The Legal Revolution Against the Accommodation of Religion:

The Secular Age v. The Sexular Age

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To LaVonna

When I dated such a beautiful a young lass from Nova Scotia,
I shared with you my dream of completing graduate school by the time I reached thirty.
Little did I know then that graduate work is, in essence, the work of one's entire life. In truth,
every day is an opportunity to learn. And with each passing day, I find my love for you
deepening in a miraculous way. You are no longer simply my lover and wife; you have become
my most powerful memory of life. That first time we met at Toronto's airport, I did not know
you were my life's consort; had I known then what I know now, the band would have played,
the red carpet laid as I made my bow! To you, my dear, I dedicate this work.

"Writing a book is an adventure. To begin with it is a toy and an amusement.
Then it becomes a mistress, then it becomes a master,
then it becomes a tyrant. The last phase is that just as you are about to be reconciled
to your servitude, you kill the monster and fling him to the public."

—Sir Winston S. Churchill

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1 INTRODUCTION

1.1 Preface

This is a study about the law's accommodation of religious practice and the brewing revolution within the legal profession against that accommodation. The revolution is especially evident, though not exclusively so, in sexual equality claims vis-à-vis religion. Originally, the study asked, "Why has religion been given special status in the law?" and "Should that status continue?" As a result of intense, multiyear research, I have come to recognize that there is within the legal profession a strident movement to remove from the law the traditional accommodation of religion. To explain my findings, I have used the work of Thomas S. Kuhn[1] as a theoretical framework.

Freedom to practice religion has long been part of the legal order in liberal democracies. Indeed, even before Canada became a country in 1867, religion and religious practices were accommodated in the British colonies that now make up the country. Religion had a special legal status. In 1982, the *Canadian Charter of Rights and Freedoms*[2] confirmed the constitutional protection for freedom of religion. The *Charter* did not grant freedom of religion but rather *respected* a freedom that already existed. To a large extent, the Supreme Court of Canada[3] expanded that freedom in its early post-*Charter* jurisprudence,[4] but has in recent years scaled back that protection.[5]

In 1953 (31 years before the *Charter*) Justice Ivan Rand opined that freedom of religion was among the "original freedoms" that was a necessary attribute and mode of human self-expression that forms the primary conditions of "*community life* within a legal order."[6] Under the *Charter*, the Supreme Court of Canada declared that "only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held" are protected.[7]

This study began with a simple question: Why? What is it about that category of beliefs and practises falling under the rubric "religion" that justifies differential treatment from "non-religious" beliefs and practises? Why, for example, should the law require workplace

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[1] Thomas S. Kuhn, *The Structure of Scientific Revolutions*, Foundations of Unity of Science (University of Chicago Press, 1970) at 93 [*Revolutions*].

[2] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK) 1982, c 11, which came into force on April 17, 1982 [*Charter*].

[3] Hereinafter referred to from time to time as "SCC".

[4] *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295, 1985 CanLII 69 [*Big M Drug Mart*], gave a very broad definition of religious freedom. Then Chief Justice Brian Dickson stated at para 94-96, "The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that …What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of 'the tyranny of the majority'."

[5] For example, in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 [*Hutterian Brethern*], the SCC denied accommodation of a small religious sect's opposition to having their photographs taken for their Alberta drivers' licenses. The SCC was not at all phased by the fact that the government of Alberta had accommodated that religious concern for the previous 29 years.

[6] *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299 at 330 [*Saumur*]

[7] *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, at para 39 [*Amselem*].

accommodation of holy day observance such that a day off for religious practise is protected[8] but a day off to attend a political rally is not? Another apt example is that of the young Sikh boy who was granted accommodation to wear his kirpan (a ceremonial dagger) to school because of its religious significance.[9] While the kirpan could only be worn if certain conditions were met (it had to be on the inside of his clothing) it nevertheless raised questions as to why he should have that right but other students who simply wanted to bring a pocket knife to school would not be permitted. The SCC responded to such concerns of other students by saying, "Religious tolerance is a very important value of Canadian society," and that "it is incumbent on the schools to discharge their obligation to instil in their students [that] this value … is … at the very foundation of our democracy."[10]

The premise that religious tolerance is at the very foundation of our democracy is now robustly challenged by legal academics. To be clear, the "religious tolerance" that the SCC spoke of, and to which this book is referencing, is the tolerance that classical liberal democracies have consistently given to the religious practices that are dissonant at times with the generally applicable law and customs. In other words, the law treats religion as special. It has given religious practices a pass even though to do so is an execption to the law. This is evident with the Sikh boy, as noted above, being allowed to take the kirpan to school; or the province of Alberta's exemption given to Sikhs from having to wear a motorcycle helmet as noted below. The special status of religion in the law will be discussed in greater detail in Chapter 4.

Legal scholars such as Yossi Nehushtan[11] see no reason why "intolerant" religious practices ought to be tolerated. Others such as Brian Leiter[12] maintain there is no moral reason to tolerate religion. Nehustan suggests that religion and religious people are intolerant and liberal democracies have no obligation to tolerate such intolerance.[13] Leiter sees no moral reason for tolerating a system of religious beliefs and practices that demands absolute obedience and is not persuaded by scientific evidence.

In light of these criticisms, this intellectual inquiry was started to discover what, if anything, was unique about religion *qua* religion that the law accommodated its practice. While a reasonable explanation was found to exist, as described below, there was a greater discovery that arose from the research: a discovery that makes sense of the growing opposition to religion's legal status and merited further investigation. This study uncovered a strident pushback against religion's special status. The pushback is justified as a sexual equality claim against the legal norm of religious accommodation and represents a seismic shift in legal doctrine that has now been legitimized by the SCC, as discussed below in the Trinity Western University (TWU) law school case.[14]

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[8] *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 [*Simpson-Sears*].
[9] *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6 [*Multani*].
[10] *Ibid* at para 76.
[11] Yossi Nehushtan*, Intolerant Religion in a Tolerant-Liberal Democracy* (Oxford: Hart, 2015).
[12] Brian Leiter, *Why Tolerate Religion?* (Princeton University Press, 2012) [*Why Tolerate*].
[13] Nehushtan, *supra* note 11, argues at 96 that "religion is strongly and uniquely linked to unjustified infringements of others' autonomy or to harming and offending others, not in accordance with the harm principle, and, accordingly, that religious people are more likely to unjustly infringe others' autonomy or to harm or offend them, not in accordance with the harm principle."
[14] The SCC made two decisions in the TWU law school case that is described in depth below: *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 [*LSBC v TWU* 2018] and *Trinity Western University v. Law Society of Upper Canada*, 2018 SCC 33 [*TWU v LSUC* 2018].

To assist in understanding this shift, Thomas S. Kuhn's analysis[15] of scientific revolutions is used as a methodological and theoretical framework. Kuhn's method, with minor adjustments to account for the obvious differences between science and law, worked well in accomplishing the goal of analysing what this study terms as the "legal revolution" against the law's accommodation of religion. It is within this frame of reference that the literature on religion's legal status is introduced and critically assessed.

The ultimate philosophical question that has arisen from this study is whether we should accept an asymmetrical view of equality[16] at the expense of religious freedom. Asymmetrical equality claims not only vanquish all other human rights that seek to occupy similar public space, but go even further to assault the private domain that liberal democracies have traditionally given to the practice of religion – individually and communally. By way of introduction, some thought is presented here to assist the reader in what to expect.
All rights are inflationary in their incremental demands for greater recognition and accommodation. Sexual equality rights are no different than any other right in that respect.[17] Indeed, I have concluded that we are not simply living in a "Secular Age" as envisioned by Charles Taylor, but we are in a "Sexular Age." I use this term, explained in depth below, to describe a socially complex convergence of sexual identity politics and radical individualism that demands societal approval and accommodation of sexual identity even at the expense of other identities such as religious identity. The Sexular Age suggests that there is a clash between sexual equality and religion. However, that is incorrect because religion is itself listed among the various heads of equality rights as in s. 15 of the *Charter*.[18] Yet, given the recent scholarship,[19] it would appear that equality rights (sexual equality rights in particular) are permitted to "cannibalize" or supersede other rights such as religious freedom. As former SCC Justice Claire L'Heureux-Dubé insisted, "I don't believe that a fundamental right can be reasonable if it's not compatible with the notion of equality."[20]

Fundamentally, it makes no sense to suggest that religious freedom, protected as it is in the Canadian Constitution, is to be marginalized by those who advocate equality at the expense of all other rights. As will be shown, the critics of religious accommodation are now suggesting that equality rights are the new paradigm and that the time of religious freedom dominating the discourse is over because we are in a new world of radical equality. We are, nevertheless, left with a serious question: have we thought through all the consequences of the emerging

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[15] Kuhn, *Revolutions*, *supra* note 1 at 93.
[16] This is a concept that is not new to me, but from Iain T. Benson, with whom I have had a long collegial friendship over the years.
[17] Barry W. Bussey, "Rights Inflation: Attempts to Redefine Marriage and the Freedom of Religion: The Case of Trinity Western University School of Law," (2016-17) 29:2 Regent University L Rev ["Rights Inflation"].
[18] *Charter, supra* note 2, s 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, ***religion***, sex, age or mental or physical disability (emphasis added).
[19] See: Beverley Baines, "Equality's Nemesis?" (2006) 5:1 J.L. & Equal., 57, 72–73. Noa Mendelsohn Aviv, "(When) Can Religious Freedom Justify Discrimination on the Basis of Sexual Orientation? – A Canadian Perspective" (2013-14) 22 J.L.& Pol'cy 613, at 670 states, "belief-based exemptions, if allowed at all, must be extremely rare and exceptional. None of the cases discussed in this Article presented a justified belief-based exemption. However, it is possible that such situations may occur."
[20] Haroon Siddiqui, "Quebec Charter's Authoritarian Streak: Siddiqui," *Toronto Star* (28 September 2013), online: <http://www.thestar.com/opinion/commentary/2013/09/28/quebec_charters_authoritarian_streak_siddiqui.html>.

revolution against the accommodation of religion? Will this bring about a utopia or is it a dystopian nightmare in the making?

This study has discovered that claims of sexual equality are fast becoming the touchstone that takes precedence over religious equality. This dynamic is starkly apparent as we review the arguments concerning the Trinity Western University Law School Case below. Finding a proper balance of the interests at stake is going to take some ingenuity to alleviate the criticisms of such strongly held positions. Consider the following thought experiment.

Suppose "B" is convinced that heterosexual marriage is the only way to live out one's sexuality. B considers homosexual sexual activities immoral, not as part of his religious beliefs but as his personal views. Can we say that B is allowed (or should he be allowed) to think this? Many will say: "Yes, of course, this is his freedom of thought. This freedom is enshrined in constitutions and in human rights legislation."

Now suppose B not only thinks this, but wants to talk about his ideas with others, both in private and in the public sphere. Is he allowed to do this? Here is where many people will have doubts: they will consider this "discrimination" or, at the very least, offensive. Now, "discrimination" can have at least two meanings. One, it can refer to unequal treatment that is justified – for example, an employment position that requires applicants to have a diploma in a certain field of study. Alternately, "discrimination" can be unjustified, such as prohibitting a person of a particular race from applying for a position.

Some view that there is a distinction between what is permissible in "private" versus in "public". B may be able to express his convictions in private settings such as his home, but not in the public settings outside his home. However, what sense does it make to treat verbal expression as discriminatory? Should free and democratic societies be permitted not only to discuss the merits of Christianity, atheism, liberalism, conservatism, but also different styles of sexual behaviour?

If some people are offended by public discussion about whether certain sexual behaviours are immoral, that is their right to be offended. But there is also a corresponding constitutional right to be offended by such behaviour. To date we do not have a right *not* to be offended. However, as we will see, there are some developments in the law, such as the SCC's *TWU* 2018 decisions,[21] that tend to be pushing toward that view.

It is possible to criticize paedophilia and it is possible to criticize polygamy. It would be senseless to say that you cannot discuss these things for the only reason that a paedophile is something that people "are," or that a polygamist is not one by choice but by nature. There is little use of these arguments in the case of paedophiles and polygamists, but they are very common within the lesbian, gay, bisexual, transgender, and queer/questioning (LGBTQ)[22] context. Is there an inconsistency here? Of course, proponents of LGBTQ rights would reject any comparison as juxtaposed above since, in their view, paedophilia and polygamy are different in kind.[23]

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[21] The SCC referred to TWU's Community Covenant as "degrading and disrespectful" (*LSBC v TWU* 2018, *supra* note 14 at para 101). Clearly, the court was emotive in its decision rather than dealing with the law. That is to say, the Court echoed the "offense" taken by LGBTQ+ individuals against TWU.

[22] Steven Petrow, "Civilities: What Does the Acronym LGBTQ Stand For?" (23 May 2014) *The Washington Post Arts and Entertainment*, online: <https://www.washingtonpost.com/news/arts-and-entertainment/wp/2014/05/23/civilities-what-does-the-acronym-lgbtq-stand-for/>

[23] Erin Fowler, "A Queer Critique on the Polygamy Debate in Canada: Law, Culture, and Diversity" (2012) 21 Dalhousie Journal of Legal Studies 93; Dana Phillips, "The Prude in the Law: Why the Polygamy Reference Is All About Sex" (2014) 19-1 Appeal: Rev. of Current Law and Law Reform 151.

To return to our thought experiment, if B is permitted to think and speak about his beliefs, is he permitted to act on his beliefs? For example, is he permitted to decline making a wedding cake for a homosexual wedding if asked at his bakery?[24] Or, is a religious institution permitted to deny admission to students who will not accept that sexual intimacy be reserved only for heterosexual marriage?

Liberal democracies have, over the last many decades, moved away from the dominant position that only government must not "discriminate" in the sense indicated, thereby allowing private enterprises and individuals to discriminate, as long as there were enough alternatives in the market. But even that former consensus is no longer viable. Private enterprises and individuals are now being viewed as being in the same position as government with respect to the principle of equality and non-discrimination.

Notice this thought experiment has nothing to do with freedom of religion – it is all about human rights and civil liberties in general, although mainly about freedom of thought, freedom of conscience, and freedom of speech. However, this illustration shows that the principle of equality is inflationary. It continually advances forward, making greater claims vis-à-vis other interests. It is an underlying theme in this work that the human right of equality can, if not guarded against, cannibalize all other human rights. This dissertation is but one example of how the claim for sexual equality rights has the capacity to erode and possibly even destroy freedom of religion.

It behoves us, in light of the academic discussion about the place of religion in the law, to consider what evidence may exist that supports the long-held view that religion is special. If there is evidence of religious tolerance being at the "very foundation of our democracy," what does that require of the law? Should liberal democracies continue to insist that religion be given special constitutional treatment in the current context? If so, why? And finally, what would be the possible consequences should the legal revolution succeed in overthrowing religion's special status?

To assist in the investigation of the legal revolution I use, as a case study, the case of the Trinity Western University law school proposal. This case is important because it involves a modern perplexity that is becoming acute: the clash between religious freedom and sexual equality that raises the whole question as to whether religion's place in the law is justified in the light of contemporary realities of changing sexual norms. TWU, as a private, evangelical university in Langley, British Columbia, operates based on a Christian moral ethic that includes limiting sexual intimacy to the traditional marriage of one man and one woman. This ethic is codified in TWU's "Community Covenant Agreement" that each student had to sign upon admission.[25] In an earlier 2001 decision,[26] the Supreme Court of Canada (SCC) supported TWU's right to have a similar admissions policy. In that 2001 case the Court ordered the British Columbia College of Teachers (BCCT) to accredit TWU's education degree despite TWU's admissions requirement. The BCCT argued that TWU's admissions requirement was discriminatory against LGBTQ student applicants to TWU and asserted that TWU's education graduates would likely discriminate against LGBTQ students under their care in the public-school system. The SCC rejected those arguments.

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[24] *Department of Fair Employment and Housing v Cathy's Creations Inc* (Cal Sup Ct, Kern Cty; BCV-17-102855; Lampe J, 5 Feb 2018); *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. ___ (2018).
[25] "Community Covenant Agreement," Trinity Western University Student Handbook (accessed 7 September 2018), online: https://www.twu.ca/student-handbook/university-policies/1.student-code-of-conduct-intro.
[26] *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31 [*TWU* 2001].

The recent challenge TWU faced was its law school proposal. It was thus the second time in less than two decades that TWU endured a legal protest to its religiously based admissions policy. This case clearly highlights this study's finding of the emerging legal revolution on the place of religion in the law. As will be discussed below, the legal community maintains that changing social norms call for an overthrow of religion's special legal status. The law societies of British Columbia, Ontario and Nova Scotia rejected the view that they were bound by the 2001 SCC decision and refused to accept TWU's law degree. They were found on June 15, 2018, to be correct in their view by the Supreme Court of Canada. In yet another twist of events in August 2018, TWU decided to remove the mandatory Covenant for its students but kept it mandatory for its faculty and staff.

The conclusion I have come to is that the objections to TWU's admissions criteria, having been legitimized by the SCC, are a rejection of the legal paradigm that once treated religion as special. Those objections go even further. They amount to a discriminatory conception of equality that preys upon *all* other human rights, including freedom of religion. It is an asymmetrical view of equality that eclipses all other rights leaving only equality as the primary right. Meanwhile TWU's decision to comply with the SCC's ruling does not change my conclusion, but is evidence of a religious community being browbeaten by the state after it had done nothing unlawful.

This radical conception of equality is inherently contradictory because it discriminates – in this case – against evangelical Christians who want to have a law school. The radical conception of equality can be juxtaposed with a non-discriminatory conception of equality that recognizes that it is but one right among many, such as religious freedom, which must be properly balanced.

The rejection of the legal paradigm that accommodated religion was reasoned as necessary because of the concept of "*Charter* values."[27] Three law societies, (being those in British Columbia, Ontario and Nova Scotia) refused to accredit TWU because "*Charter* values" required that they not "condone" the discriminatory actions of TWU in the name of the "public interest".

Such administrative entities are designed to protect the "public interest" by ensuring that lawyers are competent to practice law. However, it does seem, at first blush, far afield for them to take on the role of enforcing sexual equality norms on a religious entity that has a constitutional right to reject those norms. The law societies' attitude and actions against TWU, and the SCC's June 15, 2018 decisions[28] in favour of the law societies, is evidence of the legal revolution currently underway against the special legal significance of religion. The intricacies of this case make it possible to explore whether religious tolerance remains a foundational principle of our free and democratic society, in the same way the SCC conceived of it in the Sikh student case, referred to above, when faced with the challenges of sexual equality. It allows us to explore the legal status of religion in our liberal democracy.

We begin with the question, "Does the practice of religion merit protection in the law?" This is a far deeper concept than it appears. How is it that an act motivated by a religious belief can be different from the non-religiously motivated act? What is the essence of religion that so colours an act of individual or collective behaviour that it is deemed necessary for the state to provide an exemption from generally applicable law to that act? What distinguishes religiously motivated behaviour from non-religiously motivated behaviour? What legal status does religion have in our society? What is the road to a proper balance between religion and secular

[27] A concept that will be dealt with in depth below.
[28] *TWU* 2018, *supra* note 14.

interests? And, in light of the TWU case, to what extent are universities and educational institutions the forebearers of the future or the representations of the past? Should a voluntary community, where you apply for membership, be permitted to establish rules of conduct for that community?

It has been said that one of the markers that distinguishes religious motivation is that religiously motivated people are willing to suffer great personal loss to maintain their faith commitment, such as losing a job, losing financial security, being imprisoned, or worse.

But is the willingness to pay such a high price the bar that must be met for state exemption? Does that willingness reflect a different kind of claim on the individual that a non-religious person does not have? Is there, for example, a deep understanding of identity at play that would cause someone to be so committed that they are willing to lose everything?

In fact, there are plenty of examples of people who have been willing to die for other deeply held political or economic views.[29] So, mere commitment to the point of death does not, in and of itself, make religion different from other deeply cherished ethical commitments. To warrant an exemption from generally applicable law religious commitment must mean something more than a willingness to die for that commitment. There should be, by necessity, something else.

Perhaps, that "something else" is the non-optional characteristic of the religious belief in question that comes from a divine command. In other words, it is not simply a matter of individual preference but of supernatural authority. Such a command may form part of a worldview or ontology of what "is," as opposed to a question of personal autonomy or choice. It is an obligation. That does not mean that the believer eschews her rational, critical thought but rather, once she has become convicted of the truth after such thought, she is compelled to live out her obligations. Therefore, a religious person is not choosing to abide by a religious practice as much as she is following a divine command. To interfere with her practice would be to violate not simply her beliefs, but her very identity – her sense of who she is within the ontological understanding of the world that her religion teaches her.

Can we expect the state to support the individual's deeply held convictions of religious obligation by giving an exemption to general applicable law? And, can the state assess whether an individual's religious practice is intimately tied to identity in determining whether he or she should be given an exemption? That would cause the state to become entangled in determining the intricacies of religious beliefs – which has never been the role of a liberal democracy. Yet perhaps that is what is required to do justice to the constitutional guarantee.

Up until recently, for the most part, even among those who disagree with the idea that religion merits special legal status, there has been an acceptance that whenever possible religion is to be accommodated given the fact that it is constitutionally protected – even though society may be at a loss to explain the reason for the protection to begin with. No one alleges that discrimination based on religion is good. No one advocates the removal of religious freedom – although there are some who come very close to saying just that.[30]

What academics are questioning is whether the special protection of religion is necessary, defensible and sustainable from a legal and political perspective. If there is no case to be made for such special protection, then it is reasonable to question how long that

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[29] Kimberley Brownlee, *Conscience and Conviction: The Case for Civil Disobedience* (Oxford: Oxford University Press, 2012).

[30] Mark Tushnet, "Abandoning Defensive Crouch Liberal Constitutionalism" (6 May 2016), online (blog): *Balkinization* <https://balkin.blogspot.ca/2016/05/abandoning-defensive-crouch-liberal.html> ["Defensive Crouch"].

dissonance can be maintained. If, as we will analyse, a sizable and influential opinion exists denying the legitimacy of religion's star in the constitutional constellation, then it is surely only a matter of time before that star is removed by either judicial re-interpretation or constitutional amendment. After considerable research, and given the outcome of the *TWU* 2018 SCC decisions, it indeed appears that the religious star is now losing its lustre.

There remains a sizable group of religious citizens in liberal democracies for which the legal status of religion is a salient concern.[31] They depend upon religious exemptions from generally applicable law to worship on their holy days, wear religious garb, eat particular diets, and live in conformity to religiously-based sexual norms.

This study proposes, therefore, to get to the vital essence of religion's special legal status in liberal democracies. I am trying to understand what it is about religion, if anything, which distinguishes it to justify the special legal protection. While this study touches on the scope of religious freedom; the proper relationship of the state to religion; and the value of religion in contemporary society; it is not tethered to those. Rather it is focused on whether we can provide an acceptable, reasonable justification for the legal protection of religion as special and worthy of accommodation. This search is primarily conducted within the law itself, although there are necessary forays into legal history and political theory.

As noted above, the Supreme Court of Canada once stated that religious toleration is at the very foundation of our democracy. The questioning of that profound concept lies at the heart of this dissertation. This work is not meant to provide justification of the Court's notion of religious tolerance as a foundational political/legal principle – though it may have that effect. The goal is to discover why that was the case and to consider whether religious accommodation ought to remain despite the growing chorus in the legal establishment for the diminution of religion's special place in the law given sexual equality claims.

In other words, the question to be answered by this book is: "If religious toleration is at the heart of democracy, what justified it; should it be maintained; and what is its status in the legal community?"

The justification for religion's special status, to be effective, must provide a reasonable explanation as to why TWU should be exempt from generally applicable legal norms. If there is no such reasonable explanation, then it will be safe to say that the special status of religion cannot long last in contemporary society. If there is a reasonable basis, then that will assist us in understanding why other conflicts involving non-religious deeply held convictions (such as politics and economics) are not accommodated while the religiously held conviction is.

1.2 Research Questions

What characteristic(s) of religion, if any, justifies the law's special protection of religious practice? What other historical, practical or philosophical factors justify the law's special protection of religious practice? Do those characteristics and/or factors justify religion maintaining its legal status? What may we reasonably expect the consequences to be should the special status of religion be removed? What is the attitude of the legal profession to the accommodation of religion?

[31] In Canada, for instance some 67% still self-identify as Christian. See: Brian Clarke & Stuart Macdonald, *Leaving Christianity: Changing Allegiances in Canada since 1945* (Montreal & Kingston: McGill-Queen's University Press, 2017), 7.

1.3 Significance of the Study

The significance of this study becomes exceedingly evident considering the growing view among Canadian legal elites that religious tolerance and accommodation, as currently understood, must be curtailed in favour of sexual equality when religious communities engage in "public" endeavours such as running a law school. The importance of a law school, being an incubator of legal professionals whose careers could ascend the heights of liberal democratic law-making in the judiciary and the legislative bodies of the country, has raised the stakes in the discussion of religion's place in the law.

To begin, Thomas S. Kuhn's analysis of scientific revolutions is introduced along with his contribution of "paradigm shift." Kuhn's work forms the theoretical framework within which the legal revolution against the accommodation of religion is analyzed.

The specific contribution of this study is that it provides a unique perspective on the special place of religion in the law. While the academic discussion has been robust, and increasingly so, this is the first attempt to step back and see the larger picture of what is developing. The "revolution" metaphor is unique for this context. There is no other study that has attempted to apply Thomas S. Kuhn's analysis of scientific revolutions to the revolutionary change being proposed by academics about the law's treatment of religion. While there are several differences between the scientific and the legal contexts, nevertheless, there are considerable similarities that are worth a review and may well be subject to ongoing conversations. In that sense this dissertation makes a unique contribution to the academic debate on religion's place in the law.

2 THE SCIENTIFIC REVOLUTION: A COMPARATIVE MODEL

2.1 Introduction

Revolution in the scientific field provides an apt comparative model to explain the legal revolution on religion. While there are significant differences between law and science, both have academic and professional communities with established norms.

The scientific community has at least two distinct sub-communities: the theoretical and the experimental. The first works with abstract or "pure" scientific theory to understand nature. The other is a more practical scientific group – the applied scientists. They belong to the "technological" group. The practical fruits of science are often co-opted by business entrepreneurs who manufacture goods for public consumption. Thus, in many quarters there is a symbiotic relationship between science and business, which may lead to a number of conflicting interests, as can be seen in the ongoing debate about corporate support of universities.

For our purposes, there are distinct characteristics in science that are essential: the community seeks the truth of the natural world.[32] As mentioned, it has two groups, one I will call the "scientists" and the other I will call the practical "scientific engineers". The scientists work with theory and experiential knowledge to determine what is true, while the scientific engineers apply the scientific findings to practical implications that impact society at large. The scientific enterprise relies on established paradigms to determine how best to address any anomaly that research may uncover. Such paradigms are based upon the researchers' presuppositions and assumptions when they ask questions to determine what should or should not be done to address any new development.

Like the scientific community, the legal community has at least two subgroups. One is comprised of those who spend a considerable part of their careers addressing the theoretical and social constructs of the law and who are often confined to academic pursuits at a university. Those I call the "legal scholars." The other consists of the practitioners of law – the lawyers – who apply the principles they learned from their legal training to the problems faced by their clients in day-to-day living. The pursuit of law, at least in theory, has lofty aspirations such as justice, equality, human rights, free and democratic society, and the rule of law. These ideals, and more, are used in the law's pursuit of making society a better place.[33] Like the scientific community, the legal community has its own paradigms that provide its presuppositions and assumptions on how practical matters should be approached.

Law is different from the scientific community in that it has a hierarchical structure that settles professional debate – at the top of which is the highest court in the respective jurisdiction. In Canada that is the Supreme Court of Canada. The scientific community has no such arbiter, although it does rely on its peer review as a means of ensuring accuracy and reliability, including conformity with appropriate scientific methods.

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[32] This would explain the use of the term "natural philosopher" to refer to those we now label "scientist".

[33] There is an ongoing debate in law whether law "makes society" or whether law is the "result of society," i.e. the product of the deeper societal forces. There are also the positivist vs. natural law theoretical understandings of the concept of "the law."

Law, much more than science,[34] is susceptible to being used by the power elite in imposing its will on society. In the field of law and religion in Canada, as we will discover, significant power is wielded by the legal academic community. It is their progressive positions on fundamental human life issues (FHLI), namely marriage, abortion, and end of life, that have captured the imagination of the legal elite. This is a reoccurring theme throughout this book and will be discussed in detail in the pages that follow.

Both the scientific and legal communities are similar because each requires significant debate to establish a normative paradigm. Once that paradigm has gained recognition it is difficult to unseat it with a new theory or paradigm. This provides for continuity and a high bar of authenticity for the new to replace the old. But it also has an intuitive bias toward maintaining the status quo even in the face of reasonable criticism, based on evidence, that the old norms no longer describe what is true and/or in the best interest of the community.

2.2 The Qualitative Difference: Law Settles Disputes, Science Seeks Truth

The practice of law is not science. It does not seek to find the truth of the matter in the same way the scientific field seeks truth; rather, the law's emphasis is on settling disputes. Law's preoccupation with dispute resolution can create peculiar results such as inconsistent decisions on seemingly similar fact situations, which denies or diminishes one of the more fundamental principles in English common law – *stare decisis*. *Stare decisis* is a legal principle that maintains that previous decisions on similar facts and law will bind the court.[35] However, that is becoming less a concern for the Supreme Court of Canada as it seeks the "rule of justice" rather than the "rule of law".[36] While the SCC interprets the *Charter* as a "purposive" document,[37] the rights therein are nevertheless enshrined with a history and jurisprudence behind them.[38] "*Charter* values", like the "rule of justice" doctrine, are an increasingly

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[34] Of course, science is not immune from manipulation as we have seen in the sugar/fat debate. See Camila Domonoske, "50 Years Ago, Sugar Industry Quietly Paid Scientists To Point Blame At Fat" (13 September, 2016), online: *National Public Radio* <https://www.npr.org/sections/thetwo-way/2016/09/13/493739074/50-years-ago-sugar-industry-quietly-paid-scientists-to-point-blame-at-fat>.

[35] See: Frederick Schauer, "Precedent" (1987) 39 Stan. L. Rev. 571.

[36] Justice Rosalie Abella is perhaps the Court's most outspoken proponent of favouring the concept of "*Charter* values" in the framework of the "rule of justice" rather than the "rule of law". The rule of law, in her view, imposed discrimination such as apartheid, segregation and genocide. However, she maintains that "core democratic values" include "an independent bar and judiciary; protection for minorities; a free press; as well as rights of association, religion, and expression" and it is these that would make for a "better society than one whose greatest tolerance is for *in*tolerance." See: Hon. Rosalie Silberman Abella, "International Law and Human Rights: The Power and the Pity" (2010) 55 McGill LJ 871 at 877-878.

[37] "Its purpose is to guarantee and to protect, within the limits of reason, the enjoyment of the rights and freedoms it enshrines. It is intended to constrain governmental action inconsistent with those rights and freedoms; it is not in itself an authorization for governmental action," *Hunter et al. v. Southam Inc.*, [1984] 2 SCR 145, at 157 [*Hunter*].

[38] There seems to be an increased willingness on part of the Court to "move with the times" as Chief Justice Wagner stated in his first news conference in June 2018. It is worth observing that such decisions based on the "moral values that link the majority of Canadians" are in essence the "moral values" that a particular court *thinks* are the values of the majority. This is something that Justices Côté and Brown, in their dissent of the *TWU* 2018 decisions, pointed out were not necessarily so (see *LSBC v TWU* 2018, *supra* note 14, at para 308). Wagner CJC stated: "When you talk about interpretation, context is paramount. And when you are looking issues that come up long after the original text has been drafted, as in the Constitution for example, there are principles of interpretation that you apply. … Take the *Carter* case, for example, on assisted suicide. Many

controversial concept, as explained below, but they have no legal stature. They are not constitutionally entrenched terms but rather judge-made concepts that have yet to receive general acceptance in the Bar. A case can be made that they subvert the rule of law.[39]

The legal practitioner is concerned about achieving the best possible result for his or her client. For good or for ill, the common law system is adversarial. Nevertheless, truth of a sort is a goal of the legal apparatus. The legal system as a whole is meant to decipher the truth (the "what happened?") in any given case, provided all parties and systems are working as they should. If the judge, or jury, remains neutral to the outcome of the dispute and the advocates present their respective clients' best positions in conformity with all the rules of procedure and the ethical standards of the profession, then we presume that truth will emerge. However, it is not science. It cannot be said with absolute certainty that the truth was established even when the legal system worked – that is to say, resolved the dispute.[40]

To illustrate this peculiar nature of law (seeking a settlement within the established legal rules despite the "truth" of the matter), consider the fact that a lawyer will often have a personal opinion of justice that is different from his or her client's opinion. The lawyer, in other words, is expected to advocate even for a position that he or she would not personally hold. It is the lawyer's role to represent the client. The crown prosecutor must represent the state. Their respective clients' interests take precedence over their personal judgements.[41]

Science, at its best, however, would not condone this kind of behaviour. A scientist would not be expected to advocate for a position that he or she knows to be wrong *ab initio*. Rather, he or she would be expected to present his or her research as objectively as possible, recognizing that he or she does so within the scientific paradigm, as noted above. His or her research is to discover the universal, the necessary, and the certain by means of observation, explanation, prediction, and control. That does not mean there are no rogue scientists who would sacrifice professional opinion in favour of their pharmaceutical employer. Yet, hopefully that is rare, and such a scientist would not be applauded.

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years earlier, when looking at the same facts, the same provision of the Criminal Code, under study led to a different decision. And yet it was the same provision of the Criminal Code. So interpretation is in context, and of course, the different decision would be based on different evidence being put before the Court. But, society has evolved, as has medicine. There are moral values that link the majority of Canadians. These are rulings that take context into account as a backdrop to the legal rulings that we arrive at." See: "Richard Wagner Holds First News Conference as Canada's Chief Justice," Headline Politics (22 June 2018), online: *cpac.ca* http://www.cpac.ca/en/programs/headline-politics/episodes/62857192 ["First News Conference"].

[39] While I do not have the space to fully develop this line of thought it is worth recognizing when considering the SCC's *TWU* 2018 decisions that relied upon "*Charter* values". This concept must be analyzed keeping in mind that the use of "values" is a subjective exercise that seeks to achieve a purpose or end, making the *Charter* right a mere rule of thumb. "A rule of thumb is not a binding rule," and that does not bode well for our democracy. See Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge: Cambridge University Press, 2006), 229.

[40] In a world of "alternative facts," this can be taken to troubling extremes; consider Rudy Guiliani, President Trump's attorney, who argued "truth isn't truth" during a television interview in August 2018. For video and transcript see Tim Hains, "Giuliani vs. Chuck Todd: Truth Isn't Always Truth, Comey's 'Truth' Different From Trump's 'Truth,'" *Real Clear Politics* (19 August, 2018), online: <https://www.realclearpolitics.com/video/2018/08/19/giuliani_truth_isnt_truth.html>

[41] The Trinity Western University law school case revealed a number of lawyers who personally opposed the current state of the law toward religion. See, for example, the view of Joseph Arvay discussed in Chapter 5 ("Transcript of Law Society of British Columbia Bencher Meeting," April 11, 2014, online: **<**https://www.lawsociety.bc.ca/docs/newsroom/TWU-transcript.pdf>).

Law, however, is different. We expect lawyers to take the position of their clients regardless of the lawyer's personal stance. If a scientist were to do in his or her field what lawyers do in theirs, many would say that the scientist could not be trusted or respected. The same cannot be said of a lawyer. Instead, a lawyer is applauded for his or her advocacy skills, since the law's primary interest is to settle disputes within a civil order, not to establish truth.

2.3 The Commonalities Between Revolutions

Revolution: an overthrow or repudiation and the thorough replacement of an established government or political system by the people governed.[42] Peter Calvert observed, "[r]evolution destroys pre-revolutionary sources, provides few contemporary ones, engenders strong ideological currents in all observers and endangers the lives of those who venture too close."[43] The concept of overthrowing the established order is not only a political phenomenon but an apt description of any discipline that is set in its ways but is faced with upheaval. Once it occurs there is a tendency to shame those who hold to the pre-revolutionary order of things.

Albert Camus points out that humanity has two states of being: "the world of the sacred … and the world of rebellion."[44] The sacred is that which is accepted as the correct, the right, the only way to view the world. Rebellion destroys the current "sacred" for a different or a "new" sacred state of being. Defiance, for Camus, is heroic in that it resists oppression. Rebellion against the status quo is meant to bring order.[45] The field of law has had its own historic revolutions.

Eminent scholar of law and religion, Harold J. Berman, observed that Western legal tradition has been transformed by "six great revolutions": the Russian Revolution, the French Revolution, the American Revolution, the English Revolution (also known as the Glorious Revolution), the Protestant Reformation, and the Papal Revolution.[46] Each had their own causes and consequences on the law. Berman states that while they did not have "a perfect symmetry" they had "certain patterns or regularities". His description continues:

> Each has marked
> a fundamental change,
> a rapid change,
> a violent change,
> a lasting change,
> in the social system as a whole.
> Each has sought legitimacy in
> a fundamental law,
> a remote past,
> an apocalyptic future.
> Each took more than one generation to establish roots.

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[42] *Dictionary.com,* (Random House, accessed May 2018) sub verbo "revolution", online at <http://www.dictionary.com/browse/revolution>.
[43] Peter A. R. Calvert, "Revolution: The Politics of Violence" (1967) 15:1 Political Studies 1-11, at 1.
[44] Albert Camus, *The Rebel,* translated by Anthony Bower (New York: Vintage, 1991), 21.
[45] This is ironic because rebellion may be seen as creating chaos where order once stood; and from that rebellious chaos, a new order is made.
[46] Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983), 18-19.

Each eventually produced
a new system of law,
which embodied some of the major purposes of the revolution,
and which changed the Western legal tradition,
but which ultimately remained within that tradition.[47]

There is, I maintain, a seventh revolution currently underway that is already making a dramatic impact on the law and on society at large. The revolution of which I speak is of a different character than those described by Berman. I call it the Legal Revolution Against Religion. Berman's work already hinted at this seventh revolution. For example, he understood we were moving from the traditional symbols of community in the West, which were religious and legal, to a fissure or disconnect between religion and the law.[48] His pioneering work in the field has laid the foundation for my observation, which has the vantage of the passage of time. I suggest that what we are experiencing today is a specific consequence of our secular age,[49] which has produced an opinion among elites that religion should no longer be treated as special in the law because religion creates and perpetuates harm.

