scare Us All” *National Post* (17 January 2011) at p. A13.
- 7 R.E. Brown, *The Law of Defamation in Canada* (Toronto: Carswell, 2009).
- 8 “Net Libel Charge is First in Canada” *The Gazette* (26 May 1999) at p. A10.
- 9 “Posters Draw Police Attention” *Penticton Western News* (19 January 2010) at p. 8.
- 10 H. Keyserlingk, “The High Price of Defamatory Libel” *The Record* (19 April 2000) at p. 2.

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