An apt illustration of the Legal Revolution Against Religion (LRAR) in Western democracies, at the moment, is the case of Trinity Western University's (TWU) application for the accreditation of its law school. Until August 2018, TWU required its student body and faculty to sign a Community Covenant pledging themselves to "biblical and TWU ideals" wherein they "voluntarily abstain from" a number of actions including "sexual intimacy that violates the sacredness of marriage between a man and a woman."[50]

That particular provision of the Covenant caused such a stir in the legal profession that three Canadian law societies[51] decided not to accredit TWU's law school despite the accreditation given by the Federation of the Law Societies of Canada.[52] These law societies contended that TWU's Covenant harms those of the LGBTQ community. This dissertation argues that despite the fact that the law was clearly on the side of TWU, the legal profession was willing to ignore the law that accommodated religious universities like TWU because the professional elite no longer accepts the special legal status of religion. In other words, the legal profession is in a state of rebellion against the law with respect to religion. This rebellion was ultimately vindicated by the Supreme Court of Canada's decisions that ruled in favour of the legal elites.[53] Constitutional religious freedom, as once understood in Canada, has been altered by the TWU decision. The trajectory of the past few decades against religion's special legal status has reached a defining moment in Canadian law.

The work of Thomas Kuhn, a philosopher of science who wrote the ground-breaking book *The Structure of Scientific Revolutions*,[54] is used to frame the Legal Revolution Against

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[47] *Ibid* at 19.
[48] *Ibid* at vi.
[49] A more fitting moniker would be "sexular age," which I describe at some length below.
[50] Trinity Western University, "Community Covenant Agreement: Our Pledge to One Another" (accessed 16 May 2018), online: <https://www8.twu.ca/studenthandbook/twu-community-covenant-agreement.pdf> at 2.
[51] The Law Society of British Columbia; The Law Society of Upper Canada (name now changed to the Law Society of Ontario); and the Nova Scotia Barristers' Society.
[52] This is discussed in detail below.
[53] *TWU* 2018, *supra* note 14.
[54] Kuhn, *Revolutions, supra* note 1 at 94.

Religion. There are parallels between political and scientific revolutions that are helpful to consider in providing context for this dissertation.[55]

First, a political revolution arises from a sense among the ruling political community that existing institutions are no longer able to adequately govern in the current environment.[56] Although revolutions are often styled as eruptions that originate within the hearts and minds of the common people, in reality, most revolutions arise from one group of elites who are dissatisfied with the rule of other elites in power, and who capture the imagination of the populace with the idea that life will be better under a new regime.[57] However, revolutions often turn out differently from what elites anticipate. Unseen forces rise to push the movement in unexpected twists and turns. This may well be the case in the revolution against the place of religion in the law.

By comparison, scientific revolution arises when scientists recognize that the current paradigm is no longer accurate or adequate to explain a particular natural phenomenon.

Second, political revolutions attempt to change political institutions that prohibit such change.[58] The only way forward is to destroy the old institution. This creates a crisis gap where no institution is ruling. The conservative camp demands a return to the old, while the progressive seeks to implement new institutions. Appeals are made to the masses either by persuasive means or political force. Likewise, in the scientific community, there may be several different groups, with each group favouring one particular paradigm as the accurate description of scientific fact and therefore the legitimate explanation of a particular phenomenon. Arguments made for the respective paradigms tend to be persuasive only to those within that group.[59] "As in political revolutions," says Kuhn, "so in paradigm choice—there is no standard higher than the assent of the relevant community."[60] However, over time as more evidence gathers and as opinions coalesce, one group's paradigm will gain favour in the wider community vis-à-vis the rest. The broader scientific community will ultimately decide which paradigm it considers as legitimate.

The revolution against the special place of religion in the law is a hybrid between a political revolution and a scientific revolution. The political similarities arise from the fact that law, by its nature, is political. Law involves social and political movements that advocate for change through the state apparatus – the three branches of government: executive, legislative and the judicial. All three have been evident in the limiting of religion. For example, the Alberta

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[55] *Ibid* at 93.

[56] *Ibid* at 92.

[57] Will and Ariel Durant pointed out that it was the French "lords, rich, proud, and often functionless, who initiated the Revolution. They looked fondly back to the days before Richelieu, when their order was the ruling power in France. When the *parlements* asserted their right to annul royal edicts, the nobilities of race and sword joined with the nobility of the robe – the hereditary magistrates – in an attempt to subordinate the king. They cheered the *parlement* orators who raised the cry for *liberté*; they encouraged the people and the pamphleteers to denounce the absolute power of Louis XVI. We cannot blame them; but by weakening the authority of the monarch they made it possible for the National Assembly of 1789, controlled by the bourgeoisie, to seize the sovereignty in France. The nobles threw the first spadeful of earth that dug their grave." Will and Ariel Durant, *The Story of Civilization X: Rousseau and Revolution* (New York: Simon and Schuster, 1967), 930.

[58] Kuhn, *Revolutions, supra* note 1 at 93.

[59] *Ibid* at 94.

[60] *Ibid*.

legislature decided it would not permit Hutterites to have pictureless drivers' licenses despite their religious beliefs against having their personal photo taken. The SCC agreed.[61]

The similarity to the scientific revolution, as we will see, is that like science the legal community developed a legal paradigm of how law operates. The legal paradigm formed the thinking for generations, or, in the case of the legal status of religion, for centuries. But like science, new ideas cause a rethinking of the paradigm. This work is about the changing views on the legal paradigm about the place of religion and the likely ramifications of this revolution.

2.4 The Anatomy of a Scientific Revolution

The scientific community argued for hundreds of years that its discoveries were an accurate description of reality. It asserted that its discoveries were universal, necessary, and certain.[62] Scientists describe their process of discovery as the scientific method applied to data in an objective and consistent manner. Objectivity is paramount.[63]

Therefore, logical reason, not emotion or intuitive bias, is the means of analysis and organization of the data. Although intuition and emotion often prompt investigation, or the formation of a certain hypotheses, these are then tested dispassionately.

The ubiquitous scientific method[64] consists of a multi-staged experiential process of deductive analysis that includes observation of a specific phenomenon, measurement, and experimentation to establish a theoretical hypothesis of what scientists think is reality or truth. Once a theory is formulated which can explain, predict, and control phenomena, it will be tested, yet again, with further experimentation to determine whether modification of the hypothesis is necessary. This method is deemed the proper objective approach for determining the reality of what is.[65]

However, we have now come to understand that scientific truth is temporal and therefore not immutable. What was accepted as true years ago has subsequently been found inadequate. For example, Sir Isaac Newton's law of gravity was found by Albert Einstein to have fallen short of the truth in that "[i]t did not explain why the gravitational force on an object was proportional to its inertial mass."[66]

New revelations of scientific discovery displacing an older truth in one form or another have become a common feature of the scientific experience. Previously, the conventional view was that new discoveries built upon the truth of the past rather than replacing or eradicating it. Thomas Kuhn claims otherwise. Kuhn recognized that the scientific community's rejection of the writings of Aristotle, for example, "was a global sort of change in the way men viewed

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[61] *Hutterian Brethren, supra* note 5.

[62] Steven L. Goldman, *Science Wars: What Scientists Know and How They Know It*, Part 1 of 2 (Chantilly, VA: The Teaching Company, 2006), 14.

[63] John R. Searle, "Rationality and Realism, What is at stake?" (1993) 122:4 Daedalus, Journal of the American Academy of Arts and Sciences, 55-83.

[64] I recognize that there is an ongoing discussion about what constitutes the "scientific method;" however, as Robert Nola and Howard Sankey point out, "the study of the methodology of science and the development of sophisticated and realistic theories of method is very much alive and well." See: Robert Nola & Howard Sankey, *Theories of Scientific Method: An Introduction* (Hoboken: Routledge, 2014), Epilogue.

[65] For an introductory description see Hugh G. Gauch, Jr, *Scientific Method in Brief* (Cambridge: U of Cambridge, 2012), 267-268.

[66] See "Gravity as Curved Space: Einstein's Theory of General Relativity," U of Winnipeg (last accessed 20 November 2015), online: <http://theory.uwinnipeg.ca/mod_tech/node60.html>.

nature and applied language to it, one that could not properly be described as constituted by additions to knowledge or by the mere piece meal [sic] correction of mistakes."[67]

However, one may observe that some continuity remains. Even with radical change, certain approaches, principles, or conditions endure. For example, reason and objectivity continue as important scientific principles. In the same way, Berman, as noted above, saw despite his six revolutions in law and religion, they each ultimately remained within the Western tradition of law.

Kuhn's line of thought provoked three questions: "First, to what extent are conceptual readjustments characteristic of science? Second, what lies behind them – what do they involve and why do they occur? Third, what do they imply about science as a kind of knowledge?" [68]

Scientists operate within a conceptual paradigm that explains the world. Whenever there is an anomaly, it is explained either as part of the paradigm or it is ignored. The paradigm creates a bias or a lens through which everything is viewed. Kuhn noted in his book, *The Structure of Scientific Revolutions,* that "something like a paradigm is prerequisite to perception itself."[69] The paradigm is the accepted view of the world. It is perceived as the "correct" view from which flow the assumptions and presuppositions that are automatically applied to any new data that must be interpreted. This results in the use of subjective analysis when making decisions about what the data revealed.

Scientists are not simply discovering reality as it exists. Rather, they are debating, within their own scientific community, the implications of observed data and coming to conclusions about reality within the paradigm. Different scientists (in different time periods) used different presuppositions. Such assumptions or axioms were the result of the scientists' biases based on the paradigm that inculcated their understandings during their years of education and their scientific career. The paradigm was their conceptual framework which then made a significant difference on how they would organize and analyse the data.

2.5 Crisis

With the passage of time, anomalies accumulate that do not fit the paradigm. The normal course for scientists faced with incongruities in their scientific study is to address them in one of two ways: first, to see them as being part of the "dominant paradigm," or second, to ignore them altogether.[70] However, as anomalies increase over time, they stretch the paradigm's ability to explain them. Then, inexplicably, there comes an epiphany – someone in the community realizes that such "anomalies" challenge the very legitimacy of the paradigm itself. This creates a crisis that is met with resistance from scientists who continue to rely on the dominant paradigm.[71]

Such resistance is not negative, since it allows scientists to remain undistracted. The resistance also means that when there is a discovery it will lead to a "paradigm change [that]

[67] As quoted by Jed Z. Buchwald & George E. Smith, "Thomas S. Kuhn, 1922-1996" (1997) 64:2 Philosophy of Science, 361 at 363.
[68] *Ibid.*
[69] Kuhn, *Revolutions, supra* note 1 at 113.
[70] *Ibid* at 52.
[71] *Ibid* at 64.

will penetrate existing knowledge to the core."[72] "Retooling," in this framework, "is an extravagance to be reserved for the occasion that demands it."[73]

The time of crisis is when scientists focus their attention on the anomalies. This focus has the effect of loosening expectations while providing incremental data necessary for the paradigm shift.[74] Resolution is possible by either reconfiguring the paradigm or establishing a new paradigm that explains, predicts, and controls the anomalous findings.

2.6 Eureka Moment

After much debate, the crisis is solved when a scientist discovers an alternate paradigm that appears to offer coherence instead of contradiction. This creates tension with those who have invested their career in the old paradigm.

How the new paradigm forms remains a mystery. One who is deeply immersed in the crisis connects the dots, "sometimes in the middle of the night."[75] Kuhn notes that scientists speak of "scales falling from the eyes" or a "lightning flash" enabling them to see the solution in a new way and for the first time.[76] They experience "flashes of intuition through which a new paradigm is born."[77] Often, the discoverers are young scientists, new to the field. They are "little committed by prior practice to the traditional rules of normal science, [and] are particularly likely to see that those rules no longer define a playable game and to conceive another set that can replace them."[78]

Ultimately, "when paradigms change, the world itself changes with them. … It is rather as if the professional community had been suddenly transported to another planet where familiar objects are seen in a different light and are joined by unfamiliar ones as well."[79]

2.7 Consolidation

When the scientific community decides that a revolution has occurred, there will be only one paradigm that gains prominence and authority as the old establishment coalesces with the new.[80]

As noted above, the scientists who lead the charge for a new paradigm when going through the crisis are usually young or so new to the scientific field that they are less committed than their colleagues to the rules determined by the old paradigm.[81] Charles

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[72] *Ibid* at 65.
[73] *Ibid* at 76.
[74] *Ibid* at 89.
[75] *Ibid* at 90.
[76] *Ibid* at 122.
[77] *Ibid* at 123.
[78] *Ibid* at 90.
[79] *Ibid* at 111.
[80] Kuhn describes it this way: "When, in the development of a natural science, an individual or group first produces a synthesis able to attract most of the next generation's practitioners, the older schools gradually disappear. In part their disappearance is caused by their members' conversion to the new paradigm. But there are always some men who cling to one or another of the older views, and they are simply read out of the profession, which thereafter ignores their work. The new paradigm implies a new and more rigid definition of the field. Those unwilling or unable to accommodate their work to it must proceed in isolation or attach themselves to some other group," in *Revolutions, supra* note 1 at 18–19.
[81] *Ibid* at 44. From my observation of the TWU law school case, the younger set in the profession have been

Darwin, for instance, expected that his colleagues would have difficulty accepting his findings: "I look with confidence to the future," he stated, "to young and rising naturalists, who will be able to view both sides of the question with impartiality."[82] It does take time, often a generation, for the old paradigm to lose its influence.

Scientists who operated under the old paradigm throughout their entire careers are loath to give it up. As Kuhn notes in semi-religious tones, "the transfer of allegiance from paradigm to paradigm is a conversion experience that cannot be forced."[83] Despite the new paradigm's ability to solve the crisis and the objective proof that it does so, it remains very difficult to convince members of the community to shift paradigms. Therefore, the process of switching allegiances is gradual. During the transition period, there is no single argument that is persuasive.[84]

The triumphant group supporting the new paradigm within the scientific community gets to be on the edge of progress "and they are in an excellent position to make certain that future members of their community will see past history in the same way."[85] The repudiation of a past paradigm means that it is no longer "a fit subject for professional scrutiny" and all previous works based on that paradigm are of no use.[86] This "drastic distortion in the scientist's perception of his discipline's past" makes the member of the scientific community a "victim of a history rewritten by the powers that be."[87]

2.8 Kuhn vs. Popper

To better recognize the merits and limitations of Kuhn's work, his views can be juxtaposed with the thought of Karl R. Popper, an Austrian-British philosopher and professor at the London School of Economics. They faced each other in a debate on July 13, 1965 as part of the International Colloquium in the Philosophy of Science.[88] Both viewed science very differently. As Steve Fuller describes it, "Kuhn was tightly focused on science as a knowledge enterprise, whereas Popper invested science with symbolic import as the standard-bearer for critical rationality, a virtue in all walks of life."[89]

Popper challenged the positivists' view that logic bolsters scientific authority. Deductive logic, in Popper's view, is a tool to compel scientists to test the consequences of their claims of general knowledge in particular cases. Testing by empirical research leads to findings that contradict the scientist's predictions based on that knowledge. This is Popper's falsifiability

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particularly enamoured by the appeal to anti-discrimination language used by TWU critics. This attraction did not have a corresponding appreciation for the necessity of allowing differences of opinion and practice on fundamental human life issues such as marriage, abortion, and end of life. The youthful exuberance lacked experience with religion and was thus left to understand religion only through the lens of their legal academic tutors.

[82] *Ibid* at 151, quoting from Charles Darwin, *On the Origin of Species*, vol 2, 6th English ed (New York: D. Appleton and Company, 1889).
1889) at 296-96.
[83] *Kuhn, Revolutions, supra* note 1 at 151.
[84] *Ibid* at 155–56.
[85] *Ibid* at 166.
[86] *Ibid* at 167.
[87] *Ibid*.
[88] Steve Fuller, *The Struggle for the Soul of Science: Kuhn vs Popper* (Cambridge: Icon Books, 2003) at 10.
[89] *Ibid* at 15.

principle.[90] Popper saw his principle as a scientific ethic that could be applied elsewhere, including in political philosophy. The ethic led to "the open society" "whose members, like the citizens of classical Athens, treat openness to criticism and change as a personal ethic and a civic duty."[91]

Popper rejected "historicism," which he saw as a flawed version of Plato's thought that views progress toward the ideal no matter the outcome of our trials.[92] The problem was historicism resulted in a refusal to admit error and therefore no need to change one's course of action or belief.[93] Popper saw Kuhn as an historicist who was therefore uncritical and conformist, as were the positivists in their search for "timelessly true propositions."[94] Popper was convinced that the critical attitude would lead to further investigation. There was no guarantee that the ideal would ever be attained, since scientists would change their minds based on the evidence.

Kuhn, on the other hand, argued that scientific revolutions are successful "not because the same people are persuaded of a new way of seeing things (à la Popper) but because different people's views start to count."[95] It matters not that a "stubborn old scientist" refuses to change her mind on a post-revolutionary paradigm because "a young politically correct version will come to replace her."[96] For Kuhn, the more the scientific community is invested in their paradigm, the more mentally inflexible they are – they cannot see the world through two different paradigms. They are not "bilingual".[97]

Popper thought Kuhn was giving in to crass political motivations "that combined qualities of the Mafia, a royal dynasty and a religious order. It lacked the sort of constitutional safeguards … in modern democracies that regularly force politicians to be accountable to more people than just themselves."[98] Scientists, according to Popper, are obligated "to falsify their theories, just as people should be always invited to find fault in their governments and consider alternatives – and not simply wait until the government can no longer hide its mistakes."[99]

As Fuller points out, Kuhn's view has become the most favoured due to the deference given to science policy-makers. It is assumed that the scientific establishment is best equipped to determine what and whose research is preferable. This deference comes from the widespread public support that imbues science with "the tinge of divine inspiration that has traditionally legitimated royalty."[100]

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[90] *Ibid* at 25.
[91] *Ibid* at 26.
[92] *Ibid* at 27.
[93] *Ibid*.
[94] *Ibid* at 36.
[95] *Ibid* at 37.
[96] *Ibid* at 37-38.
[97] *Ibid* at 38.
[98] *Ibid* at 46.
[99] *Ibid*.
[100] *Ibid* at 47. Parallels may be drawn with the legal community. There is a sense that the legal profession is best equipped to determine how to interpret the constitution and *Charter* rights. Like the scientists, the judges of the Supreme Court of Canada may be seen to have "the tinge of divine inspiration that has traditionally legitimated royalty." The SCC's willingness not to be bound by precedent in the *TWU* 2018 cases and their stated concern with "public perception" illustrates their confidence that they are on the "right side of history".

Popper took seriously the scientific ideal of reaching universal knowledge and the reality that scientists "are inherently flawed and biased agents."[101] This demands science be as democratic as possible, preventing an elitism where knowledge is only known by the few. Knowledge was meant to be an instrument of liberation, not power or domination.[102] What Kuhn saw as instilling stability in the scientific world (the predominant paradigm), Popper saw as a problem to overcome – authoritarianism.[103] For Popper truth is 'transcendent' above the community; for Kuhn truth is 'immanent' in the community.[104] Popper was not committed to any view but was critical of all, whereas in Kuhn's assessment scientists are indeed committed to their paradigm.

These ideas have religious overtones, despite the fact that neither Kuhn nor Popper were religious.[105] Fuller suggests that religious conversion is Kuhn's model for his paradigm.[106] In Fuller's assessment, "the entire sociology of science is reduced to the process of training initiates for a life of total commitment to their paradigm, by virtue of which their judgement will go largely unquestioned in the larger society and questioned only on technical matters within their own community."[107]

Popper, on the other hand, rejects any form of commitment that requires the scientist to limit critical assessment or any stratification of society by maintaining different degrees of knowledge and ignorance. Popper, being influenced by Bergson's work, *The Two Sources of Religion and Morality*,[108] discards "mythology, superstition and institutionalized dogma".[109] Institutionalism requires a firebrand to break up the monopoly – "for every Catholicism, there is Protestantism; for every Hinduism, Buddhism; for every Kuhn, Popper."[110]

Popper's commitment to truth allows scientists to have courage to stand up to any theory or paradigm.[111] He explains the use of rationalism:

> We could then say that rationalism is an attitude of readiness to listen to critical arguments and to learn from experience. It is fundamentally an attitude of admitting that 'I may be wrong and you may be right, and by an effort, we may get nearer to the truth'. It is an attitude which does not lightly give up hope that by such means as argument and careful observation, people may reach some kind of agreement on most problems of importance. In short, the rationalist attitude, or, as I may perhaps label it, 'the attitude of reasonableness,' is very similar to the scientific attitude, to the belief that in the search for truth we need co-operation, and that, with the help of argument, we can attain something *like objectivity*.[112]

Popper appreciates the role that tradition has in society but he does not favour a 'sacrosanct' view of tradition that supports a collectivist mindset. The individual must be free

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[101] Fuller, *supra* note 88 at 52.
[102] *Ibid* at 53.
[103] *Ibid* at 54.
[104] *Ibid* at 56.
[105] *Ibid* at 100-101.
[106] *Ibid* at 101.
[107] *Ibid* at 102.
[108] Henri Bergson, *The Two Sources of Religion and Morality* (London: MacMillan, 1935).
[109] Fuller, *supra* note 88 at 104.
[110] *Ibid* at 104.
[111] *Ibid* at 108.
[112] Karl R. Popper, *The Open Society and Its Enemies*, vol 2 (London: Routledge, 2011), 213, emphasis added.

to "contribute to the growth or the suppression of such traditions."[113] Rationalism must allow criticism and:

> is diametrically opposed to all those modern Platonic dreams of brave new worlds in which the growth of reason would be controlled or 'planned' by some superior reason. Reason, like science, grows by way of mutual criticism; the only reasonable way of 'planning' its growth is to develop those institutions that safeguard the freedom of this criticism, that is to say, the freedom of thought.[114]

In the context of this study, Popper's criticism has merit. It is reasonable that critical thought be given the right to question all forms of tradition and accepted ways of doing things to arrive at the truth. It does not mean that we will ever arrive at truth, but it is in the search that we are able to determine what avenues we are to follow in the quest. In the past, religion was given special treatment by the law for then-obvious cultural and political reasons. It is therefore, using Popper's view, reasonable to question whether such special treatment ought to continue. It is only right and fair to ensure that our society is living up to its promises of being free and democratic. But it is also fair that we question the rise of the new hegemony of equality that has become the fashion. Just as we have a right – indeed, even an obligation – to question the law's bias towards accommodating religion, so too we have a right to question whether equality ought to eclipse religion so that it no longer has a space in which to operate.

We are amid a crisis as to the place of religion in the law. Prominent voices in the profession are of the view that religion should no longer be given special treatment. That may be the predominant view of many legal professionals as evidenced by the fierce opposition toward TWU's special exemptions from the *Charter* and human rights legislation. Indeed, the Supreme Court of Canada displayed a dismissive attitude toward TWU's Community Covenant, describing it as "degrading and disrespectful."[115]

Therefore, we must ask, as Popper would urge, whether the current view of the legal profession is, in fact, the correct view. In other words, the spirit of inquiry demands that we critically analyse the assertion that religious protection is no longer needed; or that society is no longer willing to grant religion the special exemptions, for its quirks, that have traditionally been given it. We must be open to the possibility that the law societies' opposition to TWU, and the dismissive attitude of the SCC, cannot stand up to scrutiny. Likewise, openness requires that the anti-TWU legal elites be willing to entertain the debate about whether they are right or wrong.

W. K. Clifford observed:

> When an action is once done, it is right or wrong for ever; no accidental failure of its good or evil fruits can possibly alter that … The question of right or wrong has to do with the origin of his belief, not the matter of it; not what it was, but how he got it; not whether it turned out to be true or false, but whether he had a right to believe on such evidence as was before him.[116]

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[113] *Ibid* at 213.

[114] *Ibid*. These ideas are particularly apt for our current socio-political climate as Lukianoff and Haidt observed there is such coddling of students in universities today students no longer have the ability to deal with ideas different from their own. It may in fact "be teaching students to think pathologically." See Greg Lukianoff & Jonathan Haidt, "The Coddling of the American Mind," *The Atlantic* (September 2015) 42 at 47.

[115] *LSBC v TWU* 2018, *supra* note 14 at para 101: "Being required by someone else's religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful. Being required to do so offends the public perception that freedom of religion includes freedom from religion."

[116] W. K. Clifford, "The Ethics of Belief" (1876-77) 29 Contemporary Review, 289 at 290.

The rejection of TWU by the law societies and the SCC must now be analysed to determine if it was right or wrong based on what the law was and what was consistent with liberal democratic thought on religious freedom and accommodation. This study concludes that those decisions were wrong *ab initio*. The TWU expectation for tolerance was in keeping with the law and liberal democratic expectations of how religious minorities are to be accommodated. The paradigm shift that has now occurred in the legal profession must now be examined in the spirit of Popper (and indeed others such as J. S. Mill and W. K. Clifford).

Consider for example, would a university law school that caters to the homosexual community and which does not accept heterosexuals, be permitted under constitutional and human rights law? A strong argument can be advanced that such a university in our pluralist society would be permissible. Human rights legislation has specifically provided for such a possibility.[117] Yet, the law societies and the SCC denied an evangelical Christian university law school.

Unlike Popper, Kuhn would suggest that the current crisis will be resolved when a sufficient number of key personnel in the legal community concur that religion is no longer special and that religious institutions such as TWU must be curtailed in the expression of their religious beliefs and practices. Kuhn's paradigmatic shifts tell us as much about the discoveries that flow from such shifts as they add to our understanding about professional culture. Ultimately, his work is not limited to the scientific community, but has broader implications, just as Kuhn concluded that the Copernican Revolution's[118] re-interpretation of the universe had a profound impact not only on astronomy "but it embraced conceptual changes in cosmology, physics, philosophy, and religion as well." [119] This he coined the "Revolution's plurality."

Kuhn's revolutionary plurality extends beyond conceptual changes to other subject areas; his analytical method itself can be applied to different disciplines. And one of those disciplines is law.

It is to that story that we now turn.

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[117] For example, *Human Rights Code*, R.S.O. 1990, ch. H.19, s. 18 states, "The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified."

[118] Thomas S. Kuhn*, The Copernican Revolution: Planetary Astronomy in the Development of Western Thought* (Cambridge, MA: Harvard University Press, 1957).

[119] *Ibid* at vii.

3 BEFORE THE REVOLUTION: RELIGION'S UNIQUE PLACE IN LIBERAL DEMOCRACY

3.1 Introduction

If we apply Kuhn's model to the law, religion's special treatment in the law represents the established or "old" paradigm which is now verging on crisis.[120] To understand how existing accommodations came to be the accepted paradigm is complex. There is no single or short answer. Rather, there are multiple answers or, at least, reasonable explanations that involve history, practical politics, and philosophy. This section will examine those explanations and articulate the unique place of religion in Western democracies, with particular emphasis on the Canadian context.

3.2 The Search for Meaning and Purpose

The special status of religion in the law is rooted in what it means to be human.[121] The law, after all, reflects the society that it governs, and society is the product and producer of the human quest for meaning. "This world's no blot for us," declares poet Robert Browning, "Nor blank; it means intensely, and means good: / To find its meaning is my meat and drink."[122] Indeed, ontological and epistemological questions of identity and knowledge – *what do I know? How can I know that I know? Who am I? Where did I come from? What is my purpose? Where am I going?* – are fundamental to human existence and coexistence.

Recent scholarship suggests that from a very early age, human beings search for meaning and purpose.[123] "Not only do kids look for purpose in human-made things (artifacts) like forks and pipes," explains psychology professor Justin L. Barrett, "but also in natural objects like rocks and rivers, and plants and animals."[124] Children also can understand the concept of causation. According to Barrett, "[t]his tendency to easily find agents (sometimes without large amounts of evidence) persists into adulthood and make the discovery of gods not only possible but likely."[125]

There is then an inherent desire or a teleological reasoning process that helps us comprehend purpose, design and function.[126] That is not to say "that religion in is 'hardwired' or 'innate' – rather that children have propensities to believe in gods because of how their minds naturally work."[127]

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[120] However, as explained below, in the grand scheme of things, religious freedom and the protection of religion in Western democracies is a relatively new development in the history of human civilization. It is the result of the Protestant Reformation and the ensuing Age of Enlightenment. But it is this liberal democratic view that is being challenged.

[121] Justice Harry Blackmun said that law and religion "are an inherent part of the calculus of how a man should live," foreword to John Witte Jr. & Frank S. Alexander, eds, *The Weightier Matters of the Law: Essays on Law and Religion* (Atlanta: Scholars, 1988), ix. Justice Ivan Rand, as noted in this book, saw religious freedom as an "original freedom."

[122] Robert Browning, "Fra Lippo Lippi," in *My Last Duchess and Other Poems* (New York: Dover Publications, 1993), at 44, lines 313-315.

[123] Justin L. Barrett, *Born Believers: The Science of Children's Religious Belief* (New York: Free Press, 2012).

[124] *Ibid* at 44.

[125] *Ibid*.

[126] *Ibid* at 45.

[127] Justin L. Barrett, "Let's Stick to the Science," *The Guardian* (29 November 2008), online: <https://www.theguardian.com/commentisfree/2008/nov/29/religion-children>.

Our search for meaning has had a profound impact on the place of religion within our legal framework. The historical record indicates that religion was included in the constitutions of liberal democracies not by chance, but by design.[128] This is not to suggest that religion was a political invention designed to manipulate colonial populations, nor simply a calculated "means of pinning down and managing the ideas and practices"[129] for the best interests of the West. Rather, religion's special treatment in the law is the combined result of human events and philosophical inquiry. Religion has always had, and continues to have, a key role in assisting humanity in understanding the world, particularly one person's duty toward the other in alleviating suffering. While it is certainly true that individuals may show compassion or generosity on secular moral grounds, religion has long provided the ethical and spiritual impetus for philanthropy and social justice, especially on a communal scale. Indeed, religion is a special kind of experience, incomparable with other phenomena, as recent research makes clear.

3.3 The Tale of Two Sovereignties

3.3.1 What is Religion?

Western democracies specifically included religion[130] as a protected head in their constitutions; such treatment presupposes that religion is inherently valuable. It merits protection. However, the state cannot protect religion unless it knows what religion is. The citizen cannot hold the state accountable until the boundaries of protection are clear. Therefore, it is imperative for a liberal democracy to articulate a definition of religion. However, the complexity of defining religion is daunting, especially since connotations have shifted considerably over time.

For instance, in the Western context, "religion" in the law historically referred to Christianity – with a further distinction between Protestantism and Roman Catholicism. So, for instance, the 1688 *Bill of Rights* in England guaranteed deliverance "from the Violation of their Rights … and from all other Attempts upon their Religion Rights and Liberties," but explicitly stated that any who "shall professe the Popish Religion shall be excluded".[131] Today, of course, references to religion encompass a much wider array of belief systems. However, the fact remains that the Christian faith in particular has been highly influential on Western legal traditions. As Justice Ivan Rand of the Supreme Court of Canada stated, "The Christian religion stands in the first rank of social, political and juristic importance."[132]

The second challenge in defining religion is identified by Slotte and Arsheim, who note:

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[128] Consider the full debate over the First Amendment in the US Constitution so aptly retold in John Witte, Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties* (Boulder, CO: Westview Press, 2000) at 64-86.

[129] Derek Peterson & Darren Walhof, eds, *The Invention of Religion: Rethinking belief in Politics and History* (Rutgers University Press, 2002), 7.

[130] It has been, in the West, the Christian religion that has had the most profound impact on our law. "Freedom of religion," must be understood in the context of the "Christian" West. Over time the term "religion" within the law has come to mean not just the Christian religion but religion in general.

[131] *Bill of Rights* (UK), 1688, 1 Will and Mar Sess 2, c 2, online: <http://www.legislation.gov.uk/aep/WillandMarSess2/1/2#commentary-M_F_9ca4e9d8-06b9-44aa-c5d2-e536b3f77e06>.

[132] *Saumur, supra* note 6 at para 88.

> A key issue … is the distinction between the 'inside' and the 'outside' of religion; should religious traditions be conceptualized according to their own categories, vocabularies, and forms of reasoning; or should they be approached from the outside, using 'neutral' categories, not derived from any particular tradition, but rather from neighbouring scientific disciplines?[133]

Internal and external definitions are further complicated by attempts to conform with what the law considers religion. This is because there are significant legal protections and accommodations granted to individuals if their beliefs and practices accord with generally applicable legal norms.

Finally, although such bifurcation may not reflect the experiences of religious adherents themselves, from a legal standpoint "religion" is defined as being private in nature.[134] This definition emphasizes the individual's autonomy and choice. Religion has been given a broad scope in the law, since the law avoids interfering with the individual's beliefs. As discussed below a strong argument can be made that all our rights derived from the grant of religious freedom.

The law's competence is said to be in regulating religious practice (which is thereby in the public realm and fair game for law's regulation), ensuring that such practice[135] comports with the values of "a free and democratic society."

The inclination to fit under religion's tent suggests that the law might be best served in addressing such debates with an articulate theory of why religion is protected. Such a theory would make clear what is meant by the term "religion." But is religion best served by a theoretical understanding of the concept, or would a more practical definition be appropriate? As Arnal and McMutcheon point out, "no statement about what religion *is* can avoid at least partially explaining what religion *does*, where it comes from, and how it works."[136]

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[133] Pamela Slotte & Helge Arsheim, "The Ministerial Exception—Comparative Perspectives" (2015) 4:2 Oxford J. L. & Rel. at 172.

[134] In *Amselem*, *supra* note 7 at para 39, the SCC stated: "In order to define religious freedom, we must first ask ourselves what we mean by 'religion'. While it is perhaps not possible to define religion precisely, some outer definition is useful since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion. Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to *one's self-definition* and spiritual fulfilment, the practices of which allow *individuals* to foster a connection with the divine or with the subject or object of that spiritual faith" (emphasis added). See also Benjamin Berger: "From the perspective of the adherent, religion cannot be left in the home or on the steps of Parliament. The religious conscience ascribes to life a divine dimension that infuses all aspects of being. The authority of the divine extends to all decisions, actions, times, and places in the life of the devout. Unlike the powers of a liberal state, the religious conscience is profoundly jurisdictional" in B. Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State" (2002) 17 Can. J.L. & Soc. 39 at 47 ["Limits of Belief"].

[135] *TWU* 2001, *supra* note 26 at para 36: "Instead, the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them."

[136] William E. Arnal & Russell T. McCutcheon, *The Sacred Is the Profane: The Political Nature of "Religion"* (Oxford: OUP, 2012).

3.3.1.1 The Religion Debate

The current legal revolution against the law's special treatment of religion is occurring on the heels of a fierce debate about religion's place in society and in the context of a post 9/11 upheaval of religious extremism that has gripped the imagination of society at large. Several authors of considerable academic credentials suggest that religion is inherently destructive to individuals and society. These include Sam Harris,[137] Richard Dawkins[138] and Daniel Dennett.[139]

Jonathan Haidt calls them the New Atheists who claim "to speak for science and to exemplify the values of science – particularly its open-mindedness and its insistence that claims be grounded in reason and empirical evidence, not faith and emotion."[140]

However, Haidt, a scientist in his own right as a professor of psychology, challenges their dismissive attitudes toward religion. Haidt takes a middle of the road approach toward religion, recognizing its positive contributions to society – particularly the ability to bind strangers together (therefore making society a cooperative venture) and eliminating the "freerider" problem,[141] i.e. those who would take from society's benefits without contributing. At the same time, Haidt is also mindful of religion's capacity to obscure its followers' vision, resulting in selfish hypocrites who put on a mere show of virtue.[142] According to Haidt, "Morality binds and blinds." The morality commitments of religious communities create a contextual framework that has the effect of establishing moral boundaries and thereby pressuring outliers to come into conformity with the majority.

The New Atheists define religion, as does Brian Leiter who is discussed below, as irrational.[143] Harris describes religion or "faith" as "belief in, and life orientation toward, certain historical and metaphysical propositions." In other words, "'an act of knowledge that has a low degree of evidence.' … [Being] the majority of the faithful in every religious tradition."[144] He claims, "faith is what credulity becomes when it finally achieves escape velocity from the constraints of terrestrial discourse – constraints like reasonableness, internal coherence, civility, and candor."[145]

While the New Atheists may be considered "new," their anti-religious arguments rhyme with the past. Consider US Justice John Paul Stevens' reference to Clarence Darrow: "the distinction between the religious and the secular is a fundamental one. To quote from … Darrow's argument in the Scopes case: 'The realm of religion … is where knowledge leaves off,

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[137] Sam Harris, *The End of Faith: Religion, Terror, and the Future of Reason* (New York: Norton, 2004); *Letter to a Christian Nation* (New York: Knopf, 2006); *The Moral Landscape: How Science Can Determine Human Values* (New York: Free Press, 2010).
[138] Richard Dawkins, *The God Delusion* (Boston: Houghton Mifflin, 2006).
[139] Daniel C. Dennett, *Breaking the Spell: Religion as a Natural Phenomenon* (New York: Penguin, 2006).
[140] Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Pantheon Books, 2012) at 249.
[141] *Ibid* at 257.
[142] *Ibid* at xv, 248.
[143] There is a fideistic tradition within Christian theology that does not consider irrationality as negative. "Credo quia absurdum" is attributed to Tertullian. However, that characterization may not be a fair reading. See Peter Harrison, "'I Believe Because it is Absurd': The Enlightenment Invention of Tertullian's Credo" (2017) 86:2 Church History, 339-364, doi:10.1017/S0009640717000531.
[144] Harris, *End of Faith*, *supra* note 137 at 65.
[145] *Ibid.*

and where faith begins….'"[146] One must ask what makes Darrow an authority on religion and knowledge that would be sufficient for the US Supreme Court to adopt his proposition that religion is not knowledge? This lack of critical analysis about religion by the Court suggests a dismissive attitude toward religion.

Beliefs lead to action, says Harris: "A belief is a lever that, once pulled, moves almost everything else in a person's life."[147] Beliefs "define your vision of the world; they dictate your behaviour; they determine your emotional response to other human beings."[148] For Harris, religion is a form of possession – one so captivated by religion is incapable of critical thought and inquiry.

Dawkins' description of the 'God Hypothesis' is that "there exists a superhuman, supernatural intelligence who deliberately designed and created the universe and everything in it, including us."[149] This God, says Dawkins, "is a delusion; and, as later chapters will show, a pernicious delusion."[150]

These definitions highlight a belief in the supernatural that then leads to a host of damaging acts. Such beliefs are irrational and not subject to evidence.

Haidt argues that there is more to religion than believing and doing – the missing element of the New Atheist analysis, he notes, is the notion of belonging. He insists, "You've got to look at the ways that religious beliefs work with religious practices to create a religious community."[151] Since religions are social facts, says Haidt, religion cannot be studied in lone individuals any more than a bee can be isolated from the hive.[152]

Rather, one must view it as a collective phenomenon that also has individual dimensions. As Durkheim observed, humans are homo duplex. We exist at two levels "as an individual and as part of the larger society."[153] We have a "profane" realm (Haidt calls it the "chimp" domain) where we are concerned with day-to-day worries about wealth, health, and reputation. But we experience a nagging sense of something missing, something of greater importance.[154] Most of our time (90 percent) is spent in the profane. The other realm is "higher" – it is the "sacred" space where the collective (Haidt calls it the "bee" domain) temporarily pulls us away from the profane to the spiritual. Haidt suggests that religion has a "hive switch" that causes us to switch back and forth. So, we are 90 percent "chimp" and 10 percent "bee."[155]

This has implications for understanding what aspects of religion the law protects. While most legal theorists see the law's protection of religious freedom as an individual ("chimp") right, and indeed it is, it is also more than that – it is the right of a religious community as well. The Supreme Court of Canada is now becoming reacquainted with religion as a communal

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[146] *Wolman v. Walter* 433 U.S. 229 (1977) at 265.
[147] Harris, *End of Faith*, *supra* note 137 at 12.
[148] *Ibid*.
[149] Dawkins, *supra* note 138 at 31.
[150] *Ibid.*
[151] Haidt, *supra* note 140 at 250.
[152] *Ibid* at 248, 227.
[153] *Ibid* at 225.
[154] *Ibid* at 226.
[155] *Ibid* at 189-220.

experience[156] (i.e. the "bee" nature of religion) which has lain dormant in the shadows of the judicial preoccupation with individual religious freedom.

Haidt calls on scientists to broaden their study of religion beyond the emphasis on individuals and their supernatural beliefs to "groups and their binding practices."[157] Otherwise, the description of religion as solely an individual pursuit is not accurate. His recommendation is applicable to the legal field – the communal reality of religious freedom has long been overlooked and the emphasis on the individual has led to unfortunate results.[158] And, it necessarily engages the debate over the public/private and belief/action dimensions of belief systems.[159]

With this in mind, Haidt recommends Emile Durkheim's definition of religion:

> [A] religion is a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and surrounded by prohibitions – beliefs and practices that unite its adherents in a single moral community called a Church.[160]

What Durkheim says next is telling: "The second element that takes its place in our definition is therefore no less essential than the first: demonstrating that the idea of religion is inseparable from the idea of a church suggests that religion must be something eminently collective."[161] Indeed, while religion involves an individual belief in the supernatural, it also involves a community of believers who share the same moral and worldview commitments that reinforce individual beliefs, providing a shared social context.

For the New Atheists, religion is little more than a noxious disease.[162] Their hostility is vividly expressed by Richard Dawkins who said, "I despise people who whose belief in religion

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[156] Justice Bertha Wilson, speaking in partial dissent, in *R. v. Edwards Books and Art Ltd.,* [1986] 2 S.C.R. 713 [*Edwards Books*], at para 207 noted, "Yet it seems to me that when the *Charter* protects group rights such as freedom of religion, it protects the rights of all members of the group." It was not until 2009 that the group right of religious freedom was again recognized in a serious way by the SCC when Justice Rosalie Abella, speaking in dissent, recognized the "dual nature of freedom of religion" in *Hutterian Brethren, supra* note 5, at para 130. In *Loyola High School v. Quebec (AG),* 2015 SCC 12, [2015] 1 S.C.R. 613, at para 33 [*Loyola*], Justice Abella, speaking for the majority noted, "I recognize that individuals may sometimes require a legal entity in order to give effect to the constitutionally protected communal aspects of their religious beliefs and practice, such as the transmission of their faith." Additionally, Chief Justice McLachlin and Justice Moldaver, in the *Loyola* decision at para 91, stated, "The communal character of religion means that protecting the religious freedom of individuals requires protecting the religious freedom of religious organizations, including religious educational bodies such as Loyola."

[157] Haidt, *supra* note 140 at 248.

[158] This was the case in *Hutterian Brethren, supra* note 5, where the SCC refused to grant the Hutterian Brethren exemption from the government's requirement that they have a photo taken for their driver's license – even though they had the exemption for 29 years prior to the litigation. Justice Rosalie Abella's dissent in that case rightly, in my view, recognized that religion was a communal affair and the court's decision, "severely compromises the autonomous character of their religious community" (at para 114).

[159] Of course, our context (post-9/11) has created a fear of the bonding factor of religion. Some religious communities bond so well that they exclude themselves from mainstream society. That's why J. S. Mill wanted a "Religion of Humanity" and why the French have their *laïcité*, or secularism. See Linda C. Raeder, *John Stuart Mill and the Religion of Humanity* (Columbia, MO: University of Missouri Press, 2002).

[160] Haidt quotes from a different translation than I have used. However, I find this 2001 translation by Carol Cosman more compelling: Emile Durkhiem, *The Elementary Forms of Religious Life* (Oxford: Oxford University Press, 2001), 46.

[161] *Ibid*.

[162] Dawkins, *supra* note 138 at 176.

is so firm and so unshakable that they actually think it justifies killing people."[163] Haidt sums up the post-apocalyptic overtones of the New Atheist position, explaining that:

> If religion is a virus or a parasite that exploits a set of cognitive by-products for its benefit, not ours, then we ought to rid ourselves of it. Scientists, humanists, and the small number of others who have escaped infection and are still able to reason must work together to break the spell, lift the delusion, and bring about the end of faith.[164]

There is another story, different from the New Atheist position, that is gaining ground in the scientific study of religion. While Scott Atran and Joe Henrich generally agree with the evolutionary premise described by the New Atheists, they suggest "religions are sets of cultural innovations that spread to the extent that they make groups more cohesive and cooperative."[165] What evolved was religion, not people or their genes. Religion makes civilization possible. However, there is a dark side to religion – the very cohesive nature of religious identity is also the source of conflict, especially conflicts with other groups. In a pluralist society, such as Canada, we have to find harmony in overarching principles. Those principles must be common to humanity, not just one religious (or indeed, non-religious) community.

According to Ara Norenzayan, "[r]eligion appears to be both a maker and an unmaker of conflict."[166] While our knowledge is limited, those who study this phenomenon suggest three reasons why this is the case. First, the "Big Gods" concept – the idea of the omniscient, omnipotent, omnipresent God who watches over the affairs of everyone ("supernatural monitoring") – builds trust and cooperation among strangers who are also of the same view of God. At the same time, this is the source of intergroup conflict, since "social cohesion inevitably involves setting up boundaries between those who can be trusted and those who cannot."[167] Those who are not following the same norms or believing in the same god are excluded because they cannot be trusted.

Second, the religious practices and rituals that build social cohesion also exclude those who do not take part. This is referred to as the social solidarity hypothesis. The evidence for that is, according to Norenzayan, more convincing than the religious belief hypothesis which argues there is "something about religious belief itself [that] causes intergroup hostility."[168] This is contrary to Harris's "belief as lever" claim noted above. Norenzayan suggests that the religious belief hypothesis lacks scientific evidence and involves polemical debate.

The studies suggest that "[r]eligious participation cements social ties and binds group solidarity. But when groups are in conflict, this solidarity translates into the willingness to sacrifice to defend the group against perceived enemies."[169] It is not belief alone that results in religious violence against outsiders, but the participation in group religious activities that make

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[163] "Richard Dawkins, 'Somebody as intelligent as Jesus would have been an atheist'," *The Guardian,* (27 October 2011), online (video): <https://www.youtube.com/watch?v=dQ5QG3MUTtg>

[164] Haidt, *supra* note 140 at 254-255.

[165] *Ibid* at 255, referring to the study, Scott Atran & Joseph Henrich, "The Evolution of Religion: How Cognitive By-Products, Adaptive Learning Heuristics, Ritual Displays, and Group Competition Generate Deep Commitments to Prosocial Religions," (2010) 5:18 Biol Theory.

[166] Ara Norenzayan, *Big Gods: How Religion Transformed Cooperation and Conflict* (Princeton and Oxford: Princeton University Press, 2013), 160.

[167] *Ibid.*

[168] *Ibid* at 163.

[169] *Ibid* at 164.

the difference. Norenzayan studied Palestinian suicide bombers in the West Bank and found that those who attended mosques often were twice to three-and-a-half times more likely to support suicide attacks. The frequency of prayer was statistically unrelated.[170] This supports the view that it is not only belief but belief and social context that may lead to violent acts.

Third, the sacred "values" of religions make it virtually impossible to compromise. As Norenzayan explains, those of us in the WEIRD (Western, Educated, Industrialized, Rich, and Democratic) countries are said to operate based on the rational actor paradigm that assumes we are motivated by self-interest and use a cost-benefit analysis as to what we support.[171] Our public policy mechanisms make decisions based on this paradigm. However, non-WEIRD countries may best be described as using the devoted actor paradigm that rejects personal self-interest but holds uncompromisingly to strong moral convictions on the issues at hand.[172]

The Western frame of reference does not appreciate the sacred teachings and principles of the non-Western world, which is a formula for disaster in intercultural relations. Material incentives do not make for reconciliation. In fact, trying to convince non-Western people by means of material incentives risks insulting them. There must be, says Norenzayan, a "recognition of the other's suffering, or appreciating their core values, even if we on this side do not share them" in order to transform the dynamic of conflict.[173]

Norenzayan's research provides a persuasive counterweight to the negative view of religion held by the New Atheists. It also gives us important clues as to why Christianity has had such an impact on Western law. Christianity is among the few religious movements on earth "that won in the cultural marketplace."[174] It has been successful in organizing the West into a "large, anonymous, yet cohesive and highly cooperative"[175] society just as other Big God religions[176] have done in their respective social contexts.

The Christian religion provided the moral framework and the founding mythology that bound the different language and cultural groups of Western democracies together. The modern age, being the era that commenced in the aftermath of the Reformation, provided a unique conceptualization of governance that put individual liberty, autonomy and choice at its centre. The individual became the focal point, with the state kept at bay by means of constitutional documents that recognized individual primacy. Religion, having both individual and communal aspects, would play a major role in the realization of individual rights.

Despite this heritage, liberal democracies have drifted from reliance on their Christian ideological foundations to an increasingly non-religious perspective. From all popular accounts, religious influence in society is in a marked decline.[177] This has meant a growing socio-political and legal inability to comprehend the basic religio-legal axioms that we have inherited from an era of greater understanding between Christianity and the law.[178] This was evident in the Canada Summer Jobs Program (CSJ) controversy of 2018.

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[170] *Ibid* at 163.
[171] *Ibid* at 166-167.
[172] *Ibid*.
[173] *Ibid* at 168. As will be noted below, the SCC's failure to equally appreciate the deep cultural commitments of TWU played a majour role in rejecting TWU's law school bIbid
[174] *Ibid* at 2.
[175] *Ibid* at 3.
[176] That is, Judaism and Islam.
[177] Clarke & Macdonald, *supra* note 31.
[178] See for example the SCC's note about the change in understanding of the term "marriage" in the law. *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698, para 22 [*Same-Sex Marriage*].

The CSJ provides government summer employment funding to charities, non-profits, and small businesses for students. The 2018 summer application demanded applicants attest to the government's position that abortion was a constitutionally protected right and that the employment would not violate that right nor undermine other "values underlying the Canadian *Charter of Rights and Freedoms*." This, despite the fact that no such positive right to abortion exists and, in any event, the *Charter* protects citizens from government action. It is nonsensical to demand such an attestation when private citizens and corporations are not state actors subject to the *Charter* as is the government.[179] Hundreds of religious charities refused to agree and were denied funding despite requests for accommodation based on their religious convictions.

Remarkably, Prime Minister Justin Trudeau saw no contradiction in denying funding to religious groups because they did not accept his party's view on abortion; yet provided funding to environmental groups that opposed the government's plan to approve the Alberta oil pipeline to British Columbia. In his words, "We will not remove funding from advocacy organizations because we as a government happen to disagree with them."[180] His justification for denying the religious groups was that they did not abide by the principles of the *Charter*.[181]

The result is paradoxical. On the one hand, there is increased scientific proof backed by critical analysis of the important role religion plays in supporting societal cohesion: shared faith increases the bond between strangers while addressing the free-rider problem. On the other hand, there is developing within the legal and political community of Western liberal democracies an opinion that religion's special status is no longer needed and can be avoided whenever politically expedient to do so. Instead, there is an argument that the law takes the place of religion itself.[182]

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[179] See Barry Bussey, "What the fuss about ticking a box on the Canada Summer Jobs application is about," *Canadian Lawyer Magazine* (20 February 2018), online: <http://www.canadianlawyermag.com/author/barry-bussey/what-the-fuss-about-ticking-a-box-on-the-canada-summer-jobs-application-is-about-15341/>

[180] *House of Commons Debate*s, 42-1, No 285 (April 25, 2018) at 18759 (Rt. Hon. Justin Trudeau), online: <https://www.ourcommons.ca/Content/House/421/Debates/285/HAN285-E.PDF#page=9>. See also John Ibbitson, "Trudeau's student-grant kerfuffle is the latest act that could alienate Manley Liberals," *Globe and Mail* (26 April 2018), online: <https://www.theglobeandmail.com/opinion/article-trudeaus-student-grant-kerfuffle-is-the-latest-act-that-could/>.

[181] Later he noted, "the Liberal Party of Canada is the party of the *Charter of Rights and Freedoms*, and we will always stand up to defend Canadians' *Charter* rights. Organizations that cannot ensure that they will abide by the principles in the *Charter of Rights and Freedoms*, and that indeed will work to take away the *Charter* rights of Canadians, will not get funding from this government" (*House of Commons Debates, supra* note 180 at 18759.)

[182] See, for example, Philip R. Wood, *The Fall of the Priests and the Rise of the Lawyers* (Oxford & Portland, Oregon: Hart Publishing, 2016). As discussed elsewhere in this dissertation, the idea that "law" can replace religion is dubious. It assumes that "law" has an ability to provide the same binding nature and social benefits that religion has in bringing people together. That is a tall order, as Norenzayan and Haidt's research sheds light on the complexity of religion's societal impact. Such a novel concept may be the result of a fractured civic society that Putnam observed some time ago. (Robert D. Putnam, "Bowling Alone: America's Declining Social Capital," (1995) 6:1 Journal of Democracy, 65–78.) He feared the loss of "social capital" ("shorthand for social networks and the norms of reciprocity and trust to which those networks give rise") which would inevitably lead to a diminished society where trust in institutions and others is lost. While the "9/11 generation" appears to be more engaged in civic society than their parents, social capital is still not where it once was. (Thomas H. Sander & Robert D. Putnam, "Still Bowling Alone?: The Post-9/11 Split" (2010) 21:1 Journal of Democracy, 9-16). In an age of uncertainty and with limited social capital there is a gravitational pull toward

The argument for law as the replacement for religion presupposes that law has the capability to answer humanity's struggle for cooperation and cohesion between strangers. It also presupposes that law and religion are interchangeable. According to the research of former Chief Justice of Canada, Beverley McLachlin, law and religion are two competing, absolute claims upon individual citizens.[183] "There is *no part* of modern life," she quotes Yale Professor Kahn, "to which law does not extend." Kahn is "describing the way in which, from the subjective viewpoint of the individual, the rule of law exerts an authoritative claim upon all aspects of selfhood and experience in a liberal democratic society."[184]

Likewise, "There are no limits to the claims made by religion upon the self. Religious authority, grounded as it is in basic assumptions about the nature of the cosmos, impinges upon all aspects of the adherent's world."[185]

There is then a dialectic – law and religion – which must seek a synthesis. In McLachlin's assessment:

> …[T]he synthesis of the rule of law with seemingly contradictory religious belief systems has always been a matter for the courts. Case law has not been limited to the protection of minority interests; it has included those cases in which the sources of authority and content of religious conscience actually clash with the prevailing ethos of the rule of law. I wish to call this tension between the rule of law and the claims of religion a "dialectic of normative commitments." What is good, true, and just in religion will not always comport with the law's view of the matter, nor will society at large always properly respect conscientious adherence to alternate authorities and divergent normative, or ethical commitments. Where this is so, two comprehensive worldviews collide. It is at this point that the question of law's treatment of religion becomes truly exigent. The authority of each is internally unassailable. What is more, both lay some claim to the whole of human experience. To which system should the subject adhere? How can the rule of law accommodate a worldview and ethos that asserts its own superior authority and unbounded scope? There seems to be no way in which to reconcile this clash; yet these clashes do occur in a society dedicated to protecting religion, and a liberal state must find some way of reconciling these competing commitments. …
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> For society to function properly it must be able to depend on some general consensus with respect to the norms that should be manifested in law. The authority of the rule of law depends upon this. On the other hand, in Canadian society there is the value that we place upon multiculturalism and diversity, which

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that which is (or at least seems to be) certain – thus if religion is uncertain then law, being certain, is more attractive. There are many problems with this idea as just mentioned. This innate desire for bonding also has philosophical roots in liberalism. John S. Mill called for a common "Religion of Humanity" that removed reliance on religious dogma and supernatural myths and, in its place, offered a rational religion that emphasized common humanity as a means of bonding. Mill wanted to purify religion, not eliminate it. In his view, "the human race should be striving towards 'spirtual perfection,'" where "people's spiritual nature would still be cultivated and expressed, and their religious needs would still be met." (Timothy Larsen, *John Stuart Mill: A Secular Life* (Oxford: OUP, 2018), 197). However, what Mill did not account for was the fact that religion works as a bonding agent precisely because of the metaphysical, transcendent dimension.

[183] Rt. Hon. Beverley McLachlin, PC, "Freedom of Religion and the Rule of Law: A Canadian Perspective," in Douglas Farrow, ed, *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal & Kingston: McGill-Queen's University Press, 2004), 12. Emphasis added.

[184] *Ibid* at 14.

[185] *Ibid* at 15.

> brings with it a commitment to freedom of religion. But the beliefs and actions manifested when this freedom is granted can collide with conventional legal norms. This clash of forces demands a resolution from the courts. The reality of litigation means that cases must be resolved. The dialectic must reach synthesis.[186]

The court then is to "oversee those points in public life where there is a clash between religious conscience and society's values as manifested in the rule of law." In providing a space for religious expression, McLachlin maintains, the law must not compromise "core areas of our civil commitments."[187]

From McLachlin's point of view, law and religion are interchangeable in the sense that they are both normative commitments that claim total allegiance. However, because we live in a liberal democracy, the law must make room for religion as long as the accommodation does not interfere with the "core areas of our civil commitments." The Supreme Court of Canada continues to work out what precisely those "core areas" or "national values" are.[188] However, as we will see, the Supreme Court in the TWU Law School Cases has taken the position that even in the private religious university setting where the *Charter* does not apply, those "core areas" or "*Charter* values" will take precedence over religiously inspired admissions requirements that students refrain from sexual relations outside of traditional marriage.[189]

Jean Bethke Elshtain cautions against McLachlin's view of the law. Elshtain points out that:

> where the rule of law in the West is concerned, there is a great deal about which the law is simply silent: the "King's writ" does not extend to every nook and cranny. Indeed, a great deal of self-governing autonomy and authority is not only permitted but is necessary to a pluralistic, constitutional order characterized by limited government. In other words, the law need not be defined as total and comprehensive in the way the Right Honourable Chief Justice claims.[190]

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[186] *Ibid* at 20-21.

[187] *Ibid* at 22.

[188] They include "equality, human rights and democracy," see *Loyola, supra* note 156 at paras 46-47.

[189] J. S. Mill suggests that "while mankind are imperfect there should be different opinions, so is it that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them. It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself" (John Stuart Mill, *On Liberty and The Subjection of Women* (New York: Henry Holt and Co., 1879), online: *Online Library of Liberty* <http://oll.libertyfund.org/titles/347> at 101-102 [*On Liberty and Subjection*]). In a liberal state you leave people as free as possible. Religious communities (like TWU), maintaining traditional perspectives on fundamental human life issues, such as heterosexual, monogamous marriage, are one of the "experiments of living" that liberal democracies would do well to continue permitting. Mill's quest for the truth of things is a far cry from our current context. Dr. Ronald Osborn rightly observes how far we have come from Mill's ethic, such that today, "To impede—or even to call into question—someone else's self-expression, whatever that expression might be, is to commit a kind of violence against their personhood." (Ronald E. Osborn, "Donald Trump: the president of expressive individualism," (31 October 2018), *America: The Jesuit Review of Faith and Culture*, online: <https://www.americamagazine.org/politics-society/2018/10/31/donald-trump-president-expressive-individualism>)

[190] Jean Bethke Elshtain, "A Response to Chief Justice McLachlin," in D. Farrow (ed), *Recognizing Religion in a Secular Society* (Montreal: McGill-Queens, 2004), 36.

Elstain's admonition is worth serious consideration, especially in light of the Supreme Court of Canada's 2018 decisions on TWU. The notion that law can displace religion lacks an appreciation for the work of Durkheim and the emerging science of Haidt, Norenzayan and Atran. It also lacks an historical understanding of liberal democratic government, never mind that which the courts have long recognized as the role of religion in making liberal democracy possible to begin with.[191]

> Atran's analysis of the evolutionary development of religion suggests that there is:
> …no other mode of thought and behavior [that] deals routinely and comprehensively with the moral and existential dilemmas that panhuman emotions and cognitions force on human awareness and social life, such as death and deception. As long as people share hope beyond reason, religion will persevere. For better or worse, religious belief in the supernatural seems here to stay. With it comes trust in deities good and bad, songs of fellowship and drums of war, promises to allay our worst fears and achieve our most fervent hopes, and heartfelt communion in costly homage to the absurd. This loss and gain persist as the abiding measure of humanity. No other seems able to compete for very long. And so spirituality looms as humankind's provisional evolutionary destiny.[192]

The suggestion, therefore, that law and religion are interchangeable is suspect. News of religion's demise and law's attempt to take its place is reminiscent of the cable Mark Twain sent to the press that had mistakenly announced his death. He wryly quipped, "The reports of my death are greatly exaggerated."[193]

3.3.1.2 Does It Have To Be So Complicated?

The nuanced complexities of the debate over defining religion tend to create confusion. Yet I am not convinced that the answer to the question "What is religion?" must inevitably be so complicated, especially given the history, politics and philosophical primacy of liberalism in the West. For centuries, we have been able as a civilization to understand what we mean by "religion" in the law. That ability has been due in no small part to the fact that the Western world has been dominated by the Judeo-Christian religious story.

Indeed, Yossi Nehushtan in his work does not define "religion" since he is of the view that it is impossible to do so satisfactorily.[194] Nehustan decides to short circuit the "what is religion" debate to conclude that "religion" is that which looks like Judaism, Christianity and Islam since they are "the paradigms of religion."[195]

While Nehushtan's approach may be practical, it is not complete. For example, he is apparently unaware of the ongoing academic debate about Islam. Some authors claim that

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[191] Chief Justice Dickson observed, "It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition" in *Big M Drug Mart, supra* note 4.
[192] Scott Atran, *In Gods We Trust: The Evolutionary Landscape of Religion* (New York: Oxford University Press, 2002), 280.
[193] *New Dictionary of Cultural Literacy*, 3rd edition, (Houghton Mifflin, 2005) sub verbo "the reports of my death are greatly exaggerated," online: *Dictionary.com* <http://www.dictionary.com/browse/the-reports-of-my-death-are-greatly-exaggerated (accessed: June 13, 2017).
[194] Nehushtan, *supra* note 11 at 68.
[195] *Ibid* at 68-69.

Islam is not a religion but a totalitarian ideology that should not be treated as a religion.[196] Further, Nehushtan fails to make the distinction between monotheistic religions (as in Judaism, Christianity, and Islam) and non-theistic religions (as in Buddhism, Pantheism, Hinduism, Nature).[197]

As noted above,[198] the definition of religion in Canadian jurisprudence leaves us uncertain as to whether a non-theist personal conviction or belief is a "religion" to be protected by the *Charter*. The Supreme Court of Canada's general description that religion "*tends* to involve belief in a divine, superhuman or controlling power" connotes an openness to non-theist religion. However, in earlier, pre-*Charter* jurisprudence[199] the SCC was more emphatic in clarifying that religion was what Canadians understood to be "religion" – in other words, theistic faith as exemplified in the Christian belief system.[200]

Broad respect for religious rights is deeply rooted in the traditional and important place of the Christian faith in Canadian history. Justice Rand in *Saumur v. City of Quebec* provides a brief history of this fact in Canadian law.[201] From 1760, religious freedom has been recognized in the Canadian legal system "as a principle of *fundamental character*."[202] That the "untrammelled affirmations of religious belief and its propagation, personal *or institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable*."[203]

Further, Justice Rand suggested that freedom of religion was among the "original freedoms" that was a necessary attribute and mode of human self-expression which forms the primary conditions of "*community life* within a legal order."[204] Rand not only saw the importance of the religious life of the individual, but also understood the "communal" aspect of religion that has a powerful impact on society as reflected in the law.

The legal imposition of distinctly Christian norms, as seen in the former Sunday legislation, is no longer given the same recognition in Canadian law.[205] This is true, for that

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[196] Paul Cliteur, *The Secular Outlook: In Defense of Moral and Political Secularism* (Oxford: Wiley-Blackwell, 2010), see 69-102 [*Secular Outlook*].

[197] *Ibid* at 4 notes that the percentages of the world's total population are as follows: Christianity 32%, Islam 21%, Non-religious 15%, Hinduism 12.5%, Primal religions 5.5%, Chinese traditional 5.5%, Buddhism 5.5%, Sikhism 0.35%, Judaism 0.25%, other 2.4%.

[198] See note 88.

[199] *Walter et al. v. Attorney General of Alberta et al.,* [1969] S.C.R. 383, per Martland, J., at page 393, the Court stated, "Religion, as the subject-matter of legislation, wherever the jurisdiction may lie, must mean religion in the sense that it is generally understood in Canada. It involves matters of faith and worship, and freedom of religion involves freedom in connection with the profession and dissemination of religious faith and the exercise of religious worship."

[200] It seems reasonable, therefore, given law's recognition of religious conscience that "religion" also includes non-theistic belief systems. However, it is beyond the purpose of this work to delve in that issue.

[201] *Saumur*, *supra* note 6.

[202] *Ibid* at para 89 (emphasis added).

[203] *Ibid* at paras 89, 96 (emphasis added).

[204] *Ibid.*

[205] In *Big M Drug Mart, supra* note 4 at 337, Chief Justice Brian Dickson, rejecting the constitutionality of *The Lord's Day Act,* stated:

> "To the extent that it binds all to a sectarian Christian ideal, the Lord's Day Act works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-

matter, in most other Western democracies as well.[206] However, there are vestiges of that heritage that remain in the law. In Canada, for example, Roman Catholic elementary and secondary schools in the Province of Ontario still retain government funding[207] because of the provisions of the *Constitution Act, 1867*.[208] Philosophers such as Jürgen Habermas continue to observe the pivotal role Christianity has played in laying the foundation of our current liberal democracy.[209]

It is worth noting that Habermas' view is restricted to Christianity and not to religion in general. Habermas sees Christianity as the normative force in modern self-understanding and more than a mere precursor or a catalyst.[210] Egalitarian universalism and ideas of freedom, individual rights, human rights, and democracy directly flow from the Judaic ethic of justice and the Christian ethic of love.[211] He sees no alternative, and we continue to draw on this heritage. For Habermas, "Everything else is just idle postmodern talk."[212] Religion, for Habermas, must be given a place in the public sphere with the proviso that it not be sectarian but address common concerns with a vocabulary that is universally understood.[213]

While Christianity continues to influence cultural and legal norms, there are alternate schools of thought seeking to dismantle and remove all vestiges of Christian normativity. A key manifestation of that opposition is directed at the Christian practice of heterosexual marriage on the basis that it discriminates.[214] It is unlikely that the current radical definition of equality will stop at opposing heterosexual marriage. As Professor Bruce MacDougall noted in 2003, "[a]s gay and lesbian unions are being legally recognized, so rules respecting other forms of

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believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture. Non-Christians are prohibited for religious reasons from carrying out activities which are otherwise lawful, moral and normal. The arm of the state requires all to remember the Lord's Day of the Christians and to keep it holy. The protection of one religion and the concomitant non-protection of others imports disparate impact destructive of the religious freedom of the collectivity" (emphasis omitted).

[206] Consider, for example, the changes in the U.K., which has relaxed blue law restrictions on larger stores: "Trading Hours for Retailers: The Law" (last accessed October 2018), online: *Gov.UK* <https://www.gov.uk/trading-hours-for-retailers-the-law>.

[207] This was upheld by the SCC as late as 1996 in the case *Adler v. Ontario,* [1996] 3 S.C.R. 609 [*Adler*].

[208] *Constitution Act*, *1867* (UK) 30 & 31 Vict, c 3, Reprinted in RSC 1985, Appendix II, No 5; see also *Adler, supra* note 207. These provisions were not without controversy. During the legislative debate in the Province of Canada on February 8, 1865, George Brown, not a fan of religious schools, supported the s. 93 constitutional provisions on education on the basis that it treated both Roman Catholics and Protestants in English and French Canada equally. However, he was mindful that "there lay the great danger to our educational fabric, that the separate system might gradually extend itself until the whole country was studded with nurseries of sectarianism, more hurtful to the best interests of the province…." See Janet Ajzenstat, et al, eds, *Canada's Founding Debates* (Toronto: Stoddart, 1999), 336-337.

[209] Philip S. Gorski, ed, *The Post-Secular in Question: Religion in Contemporary Society* (Brooklyn, NY: NYU Press, 2012).

[210] Jürgen Habermas, *Time of Transitions*, edited and translated by Ciaran Cronin & Max Pensky (Cambridge: Polity Press, 2006), 150-51.

[211] *Ibid*.

[212] *Ibid*.

[213] Jürgen Habermas, "Religion in the Public Sphere" (2006) 14 European Journal of Philosophy 1, 10; "Notes on Post-Secular Society" (2008) 25 New Perspectives Quarterly 17, 28

[214] Bruce MacDougall, "The Separation of Church and Date: Destabilizing Traditional Religion-based Legal Norms on Sexuality" (2003) 36 U. Brit. Colum. L. Rev. 1 ["Separation of Church and Date"].

unions, polygamous, incestuous, and so on will be re-examined."[215] MacDougall's prescient voice is noteworthy as there are indeed voices calling for a re-examination of the monogamous definition of marriage in light of the reality of polyamorous relationships.[216] Indeed, polygamy is already becoming an issue in European countries.[217]

The considerable pressure on the Christian monogamous, heterosexual norm raises the question as to whether religious communities who adhere to it are still entitled to maintain that standard in a very revolutionary social context – the social context that informs the question on religion's place in the law which this book explores.

For the purposes of this study, therefore, given the context of liberal democracies, "religion" is recognizable in Canadian law as being primarily concerned with the Judeo-Christian religion as manifested primarily in Catholic and Protestant denominations. Those religious groups, their theology, their religious practices, and their public influence formed the legal framework of English common law's conception of "religion" and how the law related to religion. Rightly or wrongly, it is through that lens that our law and the justification of treating religion as special begins. Any new religion that must be adjudicated under the Constitution, such as the Canadian *Charter*, is analysed through the long-held view of this already established, Judeo-Christian understanding of religion. Given the rise of multiculturalism and increased immigration from non-Judeo-Christian religions, there can be no doubt that the constitutional rule of law will be profoundly impacted by such cultural influences in the future. However, to be clear, we must understand the word "religion" in our Constitution as being rooted primarily in the Judeo-Christian tradition.

Professor Paul Cliteur notes that there are four dimensions of monotheistic religions – as in Christianity. They are:

First, religion as text – "A religion is what is written about in the holy book…."[218]

Second, religion as what the majority of adherents believe and do – "what the believers act upon."[219]

From these two dimensions, there "is no mysterious entity 'religion per se' distinct from the texts of the holy book and the behaviour of its devotees." [220]

Third, religion as authoritative interpretation. In this view, only what God commands is morally right or wrong; "[t]here is no independent or 'autonomous' ethical good, but morality is ultimately founded in the will of God."[221]

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[215] *Ibid* at 5; see also *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 (re-evaluating a rule respecting polygamous unions, as MacDougall predicted, in a judicial reference decision the Province of British Columbia asked for); *R v. Labaye,* [2005] 3 S.C.R. 728, paras 3, 62, 71 (upholding consensual group sex and "swinging" as not violating the Canadian Criminal Code).

[216] See Alison Crawford, "Canadian polyamorists face unique legal challenges, research reveals" (14 September 2016), *CBC News,* online: <http://www.cbc.ca/news/politics/polyamorous-families-legal-challenges-1.3758621>; also consider the recent litigation over child custody in *B.D.G. v. C.M.B*., 2016 BCPC 97.

[217] Judith Bergman, "Polygamy: Europe's Hidden Statistic" (5 June 2016), online: *Gatestone Institute International Policy Council* <https://www.gatestoneinstitute.org/8199/polygamy-europe>.

[218] Cliteur, *Secular Outlook, supra* note 196 at 91.

[219] *Ibid.*

[220] *Ibid.*

[221] *Ibid* at 205.

Fourth, religion as "morality touched by emotion."[222] God is the eternal power that "makes for righteousness".[223] God's nature is inferred from the believer's own moral views. Therefore, religion changes as do the progressive moral views of the believers that make up that religion.

The fourth dimension, while insightful, does not appear to consider that within such religions, as Christianity, there is often a debate about the evolution of religion. The "progressive" Christians, for example, will be at odds with the "conservative" Christians over fundamental life issues such as marriage, abortion and end of life. The conservatives tend to maintain traditions and principles of the faith that have guided the faith for millennia.

The law protects, to varying degrees, all four of Cliteur's dimensions. First, as a text the Bible continues to be used in our legal settings as that by which a witness swears his oath of truth; second, the religious acts of believers are what is protected by our constitution; third, the morality of God's commands in the Bible was at one time revered in Western law (particularly in the criminal law setting) and though diminished, it continues to have an influence; and fourth, constitutional law protects the individual's understanding of her religiously moral obligations *vis a vis* the state.[224]

Religion's special treatment by the law is based on the presupposition that religion is valuable – or, at least, it must be respected even if it does not have a value *per se*. One could argue that it is the protection of religion in and of itself that is to be valued, and not necessarily religion. Thus, religion is protected for the sake of civil peace, diversity, and liberty. This may therefore lead to a practical reality about the protection of religion that is key here. Lawmakers, public policy makers, opinion leaders and society at large have held either view over the years, and have still concluded that religion must be given special recognition as a result. The next section will demystify why the law has so tenaciously protected religion as part of the liberal democratic legal framework.

3.4 State Sovereignty & Religious Sovereignty

"Sovereign is he who decides on the exception."[225]

That classical definition by Carl Schmitt is an appropriate place to start the discussion about sovereignty. Where does the "buck" stop? Who is the authority that has the ultimate say on ultimate things? These questions bedevil us.[226]

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[222] *Ibid* at 239. Cliteur gets this concept from Matthew Arnold, *Literature and Dogma: An Essay towards Apprehension of the Bible* (London: Watts and Co., 1887), 47.

[223] Cliteur, *Secular Outlook, supra* note 196 at 239.

[224] *Amselem*, *supra* note 7 at para 43, "claimants seeking to invoke freedom of religion should not need to prove the objective validity of their beliefs in that their beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make."

[225] Carl Schmitt, *Political Theology* (Chicago: University of Chicago Press, 2005), 5.

[226] F. H. Hinsley, *Sovereignty*, 2nd edition (Cambridge: Cambridge University Press, 1986); Dieter Grimm & Belinda Cooper, *Sovereignty: The Origin and Future of a Political and Legal Concept* (New York: Columbia University Press, 2015); Robert Jackson, *Sovereignty: Evolution of an Idea* (Cambridge: Polity Press, 2007); Hent Kalmo, Quentin Skinner, eds, *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (Cambridge: Cambridge University Press, 2010).

Schmitt noted that an exception to a legal norm is not contained in the norm.[227] It can only be permitted by the sovereign – the one who has "the authority to suspend valid law."[228] That is "unlimited authority."[229]

Said Schmitt, "[w]hether God alone is sovereign," in the form of God's representative on earth, "…or the emperor, or prince, or the people … the question is always aimed at the subject of sovereignty, at the application of the concept to a concrete situation."[230] The interplay between law and religion that is addressed by this book involves concrete realities of how the body politic will deal with non-conformist religious entities who claim allegiance to a sovereign beyond the political sovereign.

In the case of religion, sovereignty is bifurcated into political and spiritual sovereignty. Indeed, Schmitt noted that:

> All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development – in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver – but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these consideration of these concepts.[231]

Every person is faced with two claims (or spheres) of loyalty or allegiance: state and religious. Both claim sole allegiance. The first claim is the state where one lives and/or has citizenship – it may be called "the secular claim of sovereignty." The state did not always consider itself "secular" (religiously neutral).[232] Rather, the state has often claimed to be divine, thereby having ultimate authority. The other claim of sovereignty comes from within the personal conscience. It is separate from the state and is referred to as the private realm. It often has a personal and/or communal conception of the divine or Supreme Being. This is the religious[233] claim of sovereignty.

Professor Dr. Iain T. Benson frames this discussion thus: "[l]aw has practical and theoretical limits to its proper role and function in a society, and these limits determine its jurisdiction or proper scope."[234] He continues with this very important point: "[t]he recognition of jurisdiction for law is also a recognition that errors of overreach by law pose a threat to the proper ordering of a society."[235] Throughout this work I maintain that the legal revolution, as described below, is indeed an overreach by law and is fully exposed in the SCC *TWU* 2018 decisions.

Throughout history there has been a constant struggle between the two claims of sovereignty.[236] The state, in whatever form, has often sought to impose its authority on the

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[227] Schmitt, *supra* note 225 at 6.
[228] *Ibid* at 9.
[229] *Ibid* at 12.
[230] *Ibid* at 10.
[231] *Ibid* at 36.
[232] Even the claim that there is such a thing as "religiously neutral" is not without its critics.
[233] In this context "religious" is also applicable to the atheist or non-believer (the "nones"). Each person is to decide whether the state is sovereign or the individual conscience (this is the religious question I refer to).
[234] Iain T. Benson, "Foreword: The Limits of Law and the Liberty of Religious Associations," in Iain T. Benson & Barry W. Bussey, eds., *Religion, Liberty and the Jurisdictional Limits of Law* (Toronto: LexisNexis, 2017), xxii ["Foreword"].
[235] *Ibid*.
[236] B. Berger, "Limits of Belief," *supra* note 134 describes "the clash between conflicting sources of ultimate authority" (at 40) and notes "the religious life posits sources of authority utterly beyond the reach of the state

individual conscience. The one consistent exception to that general rule is the modern liberal democratic society. Even when liberal democracies have failed to protect the individual conscience, they did so knowingly and in exceptional circumstances, with the specific promise that restricted freedoms would be monitored in accordance with democratic principles and restored in due course.[237] The fact that liberal democracies have gone to great lengths to explain why individual conscience had to be violated in a given situation is, in and of itself, a recognition of the importance of the concept.[238]

Despite their differences, law and religion must cooperatively coexist in order to make liberal democracy work. Because both claim sole allegiance, they are required to arrive at a détente on the issue of sovereignty. Liberal democratic society works best when sovereignty is bifurcated in two spheres. One is temporal sovereignty, or the duty to follow the law of the land. This refers to human-made law, or "positive law," as defined by legislatures, courts, and custom. The second is spiritual sovereignty, or the duty to follow the law of God. This refers to the non-human-made law that is defined by holy books or divine revelation, or "natural law," as understood by the individual conscience. The current battles between law and religion are analogous to the ancient battles over sovereignty. Some two thousand years ago, it was stylized this way by Jesus: "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's."[239]

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and, at the same time, asserts the complete pervasiveness of this transcendent principle. Individuals possessing a religious conscience – a disposition towards life animated by religious conviction - cannot by definition accede to the authority of the state where it is discordant with their religious beliefs" (at 46).

[237] On June 18, 1940, Rt. Hon. MacKenzie King, Prime Minister of Canada, introduced the *War Measures Mobilization Act*, to authorize government to take all necessary means to fight Germany in WWII including the imposition of conscription and the right to expropriate property for the war cause. He said in the House of Commons, "It must be kept in mind that we shall be administering this legislation not as a body of dictators, free from any kind of control, but as a responsible government, responsible to the House of Commons and, through the House of Commons, to the people. If we bear this all important fact in mind, then I think it will be found that there is ample security as to the way in which the government may exercise the powers given it under the legislation." Further, King recognized that his government would honour Canada's historical commitment to religious groups not to force them to bear arms for their settling in the country: "I wish solemnly to assure the house and the country that the government have no desire and no intention to disturb the existing rights of exemption from the bearing of arms which are enjoyed by members of certain religious groups in Canada, as for example the Mennonites. We are determined to respect these rights to the full." (*House of Commons Debates*, 18-1 vol 1 (18 June 1940) at 903-4). Note he did not commit to those religious groups who had no such agreement with the government. However, eventually the government did provide a means for other religious groups to obtain religious exemptions from having to bear arms. See Barry W. Bussey, "Humbug! Seventh-day Adventist conscientious objectors in WWII standing before the Mobilization Board," (Summer 2012) 6.3 Diversity Magazine, online: <http://www.ohrc.on.ca/en/creed-freedom-religion-and-human-rights-special-issue-diversity-magazine-volume-93-summer-2012/humbug-seventh-day-adventist-conscientious-objectors-wwii-standing-mobilization>.

[238] Consider this editorial from the Hamilton paper *Spectator*, June 11, 1940, describing the justification of interning perceived enemies within the country during WWII: "It is not the wish of those in charge of the Defense Corps to stampede our citizens at a time like this, but there is definitely a very serious danger. Our local and federal authorities are fully aware of the existence of Fifth Column elements in our midst. In times of peace democratic people will not stand for the strict police surveillance and curtailment of civil liberty that become necessary in crises such as the present." Quoted by Angelo Principe, Roberto Perin, & Franca Iacovetta*, Enemies Within: Italian and Other Internees in Canada and Abroad* (Toronto: University of Toronto Press, 2000), at 99.

[239] Matthew 22:21 (King James Version).

For a liberal democracy to work, both law and religion must have one common objective: to provide the most effective means whereby the individual has the greatest amount of freedom to pursue happiness as he or she defines it while at the same time maintaining civil peace in the political community. This will be referred to as the "Liberal Democratic Project." The Reformation and its aftermath provided the West its paramount ideological truth: freedom is of the individual.[240] The individual is responsible to obey the respective sovereign demands of the state and his or her religious or conscientious conviction.

The specific combination of factors that stimulated freedom in the West forms our cultural identity and has laid the foundation for our current system of law. Contemporary iconoclasts want to destroy this framework and replace it with something else. We have, yet, no idea whether the revolutionaries' proposal is a better plan than the inheritance we currently hold.[241] The traditional paradigm has given us much for which to be thankful including, but not limited to, the entire liberal democratic project. This book takes the position that prudence suggests we best be wary about hasty "improvements" which have not stood the test of time. Lucius Cary, 2nd Viscount Falkland's sage counsel is apt: "Where it is not necessary to change, it is necessary not to change."[242]

Dutch Christian politician Abraham Kuyper argued for "a free church in a free state" that allowed the two entities to correspond with each other on a regular basis.[243] His notion of "sphere sovereignty" has God over the entire "cosmos,"[244] under which three areas or "spheres" have sovereignty to act: the state, the society and the church.

The state is a necessity only because of humanity's "fallen nature". The original plan of God for humankind did not include the state. But it is now necessary to deal with the problem of evil. The basic principle of governance is that "no ruler can ever be truly an absolute sovereign over his people."[245] This is because ultimate sovereignty remains with God. There is, in Kuyper's view, no right form of government as that depends on history, culture and circumstances of each locale. Whatever form of governance a state may have, it is required not to violate divine sovereignty in administering justice.

Kuyper saw the sphere of society as having many groups including family, business, science and the arts. In turn, each of those have their own spheres of sovereignty with which the state has no authority to interfere. It is to work alongside them in carrying out the public

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[240] Alister E. McGrath, *Christianity's Dangerous Idea: The Protestant Revolution – A History from the Sixteenth Century to the Twenty-first* (HarperOne, 2007).

[241] The sentiment is similar to Edmund Burke when he said, "With [your politicians] it is a sufficient motive to destroy an old scheme of things, because it is an old one. As to the new, they are in no sort of fear with regard to the duration of a building run up in haste; because duration is no object to those who think little or nothing has been done before their time, and who place all their hopes in discovery," in *Select Works of Edmund Burke*, vol. 2 Reflections on the Revolution in France, 1790 (Indianapolis: Liberty Fund, 1999), 183.

[242] J. A. R. Marriott, *The Life and Times of Lucius Gary Discount Falkland*, (London: Methuen & Co., 1907), 332.

[243] Abraham Kuyper, *Our Program: A Christian Political Manifesto,* Abraham Kuyper Collected Works in Public Theology (Lexham Press, Kindle Edition), Kindle Locations 2-5. "Accordingly, to our way of thinking the separation of church and state stands for three things: (1) the political unity of our nation is no longer coupled to any church unity; (2) church and state each command a unique zone in life where each functions as a minister of God and is debarred from using compulsion on the other's zone; and (3) the relation between the two should be defined bilaterally in the form of regular correspondence" (at Kindle Locations 6924-6927).

[244] Irving Hexham, "Christian Politics according to Abraham Kuyper," (1983) 9:1 CRUX, 2-7, online: <https://people.ucalgary.ca/~nurelweb/papers/irving/kuyperp.html >.

[245] Kuyper, *supra* note 243, at Kindle Locations 544-547.

good. God "did not give all his power to one single institution, but he endowed each of those institutions with the particular power that corresponded to its nature and calling."[246] As long as each sphere carries out its responsibilities then there will be harmony. However, there are times when the failure in one means there is a requirement for another to assist. For example, as I understand Kuyper, if a family fails to care for a child the state will have to temporarily intervene for the sake of the child. It is not because the state's sovereignty gives it sole authority over the child but that the family, through neglect or inability, was unable to carry out its sovereign responsibilities.[247]

Applying Kuyper's philosophy to the legal revolution against the accommodation of religious practices, the state has no sovereign authority to interfere with TWU's religious practices. It can only assist in the work of the religious community if that community fails to properly carry out its sovereign responsibilities.[248] A religious body is a unique body, different from other civic organizations.[249]

The uniqueness of religious organisations, such as churches, denominations, and their constituent parts such as universities, is that they are composed of religious individuals that identify with a deep conscientious belief in, and an obligation to, the divine. Kuyper notes that the:

> conscience is the immediate contact in a person's soul of God's holy presence, from moment to moment. Withdrawn into the citadel of his conscience, a person knows that God's omnipotence stands guard for him at the gate. In his conscience he is therefore unassailable. If government nevertheless dares to push through its abuse of force, the end will be a martyr's death. And in that death government is beaten and conscience triumphs. Conscience is therefore the shield of the human person, the root of all civil liberties, the source of a nation's happiness.[250]

Kuyper's position is shaped by the anvil of Reformation history. In his home country, the Netherlands, religious strife was not uncommon as the region came to terms with the struggle between religious conscience and the state. Kuyper was willing to put up with strange

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[246] *Ibid*, at Kindle Locations 1524-1527.

[247] The various entities—human persons first of all—which God called into being by his creative powers and to which he apportioned power, are almost all, in whole or in part, of a moral nature. There is a distinctive life of science; a distinctive life of art; a distinctive life of the church; a distinctive life of the family; a distinctive life of town or village; a distinctive life of agriculture; a distinctive life of industry; a distinctive life of commerce; a distinctive life of works of mercy; and the list goes on. Now then, next to and alongside all these entities and ever so many other organizations stands the institution of the state. Not above them, but alongside them. For each of these organizations possesses sphere-sovereignty, that is to say, derives the power at its disposal, not as a grant from the state but as a direct gift from God." *Ibid*, at Kindle Locations 1532-1539.

[248] "…thinking the separation of church and state stands for three things: (1) the political unity of our nation is no longer coupled to any church unity; (2) church and state each command a unique zone in life where each functions as a minister of God and is debarred from using compulsion on the other's zone; and (3) the relation between the two should be defined bilaterally in the form of regular correspondence." *Ibid*, at Kindle Locations 6924-6927.

[249] "Our position is that the churches are unique bodies that cannot be compared to other associations. Churches can lay claim to separate treatment in the law, hold sway over their members even before any action of their will, ought to be subject to special regulations, and are not to be regarded as incidental but as one of the highest and most essential expressions of the life of the nation." *Ibid*, at Kindle Locations 6935-6938.

[250] *Ibid*, at Kindle Locations 1582-1587.

oddities that may come from the state protecting individual consciences that, for the majority, may seem quirky. "Ten times better is a state in which a few eccentrics can make themselves a laughingstock for a time by abusing freedom of conscience," said Kuyper, "than a state in which these eccentricities are prevented by violating conscience itself. Hence our supreme maxim, sacred and incontestable, reads as follows: as soon as a subject appeals to his conscience, government shall step back out of respect for what is holy."[251] In Kuyper's assessment, then "it will never coerce. It will not impose the oath, nor compulsory military service, nor compulsory school attendance, nor compulsory vaccination, nor anything of the kind."[252]

This strong endorsement of conscience allows for separate organizations to be governed by strong religious conscience rather than by the views of the state as understood by the judiciary, legislators or otherwise. The state has no sovereignty in the internal workings of religious communities, governed as they are by conscience.

Any disruption to the delicate balance between the two spheres of sovereignty ultimately results in the modern state's attempt to dominate both. This happens because the state has executive power; that is, an army and a police force that it can use to enforce its dictates. In Western democracies, religions do not have armies.[253]

While some militias have co-opted religious mantras over the years for their own secular purposes, as in Northern Ireland for example,[254] the reality is that throughout the modern period, meaning post-Reformation, Western religious groups have not taken up arms to enforce their edicts on society.[255] This crucial fact has not received much attention from Western critics of religion.

This is to say, using Professor Cliteur's second dimension of monotheistic religion: religion is what the majority of the believers believe and do. For example, Jitzak Rabin's murder by a religiously motivated Jigal Amir is an exception in contemporary Judaism. Similarly, Scott Roeder's shooting of Dr. George Tiller is an exception in contemporary Christianity. Christianity, as a faith community, has eradicated the use of violence as an appropriate means of dealing with those outside.[256]

Therefore, critics of Christianity such as Leiter and Nehushtan would have to go a long way back, for instance to the Crusades, to make the claim that Christianity is violent despite

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[251] *Ibid*, at Kindle Locations 1590-1595.

[252] *Ibid*, at Kindle Locations 1595-1597.

[253] Perhaps the criticism of Christianity is due, in no small part, because of the fear of ISIL-like religion.

[254] John D. Brewer, David Mitchell Gerard Leavey, eds, *Ex-Combatants, Religion, and Peace in Northern Ireland: The Role of Religion in Transitional Justice* (New York: Palgrave Macmillan, 2013), at 13 notes that "political and religious leaders who viewed politics as a religious battle succeeded in inspiring their followers to see the national cause with a similar intensity of conviction, whether or not those people shared the leaders' religious beliefs."

[255] We have come to realize, in Western religious thought, that it truly is absurd to think that violence is the means to advance a religious cause. Consider the pacifists groups like the Quakers and the Mennonites, or groups like Seventh-day Adventists with their refusal to bear arms in war. Even the mainstream Christian & Jewish groups eschew force. William T. Cavanaugh, *The Myth of Religious Violence* (Oxford: Oxford University Press, 2009) makes a convincing argument on this point. The view that religion in the West is "dangerous" and should therefore be removed from the public is a myth, says Cavanaugh. Rather, the myth becomes a justification for the violence of western democracies against Muslim societies. Today's violence of the West is seen as "secular, rational, peace making, and regrettably necessary to contain their violence. We find ourselves obliged to bomb them into liberal democracy" (at 4).

[256] Ruud Koopmans, "Religious Fundamentalism and Hostility against Out-groups: A Comparison of Muslims and Christians in Western Europe" (2015) 41:1 Journal of Ethnic and Migration Studies, 22-57.

what some see as violence in the Christian scriptures.[257] William T. Cavanaugh challenges the argument that religion "is necessarily more inclined toward violence than are ideologies and institutions that are identified as secular."[258] Cavanaugh argues that the current view that religion is absolutist, divisive and irrational while secular ideologies are not has the effect of marginalizing religious groups, and legitimizes violence against them.[259] While that may seem oversensitive and perhaps melodramatic, it is worth noting that there can be no comparison between Christianity today and the modern, atheistic and anti-religious totalitarian regimes of Stalin, Hitler, Pot, or Mao, which murdered and brutalized millions of innocent people.

In the West, law and religion have an unequal power relationship. The state can always enforce its laws, if it so chooses, at the expense of religion. However, for the most part, the liberal state has allowed religion to maintain its own sphere of influence with very little hindrance. That indifference of the state, as we already noted and will explore further below, is changing, particularly on the fundamental human life issues.

Once the state takes over both spheres of sovereignty, it takes on "divine" characteristics, meaning that it seeks to become omniscient and omnipotent. It assumes it can determine for the individual what will ultimately be sovereign.[260] At that point, the liberal democratic society that places high value on individual autonomy is in severe crisis and may, in fact, be over. This is the modus operandi of dictatorships. Therefore, the bifurcation of sovereignty forms the very foundation of liberal democratic theory and requires the continuation of the unique status of religion.

To suggest that religion is not special is to deny the collective experiences of the West that suffered the negative consequences of those polities that refused to bifurcate sovereignty. Our history, the legal history of the West, demonstrates the unique character of religion in our law.

3.5 The Three Realities of Western Experience

The formation of the current paradigm of liberal democratic support of religion arises from that set of presumptions and interpretative principles that permitted the legal/political development to allow unprecedented peace and stability, leading to expansive personal and economic freedom. That formula is the rebuttable presumption that religious belief and practice should be as maximally accommodated as can be reasonably expected in the circumstances. This formula is the result of the three realities of the collective experience of Western democracies: the historical, the practical, and the philosophical.

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[257] Jack Nelson-Pallmeyer, *Is Religion Killing Us? Violence in the Bible and the Quran* (Harrisburg: Trinity Press International, 2003); Eric A. Seibert, *The Violence of Scripture: Overcoming the Old Testament's Troubling Legacy* (Minneapolis: Fortress Press, 2012); Charles Selengut, *Sacred Fury: Understanding Religious Violence* (Toronto: Rowman & Littlefield Publishers, 2003).

[258] Cavanaugh, *supra* note 255 at 5.

[259] *Ibid* at 6.

[260] See, e.g., *Declaration of the Rights of Man and Citizen* art. 3 (approved Aug. 26, 1789), Avalon Project at Yale Law School trans., online <http://avalon.law.yale.edu/18th_century/rightsof.asp> (last visited Feb. 6, 2016) ("The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation").

3.5.1 Historical Fight Between Church and State

Western history is replete with the ebb and flow of the state demanding ultimate allegiance from its citizens. From the ancient Roman emperors onward, there have been examples of states demanding capitulation of religious sovereignty in their favour. The liberal democratic project gave the West a reprieve from state domination over the individual religious conscience.

The use of religion as a means of cementing loyalty to the state has a long pedigree. Polybius, after living seventeen years in Rome, wrote in 150 BCE, "The quality in which the Roman commonwealth is most distinctly superior is, in my judgment, the nature of its religion. The very thing that among other nations is an object of reproach – i.e., superstition – is that which maintains the cohesion of the Roman state."[261] As we will see, such misuse of religion led to great abuse and we would do well not to repeat it.

Western democratic thought has been profoundly influenced by at least three majour civilizations – Israel, Greece and Rome.

In the ancient Roman Empire, the two sovereignties were combined. The sovereignty of man and the sovereignty of the divine were united in the personhood of the emperor.[262] Emperors claimed divine titles such as Dominus et Deus Noster.[263] The emperor was both the king of man and God of man—the ultimate authority.[264] The temporal and divine authorities were personified in the emperor.

The advent of the Christian religion saw sovereignty bifurcated to the temporal and the divine. The emperor was merely human and not a deity. Divinity existed only in the Christian God, expressed in the three Persons of the Godhead – that is to say, the Father, the Son, and the Holy Spirit. Christianity took the issue of sovereignty further to the point of the individual. The individual, made in the image of God, was equal with the emperor. In fact, all human beings were equal, as proclaimed in Galatians 3:28. Hence, "the metaphysical conception of the implicit transcendent worth of each and every soul established itself against impossible odds as the fundamental presupposition of Western law and society."[265]

However, Constantine's conversion put in process the "syncretism of Roman and Christian beliefs" that "subordinated the Church to imperial rule."[266] State domination of the Roman Catholic Church continued until the Papal Revolution in the late 11th century when Pope Gregory VII led the clergy to throw "off their civil rulers and established the Roman

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[261] Polybius, *Histories* VI, Loeb Classical Library (Cambridge: Harvard University Press, 2012), 56, quoted in Will Durant, *Caesar and Christ* (New York: Simon and Schuster, 1944), at 93.

[262] Indeed, even before Rome the ancient Greeks recognized their kings as divine. Numa Denis Fustel de Coulanges describes it this way: "A king was a sacred being; βασιλεις λεροι, says Pindar. Men saw in him, not a complete God, but at least 'the most powerful man to call down the anger of the gods; the man without whose aid no prayer was heard, no sacrifice accepted.'" Numa Denis Fustel de Coulanges, *The Ancient City: A Study of the Religion, Laws, and Institutions of Greece and Rome* (New York: Dover Publications, 2006 – a reprint of Willard Small's translation published by Doubleday, 1955), p.178.

[263] "Our Lord and God," claimed by Domitian, quoted by Durant, *Caesar and Christ*, *supra* note 261 at 292.

[264] Speaking of Augustus, Edward Gibbon writes, "Augustus permitted indeed some of the provincial cities to erect temples to his honour, on condition that they should associate the worship of Rome with that of the sovereign." Edward Gibbon, *The Decline and Fall of the Roman Empire,* vol 1 (Everyman's Library, 1993), 91.

[265] Jordan B. Peterson, *12 Rules for Life* (Toronto: Random House Canada, 2018), 186.

[266] Witte Jr., *supra* note 121, at 11.

Catholic Church as an autonomous legal and political corporation within Western Christendom."[267]

The push for extremism as exhibited by Gregory VII leads to a form of theocracy. On the opposite end of the spectrum we have state dictators such as Josef Stalin who wanted the religious world controlled by the state.[268]

Over time the ascendance of the church brought the temporal and the divine back together in the office of the Roman Pontiff who "claimed the supremacy of the spiritual sword over the temporal," though he claimed to do so indirectly.[269] Christendom combined church and state, with the pope presiding over the territorial kings.[270]

The church developed its own system of canon law administered by its courts, registered citizens by baptism, taxed by tithes, conscripted through crusades, and educated the populace in its schools.[271] In short, the church was the first modern state in the West.[272] Granted, it did not have the same freedoms we associate with a modern state, but it had a form of the executive, legislative, and judicial branches that we find familiar in today's states.

Of course, the church did not totally dominate the state in all situations, nor did the state dominate the church in all contexts. Which institution dominated was complicated by the personalities involved, the issues to be decided, and the territories concerned. Both clergy and lay – the spiritual and the secular – were ostensibly working for the salvation of embodied souls.[273] However, corruption was rife; both spheres were caught up with avarice, nepotism, and abuse of power.

The Reformation led to the Thirty Years War (1618-1648) which was the costliest conflict in Europe until World War One began in 1914.[274] Though it started as a religious conflict, it took on a deeper political significance. Its end led to the making of what we now recognize as Europe. Nation-states were born. With the state came the recognition that the way out of religio-political conflict was the elevation of the individual. According to historian Brad Gregory, "Christianity as an institutionalized worldview would be abandoned."[275] Ultimately, in Gregory's view, this led to the secularization of our society.[276]

The horrifying destruction of life and property brought on by that religious war continues to have a profound impact on Western consciousness. Hardly any anti-religious polemicist doesn't take the opportunity to raise the spectre of animosity that lingered even

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[267] *Ibid* at 12.
[268] Paul Cliteur, "State and religion against the backdrop of religious radicalism" (2012) 10:1 International Journal of Constitutional Law, 127-152.
[269] Berman, *supra* note 46 at 115.
[270] A. McGrath, *supra* note 240 at 326.
[271] Witte Jr., *supra* note 121, at 15.
[272] Berman, *supra* note 46, at 113.
[273] Brad S. Gregory, *The Unintended Reformation: How a Religious Revolution Secularized Society* (Belknap Press, 2012), 132.
[274] Indeed, Peter H. Wilson suggests that the Thirty Years War may be "the most destructive conflict in European history." See *Europe's Tragedy: A New History of the Thirty Years War* (Penguin Books Ltd. Kindle Edition, 2010), Kindle Locations 13770-13771.
[275] Gregory, *supra* note 273 at 166.
[276] *Ibid* at 179: "Christianity had been before the Reformation the principal bearer of moral norms, virtues, and behaviors in Europe. The control of the churches by sovereign states and the subsequent separation of politics from religsion also meant the separation of politics from morality – or rather, a transition from a Christian ethics of the good to a secular ethics of rights in combination with a distinction between public and private spheres in conjunction with the privatization of religion."

after the war ended. The Protestant-Catholic hostility remains with us still in some circles. The atrocities of war resulted in a diminishing of institutionalized religion and led to a "turn to a naturalistic science [which] was to eliminate or at least moderate this conflict."[277]

Nevertheless, the Reformation was a catalyst for greater scientific discovery with the hegemony of institutionalized religion at an end.[278] The Reformation's search for religious "truth" would also harmonize, to some extent, with the search for scientific truth. As the emphasis on science developed, it transferred the attributes of God to "making man or nature or both in some sense divine."[279] The individual again became the focus.

Christian faith was now privatized and made subject to individual preference in Western nation-states. Not only would citizens believe and worship as they pleased, but they would be obedient to the state's laws.[280] A symbiotic relationship was established – individual religious freedom was granted in return for peace and stability. However, as Gregory noted, "obedience to laws per se cannot replace the practice of virtues regardless of how thoroughly early modern rulers might have succeeded in ensuring the behavioural compliance of their subjects."[281]

The Reformation confirmed what had been developing for some time: that the individual was not solely a citizen of the state but of two distinct spheres, one being the kingdom of God, for which the individual has a direct relationship with God;[282] and the other being the kingdom of man as represented by the king (or the earthly authority). These concepts would have profound practical political implications.

3.5.2 Practical Politics

When confronted with an obstinate citizenry, Western states could not force religious belief or practice without being willing to let rivers of blood, fear, and suffering flood the streets.[283] Nor did the state have the resources to ensure that all citizens believed and practiced the state religion.

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[277] Michael Allen Gillespie, *The Theological Origins of Modernity* (Chicago: U of Chicago Press, 2009), 274.
[278] The search for the "true conclusions about the physical world," as told by Gauch, did not begin at the Reformation but had a long pedigree beginning at least since Aristotle of the 4th Century BCE. Indeed, the medieval scholars had developed: experimental methods, an extension of deductive and inductive logic, a keen criterion to choose a theory, presuppositions without theological underpinnings and a concept of scientific truth that was broad, fitting and obtainable. See Gauch, *supra* note 65 at 39-41.
[279] Gillespie, *supra* note 277 at 274.
[280] Gregory, *supra* note 273 at 167.
[281] *Ibid* at 161.
[282] That include the belief that there is no God. The point being that the individual came to be sovereign of herself.
[283] This remains with us today. Canadian authorities tried to convince Mennonites to agree to alternative service camps under military control in light of the Mennonites' refusal to bear arms in WWII. At one point during the negotiations Maj.-Gen. L. R. La Fleche, then deputy Minister of the National War Services, stated in frustration, "What'll you do if we shoot you?" Jacob H. Janzen, a Mennonite who had escaped the Bolshevik Revolution in Russia, replied, "Listen, Major General, I want to tell you something. You can't scare us like that. I've looked down too many rifle barrels in my time to be scared in that way. This thing is in our blood for 400 years and you can't take it away from us like you'd crack a piece of kindling over your knee. I was before a firing squad twice. We believe in this." William Janzen, *The Experience of Mennonite, Hutterite, and Doukhobor Communities in Canada* (Toronto: U of Toronto Press, 1990), at 207.

What was a state to do with a religious person or group of persons who refused to follow the social and legal norms because those norms violated their religious sensibility? While extreme methods such as burning heretics at the stake for translating the Bible or drowning those who insisted on adult baptism were used during the Reformation as a means of keeping order, they were ultimately found ineffective for maintaining civil peace. Freedom for the unpopular and even the most eccentric religious views was deemed the best way forward.[284]

Law is very much a pragmatic endeavour. As part of the liberal project, it is tasked with ensuring that societal rules are making peace, order, and good government possible. Allowing the individual the maximum amount of freedom in his or her religious pursuit, as long as it did not disturb the peace, provided general stability. Experience had taught liberal democracies that religion was to be accommodated. When the majority in society developed an orthodox position on views of the transcendent and codified them into law, it created a conflict with the religious conscience of minority and dissenting views.[285] The emotive content of the ensuing clash of wills resulted in bloodshed.[286] That experience, along with the growing philosophical understanding that the human heart could not be forced to believe that which it found repugnant, and the theological view that God did not require forced obedience to the truth, permitted society to adopt an accommodating stance toward religious dissenters.[287]

The state could no longer be sovereign in transcendent issues. It was finite. In matters of conscience it had to remain silent, and it had to accept diversity. Religious warfare had run its course. "A yearning for peace led to a new emphasis on toleration," Professor Alister McGrath explains, "and growing impatience with religious disputes."[288] By 1700 the religious wars were at an end and the Enlightenment[289] made the case that religion had to be a private matter, otherwise it would be a source of conflict.[290] It became evident that the search for truth was an ongoing project.[291] It had no end; therefore, individuals and religious communities

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[284] Brian Tierney, "Religious Rights: A Historical Perspective" in Noel B. Reynolds & W. Cole Durham, Jr., eds, *Religious Liberty in Western Thought* (Grand Rapids: Wm. B. Eerdmans Pub, 2003), 29.

[285] For example, the taking of an oath was often seen as a requirement for a witness to give evidence or for a public official to take office because it induced "the fear and reverence of God, and the terrors of eternity." John Witte Jr., *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Grand Rapids: Eerdmans, 2006), 181. However, as Witte noted this requirement was eventually dropped to accommodate the religious minorities (at 182).

[286] Early in the Reformation period violence broke out between the state authorities and the emerging Protestants. The Anabaptist uprising in Germany of 1525 was at a cost of some 100,000 lives. James M. Stayer, *The German Peasants' War and Anabaptist Community of Goods* (Montreal: McGill-Queen's University Press, 2003), 20. French Huguenots were attacked in March 1562 in France when Francois, duke of Guise opened fire on some 500 whose only infraction was holding an illegal worship service. Diarmaid MacCulloch, *The Reformation: A History* (Viking Adult, 20014), 296–97, 483. These events only increased in intensity in the coming decades. August 24, 1572 some 5,000 Huguenots suffered execution in the St. Bartholomew's Day massacre. A semblance of peace arrived with the Peace of Westphalia when church and state recognized that "crusades simply had not worked" in maintaining a united church (at 483).

[287] Nicholas P. Miller, *The Religious Roots of the First Amendment: Dissenting Protestants and the Separation of Church and State* (Oxford: OUP, 2012).

[288] A. McGrath, *supra* note 240 at 143.

[289] While it is a common thing for many writers today to criticize the Enlightenment project, I am of the view that its early development was very positive for religious freedom and the place of religion in the law.

[290] A. McGrath, *supra* note 240 at 144.

[291] This is readily seen in Thomas Jefferson's writing of Virginia's "A Bill for Establishing Religious Freedom." The Bill noted, "that truth is great and will prevail if left to herself; that she is the proper and sufficient

would be granted the space to practice their own understanding of how to obey the Sovereign God as they understood Him. The state had no jurisdiction in such matters.[292]

However, as Roland Bainton, a historian of Protestant history, points out, religious freedom "has come to depend upon a diversion of interest."[293] As long as a religious practice and belief is of no consequence to the state, the liberal state will not hinder its practice. However, the moment a religious practice or belief becomes politically salient to the affairs of the state, one can always expect the liberal state to interfere in its own self-interest.

Bainton's observation would explain the liberal state's treatment of religious sensibilities on sexual equality, including marriage. When traditional heterosexual marriage was not considered to be of any political import, the state willingly allowed religions to carry on with their practices in their own institutions and among their constituency.

There are many examples that one can give which illustrate this practical reality of religion that Western democracies must reckon with. An apt case is the 1990 Smith[294] decision of the US Supreme Court that removed the state obligation to use the least restrictive means to carry out its policy in order to accommodate a religious practice that was adversely affected by a neutral, generally applicable law. In other words, if the government did not intentionally discriminate against religion when it passed its law then the religious had no right to claim accommodation on the basis that there was a substantial burden on their exercise of religion.

The upshot of the Smith decision was that the US religious communities organized aggressively and sought legislative redress. They received it in the form of a Religious Freedom Restoration Act (RFRA) that was passed through Congress in 1993,[295] which restored the pre-Smith burden on government. However, the US Supreme Court ruled RFRA unconstitutional in so far as it applies to areas of State jurisdiction.[296] While RFRA remains in effect in federally regulated areas, the religious community has now turned its attention to the individual states to pass local RFRA to address the deficiency.

Considering the effective religious campaign for RFRA, legal academic Marci Hamilton noted that the religious community exerted "extraordinarily effective political pressure" that has led her to conclude "Religion is one of the most authoritative structures of human existence and holds great potential power to effect good and to effect bad."[297]

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antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them." Thomas Jefferson, in *Writings* (New York: Library of America, 1984), 347.

[292] James Madison, "Memorial and Remonstrance against Religious Assessments," in Amendment I: Religion (1785), *The Papers of James Madison*, vol 5, edited by William T. Hutchinson et al, (Chicago and London: University of Chicago Press, 1962-77), online: *The Founders' Constitution* <http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html> ("We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.").

[293] Roland H. Bainton, *The Travail of Religious Liberty: Nine Biographical Studies* (New York: Harper, 1958), 15.

[294] *Employment Div. v. Smith* 494 U.S. 872 (1990)

[295] *Religious Freedom Restoration Act of 1993*, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), codified at 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4.

[296] *City of Boerne v. Flores*, 521 U.S. 507 (1997).

[297] Marci Hamilton, "The Constitutional Rhetoric of Religion" (1997-98) 20 UALR L. J. 619. Hamilton is no fan of RFRA and is of the view that it weakens religion and society. She is of the view that *Smith* properly saw religion as quite capable of looking after itself without the added "leg up" of forcing the state to justify an infringement of religious freedom. ("It is not a hothouse flower that must be carefully cultivated and shielded from every draft, but rather a hardy plant that can thrive even when planted in a rocky soil," at 624). Rather

That is my point. Religion is powerful, given the right circumstances and, as we have seen in history, practical politics requires religion to be granted the space to operate in its own sphere. That is not to suggest that religion is "powerful" in a violent sense, though modern history has shown that with respect to some religious fanatics. Rather, within its sphere of influence, religion can motivate non-compliance with what it perceives as an unjust law, which can cause significant disruption to liberal democratic machinery. Given this history it remains to be seen what the end result will be of the recent pullback of the Supreme Court of Canada in the area of religious freedom as exemplified by the TWU law school case. The Court, in both the TWU law school and the Hutterian Brethren[298] cases, has allowed state actors to interfere with the private, internal workings of religious belief and practices in a way that was, until recently, an anomaly.

The practical implications of these moves, as discussed below, are yet to be felt. If the history of liberal democracies is any indication, state action against religious practice has consistently been met with religious opposition.

3.5.3 Philosophical Primacy of Liberal Thought

The liberal democratic project came to be recognized as the Western state allowing the individual the maximum amount of freedom while, at the same time, maintaining civil peace. This could only be possible when the state learned its lessons from earlier collective experience that there are areas of personal allegiance with which it cannot interfere, the most important being religious conscience.

Liberalism[299] is "the philosophical tradition that undergirds the Western ideal of a political democracy."[300] It seeks to provide a basis for civil peace among the many varying, and often contradictory, ideas in society, thereby allowing for the maximum participation of individuals in society. Charles Larmore describes liberalism as "the hope that, despite [the] tendency toward disagreement about matters of ultimate significance, we can find some way of living together that avoids the rule of force."[301]

And in the place of those authoritarian heads it seeks to build a political system on individual rights. However, there is a paradox, since "the privileging of individual rights means that the substantive commitments of no individual can be allowed to inform the body of law, which must be generally applicable; applicable, that is, to every citizen no matter what his or her beliefs and biases may happen to be."[302]

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she is of the view that it is religion that must justify why it should be given an exemption from a neutral, generally applicable law.

[298] *Hutterian Brethren, supra* note 5.

[299] Benjamin Wiker notes that "Modern liberalism is a movement in politics and philosophy that cannot be given a fixed definition apart from the long history of its development." See Benjamin Wiker, *Worshipping the State: How Liberalism Became Our State Religion* (Washington, DC: Regnery, 2013), 15.

[300] Rex Ahdar & Ian Leigh, *Religious Freedom in the Liberal State* (New York: Oxford University Press, 2013), 51.

[301] Charles Larmore, "Political Liberalism" (1990) 18 Pol. Theory 339, 357; Ahdar & Leigh, *supra* note 300 at 39.

[302] Stanley Fish, "Religious Exemptions and the Liberal State: A Christmas Column," *New York Times* (24 December 2012), online: <https://opinionator.blogs.nytimes.com/2012/12/24/religious-exemptions-and-the-liberal-state-a-christmas-column/>

Therefore, it is not surprising to see terms such as John Rawls' use of "full autonomy" to distinguish his version of liberalism from the "comprehensive liberalisms" views of Immanuel Kant and John Stuart Mill.[303] Rawls does not permit "comprehensive views" or a general philosophical moral doctrine of the good life into his "political liberalism," unlike Kant and Mill.[304] Other terms that emphasize individual rights include individualism, egalitarianism, universalism, and meliorism.[305] Robert Sharpe adds freedom and neutrality.[306] Law professors Rex Ahdar and Ian Leigh further suggest rationalism – the favouring of reason over emotion.[307] In reality, these characteristics have a degree of overlap with the core concerns of liberal theory.

As I see it, the primary focus of liberal theory is a quest to discover the rational explanation for the most effective relationship between the individual and the state that permits the greatest potential for self-realization in an atmosphere of civil peace. It is an explanation that trumpets neutrality, pluralism and tolerance. It is within that matrix that religion is to find its place in the relationship with the state.[308]

Religion has thrived within the liberal state as religious freedom has allowed for a plurality of religious groups to establish themselves. This plurality has kept religious communities nimble as the many factions with their different perspectives stimulate "innovation, which improves the religious product offered, which in turn translates into vibrant and vivified religion."[309]

Liberalism, as a philosophy, has evolved over the years, keeping in tune with the historical events and social realities of the culture. "The core of common culture," says Roger Scruton, "is religion. Tribes survive and flourish because they have gods, who fuse the many

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[303] John Rawls, *Political Liberalism*, Columbia Classics in Philosophy (Columbia University Press, 2005), 78.
[304] *Ibid* at 78, 145, 196.
[305] John Gray, *Liberalism*, 2nd ed, *Concepts in Social Thought* (University of Minnesota Press, 1995) at xii: "Common to all variants of the liberal tradition is a definite conception, distinctly modern in character, of man and society. What are the several elements of this conception? It is individualist, in that it asserts the moral primacy of the person against the claims of any social collectivity; egalitarian, inasmuch as it confers on all men the same moral status and denies the relevance to legal or political order of differences in moral worth among human beings; universalist, affirming the moral unity of the human species and according a secondary importance to specific historic associations and cultural forms; and meliorist in its affirmation of the corrigibility and improvability of all social institutions and political arrangements. It is this conception of man and society which gives liberalism a definite identity which transcends its vast internal variety and complexity."
[306] Robert Sharpe*, The Cambridge Lectures*, ed by Frank E. McArdle (1991), 265–66; Ahdar & Leigh, *supra* note 300, at 40. Freedom is the idea that the state's role is to maximize the human dignity, self-fulfillment, and autonomy while minimizing the interference with individual moral choice; neutrality—the state and law is to be neutral as to the conception of the good life.
[307] Ahdar & Leigh, *supra* note 300 at 40.
[308] For a very practical and informative guide on these issues see Sophie van Bijsterveld, *State and Religion: Re-assessing a Mutual Relationship* (The Hague: Eleven International Publishing, 2018).
[309] Christopher J. Eberle, *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002), 163. Eberle was recapping his understanding of Rodney Stark's view. Stark and Bainbridge state, "…[T]he natural state of the religious economy is pluralism. To the extent that religious freedom exists, there will be many organized faiths, each specializing in certain segments of the market. Moreover, this market will be dynamic, with a constant influx of new organizations and the frequent demise of others." See Rodney Stark & William Sims Bainbridge, *The Future of Religion: Secularization, Revival, and Cult Formation* (Berkeley and Los Angeles: University of California Press, 1985), 108.

wills into a single will, and demand and reward the sacrifices on which social life depends."[310] Philosophy, as Will Durant saw it, is "the synthetic interpretation of all experience rather than the analytic description of the mode and process of experience itself."[311] Liberalism is chameleon-like in that it is ever-developing and refining itself, keeping time with different historical and cultural realities. For example, "liberalism" in the philosophy of John Stuart Mill, in the 19th century, is remarkably different from the philosophy of William Eskridge of the 20th and early 21st centuries.

Professor Brian Tierney described the evolution of "freedom of conscience" as being based on "the natural rights of man, guaranteed by natural law and discernable by the 'light of reason' or 'light of nature.'"[312] By the end of the seventeenth century, Tierney observes, the Western world had formulated "reasonably adequate theories of religious rights."[313] These liberal philosophical theories of religious rights provided religion and its adherents a space in which to operate.

However, it is worth noting that in recent years there has been a worrisome resurgence of state claims to supremacy under new garb within the liberal framework. Professor Iain T. Benson aptly observes:

> at a time when liberalism is becoming insecure about its capacity to generate binding commitments from the citizenry, certain approaches seek to give law or the state divine status. Whether expressed as "constitutional theocracy", "political theology", "human rights or political idolatry" or "civil religion", these moves invariably clothe forms of politics and law with the mystique and authority of religion. This attempt is always dangerous because it provides no place outside of politics or law from which to argue for justice since politics and law, in such an idolatrized condition, are justice. The walls are much harder to scale when the castle is built so high.[314]

It is my contention that the removal of legal accommodation of religious practices as is evident in the SCC's *TWU* 2018 decisions is a move that resurrects the ultimate sovereignty claim of the state. In essence, the state is denying any space for religious practice that supports traditional marriage (or other possibly contentious beliefs) within that religious community. The state is claiming complete control over how citizens ought to live. That is an overreach.

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[310] Roger Scruton, *An Intelligent Person's Guide to Modern Culture* (South Bend, IN: St. Augustine's Press, 2000), 5.

[311] Will Durant, *The Story of Philosophy* (New York: Garden City Publishing, 1943), at xvii.

[312] Tierney, *supra* note 284 at 54.

[313] *Ibid* at 55.

[314] Iain T. Benson, *An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion* (PhD Dissertation, University of the Witwatersrand, 2013) at 10. He cites the following sources: Ran Hirschl, *Constitutional Theocracy* (2010); Paul W. Kahn, *Political Theology* (2011); Leszek Kolakowski, *Modernity on Endless Trial* (1990) 146-161; Michael Ignatieff, in Amy Guttman, ed, *Human Rights as Politics and Idolatry* (2001) 53 ff and, in particular, 77-92 which discusses the danger of human rights "idolatry" being based upon a genuine "spiritual crisis" in the West; Silvio Ferrari. "Civil Religions: Models and Perspectives" (2010) 749 – 763; also John von Heyking, "Civil Religion and Associational Life under Canada's 'Ephemeral Monster" in Ronald Weed et al, *Civil Religion in Political Thought* (2010) 298 – 328; see, also, Ronald Beiner, *Civil Religion* (2011) 417 who wrongly views civil religion as a middle position between "liberal extremity" and "theocracy." He misses "diversity pluralism" entirely so fails to see civil religion as a threat to associations.

3.6 Conclusion

Through the developments of the early modern era, religion was granted public space to operate within the liberal political framework. Political philosophy informed by political experience with religion illustrated religion's individual and collective need for room to carry out the human purposes as taught by the faith. The theoretical basis for this arrangement was encapsulated in the idea that religious freedom was a basic birthright of every citizen, and that secular governments had to concede some authority to divine sovereignty. The political anvil played a practical and theoretical role, ensuring that religion was recognized as a deep, individual commitment that the state had to respect. This historical and practical reality of religious tolerance was then enshrined in the constitutions of Western democracies, and has formed the basis of the special nature of religion along with the state's need to tolerate. It is that understanding that is now compromised by the legal revolution against the accommodation of religion.

4 THE SPECIAL PROTECTION OF RELIGION

4.1 Why Protect Religion

The special legal protections given to religion form the current legal paradigm on religion which is now being challenged. Religion, legally speaking, is special. This is evident, for example, when the Province of Alberta recently exempted Sikhs from having to wear a motorcycle helmet solely because of the Sikhs' religious beliefs.[315] As Kuhn noted, when there is universal acceptance of a paradigm, any anomaly is addressed by explaining it within that paradigm because it does not occur to anyone that the paradigm might no longer fit. Says Kuhn, "novelty emerges only with difficulty, manifested by resistance, against a background provided by expectation."[316]

Our Western legal systems' special treatment of religion is the current legal paradigm. It is now being challenged by the demands of radical individualists who are unwilling to accept even voluntary religious practice that they find offensive. Such demands, particularly in the context of sexual equality rights, flow from what I call the "Sexular Age". This term is discussed at length below. But for purposes of introduction, I suggest that we are currently living in a Sexular Age that demands the removal of the legal status given to religion because it is deemed offensive. Before getting into a discussion about the Sexular Age, this chapter will review just how religion is given special status in the law.

4.1.1 Prototypical Nature of Religious Freedom

The historical, practical, and philosophical realities of the experience with religion allowed the West to learn important democratic truths. The peculiar nature of religion, and the struggle over religion, required its special protection in the law. As former Chief Justice Dickson noted in *Big M Drug Mart*, "[r]eligious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*."[317] Consider the following two examples.

First, freedom of expression, speech, and the press were noted by the Supreme Court of Canada in *Dolphin Delivery*[318] where the Court referenced author John Milton's appeal to the British Parliament in 1664[319] against requiring authors to obtain a government license before publishing their books. Milton argued:

> [W]ho kills a Man kills a reasonable creature, Gods Image; but hee who destroyes a good Booke, kills reason it selfe, kills the Image of God, as it were in the eye. Many a man lives a burden to the Earth; but a good Booke is the pretious life-

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[315] "Alberta 3rd province to allow Sikhs to ride motorcycles without helmets," *National Post*, (29 March 2018), online: <http://nationalpost.com/pmn/news-pmn/canada-news-pmn/alberta-third-province-to-allow-sikhs-to-ride-motorcyles-without-helmets>

[316] Kuhn, *Revolutions, supra* note 1 at 64.

[317] *Big M Drug Mart, supra* note 4 at para 123.

[318] *Retail, Wholesale and Department Store Union, Local 580 [R.W.D.S.U.] v. Dolphin Delivery Ltd.,* [1986] 2 S.C.R. 573 para 13 [*Dolphin Delivery*].

[319] John Milton, "Areopagitica; A Speech For the Liberty of Unlicenc'd Printing, to the Parlament of England" (1664), The John Milton Reading Room, online: <https://www.dartmouth.edu/~milton/reading_room/areopagitica/text.html > (last visited 7 Sept. 2018).

blood of a master spirit, imbalm'd and treasur'd up on purpose to a life beyond life.[320]

Milton's point is that freedom to think and express thought is a gift from God Himself as His essence. Religious words and their expression are not "simply words" they are the power of the universe.[321] When books are destroyed because they have the "wrong opinion," the inner voice of the soul, that which makes us human (as it emanates from the divine), is destroyed.

"The worst and fullest tyranny to which mankind tends to be enslaved is the tyranny over the mind," observes Professor Thomas L. Pangle, "the tyranny over opinion, and above all the tyranny over moral opinion, opinion as to what is right and wrong."[322]

Freedom of religion demands freedom of expression because as human beings we do not see the world in the same way. As free thinkers we can reason on our own in the search for truth. That is destroyed the moment the state demands we think as it does.

Second, Chief Justice McLachlin and Justice LeBel recognized freedom of association in *Mounted Police Association of Ontario v. Canada*[323] as having "its roots in the protection of religious minority groups."[324]

Religion is the manifestation of humanity's quest to understand the meaning and purpose of life. To think about such grand themes goes to who we are. Thinking and expressing such deep thoughts risks offending others. The revelation of one's religious beliefs or non-beliefs may engender approbation from some but condemnation from others. It is, by nature, intensely personal and yet public at the same time. Since other people have come to their own conclusions about the meaning of life, they may be threatened if our expressed thought contradicts their personal views. That is the risk we take in a free society. We risk offending others. Not to take that risk means we are not free.

Western Christianity, including the Reformation, required the West's acquiescence in granting religion space to freely operate. This meant some religious groups ran the risk of offending other religious individuals and groups who held different views. But as John S. Mill observed, it was religious minorities that claimed the indefeasible right to religious freedom against the majority. "Yet so natural to mankind is intolerance in whatever they really care about," he points out, "that religious freedom has hardly anywhere been practically realized, except where religious indifference, which dislikes to have its peace disturbed by theological quarrels, has added its weight to the scale. In the minds of almost all religious persons, even in the most tolerant countries, the duty of toleration is admitted with tacit reserves. … Wherever the sentiment of the majority is still genuine and intense, it is found to have abated little of its claim to be obeyed."[325]

The modern spin suggests that religion can only operate in the "private" sphere. For example, Richard Rorty argues, "we shall not be able to keep a democratic political community going unless the religious believers remain willing to trade privatization for a guarantee of religious liberty."[326] Rorty is not necessarily demanding that religion is to be cloistered, or that

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[320] *Ibid*.

[321] Consider the Book of Genesis, chapter 1, where "God said…." and the world came to be.

[322] Thomas L. Pangle, "The Accommodation of Religion: A Tocquevillian Perspective," in Noel B. Reynolds and W. Cole Durham, Jr., editors, *Religious Liberty in Western Thought* (Grand Rapids: Eerdmans, 2003), 291 at 299, referencing the thought of Tocqueville.

[323] *Mounted Police Association of Ontario v. Attorney General of Canada*, 2015 SCC 1, [2015] 1 S.C.R. 3 (Can.).

[324] *Ibid* at para 56.

[325] Mill, *On Liberty and Subjection*, *supra* note 189.

[326] Richard Rorty, *Philosophy and Social Hope* (Penguin Books, 1999), 170–71.

religious people are required to hide their religion, as religion will often surface in public discussion and debate. To the extent that one does not want religion to dominate the state, one could agree with him wholeheartedly.

However, the ability of the West to maintain a peaceful society lies in the recognition from the state that it cannot be sovereign in matters of individual conscience. It must allow the freedom of citizens to disagree and do so with vigour. Trouble ensues the moment the state thinks it is God and rejects the liberal democratic project.[327] In the case of TWU, as will be seen below, because the state finds religious opposition to homosexual lifestyles repugnant it will enforce its morality upon that voluntary Christian community. By doing so, the state willingly violates their freedom of religion and rejects the historical freedom to express difference.

The state's opinion on this issue is so intense and absolute that even though an LGBTQ student can choose from many other non-religious universities that support their lifestyle, the state demands TWU obey its dictates or else lose accreditation. Yet, the very freedom liberal democracies currently enjoy owes much to the struggle of religious minorities against state imposition on their inalienable rights. In other words, those who call on state actors to deny accommodation of religious practices of individuals and religious institutions, like TWU, are in essence biting the hand that historically fed them. Religious freedom is the "mother" of freedom that arose from the crucible of the religious struggles of the 16th and 17th centuries.

After a thorough, historical review of the rise of individual rights, Georg Jellinek concluded, "[t]he idea of legally establishing inalienable, inherent and sacred rights of the individual is not of political but religious origin. What has been held to be a work of the Revolution was in reality a fruit of the Reformation and its struggles. Its first apostle was not Lafayette but Roger Williams…."[328] The Independent movement within the English Protestant churches developed the idea that the "full and unrestricted liberty of conscience" was not a right granted by any earthly power nor could it be restrained by an earthly power.[329] This was not limited to religious freedom, "it was forced by logical necessity to carry its fundamental

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[327] Rabbi Lord Jonathan Sacks, *Not in God's Name* (New York: Schocken Books, 2015), 229-230 describes liberal democracy this way:

> "It does not invite citizens to worship the polis, nor does it see civic virtue as the only virtue. It recognises (unlike Jean-Jacques Rousseau) that politics is not a religion nor a substitute for one. The two are inherently different activities. Religion seeks truth, politics deals in power. Religion aims at unity, liberal democracy is about the mediation of conflict and respect for diversity. Religion refuses to compromise, politics is the art of compromise. Religion aspires to the ideal, politics lives in the real, the less-than-ideal. Religion is about the truths that do not change, politics is about the challenges that constantly change. … Religion inhabits the pure mountain air of eternity, politics the bustle of the here-and-now.
>
> More important still is what liberal democratic politics achieves. It *makes space for difference*. It recognises that within a complex society there are many divergent views, traditions and moral systems. It makes no claim to know which is true. All it seeks to do is ensure that those who have differing views are able to live peaceably and graciously together, recognising that none of us has the right to impose our views on others. Coerced agreement is not consent, said the Jewish sages. … Democratic politics has no higher aspiration than to allow individuals freedom to pursue the right as they see the right, with this proviso only, that they extend the same right to others. It seeks the maximum possible liberty compatible with an equal liberty for all."

[328] Georg Jellinek, *The Declaration of the Rights of Man and of Citizens: A Contribution to Modern Constitutional History*, translated by Max Farrand (New York: Henry Holt & Company, 1901), 77.

[329] *Ibid* at 60.

doctrines into the political sphere."[330] Former Chief Justice Brian Dickson called attention to this when he observed:

> Beginning, however, with the Independent faction within the Parliamentary party during the Commonwealth or Interregnum, many, even among those who shared the basic beliefs of the ascendent religion, came to voice opposition to the use of the State's coercive power to secure obedience to religious precepts and to extirpate non-conforming beliefs. The basis of this opposition was no longer simply a conviction that the State was enforcing the wrong set of beliefs and practices but rather the perception that belief itself was not amenable to compulsion. *Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures.* It is from these antecedents that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(a) of our *Charter*, the single integrated concept of "freedom of conscience and religion".[331]

The American colonialists carried the Independent movement sentiments with them and maintained a religious understanding that their rights came not from man but from God. Political realities soon led to a politicalization of the religious convictions. The colonialists claimed rights[332] not granted merely from the British monarch but from Nature's God that were indefeasible – "endowed by their Creator with certain unalienable Rights."[333]

The religious conviction regarding inalienable rights also led to the American philosophy of the separation of church and state. Professor Nicholas Miller points out that James Madison's *Memorial and Remonstrance*[334] was one of the foundational documents in the development of the doctrine and it had a strong theological framework. For example, Madison emphasised the inalienability of religious freedom on two fronts: first, one's opinion depends on the evidence contemplated by one's own mind and therefore one cannot follow the dictates of others and, second, this right toward others is a duty to the Creator.[335] Miller understands Madison to be saying, "…in matters of religious belief, conviction, and worship, the civil magistrate, indeed, the entire legislature, was inferior to the individual conscience."[336] Finally, it is observed that Madison was of the view that to abuse religious freedom "is an offense against God, not against man."[337]

Professor Hans-Martien ten Napel supports the view that Christian presuppositions made liberal democracy possible.[338] He argues that "no legitimate liberal democracy is feasible without there being the type of protection of religious freedom offered by the right to freedom

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[330] *Ibid*.
[331] *Big M Drug Mart, supra* note 4 at para 120, emphasis added.
[332] Keeping in mind that the rights did not include everyone – as Jellinek, *supra* note 328, acknowledges at 87, "In spite of the assertion that all men are by nature free and equal the abolition of slavery was not then accomplished. In the slave states in place of 'man' stood 'freeman'. The rights thus formally declared belonged originally to all the 'inhabitants', in the slave states to all the 'whites'. It was only later that the qualification of citizenship of the United States was required in most of the states for the exercise of political rights."
[333] *Declaration of Independence* (US 1776).
[334] Madison, *supra* note 292.
[335] Miller, *supra* note 287 at 146.
[336] *Ibid.*
[337] *Ibid* at 147, quoting from James Madison, *The Writings of James Madison,* vol 2, edited by Gaillord Hunt (New York: Putnam, 1900), 186.
[338] Hans-Martien ten Napel, *Constitutionalism, Democracy and Religious Freedom To be Fully Human* (London and New York: Routledge, 2017), 56-59.

of religion or belief as it has historically developed."[339] ten Napel explains that there are three principles of liberal democracies which interconnect: constitutionalism, democracy, and religious freedom. The interconnectedness allows citizens to become "fully human." As Koos Vorster observes, being fully human "means to cradle the spirituality of ones' religion and to build one's life on the foundation that the religion offers."[340] Thus, from ten Napel's perspective, to be fully human includes both the individual and communal aspects of human existence, which are both found in freedom of religion or belief. At the very heart of being fully human is religious freedom. And, as we have already discussed, it is the recognition that the sovereignty of the state is kept in check by this freedom.[341]

When the state has the pretention to enforce its morality, under the rubric of "*Charter* values", as it did in the *TWU* 2018 cases, it violates the prototypical right of religious freedom. In the case of TWU, it was a totally unnecessary violation given the fact that attendance at TWU is voluntary, and there are plenty of alternative law schools for those who take offense to TWU's religious practices. The fanaticism, zeal, and vindictiveness exhibited by TWU's critics displayed a complete lack of tolerance. Yet religious tolerance was the historical wellspring which gave such modern-day TWU critics the right to voice their opposition. The irony here is worth noting. The consequences of this development, as discussed below, are yet to be realized.

4.2 The Legal Status of Religion

Religious practice is often incongruent with generally applicable law. Society has had to deal with this problem in a way that works. For the most part, the path forward has been that virtually every area of law has acquiesced, in some way, to the demands of religion and its practice. In this section I will review the current legal status of religion in Canadian law. What has occurred in Canada is not unlike similar liberal democracies. There can be no doubt that religion has been, and continues to be, treated by the law as special. It is accommodated in no small measure.

This review highlights the complex relationship between religion and the liberal state. Religion manifests itself in individual and communal characteristics that have challenged the law's ability to determine how religion ought to be accommodated.

4.2.1 Constitution

The protection and accommodation of religious beliefs, as it currently stands in western liberal democracies, is either a constitutional duty because the protection of religion is constitutionally enumerated, or it forms part of the "unwritten" constitution.[342] Discrimination

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[339] *Ibid* at 7.
[340] *Ibid*.
[341] *Ibid*, see 95, 113, 114.
[342] Prior to the *Constitution Act 1982,* Canada's freedom of religion would form part of the "unwritten" constitutional conventions as was described by Justice Rand in the *Saumur* case. This is not uncommon. The US Constitution (1787), when first ratified, did not explicitly protect religious freedom until the *Bill of Rights Amendments* of 1791. In New Zealand, for example, there is no formal constitutional protection of religion; however, there is religious freedom in sections 13 and 15 of the New Zealand *Bill of Rights Act*, 1990. The manifestation of religion and belief includes "worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private." This is very wide and expansive. The Australian Constitution prevents the establishment of religion and prohibiting the free exercise of religion but the courts

based on religion is effectively outlawed. Religious freedom is often applauded as a positive good. However, it is the concept of whether special legal protection of religion is necessary, defensible and sustainable from a moral, a legal and a political perspective that is the heart of the current discussion.

Using Canada as a primary example we will review the constitutional protection of religion.

4.2.2 Pre-*Charter* Jurisprudence

The special place of religion in Canadian constitutional law[343] predates the *Charter* of 1982 by 221 years. Religion was a major concern immediately after the British conquest of New France (Quebec) in 1759. The British granted its new Catholic colony what appears on the surface to be an ambiguous measure of religious freedom with the *Treaty of Paris*, 1763, which granted freedom "according to the rites of the Romish church as far as the laws of Great Britain permit."[344] However, as Professor Margaret Ogilvie points out, in practice, "[t]he Roman Catholic Church became freer from government interference under the British than had been the case before the Conquest and received an unprecedented degree of freedom for any country…."[345] This freedom continued from the 1760s up to and including Confederation in 1867.

Even the negotiations that led to the founding of Canada in 1867 required political compromise concerning religion. This is evident in section 93 of the *Constitution Act, 1867,* which recognized the right of Roman Catholic schools to government funding if they were receiving such public funding when the province joined confederation. The province of Quebec became the focal point of religious freedom litigation due to the population being primarily Roman Catholic and the strong Catholic Church influence on society.[346] A couple of early decisions, in the 19th Century, give a flavour of what was to come during the 1940s-1960s when the tenacious Jehovah's Witnesses challenged the religious sensibilities of Quebec politicians and the Roman Catholic Church. Those cases in the mid 20th Century were to lay some groundwork for a more principled approach to religious freedom and the role of religion.

The pre-*Charter* jurisprudence is built upon the reality of a populace affiliated to the Christian religion in its major schisms – Roman Catholicism and the Protestant derivatives – with Roman Catholicism being the majority in Quebec and Protestantism in the minority, and vice versa in the rest of the country. Indeed, the lion's share of the case law pre- and post-*Charter* has involved the Christian religion. The law was forced by historical and practical realities to deal with religious controversy that continues to resonate to this day.

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have interpreted it narrowly and it does not apply to State laws. See Michael Quinlan, "Born (Again) This Way: Why The Inherent Nature Of Religiosity Requires A New Approach To Australia's Discrimination Laws," publication forthcoming; Denise Meyerson, "The Protection of Religious Rights Under Australian Law" (2009) BYU Law Rev 529, 538-540; and Paul Babie & Neville Rochow, "Feels Like Déjà vu: An Australian Bill of Rights and Religious Freedom" (2010) BYU Law Rev 821, 829-832.

[343] I am also including in the term "Canadian law" as that law since the British conquest of Quebec in 1759.

[344] M. H. Ogilvie, *Religious Institutions and the Law in Canada,* 2nd ed (Toronto: Irwin Law, 2003), 36.

[345] *Ibid* at 37.

[346] Mason Wade, *The French Canadians; 1760-1945* (Toronto: Macmillan, 1956).

These themes include the law's role in arbitrating internal religious disputes;[347] the state's ability to provide public financial benefits to religious institutions;[348] the regulation of the public expression of religious sentiment that has direct political impact;[349] religious expression;[350] state regulation of religious holy days;[351] and the law's protection against the abuse of state actors intentionally interfering with religious actors who are out of the mainstream.[352]

4.2.2.1 Division of Powers Analysis

To understand the pre-*Charter* jurisprudence on the protection of religion, one must appreciate the legal climate of the time. Canada came into being with the passage of the *British North America Act*[353] in 1867 (now known as the *Constitution Act, 1867*). That Act of the British parliament created a federal state and listed the respective responsibilities of the two levels of government. The court of final appeal, up until 1949, was the Privy Council of the House of Lords in London. In 1949 that was changed to the Supreme Court of Canada.[354] For the bulk of the first one hundred and fifteen years Canada's constitutional jurisprudence was preoccupied with determining the division of legislative powers in section 91 (federal) and section 92 (provincial) of the *Constitution Act, 1867*. Each case laid a brick on the legal territorial boundary between the two levels of government.

Even as late as the 1950s the division of power constitutional analysis also saw religion through that lens. For several of the members on the bench, "religion" was a term to be parsed according to which level of government was responsible for the regulation of religion and under which "head" of the list of powers, in the *Constitution Act, 1867*, religion fit. Protection of religion, like any other legal principle, had to be decided based on the jurisdictional debate and struggle between the federal and provincial authorities. It was a rigid legal analysis that did not take the "purposive approach" that would become a hallmark of the post-*Charter* jurisprudence.

This rigid scrutiny dominated the pre-*Charter* religion cases. However, by the 1940s a more progressive view was budding in the Supreme Court in the decisions of Justice Ivan Rand. He took the position that religion is a "fundamental freedom" and an "original right" that is longstanding and forms the foundation of society. Justice Rand was prescient in his opinions. His Harvard Law School education exposed him to a rich liberal understanding of rights protection. Rand wrote in the 1950s that the American Bill of Rights was "man's highest attainment in constitutional establishment."[355] This progressive attitude was evident in his SCC decisions.

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[347] *Brown v Curé et Marguilliers de l'Œuvre et Fabrique de Notre Dame de Montréal* [1874] UKPC 70 [*Brown v Curé*].
[348] In *Re Certain Statutes of the Province of Manitoba relating to Education* (1894) 22 SCR 577.
[349] *Brassard et al, v. Langevin*, (1877) 1 SCR 145 [*Langevin*].
[350] *Saumur, supra* note 6.
[351] *Henry Birks & Sons (Montreal) Ltd. v. City of Montreal*, [1955] SCR 799 [*Henry Birks*].
[352] *Saumur*, supra note 6.
[353] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.
[354] *An Act to amend the Supreme Court Act*, 1949, 13 Geo VI, c 37. [Assented to 10 December 1949.]
[355] Rand, "The Role of an Independent Judiciary in Preserving Freedom," (1951) 9 University of Toronto Law Journal 1 at 5.

It is open to debate whether the pre-*Charter* Court would have moved away on its own accord from the ingrained textual analysis of religious freedom toward Justice Rand's method of looking beyond the legal text to a more purposive approach to religious freedom. Perhaps the changing times of Canadian society would have forced the court to become more progressive. However, Prime Minister Diefenbaker's *Canadian Bill of Rights*[356] was a perfect opportunity to breathe life into its enumerated rights such as freedom of religion. But that was not the case. The Court remained positioned in a strict constructionist analysis that treated the bill as any ordinary legislative act[357] rather than a quasi-constitutional document with the deference that is accorded to human rights legislation today.[358]

Rand's reasoning for the important constitutional role of religion is clear and persuasive. His position is buttressed by the evidence of the protection of religion in the various international, historic documents affecting Canada – *Articles of Capitulation* in 1760, the *Treaty of Paris* in 1763, and the *Quebec Act* of 1774 which was continued in the Statute of 1851[359] declaring that citizens had "the free exercise and enjoyment of Religious Profession, and Worship." The existence of such longstanding religious protection gives considerable weight to Rand's position.

4.2.2.2 Pre-*Charter* Limits on the Church and on the State

The following is a quick survey of the pre-*Charter* jurisprudence on the accommodation of religion. This review is necessary to highlight the fact that similar themes at play today existed prior to the *Charter*. Despite the Court's obsession with strict legislative analysis, religion was recognized as of sufficient importance to merit special protection in the law. Yet religion was not without boundaries. Nor was the state without boundaries. The courts were very much aware of the need to strike a balance between the interests of the state and of the church.

4.2.2.2.1 Limits on the Church

Internal Rules Must be Consistent

To what extent should the law get involved in private religious disputes? When does an internal religious dispute become a concern for the law? How is the law to accommodate the religious practice of the religious officials while at the same time protecting the autonomous right of religious individuals? And should the law give deference to the rules of a voluntary community for those community members? These were among the questions that the Canadian courts and subsequently the British House of Lords had to deal with in the Guibord case.[360]

Henriette Brown sought to have her deceased husband Joseph Guibord's body be buried in a Roman Catholic cemetery in Montreal. The Church agreed to have Guibord buried in the

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[356] *Canadian Bill of Rights,* SC 1960, c 44 [*Bill of Rights*].
[357] Justice Ritchie said, "that the *Canadian Bill of Rights* is not concerned with 'human rights and fundamental freedoms' in any abstract sense, but rather with such 'rights and freedoms' as they existed in Canada immediately before the statute was enacted," *Robertson and Rosetanni v. R.,* [1963] S.C.R. 651, p. 654 [*Rosetanni*].
[358] *Mouvement laïque québécois v. Saguenay (City),* 2015 SCC 16, [2015] 2 S.C.R. 3, at para 152 [*Saguenay*].
[359] S Prov C 1851 (14 & 15 Vict), c 175, Preamble, 2313.
[360] *Brown v Curé*, *supra* note 347.

cemetery but only in the non-Catholic portion of the cemetery due to him being labelled a "public sinner" by the Church for his membership in the Institut Canadien.[361] Burial in that area was, in the opinion of the Privy Council, an implication of "degradation, not to say infamy."[362] The Institut was deemed to support ideas that were inimical to the teachings of the Church as it advanced such liberal democratic ideas as separation of church and state.[363]

Brown sought relief by taking the Church entities to court, seeking an order of mandamus for her husband's remains to be buried in the regular Catholic portion of the cemetery. This set up for a very interesting debate about freedom of religion. To what extent should the temporal courts impose on the very internal workings of the Church?

The Privy Council (PC) held that the Roman Catholic Church did not have the same rights it had prior to the British conquest and can no longer be considered an established church. But the Church also differs from "voluntary religious societies" because its lay members pay "dimes" to its clergy and are subject to taxation for the maintenance of parochial cemeteries.[364] There was a civil duty to perform the burial. The PC recognized that the law had no jurisdiction to interfere with the internal workings of the Church (the purely ecclesiastical) and its pronouncements about whether a member met the prerequisites to be receive the Church blessings.

However, what the law did have jurisdiction to do was provide relief to those who were aggrieved by the inappropriate application of the Church's own rules (Canon law) and procedures.[365] The only way by which Guibord could have been refused burial in the regular place of the cemetery, the PC reasoned, was if he were excommunicated from the Church. However, he was not. The PC therefore ruled that Guibord was to be buried in the regular part of the cemetery, although the PC reasoned that it could not force the Church to perform the regular religious ceremony at the burial.

As has been noted by one commentator, the PC decision is self-contradictory – while it ruled that it did not have the jurisdiction to interfere with ecclesiastical affairs but civil, it then promptly ordered a burial in the consecrated ground of the cemetery, which is a matter of ecclesiastical jurisdiction.[366] The primary issue was whether the Church's acquiescence to Guibord being buried in the non-consecrated portion was sufficient to meet the "civil burial" legal requirement. By ruling that Guibord's remains were to be buried in the consecrated area the PC created another "civil burial" (i.e. one that must include the right to the consecrated area). This violated the Church's position. In the end, the Church allowed Guibord to be buried

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[361] (Author unknown), *History of the Guibord Case: Ultramontanism versus Law and Human Rights* (Montreal: John Dougall & Son, 1875). The Institut Canadien was a French literary society founded on December 17, 1844 in Montreal. "Their object was to cultivate a pure spirit of patriotism, to obtain instruction, and, by discussions and essays, to prepare themselves for the honorable activities of life" (at 3). Before its founding there was not a single French public library in Montreal. The Institut became a focal point of young intellectuals who advocated liberal views that were seen as anti-Catholic by the members of the Quebec clergy.

[362] *Brown v Curé*, *supra* note 347 at 18.

[363] Wade, *supra* note 346 at 350.

[364] *Brown v Curé*, *supra* note 347 at 17.

[365] *Ibid* at 19.

[366] Rainer Knopff, "Quebec's 'Holy War' as 'Regime' Politics: Reflections on the Guibord Case," (June 1979) 12:9 Canadian Journal of Political Science / Revue canadienne de science politique, 315-331, at 320.

in the consecrated area to appease the law but then subsequently its clergy held another religious service to deconsecrate the burial plot![367]

What is significant about this case, for our purposes, is that the law recognized that it did not have a right to interfere with the internal affairs of the Church, even if it were discriminatory against one who claimed to be a member of the Church. The religious community has autonomy to conduct its own affairs. Despite that recognition, the Privy Council found that the Church must follow its own rules and should have excommunicated Guibord to prevent his burial in the consecrated area of the cemetery.

The issue of internal autonomy of religious communities remains a live issue in Canada today. For example, the SCC recently ruled that a former member of the Jehovah's Witnesses cannot ask a court to judicially review his church's decision to dismiss him as a member.[368]

Religion Has No Place Interfering with the Electoral Process

To what extent is the law to interfere with religious expression when that expression is an attempt to influence a political outcome during an election? In 1877 the Supreme Court of Canada was confronted with the issue of "undue clergy influence." In 1876, Charlevoix Conservative MP Hector Langevin was elected as a Conservative Member of Parliament for the Charlevoix riding, having defeated Liberal candidate Pierre-Alexis Tremblay, who was the incumbent. Langevin had the support of the local Catholic bishop. In fact, pastoral letters from the bishops were read to congregants while they attended Sunday Mass, imploring them to vote for Langevin. Langevin won but the election was contested by Tremblay based on undue influence. The lower court upheld the election but the Supreme Court declared it void.

Letters read to the congregants insisted, "The Church is not only independent of civil society, but is superior to it by her origin, by her comprehensiveness and by her end."[369] They warned, "The priest and the Bishop may then, in all justice, and shall, in conscience, raise their voice, point out the danger, and authoritatively, declare that to vote on such a side is a sin, that to do such an act makes liable to the censures of the Church."[370] If it is known that a candidate "is a Liberal, you cannot conscientiously give him your vote; you are sinning by favoring a man who supports principles condemned by the Church, and you assume the responsibility of the evil which that candidate may do in the application of the dangerous principles which he professes."[371]

One curé, in a one and a half hour sermon, likened Catholic Liberals as ravening wolves who rebelled against religion; if they were in power "… we should wade in the blood of the priests that all the horrors of the French revolution would be reenacted; that to prevent those misfortunes Liberalism must be crushed by the people and by the clergy."[372]

Justice Thashereau held:

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[367] The Pastoral Letter of Mgr. the Bishop of Montreal sent to the local churches after Guibord's burial declared, "For we had truly declared, in virtue of the divine power which we exercise, in the name of the pastors, that the place where this rebellious child of the Church has been laid is now in fact separated from the rest of the consecrated cemetery, to be no more anything but a profane place." (*History of the Guibord Case*, *supra* note 361 at 122.)

[368] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall,* 2018 SCC 26 [*Wall*].

[369] *Langevin*, *supra* 349 at 152.

[370] *Ibid* at 156.

[371] *Ibid* at 163.

[372] *Ibid* at 192.

> I admit without the least hesitation and with the most sincere conviction the right of the Catholic priest as to preaching to the definition of dogmas and of all points of discipline; I deny that he has, in this case or in any other similar case, the right to point to an individual or a political party and hold them up to public indignation….[373]
>
> All are equal before that law which declares that whosoever does injury to another must repair it and indicates the means to be used to compel him to do so.[374]
>
> The principle which should govern in cases of the like nature is the following, to wit that the minister who so far forgets himself in the pulpit as to revile or defame any person, does not speak of religion, does not define doctrine or discipline, but puts aside his sacred character and is considered like any other man as satisfying his personal revenge, or as acting through, interest, and, in consequence, he is not held to be in the exercise of his spiritual functions.[375]

The Church argued that since it was given religious freedom following the British conquest, it had the right to preach of the dangers of voting for candidates with a political platform that violated Church teachings such as bringing in divorce courts.[376]

The SCC ruled that the federal election for the Quebec seat was void due to the undue influence of the Roman Catholic clerics. Justice Ritchie noted, "a clergyman has no right, in the pulpit or out, by threatening any damage, temporal or spiritual, to restrain the liberty of a voter so as to compel or frighten him into voting or abstaining from voting otherwise than as he freely wills. If he does in the eye of the law this is undue influence."[377]

The *Guibord* and *Langevin* cases are but examples of the fact that while religion was treated as special in Canadian law prior to the *Charter* in 1982, it had limits. The accommodation of religion was not open-ended. There were times when religious communities had to be restrained in the exercise of their religious freedom.

4.2.2.2.2 Limits on the State

Throughout the 1940s and 1950s the Jehovah's Witnesses (JWs) faced considerable opposition and persecution in Quebec where political and religious officials colluded together in prosecuting and harassing JWs with the clear intention of driving them out of the province. JWs were persona non grata. Over 1,500 were arrested.[378]

While the facts of these cases revealed abuse of authority there was, nevertheless, a strong contingent in the Supreme Court of Canada that still saw religion as a division of powers issue. The consequence of such a position was to limit religious freedom and give deference to the action of the authorities that the JWs found offensive. Rather than dealing with the substantive freedom of religion the SCC was content with the legal form. This was evident in the case of *Saumur v. Quebec.*[379] The JWs won the case but the majority on the SCC ruled the Quebec government had the power to pass legislation to take away religious freedom.

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[373] *Ibid* at 196.
[374] *Ibid* at 197.
[375] *Ibid* at 198-199.
[376] *Ibid* at 177.
[377] *Ibid* at 223.
[378] Janet Epp-Buckingham, *Fighting Over God: A Legal and Political History of Religious Freedom in Canada* (Montreal & Kingston: McGill-Queen's University Press, 2014), 109.
[379] *Saumur, supra* note 6.

However, as the 1950s wore on, the SCC decided that the Quebec government and Premier Duplessis had stepped too far in persecuting the JWs. Justice Ivan Rand's analysis of religious freedom as an "original freedom" would become universally accepted as a limit against a capricious state power intent on limiting religious accommodation.

4.2.2.2.3 Religious Criticism Has A Place

In the *Boucher* case[380] the Supreme Court of Canada struck down the conviction of a Jehovah's Witness of seditious libel for distributing a four-page tract entitled, "Quebec's Burning Hate for God and Christ and Freedom Is the Same of all Canada."[381] The majority of the Court held there was no evidence of an intention to incite violence. The tract recited the experiences JWs faced during the WWII era in the Province of Quebec. For their earnest religious activities of distributing religious literature door to door they were assaulted and beaten, and their bibles and literature were torn up by mobs; their homes were searched and property taken by the authorities; hundreds were charged and held on exorbitant bail. The tract accused public officials and the Roman Catholic Church as being behind the prosecutions.[382]

Justice Rand looked beyond the mechanical application of the law to consider the broad implications of freedom that this case stood for. He noted that the crime of seditious libel up until the 18th Century was to express contempt of political authority. It was based on a conception of "the governors of society as superior beings, exercising a divine mandate, by whom laws, institutions and administrations are given to men to be obeyed who are, in short, beyond criticism…."[383] Any censure implied an equality with such authority and was therefore offensive. "But constitutional conceptions of a different order making rapid progress in the 19th century have necessitated a modification of the legal view of public criticism," he observed; so "the administrators of what we call democratic government have come to be looked upon as servants, bound to carry out their duties accountably to the public."[384]

Imagining political leaders as servants, accountable to the public, created a safe space for open debate. The chill of expressing one's mind on the nature of things political and social was removed. Public dialogue on issues of the day were now not only allowed but encouraged.

Justice Rand's poignant description of this modern understanding forms the basis of why religion and its expression were protected:

> Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: what is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in mortals; but our compact of

[380] *Boucher v. the King,* [1951] S.C.R. 264 [*Boucher*].
[381] *Ibid.*
[382] *Ibid at* 285.
[383] *Ibid at* 286.
[384] *Ibid.*

> free society accepts and absorbs these differences and they are exercised at large within the frame-work of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, affection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally.[385]

Rand was suspicious of "fanatical puritanism in ideas." As a free society, Canada had the ability and responsibility to accept differences of opinion in the "clash of critical discussion on political, social and religious subjects." Allowing such a wide spectrum of opinion underlies our social stability.

By allowing differences the law permits, in Rand's view, sharp criticism to be vented in public debate. It thereby acts as a relief valve on controversial subjects. Rather than rioting in the streets the opinion holders can proclaim their disapproval in the spoken or written word. Everything short of public incitement to violence is permitted. This release of social energy is far more constructive than the destructive impulse that has been so evident in repressive countries.

For Rand, the law recognizes that by protecting freedom in thought and speech over disagreement in ideas and beliefs, it serves society in a communal search for stimulating discussion, clarity of thought and the quest for ultimate truth. Accommodating religion, therefore, is a public good not to be discounted.

4.2.2.2.4 Distribution of Religious Literature

The *Saumur* case[386] was a challenge to the City of Quebec's by-law that required permission from the Chief of Police to allow distribution of any book, pamphlet, booklet, circular, or tract in its streets. Laurier Saumur, a JW, challenged the validity of the by-law. Five SCC justices ruled that Saumur's rights were infringed and to the extent the by-law prevented the distribution of religious materials it was invalid. Therefore, the by-law remained in effect for other non-religious material. One of those five judges, Justice Kerwin, while agreeing that Saumur's religious rights were infringed, nevertheless joined the minority in holding that the issue of religion fell within the provincial powers of "property and civil rights" granted in the *Constitution Act, 1867*.[387] The effect of the *Saumur* decision was that Saumur won the case but religious freedom lost as the Quebec government promptly passed legislation to grant itself power "to outlaw any religious group that published abusive and insulting attacks on established religions."[388] Of course, it was then promptly applied to the Jehovah's Witnesses for their religious challenge to Roman Catholic teachings.

Justice Rand in *Saumur* saw freedom of religion as distinct from civil rights. On this point he was part of the minority view. Civil rights, he maintained (which I quoted above) are from positive law, "but freedom of speech, religion and the inviolability of the person, are

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[385] *Ibid* at 288.
[386] *Saumur, supra* note 6.
[387] *The Constitution Act*, 1867, 30 & 31 Vict, c 3.
[388] William Kaplan, *State and Salvation: The Jehovah's Witnesses and Their Fight for Civil Rights* (University of Toronto Press, 1989), 245.

original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order." [389]

When legislation is made "in relation to" religion and its profession, it is not a local or private matter, Rand argued, but rather:

> the dimensions of this interest are nationwide; it is even today embodied in the highest level of the constitutionalism of Great Britain; it appertains to a boundless field of ideas, beliefs and faiths with the deepest roots and loyalties; a religious incident reverberates from one end of this country to the other, and there is nothing to which the 'body politic of the Dominion' is more sensitive.[390]

He also wrote, as noted earlier, "The Christian religion, its practices and profession, exhibiting in Europe and America an organic continuity, stands in the first rank of social, political and juristic importance."[391] Rand does not tell us why religious freedom is "of the greatest constitutional significance" nor why the Christian religion "stands in the first rank." He states it as if it were a given. Perhaps it was the historical fact of the Christian religion (with its many variants seeking influence) being the "first rank" that made religious freedom "of the greatest constitutional significance."

This is a clear recognition of what was, in all practical terms, reality – reality in the political and social life of a country whose laws and norms were Christian. It is to this overwhelming reality that Rand spoke. It is unfortunate for the JWs that his view did not convince Justice Kerwin. That would take more litigation.

4.2.2.2.5 Religious Assembly

In the case of *Chaput v. Romain,*[392] three members of the Quebec provincial police, acting on orders, broke up a religious meeting of the Jehovah's Witnesses at the home of Mr. Chaput. The police seized religious literature and ordered the congregation to leave. There was no warrant, no charges were laid, and the items seized were not returned. Chaput brought a legal action against the police officers for damages and the value of articles seized. It was dismissed at trial and at the court of appeal. The SCC held otherwise, noting that Chaput was entitled to the privileges of c. 175 of the *Statutes of Canada,* 1851, which granted "the free exercise and enjoyment of Religious Profession and Worship, without discrimination or preference, so as the same be not made an excuse for acts of licentiousness, or a justification of practices inconsistent with the peace and safety of the Province."[393]

"Dans notre pays, il n'existe pas de religion d'Etat", Justice Taschereau opined, observing:

> "Personne n'est tenu d'adhérer à une croyance quelconque. Toutes les religions sont sur un pied d'égalité, et tous les catholiques comme d'ailleurs tous les protestants, les juifs, ou les autres adhérents des diverses dénominations religieuses, ont la plus entière liberté de penser comme ils le désirent. La conscience de chacun est une affaire personnelle, et l'affaire de nul autre. Il serait désolant de penser qu'une majorité puisse imposer ses vues religieuses à une minorité. Ce serait une erreur fâcheuse de croire

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[389] *Saumur, supra* note 6 at 329.
[390] *Ibid*.
[391] *Ibid* at 327.
[392] *Chaput v. Romain* [1955] S.C.R. 834.
[393] *Ibid* at 865, quoting S Prov C 1851 (14 & 15 Vict), c 175, Preamble, 2313.

qu'on sert son pays ou sa religion, en refusant dans une province, à une minorité, les mêmes droits que l'on revendique soi-même avec raison, dans une autre province."[394]

Justice Locke noted that "The appellants' right to maintain his good name and to enjoy the privileges conferred upon him by the Statute of 1851 are absolute and very precious rights and he is entitled to recover substantial general damages."[395]

"Very precious rights," is a curious use of term. Certainly, all rights are precious but what makes these rights – the right to "the free exsercise and enjoyment of Religious Profession and Worship, without discrimination or preference" – "very precious"? If he has any sympathy towards Rand's view it remains opaque.

4.2.2.2.6 Capricious Action Against Religion

Roncarelli[396] owned a restaurant in Montreal and as such was the holder of a licence to sell liquor. Roncarelli, a member of the Jehovah's Witnesses, provided bail for JW members who were charged under Quebec by-laws for distributing anti-Catholic literature. This angered Premier Duplessis, who ordered the Quebec Liquor Commission to cancel Roncarelli's liquor license. Duplessis did not think Roncarelli "was worthy of obtaining privileges from the province."[397] He considered it his duty in "soul and conscience" to take away the license because "[t]he Sympathy which this man has shown for the Witnesses, in such an evident, repeated and audacious manner, is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice."[398]

The SCC was not sympathetic toward Premier Duplessis and held him personally liable for cancelling the license. The Court reasoned that while the Premier is a public official he was not carrying out the responsibility of his office in directing an illegal action. He had no authorization to interfere in the livelihood of Roncarelli because he did not agree with Roncarelli's support of the Jehovah Witnesses. It was an abuse of power. The fact that he thought it was right does not affect the legal effect of the action. "In public regulation of this sort there is no such thing as absolute and untrammelled 'discretion'," explained the Court: "that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be capricious or irrelevant, regardless of the nature or purpose of the statute."[399]

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[394] *Ibid* at 841, loosely translated: "In our country, there is no state religion. No one is bound to adhere to any belief. All religions are on an equal footing, and all Catholics, as well as all Protestants, Jews, or other adherents of various religious denominations, have the most complete freedom to think as they wish. The conscience of each is a personal matter, and the business of no one else. It would be sad to think that a majority could impose its religious views on a minority. It would be an unfortunate error to believe that one serves one's country or one's religion, by refusing in one province, to a minority, the same rights that one claims rightly in another province".

[395] *Ibid* at 865.

[396] *Roncarelli v. Duplessis* [1959] S.C.R. 121.

[397] *Ibid* at 135, translated by the author.

[398] *Ibid* at 137.

[399] *Ibid* at 140.

4.2.2.2.7 State Endorsement of Religion

Judicial acceptance of the state's partiality to Christian norms was evident in the cases dealing with Sunday closing legislation. In the *Henry Birks*[400] decision, the Supreme Court of Canada approached legislation requiring stores to close on religious holidays in its typical division of powers framework. It held that the provinces did not have the jurisdiction to require stores to close on religious holidays as it related to the federal "criminal law" power. It was a criminal law power because it was prescribing "what are in essence religious obligations."[401]

As explained above, even with the *Canadian Bill of Rights*,[402] the SCC refused to reflect upon freedom of religion in the broad purposive sense. It was content to deal with the constitutional separation of powers, and the effect versus purpose of legislation as it did in the *Robertson and Rosetanni*[403] decision.

As far as the SCC was concerned, the Canadian Bill of Rights simply entrenched the rights as they existed before.[404] The federal government's jurisdiction to pass the *Lord's Day Act*[405] was under the constitutional criminal law power and not a matter of religious freedom. For the SCC, the practical result on those whose religion required them to observe a day of rest other than Sunday was purely secular and financial.[406]

Despite his decision to uphold the *Lord's Day Act*, Justice Ritichie quoted from Justice Rand's *Saumur* decision to make the following definitive expression of religious freedom in Canada:

> It is apparent from these judgments that "complete liberty of religious thought" and "the untrammelled affirmation of 'religious belief' and its propagation, personal or institutional" were recognized by this Court as existing in Canada before the *Canadian Bill of Rights* and notwithstanding the provisions of the *Lord's Day Act*.
>
> It is to be remembered that the human rights and fundamental freedoms recognized by the Courts of Canada before the enactment of the *Canadian Bill of Rights* and guaranteed by that statute were the rights and freedoms of men living together in an organized society subject to a rational, developed and civilized system of law which imposed limitations on the absolute liberty of the individual.*[407]*

Justice Cartwright, being the sole voice on the bench in the *Rosetanni* decision for an expansive view of religious freedom in the *Canadian Bill of Rights* saw what Justice Dickson would see two decades later in the *Big M Drug Mart*[408] decision: "a law which compels a course of conduct, whether positive or negative, for a purely religious purpose infringes the freedom of religion."[409]

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[400] *Henry Birks, supra* note 351.
[401] Per Justice Cartwright, *Rosetanni, supra* note 357 at 659.
[402] *Bill of Rights, supra* note 356.
[403] *Rosetanni, supra* note 357.
[404] See note 357.
[405] *Lord's Day Act*, R.S.C. 1952, c. 171.
[406] *Rosetanni, supra* note 357 at 657.
[407] *Ibid* at 655.
[408] *Big M Drug Mart*, *supra* note 4, see para 70.
[409] *Rosetanni, supra* note 357 at 660.

Despite the division-of-powers framework, it would have to be conceded that the law pre-*Charter* not only accommodated religion but enforced religious norms and sentiments as the Sunday closing litigation reveals.

4.2.2.2.8 Conclusion

The pre-*Charter* jurisprudence on religious freedom can be characterized as being overtly pragmatic within a Christian societal context. Deference was given to legislative power until circumstances made that posture unpalatable. This institutional resistance to expand protections for religious freedom continued after enactment of the *Canadian Bill of Right*s. However, there were a couple of notable exceptions: Justices Rand and Cartwright. Justice Rand was openly at odds with other members of the SCC in advocating an expansive understanding of religious freedom. His influence led to a keen sensibility of religious freedom.

Author and lawyer William Kaplan gives us a glimpse of the kind of tension Rand faced when he openly disagreed with Chief Justice Rinfret in the *Saumur* hearing. The Jehovah's Witnesses lawyer, Glen How, argued that freedom of religion meant freedom from civil laws that interfered with their rights to worship. Chief Justice Rinfret asked, "How can a country be administered if all religions took the view that they did not have to obey the law?" Someone could merely pretend. Rand interjected, "That is not what Mr. How is saying." How was trying to demonstrate that a breach of civil law did not necessarily constitute licentiousness. Rinfret ignored Rand and asked How if laws could be broken on religious grounds. Rand interjected again but Rinfret retorted, "I want to hear from Mr. How, not from another member of the bench."[410]

The pre-*Charter* jurisprudence lacked a cohesive understanding of why the law gave special treatment to the practise of religion, even a practise that was outside of the religious orthodoxy of the time. The deficiency may be understood as a product of an institutional blind spot in understanding the concept and role of rights and the protection of minorities. Canadian constitutional law was dominated by the concern about the division of powers and strict adherence to the application of the law to the case at hand, with little regard for the theoretical or the purposive understanding of why the law applied as it did.

The effect of such rigidity was to maintain the status quo and not allow room for an expansion of civil liberties as quickly as it might have. That status quo meant that the majority religious groups would continue to have an appreciable advantage over minority religious groups in Canada. Arguably this led to the unfortunate circumstance that Jehovah's Witnesses, as a religious minority, were constantly harassed by the Quebec government in the 1940s and 1950s.

There was a pre-*Charter* political reality of the influence and power of religion. Christianity formed the basis of the political and legal norms in Canada. But it was broader than that. Professor Roger O'Toole notes, "organized religion secured such profound importance in the new nation that it is impossible to comprehend the expansion of the Canadian state and economy without reference to it."[411]

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[410] William Kaplan, *Canadian Maverick: The Life and Times of Ivan C. Rand* (Toronto: The Osgoode Society, 2009) at 129.

[411] Roger O'Toole, "Canadian Religion: Heritage and Project," in David Lyon and Marguerite Van Die, *Rethinking Church, State, and Modernity: Canada Between Europe and America* (Toronto: University of Toronto Press, 2000), 34 at 42.

As mentioned previously, this is evident with respect to the school systems. In 1867 it was necessary to provide for a recognition of the place of religious schools. The Roman Catholics were the majority in Quebec, whereas Protestants were the majority in Ontario. The founding of Canada required a political compromise that guaranteed funding for the religious schools in each province in accordance with the practice at the time the province entered Confederation. Since Ontario and Quebec provided funding to religious schools at Confederation the *Constitution Act, 1867*[412] required that it continue.

However, when Manitoba joined Canada in 1870,[413] the religious schools were self-funded. After joining Canada, the Manitoba government began funding religious schools but then stopped the funding and created one public, non-sectarian school system. The uproar this created resulted in litigation. The Privy Council held that Manitoba religious bodies had no constitutional right to public funding[414] but did have a right to appeal to Parliament for remedial legislation.[415] Eventually a compromise was made between the federal government of Wilfred Laurier and the government of Manitoba that permitted Catholic education in the public schools and French instruction would be given where there were at least 10 French students.

Could it be said that the privileging of religion in the law, such as making provisions for religious schools in the *Constitution Act 1867*, was due to some special essence of religion itself? Or, was something else at play?

It is reasonable to conclude that it may not be "religion" per se, as being an individual spiritual pursuit, but the political realities of organized religion that have had a defining influence on the law. It is not simply a matter of an individual's religious freedom; it is the fact that organized religion has an ability to exercise a powerful influence on the body politic.

Canada, as a new nation, did not have an organized administrative state and by necessity had to rely upon religious organizations to carry out many civil duties. Institutions such as schools, universities, and hospitals were heavily influenced by the organized religions – as for the most part they ran them. "Consolidation of state, economy, and religion went hand in hand," noted Professor O'Toole. "Faced by materialism, commercialism, industrialism, land clearance, immigration, settlement, rapid population growth, and their attendant social problems, organized religion responded remarkably. Whether in social reform movements, voluntary societies, educational ventures, charitable trusts, or the missionary effort to win the West for Christ, churches and denominations skilfully adapted to modernity."[416]

If there is a lesson to be had from the pre-*Charter* jurisprudence on the accommodation of religion in the law, it is that the law had to respond to the institutional religious groups and make way for the involvement of citizens in their respective communities. That did not mean there were no limits – as the *Guibord* and *Langevin* cases made clear – but there remained a strong bias in favour of accommodating religious beliefs even in the face of strident opposition, as seen in Quebec to new religious minorities.

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[412] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s. 93.
[413] *An Act to amend and continue the Act 32-33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba*, SC 1870 (33 Vict), c. 3 [assented to 12th May, 1870], now known as the *Manitoba Act, 1870*.
[414] *City of Winnipeg v. Barrett; City of Winnipeg v. Logan*, [1892] A.C. 445 (P.C.).
[415] *Brophy v. Attorney General of Manitoba*, [1895] A.C. 202 (P.C.).
[416] O'Toole, *supra* note 411 at 42.

4.2.3 Post-*Charter* Jurisprudence

4.2.3.1 Big M Drug Mart

The first time the Supreme Court of Canada interpreted freedom of religion in the *Charter* was the *Big M Drug Mart*[417] case that involved the constitutionality of the *Lord's Day Act*.[418] Chief Justice Brian Dickson outlined the analysis to define the s. 2(a) *Charter* right of conscience and religion.[419] In keeping with the Court's methodology of interpreting the *Charter*, it required a purposive approach.[420] That is to say, "an analysis of the purpose of such a guarantee" understood "in the light of the interests it was meant to protect,"[421] while keeping a "reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*."[422] It is a generous approach, not a legalistic one, that fulfills the purpose of the protection giving the individual the full benefit of the right.[423] The "*Charter* was not enacted in a vacuum, and must … be placed in its proper linguistic, philosophic and historical contexts."[424]

Dickson's eloquent description of religious freedom was placed in the context of "[a] truly free society" that "can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct."[425] Religious freedom was possible in a "truly free society" because such a society places a high regard on freedom. And "Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person."[426]

I extrapolate from Dickson's reasons that religious freedom goes to the "inherent dignity and the inviolable rights of the human person," which a country like Canada protects because it is a "truly free society." This "truly free society" principle is the basis of why religion is protected under the *Charter*. At least, that is how Dickson appears to have understood the protection. According to Dickson, "the essence" of freedom of religion:

> is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.[427]

Free societies, by definition, according to Dickson, protect religious freedom. The only limitations to this general principle are "such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others," otherwise "no one is to be forced to act in a way contrary to his beliefs or his conscience."[428]

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[417] *Big M Drug Mart*, *supra* note 4.
[418] *Lord's Day Act*, R.S.C. 1970, c. L-13.
[419] *Big M Drug Mart, supra* note 4 at paras 116-117.
[420] *Hunter, supra* note 37.
[421] *Big M Drug Mart, supra* note 4 at para 116.
[422] *Ibid* at para 117.
[423] *Ibid*.
[424] *Ibid*.
[425] *Ibid* at para 94.
[426] *Ibid*.
[427] *Ibid*.
[428] *Ibid* at 95.

Dickson noted that the *Charter* protection of religion was not dependent on the definition of religious freedom in legislation prior to the *Charter*. He said:

> …it is certain that the *Canadian Charter of Rights and Freedoms* does not simply "recognize and declare" existing rights as they were circumscribed by legislation current at the time of the *Charter's* entrenchment. The language of the *Charter* is imperative. It avoids any reference to existing or continuing rights but rather proclaims in the ringing terms of s. 2 that:
>
> > Everyone has the following fundamental freedoms:
> > Freedom of conscience and religion.[429]

The *Charter* therefore must be understood to have ushered in a distinctively different rationale for the protection of religion than previous legislative initiatives such as the *Canadian Bill of Rights*.[430] As a constitutional document – being the supreme law – the *Charter's* concept of protecting religion has a long pedigree of political and philosophical thought. Dickson admitted as much when he analyzed the freedom of religion by ascertaining its purpose – "in the light of the interests it was meant to protect"[431] in the context "of the larger objects of the *Charter* itself," the chosen language to "articulate the right, historical origins of the concepts, and the meaning and purpose of other rights and freedoms associated with it in the *Charter*."[432]

Dickson maintains that the historical religious struggles in post-Reformation Europe are relevant. The relevance flows from the fact that as the religious allegiances of the monarchs changed, large numbers of people were "subject to laws aimed at enforcing conformity to religious beliefs and practices they did not share."[433] When the fortunes of the persecuted changed such that they took the reins of power, they switched roles and became the persecutors. However, it was during the Commonwealth of England (in the middle 17th century) that opposition arose to state power being used "to secure obedience to religious precepts and to extirpate non-conforming beliefs."[434]

Dickson argues that the thinking behind this opposition was not that the state was enforcing the wrong beliefs but that "belief itself was not amenable to compulsion. Attempts to compel belief or practice denied the reality of individual conscience and dishonoured the God that had planted it in His creatures."[435] These historical realities influenced the religious-political philosophy that not only made religious freedom possible but our entire political system of self-government.[436] "It is from these antecedents," Dickson writes, "that the concepts of freedom of religion and freedom of conscience became associated, to form, as they do in s. 2(a) of our Charter, the single integrated concept of 'freedom of conscience and religion.'"[437]

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[429] *Ibid* at para 115.
[430] SC 1960, c 44.
[431] *Big M Drug Mart, supra* note 4 at para 116.
[432] *Ibid* at para 117.
[433] *Ibid* at para 118.
[434] *Ibid* at para 120.
[435] *Ibid* at para 120. Recent scholarship has confirmed this interpretation, see for example Miller, *supra* note 287.
[436] Dickson could not be clearer when he stated, "It is easy to see the relationship between respect for individual conscience and the valuation of human dignity that motivates such unremitting protection. It should also be noted, however, that an emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government" in *Big M Drug Mart, supra* note 4, at paras 121-122.
[437] *Ibid* at para 120.

The following pre-suppositions are made about the protection of religion: it is a) related to the inherent dignity of the human person, b) an inviolable right of the human person, c) protected by a "truly free society," and, d) historically prototypical and the *sine qua non* of a free and democratic political system that underpins the Charter.[438] Thus, religious freedom goes to the very core of what it means to be human and defines our socio-political relationship.

Dickson's concept of religious freedom does not tell us what it is about religion in and of itself that requires the law's protection. Rather, Dickson's jurisprudence centres on the concept of freedom – individual freedom. That is to say, each citizen has the ability to make free and informed decisions. While that is certainly a laudable understanding and it is, as he put it, "the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government,"[439] it does not answer our question as to why religion ought to be protected. As discussed elsewhere in this book, there are numerous situations where secularly motivated behaviour does not garner the same protection as religiously motivated behaviour does.

If, at its pith and substance, Dickson's argument is that we protect religious freedom because the liberty of each citizen to make free and informed decisions (i.e. personal autonomy) lies at the heart of our "truly free society," why would that not also hold true for the secularly motivated behaviour? It begs the question, is freedom for the religious to practise their faith somehow different from the freedom of the non-religious to practise their way of life? It is arguable that for Dickson there is a difference. The difference is historical and theological.

Historically, our progenitors of political thought which influenced our understanding of democracy did not protect non-religiously motivated behaviour in the same way as they did the religiously motivated behaviour. There always was a distinction.

Could the special status accorded to religion be based upon a religious or philosophical understanding of the world that views religion as one of the most, if not the most, important characteristics of what it is to be human? Dickson, C.J. explains that the basis of the opposition to state imposition was "that belief itself was not amenable to compulsion" because compulsion "denied the reality of individual conscience and dishonoured the God that had planted it in His creatures."[440] Each individual had a conscience that was implanted by the Creator God. In other words, religious convictions are as fundamental to a believer's sense of identity as race or gender, and therefore demand special treatment.

This special treatment is echoed in the Supreme Court's 2004 definition of religion. It is curious that a definition was not given earlier in the Court's 1985 seminal decision in the *Big M Drug Mart* case – and that it took so long to attempt the definition, as the intervening years were not without opportunity.[441]

The Court was content to give what it calls an "outer definition" [442] of religion. The term "outer definition" was not explained, but it would appear to be a definition of religion that is vague, allowing for greater inclusion. Religion, says the SCC, "typically involves a particular and

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[438] *Ibid* at para 122.
[439] *Ibid* at para 122.
[440] *Ibid* at para 120.
[441] For example: *Jack and Charlie v. The Queen*, [1985] 2 SCR 332; *R. v. Jones*, [1986] 2 SCR 284; *Edwards Books supra* note 156; *R. v. Gruenke* - [1991] 3 SCR 263; *Young v. Young*, [1993] 4 SCR; *P. (D.) v. S. (C.),* [1993] 4 SCR 141; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315; *Ross v. New Brunswick School District No. 1*5, [1996] 1 SCR 825; *Adler v. Ontario*, [1996] 3 SCR 609; *TWU* 2001 *supra* note 26; *Chamberlain v. Surrey School District No. 36* - 2002 SCC 86 - [2002] 4 SCR 710 [*Chamberlain*].
[442] *Amselem*, *supra* note 7, per Iacobucci J, at para 39.

comprehensive system of faith and worship." It involves "belief in a divine, superhuman or controlling power."

However, this definition does not consider the different dimensions of religion that are possible, such as those four dimensions by Professor Cliteur noted above. Nor does it address the homo duplex human nature observed by Durkheim, who recognizes that religion is experienced by the individual and the community.

In essence, according to the SCC, "religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith."[443] It involves "profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices."[444] Canadian jurisprudence has recognized that religion has both individual and communitarian aspects.[445] Yet, it is the individual's right to determine what to believe and practise even if such is at odds with his religious community.[446]

The SCC's overly broad definition of religion fits well with the modern liberal democratic theory that suggests a bifurcation of religion into religious belief, being relegated to the private realm, and religious practise, which is considered as being in the public domain. The definition of religion does not allow the court to examine what the claimant believes, which would involve such matters as determining consistency of beliefs with religious doctrine; nor does it permit the law to investigate the extent of commitment the claimant has to the belief, which would assess the importance of the beliefs to the claimant. Both inquiries are considered private and not in the prerogative of the law. However, failure to do so means that the law's ability to kerb excessive (perhaps even fraudulent) claims is limited. As noted above, the only avenue to do so is by restricting the religious practise of beliefs,[447] when there is a balancing of rights contest with either other rights claimants who want to occupy the same space, or with the interests of government.

Thus, the law reinforces the private/public distinction of religion that is so prevalent in modern liberal democratic theory. The boundary between the private/public is "policed by the logic of reasonableness: one's expectation of privacy must be a reasonable one, and one's interests and choices must be acted on in a reasonable manner, specifically in a manner that gives due regard to the parallel rights of others."[448]

Such a distinction is problematic because an individual's view of what constitutes private and public religious belief and expression may well be very different from the distinctions made by a court influenced by liberal theory. When the law restricts religious practice under its current regime, without appreciating either what a claimant believes; or the extent of commitment the person has to that belief; then the law is imposing its own different value system on the very person it says is permitted to live and practise their religious beliefs as they see fit. In other words, the law is choosing what is to be a protected religious practice based on its own criteria that may change given the prevailing jurisprudence at the time of

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[443] *Ibid*.
[444] *Edwards Books, supra* note 156 at para 97.
[445] *Hutterian Brethren, supra* note 5 at para 31; *Edwards Books, supra* note 156 at para 145.
[446] *Amselem*, supra note 7.
[447] Ahdar & Leigh, *supra* note 300 at 125.
[448] Benjamin L. Berger, "Law's Religion: Rendering Culture" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 264 at 279 ["Law's Religion: Rendering Culture"].

adjudication, without considering the individual's subjective understanding of his religious obligation.

Of course, when there are competing interests, there has to be a weighing or balancing of interests to determine which should supersede in the circumstance.[449] Such a balancing process will be more just when the SCC understands why religious freedom ought to be protected, for it would have built in that understanding a greater appreciation for the importance of religion to society and would recognize religion's complexities upon the individual. Such an individual, in turn, when faced with a balancing contest of his competing rights and interests, can then be expected to have a greater assurance that justice will be served because his private religious beliefs and practices are taken seriously.

4.2.4 Conclusion

A cursory glance at the law of liberal democracies reveals the current paradigm that gives a prominent role to religious accommodation. Religion has been, and continues to be, treated by the law as special. There are many legal examples that makes this point. Consider again, for example, that holy days must be accommodated in the workplace,[450] but a day off to attend a political rally is not. Similarly, as noted above, a student in school may wear a religious ceremonial dagger,[451] but a student wearing a hunting knife in school would not be tolerated. Further, an individual of the Jewish faith may erect a sukkah on his or her condominium balcony during his or her religious holy days, but a person would not be permitted to set up a small tent for non-religious purposes.[452]

Religion is accommodated in a myriad of legal statutes and judicial decisions. Consider that human rights legislation continues to allow religious communities to discriminate in their hiring practices based upon their religious beliefs and practices.[453] Provincial legal regimes also recognize religion in such matters as providing for special legislation for the ownership of land[454] and numerous special religious exemptions, including exemptions from:

consumption or sales tax on religious literature[455]
property tax[456]
regular school activities for religious observance[457]
entertainment tax[458]
having photographs taken for gun licenses[459]
having to eat regular food in prisons[460]

One of the better-known special treatments of religion is found in Canada's charity law, which allows religious organizations to receive registered charitable status and the consequent

[449] *R. v. Oakes*, [1986] 1 S.C.R. 103.
[450] *Simpson-Sears, supra* note 8.
[451] *Multani, supra* note 9.
[452] *Amselem*, *supra* note 7.
[453] *Human Rights Ac*t, R.S.N.S. 1989, c 214, s. 6(c)(ii).
[454] E.g., *Religious Congregations and Societies Act*, R.S.N.S. 1989, c 395.
[455] *Excise Tax Act,* R.S.C. 1985, c E-15, Sched. III, Part III, s. 1.
[456] E.g., *Assessment Act*, R.S.N.S. 1989, c 23, s. 5(1)(b).
[457] *Schools Act*, 1997, S.N.L. 1997 c S-12.2, s. 10.
[458] *City of St. John's Act*, R.S.N.L. 1990, c C-17, s. 271(1).
[459] *Firearms Licences Regulations*, SOR/98-199, s. 14 (2).
[460] *Correctional Services Act,* S.N.S. 2005, c 37, s. 58(2).

charitable tax donation privileges for the advancement of religion.[461] Further, religious views on marriage were protected when the *Income Tax Act* was amended to shield religious charities from tax penalties due to exercising their religious freedom on the issue of same-sex marriage.[462]

These examples show that Canadian law, as with the law in most Western democracies, is saturated with religious accommodation. That is the default position, or in other words, the current legal paradigm regarding religion. Not only have religious beliefs been protected, but religious acts based on those beliefs have also been protected. Certainly, within the confines of religious communities, even when their religious enterprises entered the "public sphere," the law has, up until recently, been loath to interfere except in the rarest of circumstances.

We must conclude that there is something unique about religion that created a willingness in Western law to be flexible in exempting religious practices from generally applicable legal norms.[463]

This paradigm is now under fire. Challenges appear to have found traction on matters concerning sex. Religion has had and continues to have much to say about the morality of sexual relations. This work argues that our current society (which I call the "Sexular Age") causes the disposition of religious teachings to be seen as not only prudish and anachronistic but offensive and even harmful.[464] While sexuality may be arguably the primary motivator, other issues such as medical assistance in dying and abortion have also contributed to the anti-religious sentiment. These, along with the extensive media attention to sexual abuse scandals

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[461] *Income Tax Act*, RSC 1985, c 1 (5th Supp), does not define what is charitable. The Canada Revenue Agency (CRA) must therefore rely on the common law definition, which sets out the four heads of charity including the advancement of religion, most recently confirmed in the Supreme Court of Canada decision in *Vancouver Soc'y of Immigrant & Visible Minority Women v. Minister of Nat'l Revenue*, [1999] 1 S.C.R. 10, paras 42, 144.

[462] RSC 1985, c 1 at s. 149.1(6.21). This was a consequential amendment to the *Civil Marriage Act,* necessitated by challenges threatened to religious communities by certain activists at the time.

[463] An in-depth study about the "public good" of religion is not something this paper is addressing though it would certainly be germane to a larger work. Brevity requires that the "public good" tributary not be canvassed here. There are a number of compelling pieces on that point that I refer the reader to: James Davison Hunter, "Law, Religion, and the Common Good," 39 Pepp. L. Rev. 1065. For a provocative psychological argument see Norenzayan, *Big Gods, supra* note 166*.* For an empirical analysis of religion's economic value to society see Brian J Grim & Melissa Grim, "The Socio-economic Contribution of Religion to American Society: An Empirical Analysis," (2016) 12 Interdisciplinary J of Research on R, online (pdf): <http://www.religjournal.com/pdf/ijrr12003.pdf>.

[464] Consider, for example, Luthern Pastor Nadia Bolz-Weber's campaign requesting women who grew up in evangelical Christianity to send her their "purity rings" (those rings given to these women when they were teenagers to signify their pledge to refrain from sexual relations until marriage). Bolz-Weber plans to melt down those rings and recast them into a "golden vagina". See "Help Create a Special Shameless Sculpture" (2018), Being Wicked, online: *Nadia Bolz Weber* < http://www.nadiabolzweber.com/sculpture-promotion>. Bolz-Weber's forthcoming book, *Shameless: A Sexual Reformation* (New York: Convergent Books, 2019), will "explore what the church has taught [about sex] and the harm those teachings have caused." See "Shameless" (2018), Being Wicked, online: *Nadia Bolz Weber* <http://www.nadiabolzweber.com/book/shameless>. The issue of religion causing harm came up in oral argument at the SCC in the November 2, 2017 hearing in *Wall, supra* note 368, where the counsel for Mr. Randy Wall stated, "the concern…that I'm trying to highlight is the potential for serious harm at the hands of religious organizations. Not because they're inherently harmful, not because they act maliciously, but because their scope of influence is so large. For many individuals, their religion is their lodestar. It tells them what to eat, what not to eat, when to work, when to rest, what occupations to pursue, what occupations not to pursue. And it's that potential for harm that I say the court should have in mind as it thinks about how to calibrate this review." Michael A. Feder, Counsel for Randy Wall (Transcript of oral hearing, 2 November 2017, by StenoTran, at 88).

in residential schools and orphanages have made for a narrative that religion's special legal status ought to be expunged.

5 THE LEGAL REVOLUTION: AN ACCUMULATION OF ANOMALIES

5.1 Introduction

Kuhn's conceptual framework for evaluating what takes place in a scientific revolution will assist in evaluating the legal revolution on the place of religion in the law. In law, as in the scientific context, there are established paradigms through which the law sees the world. The current legal paradigm has given religion a special status where there is a rebuttable presumption that religious beliefs and practices will be accommodated as much as possible, but only within reasonable limits.

However, arguments are now being advanced that religion is not special,[465] or, if it is special, such "distinctiveness provides reasons for *not* tolerating it."[466] Such arguments would take away the special accommodations given to religion.

One of the galvanizing issues for those against religion's unique treatment is the religious norm regarding human sexuality that defines marriage as being limited to one man and one woman.[467] As we will discover, this religious norm is seen by many legal academics as not worthy of legal accommodation. The rationale is that since same-sex marriage has been accepted by society and in Canadian law, the "struggle" for equality of outcome must continue even in private, voluntary religious institutions to ensure that "discrimination" is eradicated. The problem is that the private, religious institution is not the state, nor is it subject to the non-discriminatory obligations of the state. The proposed new legal position is so different from the current legal paradigm on religion that it is revolutionary.

Adapting Kuhn's personal quest to the matter of law we ask, first, to what extent are conceptual readjustments characteristic of law? Second, what lies behind them? What do they involve and why do they occur? Third, what do they imply about law as a kind of knowledge?

5.2 Crisis: The Paradigm under siege in the Literature

The legal paradigm that presumes religion is special and ought to be accommodated is now challenged by legal academics and has erupted into a robust debate.[468] An increasing

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[465] Micah Schwartzman, "What if Religion is not Special?" (2012) 79 U. Chi. L. Rev. 1351.

[466] Nehushtan, *supra* note 11 at 191, emphasis added.

[467] It is worth noting that this is a worldwide religious phenomena. See Don S. Browning, M. Christian Green, & John Witte, Jr, eds, *Sex, Marriage, and Family in World Religions* (New York, NY: Columbia University Press, 2006).

[468] For example see: Tore Lindholm & W. Cole Durham, "Do We Need the Right to Freedom of Religion or Belief" (May 25, 2011) (paper presented at the Norwegian Centre for Human Rights, Oslo, Norway); Brian Leiter, "Why Tolerate Religion," (2008-09) 25 Const. Comment 1; Brian Leiter, "Foundations of Religious Liberty: Toleration or Respect?" (2010), 47 San Diego L. Rev. 935; Schwartzman, *supra* note 465; Andrew Koppelman, "Is It Fair To Give Religion Special Treatment?" (2006) U. Ill. L. Rev. 571; Andrew Koppelman, "How Shall I Praise Thee? Brian Leiter on Respect for Religion" (2010) 47 San Diego L. Rev. 961; Steven G. Gey, "Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment" (1990-91) 52 U. Pitt. L. Rev. 75; E. Gregory Wallace, "Justifying Religious Freedom: The Western Tradition" (2009-10) 114 Penn St. L. Rev. 485; Iain T. Benson, "The Attack on Western Religions by Western Law: Re-Framing Pluralism, Liberalism and Diversity" (2013), 6:1 Int'l J Religious Freedom, http://ssrn.com/abstract=2328825 ["Attack on Western Religions"]; Iain Benson, "Notes Towards a (Re)definition of the Secular" (2000) 33 U.B.C. L. Rev. 519; Iain Benson, "Physicians and Marriage Commissioners: Accommodation of Differing Beliefs in a Free and Democratic Society" (2008) 66:5 Advocate

chorus suggests that religion, as a constitutionally protected right, is redundant; there are other constitutional protections religion could avail itself of, such as freedom of association and freedom of speech.[469] In fact, other scholars are more radical still. Brian Leiter argues that there is no moral reason to continue to honour religion's special legal status;[470] and Yossi Nehushtan argues there is no place for religious accommodation in liberal democracies.[471]

Academics are not alone in those views. Judges are also openly questioning the special status given to religion. In his dissenting judgment in *Hutterian Brethren*, Justice LeBel observed that the constitutional guarantee of freedom of religion has been difficult to interpret and apply.[472] He stated, "[p]erhaps, courts will never be able to explain in a complete and satisfactory manner the meaning of religion for the purposes of the *Charter*."[473] He went on to opine that other *Charter* rights such as freedom of opinion, freedom of conscience, freedom of expression, and freedom of association could have been sufficient to protect religious freedom, but that since freedom of religion was in the *Charter* it "must be given meaning and effect."[474]

Justice LeBel's musing that religion could have been protected by other constitutional freedoms, with no need for a specific religious constitutional head, suggests that religious freedom is an unnecessary appendage rather than a foundational principle of our democratic state. Yet, as noted above, it was the struggle to obtain religious freedom that had a profound impact on the creation of our Western democratic traditions. History suggests that it was the

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(Vancouver Bar Association) 747–52; Iain Benson, "The Freedom of Conscience and Religion in Canada: Challenges and Opportunities" (2007) 21 Emory Int'l L. Rev. 111; Mike Madden, "Second Among Equals? Understanding the Short Shrift that Freedom of Religion is Receiving in Canadian Jurisprudence" (2010) 7 L. & Equality 57; Jeremy Webber, "The Irreducibly Religious Content of Freedom of Religion" (2006) in Avigail Eisenberg, ed, *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006); Benjamin Berger, "The Cultural Limits of Legal Tolerance" (2008) 21 Can. J.L. & Juris. 245; Benjamin Berger, "Limits of Belief," *supra* note 134; Benjamin Berger, "Law's Religion: Rendering Culture," *supra* note 448; Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54 U. Toronto Faculty L. Rev 1; Jonathan Chaplin, "Beyond Liberal Restraint: Defending Religiously-Based Arguments in Law and Public Policy" (2000) 33 U.B.C. L. Rev. 617; Lorenzo Zucca, "The Place of Religion in Constitutional Goods" (2009) 22 Can. J.L. & Juris. 205; Bryan Thomas, "Secular Law and Inscrutable Faith: Religious Freedom, Freedom of Conscience, and the Law's Epistemology" (2010), online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275351; Avihay Dorfman, "Freedom of Religion" (2008) 21 Can. J.L. & Juris. 279; Timothy Macklem, "Faith as a Secular Value" (2000) 45 R.D. McGill 1; Anthony Ellis, "What Is Special About Religion?" (2006) 25 L. & Phil. 219; Christopher L. Eisgruber & Lawrence G. Sager, "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct" (1994) 61 U. Chi. L. Rev. 1245; Christopher L. Eisgruber & Lawrence G. Sager, *Religious Freedom and the Constitution* (Harvard University Press, 2007); Paul Horwitz, *The Agnostic Age: Law, Religion, and the Constitution* (OUP, 2011); Martha C. Nussbaum, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality* (Basic Books, 2008); Douglas Laycock, "Liberty as Liberty" (1996) 7 J. Contemp. Legal Issues 313; Steven D. Smith, "Discourse in the Dusk: The Twilight of Religious Freedom?" http://ssrn.com/abstract=1431556; Steven D. Smith, "Unprincipled Religious Freedom" (1996) 7 J. Contemp. Legal Issues 497; Steven D. Smith, "Is A Coherent Theory Of Religious Freedom Possible?" (1998) 15 Const. Comment. 73; Kent Greenawalt, "Moral and Religious Convictions As Categories For Special Treatment: The Exemption Strategy" 48 Wm. & Mary L. Rev. 1605.

[469] Mark Tushnet, "The Redundant Free Exercise Clause?" (2001-02) 33 Loy. U. Chi. L.J. 71 at 72 ["Redundant"].

[470] Brian Leiter, *Why Tolerate, supra* note 12.

[471] Nehushtan, *supra* note 11 at 191.

[472] *Hutterian Brethren, supra* note 5.

[473] *Ibid* at para 180.

[474] *Ibid*.

accommodation of religious belief and practice that gave rise to freedom of opinion, conscience, expression, association, and assembly. Justice Ivan Rand[475] and former Chief Justice Brian Dickson[476] understood that historical position during their respective tenures in the Court. Further, as we noted above, Canadian constitutional law recognized the importance of religious accommodation from at least the British Conquest in 1759.

Justice LeBel's position that courts may not be able to completely understand religion is particularly salient given the academic context that is questioning the law's treatment of religion. It is also germane to the legal profession's review of the ability of religious organizations, such as universities, to make membership rules concerning human sexuality. This is exemplified in the TWU case where academics and the legal profession struggled to understand how religion could discriminate on the basis of sexual identity.[477] The inability to understand religion is also shown in the dramatic difference between the BC Court of Appeal's decision and the SCC's decision. The BCCA held that the Law Society's decision to deny TWU "would limit the engaged rights to freedom of religion in a significantly disproportionate way",[478] whereas the SCC ruled that "the limitation in this case is of minor significance because a mandatory covenant is … not absolutely required for the religious practice at issue" and the infringement meant that the "TWU religious community are not free to impose those religious beliefs on fellow law students, since they have an inequitable impact and can cause significant harm."[479] The SCC failed to recognize or appreciate the "bifurcated sovereignty" discussed above, nor was freedom of association adequate to serve the interests of religious adherents in this case.

Indeed, the charge is that there is nothing inherent about religion that would warrant its special legal status. Therefore, although religion's legal status has survived since the beginning of the modern nation-state, it needs to be reconsidered. A rethink is necessary to determine whether the status ought to remain as is or be amended to fit the new circumstance of our modern society.

As we have noted above, Kuhn's analysis of scientific revolutions explains that as anomalies surface, the community does its best to explain their occurrence in keeping with the accepted paradigm. However, as the anomalies increase and are no longer satisfactorily explained, then, at the moment of crisis, it occurs to the scientists that something much more earth-shattering is occurring. That something is that the paradigm itself is no longer the appropriate vehicle to understand the world. From this we may extrapolate that a similar type of process is at play in other areas of human endeavour, including law, and law as it relates to religion. Applying Kuhn's observation in the scientific field to the legal field, I argue that the

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[475] Rand noted, in *Saumur, supra* note 6: "From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character."

[476] *Big M Drug Mart, supra* note 4 at paras 346–47 ("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.").

[477] Lawyer Jane O'Neil observed in oral hearing at the Nova Scotia Supreme Court, "What is it about prohibiting same-sex activity [that you would] [refuse] a degree on the basis? That you will not allow same-sex activity at a law school, not a church – what does that have to do with religion and what… they [are] associating for?" See *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25 (Transcript of 18 December 2014 hearing, by Angèle Poirier, legal transcriptionist, at 169, slightly edited).

[478] *Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423, para 192 [*TWU* BCCA 2016]. The BCCA also stated at para 193: "This case demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is in itself intolerant and illiberal."

[479] *LSBC v TWU* 2018, supra note 14 at paras 87 and 103.

increased questioning by academics and practitioners about the law accommodating religion is an anomaly, similar in form to Kuhn, within the legal paradigm that understands "religion as special" and thereby grants it legal privileges.

The literature reveals a dichotomy. There are vigorous arguments supporting the status quo on religion's place in the law and an equally vigorous, if not more passionate, argumentation that religion's status ought to be removed. From my analysis, at the heart of this debate is an undergirding assumption about the worth of religion.

Religion, as we saw earlier in Haidt's work, does benefit society. But religion also has intrinsic value. That is to say, it is a good in itself. The right to religious freedom therefore has a deontological status. It is fair to say that even if religion did *not* benefit society it is simply wrong to violate a person's freedom of religion. Faith defines the religious person's identity – who they are – and they have a right to be such without state interference.

The arguments against religion assume that religion has *no benefit* to society. Whereas, underlying the argument supporting religion's special status in the law is the assumption that religion is *valuable* and that it contributes to the overall good.

5.2.1 Religion Is Not Special

It is my observation, after reviewing a number of scholars on this subject, that a particular scholar's position on whether the law ought to continue to accommodate religion, as it has historically, is directly related to the underlying presuppositions of the scholar about the importance of religion to the public good. In other words, if we assume that religion has no inherent value to society then it only makes logical sense that society should not protect it. Why protect something that is not beneficial?

Further, I have observed that support for the continued protection of religion has remained fairly consistent in the legal literature until recent times.[480] By and large, the discussion about the non-special character of religion and therefore the advocacy for the removal of religion's special status is new.[481] It is my observation that this demand has paralleled the increasing demand of sexual equality rights (SER). The SER movement has found its most profound legal success in the legal recognition of same-sex marriage.

For millennia, marriage and its legal norm was wrapped in a religious cloak.[482] I will make the case that in Canada the decision to grant same-sex marriage has brought into focus the issue of religious accommodation in the law.[483] The removal of this orthodoxy has led to the demand that religion must no longer be treated as special in the law.[484] Or, if it is special, as noted above, such "distinctiveness provides reasons for not tolerating it."[485] Such arguments would take away the special accommodations given to religion.

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[480] Michael E. Smith, "The Special Place of Religion in the Constitution" (1983) Sup. Ct. Rev. 83.
[481] Gey, *supra* note 468; Abner S. Greene, "Is Religion Special? A Rejoinder to Scott Idleman" (1994) U. Ill. L. Rev. 535; James W. Nickel, "Who Needs Freedom of Religion?" (2005) 76 U. Colo. L. Rev. 941; Tushnet, "Redundant," *supra* note 469; Schwartzman, *supra* note 465.
[482] *Hyde v. Hyde* (1866), L.R. 1 P. & D. 130, at 133 [*Hyde*].
[483] See generally Bussey, "Rights Inflation," *supra* note 17; Bruce MacDougall, "Refusing to Officiate at Same-Sex Civil Marriages" (2006) 69 Sask. L. Rev. 351; Bruce MacDougall, et al, "Conscientious Objection to Creating Same-Sex Unions: An International Analysis" (2012) 1:1 Can. J. Hum. Rts. 127; Bruce MacDougall & Donn Short, "Religion-based Claims for Impinging on Queer Citizenship" (2010) 33 Dalhousie L. J., 133.
[484] Schwartzman, *supra* note 465.
[485] Nehushtan, *supra* note 11 at 191.

Before analysing the specific issue of religious norms and sexuality I will review the scholarship challenging religion's special legal status. The scholarship is dynamic, with an explosive volume of commentary. Getting lost in the thicket is a real concern. Some attempt has been made by others to categorize the literature,[486] bringing a semblance of order to this robust discussion. While this is helpful to give shape to the arguments being made, there is a lack of common parlance that ensures scholars are not talking past themselves as they articulate their positions.

My analytical approach to the literature is not to take at face value the various arguments for and against the concept that religion is special and therefore merits the special protection of the law. It is my purpose to use the "Revolution" analogy and consider through that lens what may in fact be happening or motivating the discussion to date.

In summary, I have argued that up to now the law has treated religion as special in our constellation of constitutional law. The literature has primarily centred on whether or not religion ought to be treated as special and articulating the various reasons for each position. Brian Leiter and Yossi Nehushtan have taken the position that religion *qua* religion should not be treated as special because in the case of Leiter, there is no moral reason to do so; and in the case of Nehushtan, because religion is intolerant and those who follow religion are intolerant. A liberal society, says Nehushtan, does not have to tolerate the intolerant.

I contend that the positions in favour of or against the special status of religion in the law are directly related to the authors' respective positions on the underlying value of religion in a liberal democracy. My observation suggests that the literature has been moving on a continuum from arguments that support the presupposition that religion has *worth*, on one end, to arguments that religion has no *benefit* on the other end. In the middle is the so called "neutral" view that it matters not whether religion has or has not value but that it be treated equally with all the other enumerated rights in the *Charter.*

My conclusion is that there is a correlation between the general apathy (if not disdain) amongst legal elites towards religion and the growing opinion that sees religion as the obstacle of other substantive rights such as sexual equality.[487] A review of the literature with an eye to determining the presuppositions about the value of religion in a liberal democracy provides a

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[486] *Ibid* at 138, for example uses five categories: One, neutral approaches – that is to say it is neutral if the decision whether to grant an exemption is not affected by the content of a person's conscience; Two, equal regard – says when an exemption is granted to a non-religious conscientious objector an exemption should be given to his equivalent religious objector; Three, liberal value-based approaches – take into account the content of a person's conscience but not its religiosity to determine whether to grant an exemption – some content is more favourable than others; Four, pro-religion – the religiosity of the conscience claim is a relevant reason to grant the exemption; Five, anti-religion – refusal to grant the exemption if the conscience claim is religious.

[487] Consider the statement of the former Supreme Court law clerk, now professor at Osgoode Hall Law School, Christopher Bredt, in speaking to the LSUC Convocation, 2014: "So the first right at issue here, the right not to be discriminated against based on sexual orientation is one I strongly believe in. The second right at issue, the right to freedom of religion, is a right that I have to confess I personally have less affinity for, but perhaps because I'm not a religious person, and so for me, at the outset, the easiest approach to this issue would have been to simply go with my heart and take the position that discrimination based on sexual orientation is wrong, and we should not accredit, but I'm not there yet. I'm struggling with this issue. I have to be frank with Convocation. I am struggling." See Transcript, Convocation of the Law Society of Upper Canada, Public Session (10 April 2014), at 152-53, online (pdf):
<https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/c/convocationtranscriptapr102014twu.pdf>
[LSUC Convocation].

more nuanced approach that will garner further insight. The conclusion of this review is that the criticism of religion's status is due to the view that religion does not contribute positively to a liberal democracy. Despite the law's current accommodation of religion there is a growing academic opinion that religious beliefs and practices hold no inherent value for a liberal democracy. This is due in no small part to a lack of experience with and understanding of how religion adds to civil society.

The question of whether religion is special is different from determining whether religion has value. It is reasonable to conclude that if one values religion in a liberal democracy then one will likely hold the opinion that religion's special legal status ought to remain and vice versa. It is clear, as shown already, that the current state of the law sees religion as special. However, there is a further question that must be answered – whether religion ought to continue to be treated as special in our current context. That question depends upon whether there is a reasonable argument to be made that religion retains sufficient value to society to justify the maintenance of the special treatment at law.

Two recent arguments against the specialness of religion have been advanced by Yossi Nehushtan and Brian Leiter. We will consider them in turn.

5.2.1.1 Yossi Nehushtan – Intolerant Religion Need Not Be Tolerated

Nehushtan presents a forceful and a substantial discussion about the reasons why religion should not be tolerated by a liberal democracy, or at the very least why the state should be reluctant to tolerate religion.[488] From my reading of Nehushtan, it would appear that he is adopting a line of thinking from Charles Taylor. Religion is special, Nehushtan maintains, but that specialness is not a reason to grant special, favourable status in the law. Rather, its "specialness" is reason why it should have unfavourable status in the law.[489] His three main points are, first, "illiberal intolerance should not be tolerated in a tolerant-liberal democracy;"[490] second, there are "unique links between religion and intolerance, and between holding religious beliefs and holding intolerant views" that are acted upon; [491] and third, "the religiosity of a legal claim is normally a reason, although not necessarily a prevailing one, to reject that claim."[492]

Of course, the unscrupulous use of religion is intolerant. There are many examples of religion being used for immoral purposes.[493] However, every other right is subject to similar criticism. Consider for example, freedom of speech. While speech is important, we know that it can be abused. Speeches by Reich Minister of Propaganda Joseph Goebbels were anything but supportive of human flourishing.[494] What is necessary for Nehushtan to prove is that the freedoms of speech, assembly, thought, press, mobility (and other rights) that come together under the label "freedom of religion" are more dangerous in the aggregate than if these freedoms were individually expressed. In other words, Nehusthan must prove that the

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[488] Nehushtan, *supra* note 11, at 1.
[489] *Ibid*, at 2.
[490] *Ibid*.
[491] *Ibid*.
[492] *Ibid*.
[493] Mang Hre, "Religion: A Tool of Dictators to Cleanse Ethnic Minority in Myanmar?" (2013) 1:1 IAFOR Journal of Ethics, Religion & Philosophy, 21-29.
[494] Haig A. Bosmajian, "The Nazi speaker's rhetoric" (1960) 46:4 Quarterly Journal of Speech, 365-371.

coalescence of the composite parts of religious freedom creates a toxic mixture that must be avoided at all costs. As discussed below, he fails in this regard.

5.2.1.2 The Principle of Tolerance

To understand Nehushtan's argument we need to appreciate his understanding of the principle of tolerance. A tolerant person may make an adverse judgement against another. Normally, this adverse judgement would give him reason to harm another, but the tolerant person voluntarily refrains from causing harm – he is thus tolerant.[495] For example, imagine I support the Montreal Canadiens hockey team but when in a stadium, I see a person wearing a Toronto Maple Leaf's jersey. Naturally, I judge the person as not being as important as a Canadiens fan. That judgement gives me a reason not to help him if he needs assistance carrying his French fries back to his seat. However, because I tolerate the person, I do offer my help.

The primary justification for the right of tolerance is individual autonomy.[496] I would add that it is also respect for the human person to make choices different from my own. However, Nehushtan states that, "in cases where the intolerant activity or the intolerant persons are not worthy of any respect but rather deserve condemnation and ostracizing, an attitude of 'right to tolerance' would be morally wrong."[497] Tolerance is a description of a behaviour with a state of mind that "may be but does not have to be justified."[498]

The concept of "harm" is "interpreted in the broadest way possible;" and the person is harmed if his condition is worsened, from his own perspective; harm can also occur by omission.[499]

Nehushtan takes harm beyond what was traditionally understood in the liberal democratic tradition such as that described by John Stuart Mill.[500] Harm, according to Nehushtan, can include, but is not limited to emotional, mental, psychological, physical, and economic areas. He suggests that harm can be expressed by condemnation, disrespect, physical or cultural estrangement, discrimination, avoiding his or her presence, or physically harming the person.[501]

Nehushtan's expansion on Mill's notion of "harm" is bound to lead to problems of definition. Mill is vague on what he meant by "harm." We intuitively accept that there have to be limits to individual autonomy.[502] However, this harm principle has, until now, been applied to instances of physical harm. For example, Justice Oliver Wendell Holmes, Jr.'s famous dictum reminds us that "[t]he most stringent protection of free speech would not protect a man in

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[495] *Ibid*, at 25.
[496] *Ibid*, at 8-9.
[497] *Ibid*, at 18.
[498] *Ibid*, at 20.
[499] *Ibid*, at 9.
[500] J. S. Mill, *On Liberty, Representative Government, The Subjection of Women* (Oxford: OUP, 1985) [*On Liberty*].
[501] Nehushtan, *supra* note 11 at 10.
[502] Former Chief Justice Brian Dickson in the *Big M Drug Mart* decision, *supra* note 4 at para 95 noted, "Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."

falsely shouting 'fire' in a theatre and causing a panic."[503] Holmes' understanding of the limit was that circumstances created "a clear and present danger" to warrant state intervention.

However, the identity politics movement, as described in this work, has moved the goal post. It has redefined "harm" in an expansive manner as Nehushtan describes." So much so that mere "offense" has become akin to "harm".[504] Such a view makes it very difficult, as we have seen, for society to maintain any room for differences of opinion and diversity of practices on how people want to live their lives. The irony is that the individual seeks to be without restraint, including the "restraint" or "harmful speech" of someone else having a different view. It is "this seeming open-mindedness" which "inspires its proponents to silence those who offend against it. Certain opinions – namely, those that make the forbidden distinctions – become heretical."[505] This is very different from Mill's notion of harm.

In his seminal work, *On Liberty,* Mill was prescient in his observations that the "tyranny of the majority" sought compliance at the expense of minorities to be free to live their lives in accordance with their fundamental understandings of what it means to flourish. Two of his examples are particularly on point to our concerns here. First, Mill discussed the prohibition movement against alcohol. Mill found it obnoxious that a person would claim his "social rights" were violated by the "social act of another," in this case drinking alcohol.[506] The claimant states that strong drink destroys:

> …my primary right of security, by constantly creating and stimulating social disorder. It invades my right of equality, by deriving a profit from the creation of a misery I am taxed to support. It impedes my right to free moral and intellectual development, by surrounding my path with dangers, and by weakening and demoralizing society, from which I have a right to claim mutual aid and intercourse.

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[503] See *Schenck v. United States*, 249 U.S. 47 (1919), at 52, online: *Legal Information Institute* <https://www.law.cornell.edu/supremecourt/text/249/47>. "But the character of every act depends upon the circumstances in which it is done. …. The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. … The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree" (citations omitted).

[504] See, for example, the Public Policy Forum's report, "Poisoning Democracy: How Canada Can Address Harmful Speech Online," which has called into question even legal speech. It states that "Co-ordinated harassment" is one of the common forms of "harmful speech" where "[p]eople frequently encounter problematic but legal forms of harassment online, including *offensive* speech and memes, repeated insults, adversarial use of platform complaint processes, and the use of bots or fake accounts to flood their social media feeds" (emphasis added, at 10), November 2018, online (pdf): <https://www.ppforum.ca/wp-content/uploads/2018/11/PoisoningDemocracy-PPF-1.pdf>. The report calls for a "Moderation Standards Council" to ensure the proper regulation of "harmful speech". The idea of having a government bureaucracy telling the public how they ought to think brings to mind George Orwell's observation that "[o]rthodoxy means not thinking—not needing to think. Orthodoxy is unconsciousness", in *1984* (Brace & World, 1963), 25.

[505] Roger Scruton, "Is the University a Safe Space for Rational Argument" (14 November 2018), online: *Mercatornet* https://www.mercatornet.com/features/view/free-speech-and-universities/21933 ["Safe Space"].

[506] *The Collected Works of John Stuart Mill*, vol 18, edited by John M. Robson (Toronto: University of Toronto Press, 1977), online: *Online Library of Liberty* <http://oll.libertyfund.org/titles/233#lf0223-18_footnote_nt_662_ref>. Quotations in this paragraph taken from this source.

Mill described the situation as one where "…the absolute social right of every individual, that every other individual shall act in every respect exactly as he ought; that whosoever fails thereof in the smallest particular, violates [the claimaint's] social right, and entitles [him] to demand from the legislature the removal of the grievance." Mill thought this a "monstrous" principle "far more dangerous than any single interference with liberty." Mill saw that "there is no violation of liberty which [this view] would not justify; it acknowledges no right to any freedom whatever, except perhaps to that of holding opinions in secret, without ever disclosing them: for, the moment an opinion which [the claimant] consider[s] noxious passes any one's lips, it invades all the 'social rights' attributed to me."

Mill held that "[this] doctrine ascribes to all mankind a vested interest in each other's moral, intellectual, and even physical perfection, to be defined by each claimant according to his own standard." I suggest that Mill describes the current fixation in identity politics, where the individual finds offense with those who do not have the "right" opinion or practice. In this dissertation, the example of TWU's admission's policy was seen as "degrading and disrespectful" by those who could not abide by its terms, and by the legal profession. This, even though the Covenant was voluntary. In other words, the Community Covenant was to the legal profession what alcohol was to Mill's prohibitionist.

The second example Mill used in *On Liberty* that sheds light on the subject of this paper is the practice of polygamy by the Mormon religion in Utah.[507] Mill was sympathetic to the protection of the Mormon community who "conceded to the hostile sentiments of others" and went to "a remote corner of the earth" to avoid further persecution. "[I]t is difficult to see," said Mill, "on what principles but those of tyranny they can be prevented from living there under what laws they please, provided they commit no aggression on other nations, and allow perfect freedom of departure to those who are dissatisfied with their ways." Mill rejected out of hand the suggestion that there be a crusade (euphemistically called a "civilizade") against the Mormon people to prevent polygamy. Rather than violence, said Mill, if society is so opposed to polygomy then it ought to send "missionaries" to the Mormons "to preach against it." Thus, Mill's harm principle supports the majority using a deliberative process and not a violent or coercive process in trying to convince the other of the majority views. Mill argued that if a civilization succumbs to barbarianism because of its fears of the religious other and it lacks the moral will to stand for its truth then "the sooner such a civilization receives notice to quit, the better. It can only go on from bad to worse, until destroyed and regenerated (like the Western Empire) by energetic barbarians."

In these two examples, Mill allows significant latitude for individuals and communities to live their lives without compulsion to follow the majority opinion. However, Mill's "harm principle" has now moved far beyond what Mill envisioned. Nehushtan's concept does not resemble Mill as much as it resembles Charles Taylor.

Charles Taylor's "politics of recognition" provides Nehushtan and others the rationale necessary to reimagnine Mill's "harm". Taylor maintains that "a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being."[508] Such logic leads us to the odd conclusion that a

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[507] *Ibid*, online: <http://oll.libertyfund.org/titles/233#Mill_0223-18_991>.

[508] Charles Taylor, "The Politics of Recognition," in Amy Gutman, ed, *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994).

Christian must "recognize" those who live non-Christian lives. Note, what Taylor means by "recognition" is unclear.[509] He is vague on this point. Nevertheless, if the Christian does not "recognize" the LGBTQ individual, for example, then she has caused them harm. Therefore, under this model, TWU caused harm for its "degrading and disrespectful" policy in admitting only those who were willing to sign the Community Covenant. In other words, using Mill's example, the person who does not like the consumption of alcohol, or does not like the practice of polygamy, is harmed if others believe differently. Hence the state must remove that harm when the alcohol-imbibing citizen refuses to stop drinking, or the Mormon congregant does not stop his polygamous relationships.

One could argue that TWU is itself suffering from the non-recognition of the legal profession when it withholds TWU's accreditation. In contemporary society TWU is a vulnerable minority. One only has to consider the opposition TWU faced from the law faculties and professional members, not to mention the very strident opposition in the profession's governing legal bodies.

However, identity politics suggests that TWU represents colonial and patriarchal repression as epitomized in the traditional marriage bond. So this repressive Christian university must atone for all the "degrading and disrespectful" Christian teachings that resulted in non-equal outcomes. In other words, TWU must be penitent for the (perceived or actual) sins of its Christian forefathers.

It has to be said, as Mill insisted, that this is a monstrous position that simply cannot be left unchallenged. Mill's outrage is worth repeating: "there is no violation of liberty which [this view] would not justify; it acknowledges no right to any freedom whatever, except perhaps to that of holding opinions in secret, without ever disclosing them." The reality is a queer person is not "harmed" in the Millian sense because of TWU's Community Covenant. Disappointed? Perhaps. But not harmed as we have historically understood "harm". But if we are to accept, as did the Ontario Court of Appeal and the Supreme Court of Canada, that "harm" is subjective, then yes, TWU caused harm. But, we have to ask whether we are not moving toward the monstrosity that Mill warned about. One is not harmed when forbidden to play tennis on a golf course and vice versa. The rules of the games are different. Religious institutions are not secular institutions. Whatever negative epithets are flung at institutions such as TWU, these subjective "hurts" cannot change that objective fact.

Nehushtan is of the view that there is no limit to the harm of religion. A person who forbids another to smoke is intolerant to the smoker even if the reason was to protect the smoker from the harmful effects of smoking. It may or may not be justified depending on the circumstance. Intolerance is to limit the freedom of another because of a negative view of the person's conduct. Finally, Nehushtan argues that harm can be caused by omission as when a person's condition is worsened because I did not protect him (because of my own adverse judgement against him) from others who prevent him or force him to do something against his will; or when he needs help generally.[510]

Nehushtan argues that illiberal intolerance should not be tolerated on the basis of two principles. First, reciprocity, that is to say, that the tolerant "should not tolerate anything that

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[509] Paul Cliteur observes, "Once [Taylor] has stated his views, this is usually followed by statements that seem to take back what he defended in previous sentences. This is probably considered by some to be a manifestation of his sophistication, but others may less generously view it as vagueness or imprecision." See: Paul Cliteur, "Taylor and Dummett on the Rushdie Affair" (2016) 18 *Journal of Religion and Society*, 1-25 at 7.
[510] Nehushtan, *supra* note 11 at 11.

denies the justification of tolerance and tolerance itself."[511] Second, proportionality, which asks "what nature and level of intolerance justifies a specific intolerant response and its degree."[512]

Reciprocity allows the state to protect autonomy by not tolerating those who diminish tolerance. This is done by diminishing the autonomy of the intolerant.[513] Nehushtan accepts Joseph Raz's perception of autonomy as that which allows individuals to make their own choices when they have an adequate range of valuable options.[514] In other words, "[t]he autonomous person is part author of his life."[515]

The argument therefore flows: if tolerance enables autonomy and if the government's duty is to ensure and promote autonomy, then government is duty-bound to ensure and promote tolerance. And, since intolerance harms others, and since autonomy may be infringed to protect autonomy, then not tolerating the intolerant in order to defend and promote tolerance is permissible.[516]

5.2.1.3 The Role of The State

Nehushtan suggests that if minorities such as religious groups aim their intolerance at the state or the powerful then any state response should be measured, as state power may be misused. If, however, the minority group is aiming their intolerance on their own members then the government has a role in ensuring that those groups not infringe on their members' autonomy. A failure to eliminate this intolerance results in harm to society's weakest because they are powerless and carry the burden of tolerance.[517]

According to Nehushtan "an intolerant state response in these cases is less suspicious and no special considerations should be taken into account."[518] While the state may be accused of imposing its values on minority groups that will only be troubling "if the state holds or imposes illiberal or wrong values."[519] What remains unclear is who determines which values are wrong? And how? On what basis?

Nehushtan's criticism is a critique of the protean concept of "multiculturalism." Canada has long seen itself as a "community of communities"[520] but there are times, as the TWU law school case indicates, when the parameters of what that means are challenged. The underlying danger is of the intolerance of a minority within an already minority community. The high-profile cases often involve religion. For example, consider the Supreme Court of Canada's recent decision[521] involving a former member of a Jehovah's Witness congregation, Randy Wall, who was disfellowshipped by a Judicial Committee of elders because he was not sufficiently

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[511] *Ibid* at 29.
[512] *Ibid*.
[513] *Ibid* at 31.
[514] *Ibid* at 32.
[515] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), at 370.
[516] Nehushtan, *supra* note 11, at 34.
[517] *Ibid* at 44.
[518] *Ibid*.
[519] *Ibid*.
[520] From "Building A Nation" speech by Joe Clark, then leader of the Progressive Conservative Party of Canada, delivered at the Empire Club, Toronto, during the 1979 federal election. Clark won a minority government to become the country's youngest prime minister. See The Empire Club of Canada Addresses (19 April 1979), online: <http://speeches.empireclub.org/61505/data?n=17>. See also, Allan Levine, *Scrum Wars: The Prime Ministers and the Press* (Toronto: Dundurn Press, 1993), 296.
[521] *Wall, supra* note 368.

repentant for two incidents of drunkenness, one of which included verbal abuse of his wife. He was "shunned," meaning the congregation was forbidden to have any interaction with him. As a real estate agent, that meant he lost congregation members and other Jehovah's Witnesses as clients. This led to financial hardship. Wall applied to the Alberta Court of Queen's Bench for redress. The church argued the court did not have jurisdiction to hear the case, but the Court said it did. On appeal, the Alberta Court of Appeal agreed with the lower court. The SCC decided overwhelmingly (9-0) that such matters could not be judicially reviewed.

Mr. Wall's legal counsel urged the Court to consider "the potential for serious harm at the hands of religious organizations. Not because they're inherently harmful, not because they act maliciously, but because their scope of influence is so large."[522] His point was that religion is pervasive for the religious – guiding all areas of life from what they eat or drink to what occupations they pursue. This should mean the Court ought to intervene and judicially review internal decisions. Such an argument is similar to Nehushtan's concern that a tolerant society ought not to tolerate the intolerant.

The SCC ruled, "In the end, religious groups are free to determine their own membership and rules; courts will not intervene in such matters save where it is necessary to resolve an underlying legal dispute."[523] Ironically, it also stated that the *Charter* does not "directly apply" to the case because they were private parties. However, only mere weeks later the same Court would rule that though TWU is not subject to the *Charter* it is indirectly subject to the *Charter* by means of the controversial "*Charter* values" doctrine, as discussed below.

5.2.1.4 The Principle of Proportionality and Intolerant Religion

Nehushtan points out that the principle of proportionality recognizes that there are different kinds and degrees of tolerance and intolerance by requiring the person who is responding to intolerance to do so in a manner that matches the nature and level of the original intolerance they faced.[524]

This necessitates that the response meet three criteria: first, that there is a rational, logical connection between the nature of the original intolerance and the responding intolerance. This implies that it be effective. Second, that the response eliminate or significantly reduce the effect of the original intolerance in a manner that is the least damaging to human rights.[525] Third, the response and its consequences should be proportionate to the legitimate aim one is trying to achieve.

The example that Nehushtan gives to illustrate these principles is the public protest by a religious group that disrupts a theatre production that it finds offensive. The police response that arrests a few of the protesters and keeps the rest at bay from the theatre would be a response that is rationally connected to the nature and level of the group's intolerance, and the least harmful, while being effective in allowing the play to continue. If the police violence led to a protestor's death it would not be proportional.[526]

Nehushtan anticipates the argument that for a liberal state to be intolerant to the intolerant is in fact forcing the original intolerant person to be tolerant in the liberal sense.

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[522] *Ibid* (Transcript of oral hearing, 2 November 2017, by StenoTran, at 88).
[523] *Wall*, *supra* note 368 at para 39.
[524] Nehushtan, *supra* note 11, at 45.
[525] *Ibid*.
[526] *Ibid* at 46.

Conversely, the liberal state is being intolerant.[527] Nehushtan maintains that there is no neutral way to decide who the original intolerant person is. By definition, tolerance discourse is "value-based" and it should not be surprising that value-based liberalism would act in accordance to its "values." If there are differences of "values" then the discourse of tolerance will not bring about a reconciliation.[528] For the most part, the issue comes down to the justification of an intolerant act in a specific fact situation that becomes the subject of disagreement. Most will agree that there should be no intolerance, but how that is carried out will engender disagreement. Many of these issues can be resolved by answering whether there was an intention to harm and "who started it?"[529]

"Who started it?" is useful only as a mechanism for shifting the burden of proof – the person who started the original intolerance has to justify it.[530] Whether he is justified will depend upon whether there is an agreement on the issues of morality in the circumstance. However, there will be argument over who initiated the original intolerance to begin with. Nehushtan illustrates with the issue of homosexuality.

"There is nothing in homosexuality as such," Nehushtan notes, "that intends to deny the legitimacy of others, to condemn their way of life or to exclude it legally, socially and culturally. Homosexuality, as such, does not entail making adverse judgements about others."[531] However, he maintains, the same cannot be said about religious opposition to homosexuality. "[T]he very essence of religious or conservative homophobia," says Nehushtan, "when it is expressed openly, promoted in the public sphere or being used as a reason for formulating legal rules, is making an adverse judgement about homosexuals, condemning homosexuality as immoral and excluding it legally, culturally or even physically."[532]

Unfortunately, Nehushtan, like many who do not agree with religious conservative views regarding sex, uses the controversial and demeaning term "homophobia" to chastise his opponents. Phobia, being a psychiatric term, suggests that the people who have objections to homosexuality are "sick", or mentally deranged. That is a regrettable use of language that does nothing to enable a civil discourse – and it belies his argument that homosexuality does not entail a judgement against others.

Applying Nehushtan's argument to TWU, we have Christians who think that heterosexual marriage should be the norm for their own lives and for the institutions they create. For this, they are made into psychiatric patients. Their vision does not get the respect it deserves and is characterized as "phobic". Strangely enough, this is all done in the name of "tolerance" and "respect". Unfortunately, such "phobia discourse" has replaced honest and open discussion in many other contexts, e.g. "islamophobia".

With "phobia discourse" as the new language of identity politics, the alleged victim who claims to be offended, insulted, or disrespected applies this turn of phrase to hit back at the alleged abuser. The problem is, as Mill observed, we end up where every individual is both a

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[527] *Ibid* at 48.

[528] This is the very problem of using "values" language – it is imprecise. It is meant to convey a moral truth but it has no intellectual depth to do so – it is the opinion of the person claiming his "values" as authoritative by his mere say so.

[529] Nehushtan, *supra* note 11, at 49.

[530] *Ibid* at 53.

[531] *Ibid* at 51. This presupposition is suspect as every position of "moral truth", in this case, that sexual identity is the basis for public expression and to be used in formulating law is every bit as judgemental as the "religious or conservative" views on sexual identity.

[532] *Ibid* at 51.

victim and an abuser. For instance, TWU becomes both a victim (of Chritianophobia) and an abuser (homophobia). Such language leaves no room for meaningful dialogue.

Under the intention to harm and "who started it?" criteria, Nehushtan argues that any legislation that supports and promotes homosexuality cannot be viewed as intolerance. But "any homophobic response" to the legislation or homosexuality is "indeed the original intolerance."[533] That homophobic intolerance should not be tolerated unless one thinks it is justified because homosexuality is immoral or harmful.[534]

Nehushtan advocates a role for government in publicly condemning non-liberal speech such as attacking speech against homosexuals, on the basis that it has an obligation to support personal autonomy. Not to condemn such speech would be considered "sustaining such speech."[535]

The state has a role in ensuring that the liberal ideals – autonomy, freedom and equality – are promoted. Here I have no problem agreeing with Nehushtan. However, where we disagree is how those ideals are interpreted. Autonomy, freedom and equality in the classical liberal sense is a far cry from the identity political framework as espoused by Nehushtan. It must therefore not tolerate intolerance on the basis of the harm principle and the offence principle. However, Nehushtan's views, if taken literally on the issue of "not tolerating intolerance", as he defines intolerance, would result in the liberal state imploding. It would lead to Mill's monstrous idea of the individual demanding everyone else act according to his or her view. It is not practical. Liberal states cannot operate without intolerance; intolerance toward theft, homicide, and so on. What liberal states must be tolerant of is freedom of religion, because it is here where unpopular views, speech, and practices offend the majority throughout the liberal experiment of governance. This prototypical right has made freedom of other rights possible, as discussed in this work.

Nehushtan is of the view that the harm principle "allows the state to prevent unjustified serious harm to individual persons or groups, or unreasonable risks of harm." The offence principle "allows the prevention of an unjustified offence (as opposed to injury or harm) to others."[536] This prevention is different from "legal moralism" which prohibits the immoral but not harmful conduct.[537] Yet the offence principle cannot be separated from legal moralism. Legal moralism is only a problem if it is used to support illiberal values and "[i]t is less suspicious when it is used to uphold liberal values."[538]

Because the state must make judgements about what is good and make value judgements that affect the lives of its citizenry, state neutrality is an impossibility.[539] The reality is no one is seriously defending state neutrality – as in the state takes no moral positions. As Professor Cliteur argues, we have a great tradition in the West: it "is the tradition of critique, also religious critique, or moral autonomy, and of the *religiously neutral* or secular state."[540] All states are based on certain norms or political axioms, for instance that the individual has an inherent dignity. What the secular model tries to achieve is a state that is just and fair towards

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[533] *Ibid* at 51.
[534] *Ibid*.
[535] *Ibid* at 52.
[536] *Ibid* at 58.
[537] *Ibid*.
[538] *Ibid*.
[539] *Ibid* at 59.
[540] Cliteur, *Secular Outlook*, *supra* note 196 at 9 (emphasis added).

all its citizens, i.e. religious citizens and non-religious citizens. And it tries to treat all religions alike.[541]

Nehushtan continues, "[a]t the end of the day political and legal decision-makers must take a stand."[542] Therefore, the multicultural, plural and neutral arguments for inclusivity and respect are unsustainable based on "neutral considerations" separate and apart from the content of the conceptions of the good. To deny an evaluation of the content of an individual's values that ground their views is not showing respect to the individual since his views are being ignored.[543]

The alternative to the neutral-liberal state is the tolerant-liberal state which still values diversity and pluralism but does not see them as inherently valuable.[544] Such values are only valuable within the limits of liberalism, beyond which they may or may not be tolerated based on the core values of liberalism.

Nehushtan, as noted above, does not define "religion" because he says it is impossible to do so satisfactorily.[545] Instead, he simply sees "religion" as that which is common to Judaism, Christianity and Islam. They are his "paradigms of religion" and he addresses his arguments to their common characteristics (and others that share the same traits).[546] Nehushtan's refusal to define religion is puzzling. The idea that religion cannot be defined is obfuscating as it fails to appreciate the human experience of religion. A failure to define is a failure to engage.

Evading the complex but necessary task of defining religion evinces a disregard for the objective reality of religion. The whole purpose of scholarly research is to adopt a definition and then assess whether the definition is useful.

Nehushtan argues that religious people, because they are religious, "are likely to be more intolerant than non-religious persons, not only concerning religious or 'religious matters' but in general."[547] He asserts there are "clear and unique theoretical links between … certain types of religion, and intolerance."[548] He has formulated seven characteristics of religion that he suggests make the link between religion and intolerance.[549]

They are: (1) religion perceives maintaining the unity of a distinct community and preserving its existence as one of its main functions; (2) religion aspires to gain formal control over its believers, other religious believers and heretics alike; (3) religion perceives its traditions, customs and symbols as sacred; (4) religion has a unique perception of the 'truth'; (5) religion is 'absolute'; (6) religion prescribes unique links between religious faith, morality and the law; and (7) religion is almost always composed of intolerant values and beliefs.

Nehushtan's list of religion's troublesome characteristics are more indicative of "fundamentalist"[550] elements of the religious traditions he based his definition on – namely,

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[541] Professor Benson observes, "[s]tate neutrality…is itself a concept that cannot mean that the State takes no moral positions, but rather, that it tries as far as possible to be impartial between legitimate different positions," in "Foreword," *supra* note 234 at xxv.
[542] Nehushtan, *supra* note 11, at 61.
[543] *Ibid*.
[544] *Ibid* at 67.
[545] *Ibid* at 68.
[546] *Ibid.*
[547] *Ibid.*
[548] *Ibid*.
[549] *Ibid*.
[550] For a useful scale see Bob Altemeyer & Bruce Hunsberger, "RESEARCH: A Revised Religious Fundamentalism Scale: The Short and Sweet of It," (2004) 14:1 *The International Journal for the Psychology of Religion*, 47-54, DOI: 10.1207/s15327582ijpr1401_4.

Judaism, Christianity, and Islam. However, recent research suggests that there is a wide gap between Islam and the other two religions just mentioned. Ruud Koopmans' research[551] found that in Europe "religious fundamentalism[552] is much more widespread among Muslims than among Christian natives." Even "controlling for education, labour market status, age, gender, and marital status," for differences between the groups it was found that "they do not at all explain or even diminish the difference between Muslims and Christians." Almost half of European Muslims are fundamentalist while less than one in 25 native Christians are. While Christian young people were less likely to be fundamentalist, the same was not the case for young Muslims. Fundamentalism is directly related to "out-group hostility". Almost 60 percent of Muslims reject homosexuals as friends and 45 percent think that Jews cannot be trusted. Whereas for native Christians, 13 percent reject homosexuals as friends and 9 percent think that Jews cannot be trusted.

It is of interest to note that Sam Harris in his work *Letter to a Christian Nation*[553] excoriates Christians for their beliefs but throughout this writing he references "religious terrorism" today as being in the Islamic context.[554] It would appear that he implicates Christianity along with Islamic terrorism because Christians create suffering in service to their "religious myths" and "imaginary God."[555] For Harris, Jainism is a much more promising religion because it preaches "a doctrine of utter non-violence."[556] Christians, says Harris, lack compassion toward pregnant teenagers; they have "abused, oppressed, enslaved, insulted, tormented, tortured, and killed people in the name of God for centuries, on the basis of a theologically defensible reading of the Bible." Gone from Harris is any appreciation of the developments that have occurred in the Christian faith since the Reformation. Contemporary Christianity bears little resemblance to the caricature described by Nehushtan and Harris when they use the term "religion".

5.2.1.5 Conclusion

Nehushtan's position suggests that state enforcement of its own description of the good life is legitimate. There is no tolerance for views that are considered outside of the accepted

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[551] Ruud Koopmans, "Religious fundamentalism and out-group hostility among Muslims and Christians in Western Europe" (2013) WZB Mitteilungen, Berlin Social Science Center, online (pdf): <https://www.wzb.eu/system/files/docs/sv/iuk/koopmans_englisch_ed.pdf>.

[552] Using Bob Altermeyer and Bruce Hunsberger's work fundamentalism was defined in the study by three key elements:

- that believers should return to the eternal and unchangeable rules laid down in the past;
- that these rules allow only one interpretation and are binding for all believers;
- that religious rules have priority over secular laws.

[553] Harris, *Letter to a Christian Nation*, *supra* note 137.

[554] *Ibid* at 39, 44, 53, 81, 83-87, 91.

[555] *Ibid* at 91. Harris argues that Christians are more concerned with theology rather than human suffering. They "expend more 'moral' energy opposing abortion than fighting genocide" (25). Therefore, the moral worth of embryos concerns Christians more than the alleviation of suffering promised by stem-cell research. Christians are not concerned with teenage pregnancy or the spread of disease (28). And, since every human cell is a potential human being, Harris suggests Christian absurdity leads to the conclusion that "[e]very time you scratch your nose, you have committed a Holocaust of potential human beings" (30).

[556] *Ibid* at 11. Harris fails to mention the Anabaptist Christians who, though "fundamentalist" in many respects, also preach non-violence and have suffered greatly as a result.

state norm.[557] Nehushtan represents a claim for liberalism that has the ironic effect of being illiberal. This view suggests that there is no limit on the law's ability to interfere with the internal regulatory matters of religious communities. In other words, there is no safe space which religious communities are entitled to occupy separate and distinct from the state. This is the crux of the matter in the TWU law school case. But, it is prevalent in many other activities or organizations run by religious communities, such as seniors' residences.[558]

Nehushtan and, as we will see, Brian Leiter, rejects the collective wisdom of liberal democratic thought, of men like Burke, Oakeshott, and Hume, that has developed over the last four to five hundred years in the wake of the Reformation. Nehushtan and Leiter come from a Hobbesian position of power – the sovereign state will control. Theirs is a totalitarian regime that does not permit civil society, religious organizations in particular, to hold and practice views that are inconsistent with their sense of what is tolerant. Their interpretation of truth follows the Kuhnian view that a new paradigm is necessary that will replace the old – and with the new comes a shaming of those who cling to the old. They evince the position made earlier that a scholar's position regarding the special treatment of religion in the law is a reflection of the scholar's view of religion.[559]

To be successful in their quest there needs to be a general, well-understood theory that is consistent in its approach and capable of being fully disseminated in the body politic. There is no single focus as of yet.

To return to the revolutionary model, Popper's correction on Kuhn would be that one always has to keep open the possibility that new paradigms arise; new paradigm shifts are possible. In this sense, Kuhn is descriptive sociology; Popper is ethics. Allowing for new perspectives is the essence of fundamental rights: freedom of expression makes it possible that people will advocate the need for new paradigm shifts.

Nehushtan is right, of course, that every society accepts certain basic rules that are non-negotiable. Liberal-democratic societies cannot open the door to those who have vowed to abolish liberal-democratic societies. That was the meaning of Popper's no tolerance for the intolerant.[560] But Nehusthan goes much further than Popper in that he sees intolerance everywhere. As will be seen, TWU does not undermine liberal-democratic society. Perhaps, if

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[557] Especially is this so if the religious person is a public office holder. See: Katie Leslie, "Fire chief suspended over book controversy," *The Atlanta Journal-Constitution* (24 November 2014), online: <https://www.myajc.com/news/fire-chief-suspended-over-book-controversy/mYFsK5I6cdb7bHzNCQ21bM/>.

[558] Paula Span, "A Retirement Community Turned Away These Married Women: According to the facility's 'cohabitation policy,' marriage is between one man and one woman, 'as it is understood in the Bible,'" *The New York Times* (17 August 2018), online: <https://www.nytimes.com/2018/08/17/health/lgbt-discrimination-retirement.html>; and Calvin Freiburger, "Lesbian couple sues Christian retirement community for denying housing application," *LifeSiteNews* (20 August, 2018), online: <https://www.lifesitenews.com/news/lesbian-couple-sues-christian-retirement-community-for-denying-housing-appl>.

[559] My point is that we all must be cognizant of our own bias because our bias leads us to search for the "scientific proof" of our bias. This was Popper's view. Also Dr. Tyger Latham, noted, when describing scientific homophobia, "Scientific heterosexism operates in a very similar fashion to that of scientific racism in that it starts with a priori view - in this case the belief that homosexuality is an aberration - and then creates a body of empirical evidence designed to confirm the very theory it purports to scientifically prove." See: Tyger Latham, "Scientific Homophobia," *Psychology Today* (19 April 2011), online: <https://www.psychologytoday.com/ca/blog/therapy-matters/201104/scientific-homophobia>.

[560] Bastiaan Rijpkema, "Popper's Paradox of Democracy" (2012) 11:32 Think, 93-96.

TWU had the monopoly on education in Canada, Nehushtan would have a stronger argument. But it does not. So we have to see TWU as a small enclave where societal experiments are allowed – just as Mill envisioned.

5.2.1.6 Brian Leiter – Why Religion Should Not Be Tolerated

Leiter argues that "there is no principled reason for legal or constitutional regimes to single out religion for protection"; neither is there any moral[561] or epistemic[562] reason for "special legal solicitude" for "categorical commands" of religion that are insulated from evidence even if there is an "existential consolation."[563] The most consistently fair approach of toleration is not to allow any exemptions. Leiter maintains a sceptical stance toward tolerating religion because of the potential harm of religion.[564] Leiter's views are similar to Nehushtan and Harris.

He rejects the notion that the state ought to be neutral. Every state stands for and enacts a "Vision of the Good."[565] However, as Professor Cliteur notes, the point of secularism is to find a Vision of the Good that is acceptable to all citizens, both religious and non-religious. "Secularism is the only perspective," Cliteur maintains, "under which people of different religious persuasions can live together."[566] Searching for a "Vision of the Good" that does not take into account the entire polis – the religious and non-religious – is not taking seriously the whole enterprise of political philosophy to find a just state. Indeed Professor Dr. Iain T. Benson's work likewise explains that "secular" must not mean "non-religious" but must be "a religion-inclusive view of the secular."[567]

Suppose there is religion that is not absolutist and categorical as Leiter describes. If we are to take Leiter literally, he suggests that such innocuous religious convictions can only be granted freedom as contained in the constituent parts of constitutional protection. So, the innocuous faith could have freedom of assembly, speech and thought but not, under Leiter's view, "freedom of religion." Granted, by this approach he is preventing ISIS from claiming freedom of religion for its imams to issue fatwas, but surely our free and democratic societies are competent to distinguish between these types of religions and recognize that freedom of religion is still a concept worth keeping. Leiter argues that while the US maintains "liberty and

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[561] The "moral" arguments claim "either that there is a right to the liberty to hold the beliefs and engage in the practices of those beliefs and practices of which toleration is required; or that toleration of those beliefs and practices is essential to the realization of morally important goods. The moral arguments divide, predictably enough, into Kantian and utilitarian forms." See Leiter, *Why Tolerate*, *supra* note 12 at 15.

[562] *Ibid* at 19: "…epistemic arguments for toleration emphasize the contribution that tolerance makes to knowledge. Such arguments find their most systemic articulation in the work of John Stuart Mill. According to Mill, toleration is necessary because (1) discovering the truth (or believing what is true in the right kind of way) contributes to overall utility; and (2) we can only discover the truth (or believe what is true in the right way) in circumstances in which different beliefs and practices are permitted to flourish."

[563] *Ibid* at 67.

[564] *Ibid.*

[565] *Ibid* at 118: "… a vision, broadly speaking, of what is worthwhile or important."

[566] Cliteur, *Secular Outlook, supra* note 196 at 11. Mark Witten refers to this as "soft secularism." See Witten, "Tracking Secularism: Freedom of Religion, Education, and the Trinity Western University Law School Dispute," (2016) 79 *Saskatchewan Law Review* 215 at 216.

[567] Iain T. Benson, "Considering Secularism," in Douglas Farrow, ed, *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal & Kingston: McGill-Queen's University Press, 2004), 83-98.

equality for all" as fundamental values it nevertheless treats some things more equal than others. This is shown, says Leiter, in the fact that every child, in the US educational curriculum, must learn Darwin's theory of evolution but does not need to know the biblical view of creation. Obviously the two views are not treated equally in public policy. While Leiter is referencing the US context there is a similar notion of some "values" being treated as more important than others in Canada. For example, as we will discuss below, in the TWU case the SCC prioritized "*Charter* values" over the *Charter* right of religious freedom.

Toleration remains a virtue for the liberal state as it does for the individual. When a minority demands an exemption from laws of general applicability they are demanding "something like the virtue of toleration" – "that is, they are demanding the state suspend its pursuit of the general welfare in order to tolerate … a conscientious practice of a minority of its citizens that is incompatible with it."[568]

5.2.1.6.1 Defining Religion

Leiter describes two broad classes of argument for toleration: moral and epistemic.

The moral argument claims either a right to hold beliefs and practices requiring toleration (Kantian); or toleration of beliefs and practices as "essential to the realization of morally important goods".[569]

Of the Kantian argument, Rawls says that "[E]qual liberty of conscience is the only principle that the persons in the original position can acknowledge. They cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes."[570] Equal liberty may include religious matters of conscience but is not limited to them. "[T]hey know that they will have certain convictions about how they must act in certain circumstances – convictions rooted in reasons central to the integrity of their lives."[571]

The utilitarian argument asserts that religion is not singled out or favoured for special consideration as opposed to other important matters of conscience. The core idea is that it maximizes human well-being to protect liberty of conscience against infringement by the state.[572] Why would that be so? It is argued that being able to choose what to believe and how to live makes for a better life. Leiter grants that this "private space argument is plausible" but he questions whether it can be true as people may just be hostages "to social and economic milieux and enjoying only the illusion of choice."[573]

Epistemic arguments emphasize the contribution that tolerance makes to knowledge. Leiter relies on John Stuart Mill that toleration is necessary because 1) Discovering the truth contributes to overall utility and 2) We can only discover the truth (or believe what is true in the right way) when different beliefs and practices flourish. Mill's premise is that we should care about the truth because of the contribution that it makes to the morally valuable end of utility.[574]

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[568] Leiter, *Why Tolerate*, *supra* note 12 at 14.
[569] *Ibid* at 15.
[570] John Rawls, *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971), 214 as quoted by Leiter, *Why Tolerate*, *supra* note 12 at 16.
[571] Leiter, *Why Tolerate*, *supra* note 12 at 17.
[572] *Ibid.*
[573] *Ibid* at 18.
[574] *Ibid* at 19.

Mill's truth includes "facts" and "value" – moral truths about the best kind of lives available. Factual and moral truths have the following in common: We are not infallible – we may be wrong – therefore we ought to allow other opinions that may be true. We may have partial truth; by allowing other beliefs, we may discover the other parts to the whole truth. Even if we possess the whole truth, if we allow differing opinions we are more likely to hold our own truths for the right kinds of reasons and will be better able to confront other opinions.[575]

Mill's moral truths encompass not only beliefs but practices: "[t]he worth of different modes of life should be proved practically."[576] So one allows differing practices in order to determine which life is better.

Leiter accepts the limits (side-constraints) on how much toleration the state must display toward acts of conscience as described by Rawls and Mill.[577] Rawls concedes the liberty of conscience is to be limited only when there is a reasonable expectation that not doing so will damage the public order. Mill insists that power can only be exerted against a person's will to prevent harm to others. The most common constraint would occur when there is a "clear and present danger" as would be the case of inciting a mob to violence.

5.2.1.6.2 No Moral Need to Tolerate Religion

Leiter argues that even if there are Rawslian or Millian reasons why religion ought to be tolerated, these do not constitute a moral reason for special treatment. The Rawlsian perspective allows the person in the original position to accept some categorical demands but not that they will accept distinctively "ones whose grounding is a matter of faith."[578] As to the epistemic arguments for toleration, it hardly seems likely that knowledge is increased from an acceptance of beliefs that are insulated from evidence.[579] While the characteristics of religion – categoricity of demands conjoined with insulation from evidence – may be responsible for laudable acts such as resistance to Nazism and apartheid,[580] they also have potential for harms to well-being which gives "reason to doubt whether any utilitarian argument for tolerating religion *qua* religion will succeed."[581]

Leiter observes that religion has an existential consolation function for those who are followers. However, that is only germane if we are able to determine that those existential benefits outweigh the potential harm of the categorical demands and insulation from evidence,[582] and that such benefits could not be had by non-religious beliefs and practices. Otherwise, it is speculative. The reality is there are other ways of finding existential consolation such as meditation and therapeutic treatment.[583] Leiter concludes that religious conscience deserves toleration not because it involves religion but because it involves conscience.[584]

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[575] *Ibid* at 20.
[576] *Ibid* at 21.
[577] *Ibid* at 21-23.
[578] *Ibid* at 55.
[579] *Ibid* at 56.
[580] *Ibid* at 60.
[581] *Ibid* at 61.
[582] *Ibid* at 62.
[583] *Ibid*.
[584] *Ibid* at 64.

Religion, for Leiter, is entitled to what he calls "minimal" respect but not entitled to "affirmative" respect.[585] Minimal respect only requires that one honour the moral requirements resulting from the existence of other persons.[586] So, therefore, when you respect someone's feelings you are acknowledging how they feel, respectfully, but you are not doing more than that. An affirmative respect is to generate "prima facie obligations toward that person."[587] Here you value a person's attributes such as his genius. Leiter rejects Martha Nussbaum's argument that there needs to be a special respect for the human search for meaning that religious conscience represents. Because we are equal in our capacity for self-deception we are only entitled to toleration, based on minimal respect, as long as our self-deception, in following our religion, does not harm someone else.[588]

5.2.1.6.3 The Tolerant Society Tolerates Non-Burdening Religious Practice

Leiter suggests since there is no good moral reason for treating the nonreligious "unequally" in conscience claims, it may be argued that logically there is nothing wrong with the state extending exemptions to all claims of conscience (religious or not).[589] Leiter recognizes that would not work for three reasons: First, it would be "constitutionalizing a right to civil disobedience" and would "amount to a legalization of anarchy!"[590]

Leiter may have had Bentham's "anarchical fallacies"[591] in mind, where Bentham criticized *The Declaration of the Rights of Man and Citizen*. "Natural rights," said Bentham, "is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts."[592] The point is that any person may have highly idiosyncratic opinions that he or she is not subject to law.[593]

Second, there is the question of proof of the non-religious conscience. Religious claims, unlike the non-religious, "… typically provide evidential proxies for conscience that are much easier for courts to assess."[594] The conscience is a claim of what "one must do, no matter what – not as a matter of crass self-interest but because it is a kind of moral imperative central to one's integrity as a person, to the meaning of one's life."[595] The religious claim gives the courts a more evidentiary base for determination. Religions have texts, doctrines, commands. Membership depends on participation in practices, rituals, and ceremonies. There is no need to "peer into the depths of a man's soul"[596] to find the evidence.

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[585] *Ibid* at 69.
[586] *Ibid* at 72 in reference to Stephen L. Darwall, "Two Kinds of Respect" (1977) 88 Ethics, 36.
[587] Leiter, *Why Tolerate, supra* note 12 at 72.
[588] *Ibid* at 73.
[589] *Ibid* at 94.
[590] *Ibid*.
[591] Jeremy Bentham, "Anarchical Fallacies; Being An Examination of the Declarations of Rights Issued During the French Revolution," in *The Works of Jeremy Bentham*, vol 2, edited by John Bowring (Edinburgh: William Tait, 1843), online: *Online Library of Liberty* <http://oll.libertyfund.org/titles/1921#Bentham_0872-02_6149>.
[592] *Ibid.*
[593] Cliteur, *Secular Outlook, supra* note 196 at 115-121, provides a very stimulating discussion about one such story in Numbers 25 of the Bible, of Phinehas who murdered an Israelite man and a woman from another tribe who violated the law of God.
[594] Leiter, *Why Tolerate, supra* note 12 at 95.
[595] *Ibid*.
[596] *Ibid*.

Therefore, it is not surprising that the only supportable non-religious claims of conscience, Leiter suggests, are those that have religion-like qualities. They are "rooted in communal or group traditions and practices."[597] Examples include vegan and animal rights groups that maintain memberships. If called upon they would be able to give evidence of membership and beliefs in the same way religious groups could.

The third difficulty with extending exemptions to all claims of conscience is that it imposes burdens on those who have no claim of exemption. For example, conscientious objectors to bearing arms increase the burden for others. "If general compliance with laws is necessary to promote the 'general welfare' or the 'common good,'" says Leiter, "then selective exemptions from those laws is a morally objectionable injury to the general welfare."[598] They are called "burden-shifting exemptions."[599] Some exemptions raise no burden-shifting at all, such as religious garb, since there is no burden shifted to another non-religious person if the religious person is granted an exemption to wear religious clothing.

In offering this example, Leiter does not address the serious issues that scholars have raised concerning the strategies radical Islam use to advance their cause.[600] These scholars point out that there are two problems with religious garb. First, they argue that if officials within the state wear religious garb, this undermines the idea of a religiously neutral state.[601] Second, while they give more leeway for religious garb on the streets, there is concern that burqas and other face-covering garb make it impossible to "*vivre ensemble*" (live together).[602]

Leiter favours no exemptions from generally applicable laws for any claims of conscience, but he fears that if that were the case society would be open to "state conduct motivated by antireligious animus, but under the pretense of legitimate, neutral objectives."[603] The French policy of *laïcité* that bans religious head coverings is his example of this problem in that it appears to target only those who are Muslim. However, *laïcité* does not target only Muslims, as it applies to all citizens who wear religious and ideological symbols. I would

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[597] *Ibid* at 96.
[598] *Ibid* at 99.
[599] *Ibid* at 100.
[600] See: Paul Cliteur & Machteld Zee, "The Burqa Challenge to Europe", (2016) 23:2 *The Middle East Quarterly,* 1-8, online: http://www.meforum.org/5878/the-burqa-challenge-to-europe.
[601] Charles Taylor's Quebec Commission recommended that religious "symbols" not be permitted for "judges, Crown prosecutors, police officers, prison guards and the president and vice-president of the National Assembly of Québec," but that it would be permitted for "teachers, public servants, health professionals and all other government employees be authorized to do so." See: Quebec, Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles, *Building the Future: A Time for Reconciliation*, by Gérard Bouchard & Charles Taylor (Québec, 2008) at 271, online (pdf): https://www.mce.gouv.qc.ca/publications/CCPARDC/rapport-final-integral-en.pdf>. However, Taylor has now personally changed his position. He is now of the view that all government employees should be permitted to wear religious symbols. See: Jonathan Montpetit, "Religious garb OK for cops, judges, says Bouchard-Taylor report's co-author: Philosopher Charles Taylor backs away from controversial recommendation in report that bears his name," *CBC News* (14 February 2017), online: <http://www.cbc.ca/news/canada/montreal/charles-taylor-hijab-reasonable-accommodation-reversal-1.3982082>.
[602] Fadela Amara, a French Muslim civil rights campaigner wrote that it "is a mistake to see the veil as only a religious issue. We must remember that it is first of all a tool of oppression, alienation, discrimination, and an instrument of men's power over women. It is not an accident that men do not wear the veil." See, Karima Bennoune, "Secularism and Human Rights: A Contextual Analysis of Headscarves, Religious Expression, and Women's Equality under International Law" (2007) Columbia Journal of Transnational Law, 390-1.
[603] Leiter, *Why Tolerate, supra* note 12 at 104.

suggest that accommodating religious dress is not a heavy burden for the state. There is no material loss or expense that the state incurs because a Muslim woman wears a hijab or a Sikh wears a turban. That is not to say there could not be a loss; for example, a woman who is forced to wear a hijab against her will is something that cannot be condoned. Nor, I would suggest, should the state have to suffer loss (by means of medical expense) because a Sikh man suffers head injuries that were preventable by wearing a helmet. In other words, religious practice may result in a personal loss that is not necessarily compenstatable by the state. In any event, it has to be approached on a case by case basis.

On the other hand, "[t]he state is under no moral obligation to tolerate acts of conscience that cause harm to other persons."[604] Because it cannot be said "that religious dictates of conscience in general violate the Harm Principle," says Leiter, "a general ban on the expressions of such claims of conscience in the public sphere cannot be justified."[605]

Leiter does not distinguish between two dimensions of the "public sphere". Let us call them the society and the state. Both are public, but there the commonality ends. The state has to be religiously neutral because the state is an arbiter between the different religious claims. No liberal democracy can be a denominational state as it would violate freedom of religion in pluralist, religiously diverse societies.

France claims that a "general ban" (as per Leiter) on headscarves in the state realm (that is, public officials) is neutral and honest. However, there is a profound difference between a state-enforced religion, where all officials (state) and citizens (society) must conform to a particular religious tradition, versus individual public officials choosing to wear (or not wear) symbols that reflect their faith. The banning of religious garb for public officials rests on a mistaken notion that religion consists merely of superficial rituals or costumes rather than beliefs that shape a person's actions, outlook, speech, and behaviour.

For example, if one argues that state daycare workers or educators shouldn't be able to wear crosses or headscarves because they influence impressionable children, such logic suggests that the state cannot hire any Christians or Muslims. For, even without a crucifix, a Christian is going to act and speak according to Biblical principles. Similarly, a Muslim caregiver will presumably follow *halal* dietary restrictions, stop to pray five times a day, and show reverence for her God even if she's not wearing a hijab. Again, it seems to me the proportionality analysis is going to have to be played out on a case by case basis. The cost of accommodation for the state will be minimal (meaning no harm is caused) in some circumstances compared to deleterious effects on the believer where some articles of clothing may hold tremendous spiritual significance, as for the Sikh wearing the kirpan. Conversely, in other cases religious symbols can be very problematic – for example, members of eastern religions such as Hinduism or Jainism may want to wear a swastika but given the history of Europe that would be anathema in light of the historical reality of WWII.

Furthermore, it is worth noting that a state ban is different from a ban in society. Society ought to be the realm of diversity, where citizens have their own choices protected by constitutional and human rights. Here a ban would be a violation of freedom of religion. Accordingly, the French have no such ban.

The inevitable complication that arises here is in the interpretation of what belongs in which dimension: for instance, is a primary school public in a "state" sense or a "societal" sense? And, what are the particular circumstances at play? However, that does not prevent the

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[604] *Ibid* at 110.
[605] *Ibid* at 114.

state from putting its imprimatur on values and worldviews that are inconsistent with the claims of conscience of some of its citizens, as long as the state objective is not to suppress or coercively burden those claims but to seek some conception of the good.[606]

According to Leiter, a state may, therefore, establish a particular religion (or non-religious Vision of the Good) as long as it does not shut down other religious and non-religious claims of conscience that offer a different Vision of the Good.[607] This will depend on the cultural context of the communities affected. For example, the Bible readings in a public school in Brooklyn, with its very anti-religious culture, will not be as coercive as would be the Bible readings in a public school in a small Texas school.[608]

Leiter's argument buttresses the state's capacity to legislate generally applicable law without the worry of providing exemptions for conscience claims. The state is presumed to act in the best interests of the governed. He is willing to allow for exemptions of only minor consequence such as religious garb where there is no burden imposed on anyone or on the state in granting the exemption.

5.2.2 Concluding thoughts on Nehushtan and Leiter

Liberal democratic theory always had an awkward relationship with religious beliefs and practices. While there were strains of thought that saw religion as a public good there were also those who were wary of religion. The notion that religion or religious believers are intolerant is hardly new. 150 years ago, J. S. Mill stated that the *odium theologicum* "in a sincere bigot, is one of the most unequivocal cases of moral feeling."[609] Indeed, as Mill so rightly points out, those religious communities that broke with Rome at the time of the Reformation "were in general as little willing to permit difference of religious opinion as that church itself."[610]

Mill notes that the religious minorities realized they could not become the majority and had no choice but to work with those whom they could not convert; they had to plead for "permission to differ."[611] "It is accordingly on this battle-field, almost solely, that the rights of the individual against society have been asserted on broad grounds of principle, and the claim of society to exercise authority over dissentients, openly controverted."[612]

This is, as I argue elsewhere in this dissertation, the grounding of my assertion that it was in the granting of religious tolerance, accommodation and the treating of religion as special that laid the framework for a broad understanding of other human rights. In other words, religious freedom is the prototypical right that blazed the trail for others.[613] But even the realization amongst the various religious groups that they had to work together in maintaining freedom did not end intolerance.

"Yet so natural to mankind is intolerance in whatever they really care about," said Mill, "that religious freedom has hardly anywhere been practically realized, except where religious

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[606] *Ibid* at 117.
[607] *Ibid* at 117-121.
[608] *Ibid* at 127-128.
[609] Mill, *On Liberty, supra* note 500 at 12.
[610] *Ibid*.
[611] *Ibid* at 13.
[612] *Ibid*.
[613] See Professor Rex Ahdar's discussion on exemptions for religious and non-religious beliefs in Rex Ahdar, "Exemptions for Religion or Conscience under the Canopy of the Rule of Law" (2017) Journal of Law, Religion and State 5, 185-213.

indifference, which dislikes to have its peace disturbed by theological quarrels, has added its weight to the scale."[614]

The reality is humankind is by nature intolerant "in whatever they really care about." It matters not the subject. We do not have to go to church to see intolerance. Simply attend a soccer game wearing the opposing team's colours and you will find out what it means to have the "cold shoulder treatment." When Nehushtan suggests that intolerance is reason enough for the liberal society to not tolerate religion he is too narrow in his focus. The situation is much more complicated, as the research of Haidt and Norenzayan noted above makes clear.

Religion may, in fact, mitigate our natural tendency to intolerance by its binding together of strangers as Haidt observed in his research. Further, as will be discussed below, Nehushtan represents the current normative thinking that there is to be no moral judgement, period. However, that is an intolerance – for to say there can be no moral judgement is a moral judgement of what is acceptable.

Neither Leiter nor Nehushtan have applied a rigorous analysis of religion in their work and both have arrived at conclusions that fail to appreciate the complexity of so called "religious violence". There needs to be an awakening to the importance of research to assess which religions or what ideologies preach intolerance and what effect they have on individuals and communities that perpetrate violence. The historic, economic, and cultural factors may be even more divisive than the religious motivations which are generally blamed. Religion is often used as a justification for political ends.[615]

Benjamin Franklin, in his September 17, 1787 speech to the Federal Convention held in Philadelphia, stated:

> Most men indeed as well as most sects in Religion think themselves in possession of all truth, and that wherever others differ from them it is so far error. Steele a Protestant in a Dedication tells the Pope, that the only difference between our Churches in their opinions of the certainty of their doctrines is, the Church of Rome is infallible and the Church of England is never in the wrong. But though many private persons think almost as highly of their own infallibility as of that of their sect, few express it so naturally as a certain french lady, who in a dispute with her sister, said "I don't know how it happens, Sister but I meet with nobody but myself, that is always in the right—*Il n'y a que moi qui a toujours raison.*[616]

Franklin recognized human nature to be self-righteous in judgement and therefore intolerant of any opinion that does not harmonize with one's own. This common realization found expression in the political institutions constructed to alleviate the abuse of power that came because of that reality. Institutions of Western government provided what few other political structures permitted before – the ability of citizens to openly express and hold deep

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[614] Mill, *On Liberty, supra* note 500 at 13.

[615] Gregory M. Reichberg, Nicholas Turner & Vesselin Popovski, "Norms of war in cross-religious perspective," in Vesselin Popovski, Gregory M. Reichberg, & Nicholas Turner, eds, *World Religions and Norms of War* (New York: United Nations University, 2009), 313: "For political leaders engaged in war, there can be a strong temptation to deploy the rhetoric of religious justification, with all the increased support and protections from criticism this brings. Religious discourse can magnify and exacerbate pre-existing tensions: this effect is open to exploitation by leaders who use it to rally their troops, the public and other politicians."

[616] See "Article 7, Document 3: Benjamin Franklin to the Federal Convention" in *The Records of the Federal Convention of 1787*, vol 4, edited by Max Farrand, revised edition (New Haven and London: Yale University Press, 1937), online: *The Founders' Constitution* <http://press-pubs.uchicago.edu/founders/documents/a7s3.html>.>.

differences of opinion. But it came with the cost of bloody warfare in the wake of the Protestant Reformation.

The concept of religious freedom wherein the individual is free to believe and practice his or her own religion is very much a part of the liberal democratic emphasis on rationality,[617] individuality, and the neutrality of the state. Liberalism sees each individual person "as worthy as any other, that each must be treated with equal concern according to some coherent conception of what that means."[618]

5.2.2.1 Why the Legal Profession is in Revolt

The literature and some case law suggest at least two major political and social developments that help explain why there is a call for a legal revolution on the accommodation and legal status of religion. First is the rise of the "Secular Age" as noted by Charles Taylor, who describes our current era as going "from a society in which it was virtually impossible not to believe in God, to one in which faith, even for the staunchest believer, is one human possibility among others."[619] On the other hand, there is also the rise of intolerance in the form of religious fundamentalism – a phenomenon to which Charles Taylor's writings appear blind.[620]

Second, as society's elite has become more secular, there is a hypersensitivity toward any religious judgement on how people ought to live their lives. The academic and societal elite demand religion be a private endeavour with little to no public manifestation. References to religion, or religious influence in the law, are seen to be a residue of the oppressive institutional power of the past. Further, religion is particularly offensive as it makes claims on the morality of sexual relations.

There has been a shift in the evolution of the concepts of "private" and "public" so that enterprises that were once thought to be private, such as religious universities, have now come into the crosshairs of the "civic totalists"[621] who demand that public sexual norms must be reflected within those religious institutions.

The cause of "liberty" for these civic totalists demands that public supervision extend to the innermost sanctuary of private religious institutions in order to eliminate these religious sources of "oppression." The irony must not be lost. The civic totalists demand public interference in the private religious institution but the private religious institution cannot publicly express its religious sexual norms. The Papal adage, "Error has no rights" appears to be the modus operandi. Indeed, we may have arrived at a "Sexular Age."

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[617] However, it must be recognized that over the course of recent decades the idea that religious belief is rational has fallen off. Today the popular account is that religion is irrational as per Brian Leiter, *Why Tolerate, supra* note 12. We have come a long way since Martin Luther's statement at the Diet of Worms that he needed to be convinced by "clear argument." Philip Schaff, *History of The Christian Church*, vol 7: *Modern Christianity: The German Reformation (*Wm. B. Eerdmans Publishing Co, 1995) 304–05.

[618] Ronald Dworkin, *Law's Empire* (Belknap Press, 1986), 213.

[619] Charles Taylor, *A Secular Age* (Cambridge, Mass: Belknap Press, 2007), 3.

[620] See Cliteur, "Taylor and Dummett" supra note 509 at 1.

[621] A term coined by Stephen Macedo and used by William Galston, "Religion and the Limits of Liberal Democracy," in Douglas Farrow, ed, *Recognizing Religion in a Secular Society*: *Essays in Pluralism*, *Religion, and Public Policy* (Montreal: McGill-Queen's UP, 2004) 41, at 43.

5.2.3 The Secular Age

As noted above, coming out of the religious upheaval of the 16th and 17th centuries was a liberal philosophy and a liberal political theory that sought to ensure the primacy of the individual vis a vis the state. As philosopher Jan Narveson notes, "individual liberty is the fundamental and only legitimate concern of any just society".[622] That intellectual confidence is characteristic of liberalism, for it sees itself as a neutral, procedural process that ensures that a just state protects individualism to the full.

Yet, it is more than procedural, it is a substantive philosophical position on such things as individual freedom, the rule of law, limited government, free market, protection of private property, and so on. The collective wisdom from the Enlightenment philosophies of Locke, Rousseau, Kant, and Hume became the classical formulation of a liberal society. Succeeding generations of thinkers added to the liberal canon, such as John S. Mill with his utilitarian slant on allowing the individual maximum freedom subject only to the harm principle – that freedom extends to the point at which it causes harm to others.[623]

Classical liberalism contained the anti-religious sentiment of freethinkers, beginning with Voltaire,[624] whose common core was twofold: to criticize religion, and to affirm the importance of freedom of thought and speech.[625] It must be said that Voltaire remained a supporter of religion in the sense that he was of the view that we need religion "to preserve order among mankind."[626] That is not at all surprising considering the historical framework (i.e. the Reformation) from which this tradition emerged. Anytime there is a "groupthink", that is, a time where unstated propositions are accepted uncritically, then whenever an outlier presents an idea that challenges those underlying assumptions there is bound to be a reaction from conservatives. Yet, liberalism was mindful that allowing the individual to speak new ideas was ultimately to the benefit of all of society.

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[622] Jan Nareson, *The Libertarian Idea* (Peterborough, Canada: Broadview Press, 2001) at 13.

[623] "The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign." John Stuart Mill, "Essays on Politics and Society Part I" in *The Collected Works of John Stuart Mill*, vol 18, edited by John M. Robson (Toronto: University of Toronto Press, 1977), online: *Online Library of Liberty* <http://oll.libertyfund.org/titles/233#Mill_0223-18_900>

[624] Cliteur, *Secular Outlook, supra* note 196 at 69.

[625] *Ibid* at 71.

[626] "Religion is instituted only to preserve order among mankind, and to render them worthy of the bounty of the Deity by virtue. Everything in a religion which does not tend to this object ought to be regarded as foreign or dangerous." See *The Works of Voltaire*, vol 7 (A Philosophical Dictionary Part 5, 1764), translated by William F. Fleming (New York: E. R. DuMont, 1901), online: *Online Library of Liberty* <http://oll.libertyfund.org/titles/1660#Voltaire_0060-07_386>.

By the time of the 19th Century, J. S. Mill's work furthered the project of secularism to reduce the influence of institutional religion. Professor Maurice Cowling noted that Mill's liberalism was to replace Christianity with a 'Religion of Humanity':

> Mill's liberalism was a dogmatic, religious one, not the soothing night-comforter for which it is sometimes mistaken. Mill's object was not to free men, but to convert them, and convert them to a peculiarly exclusive, peculiarly insinuating moral doctrine. Mill wished to moralize all social activity – religion and art no less than politics and education – and to mark each with his own emphatic imprint.[627]

Mill's work has remained for many the touchstone exposition on liberal principles governing modern society that promotes a minimal state to ensure the individual lives unmolested from unnecessary state regulation and interference. A demarcation between the individual (i.e. private) interests and the state (i.e. public) interests is the significant marker. It laid the groundwork for today's secular proclivity as described by Charles Taylor below.

Freedom of speech is one of the important liberal pillars to ensure individual freedom. The ability to communicate public policy lies at the heart of public discourse and debate. Citizens must have the means to address the concerns of the age that put individual freedom at the centre.

John Rawls' hesitancy to allow "comprehensive views" (whether religious, philosophical, or moral) to dominate political interpretation resonates with liberal thought because "[c]itizens realize that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines."[628] The mischief that Rawls sought to avoid was that comprehensive doctrines have their own language and frame of reference that is understood only by those who are conversant in that doctrine. It is incomprehensible to those on the outside. Therefore, a religious comprehensive doctrine, when in the public square or "forum", must be couched in terms everyone can understand as "reasonable".[629]

Rawls' "public reason" is "the basic moral and political values that are to determine a constitutional democratic government's relation to its citizens and their relation to one another."[630] This can only be successful if those in the "public forum"[631] are able to communicate. That requires:

> …accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial. … As far as possible, the knowledge and ways of reasoning that ground our affirming the principles of justice … are to rest on the plain truths now widely accepted, or available, to citizens generally.[632]

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[627] Maurice Cowling, *Mill and Liberalism* 2nd edition (Cambridge: Cambridge University Press, 1990), il. See also Cowling's monumental work *Religion and Public Doctrine in Modern England* (Cambridge: Cambridge University Press, 2003) vol 1-3. Mill's Religion of Humanity is a product of his later work in *Three Essays on Religion* and not his *On Liber*ty. Although Mill was enamoured by Comte's Religion of Humanity he was not at all in agreement with Comte's totalitarian approach to the concept. See C. L. Ten, *Mill on Liberty* (Oxford: Clarendon Press, 1980), 146-51.

[628] John Rawls, "The Idea of Public Reason Revisited" (Summer 1997) 64 U. Chi. L. Rev. 765 at 766.

[629] *Ibid*, at 769.

[630] *Ibid* at 766.

[631] The judiciary, the government officials – especially the chief executives and legislators – and those candidates running for public office.

[632] Rawls, *Political Liberalism*, *supra* note 303 at 224-5.

Rawls' willingness to allow religious views a voice in the public forum is very similar to Greenawalt[633] and Audi,[634] who recognize the discriminatory and counter-productive nature of silencing of religious advocates. Greenawalt argues that "citizens of extremely diverse religious views can build principles of political order and social justice that do not depend on particular religious beliefs."[635]

Rawls is of the view that religious arguments can be used in dialogue with policy makers, politicians, and judges but they are not to be relied upon simply because they are religious. That is because religious views are not accessible to everyone. Instead, such religious views must have a secular, non-religious basis to be conclusive.[636] Paul Cliteur notes that secularism "is a normative or ethical creed."[637] "The secularist contends," says Cliteur, "that the best way to deal with religious differences is a morally neutral vocabulary that we all share and a morality that is not based on religion."[638] For all intents and purposes, Western democracies are secular. Religious devotion has declined dramatically in recent decades. Britain, for example, has been declared a "post Christian country" by the former Archbishop of Canterbury Rowan Williams[639] while the current office holder, Justin Welby, notes, "It is clear that, in the general sense of being founded in Christian faith, this is a Christian country. It is certainly not in terms of regular churchgoing, although altogether, across different denominations, some millions attend church services each week."[640]

"Belief in God," says Charles Taylor, "is no longer axiomatic. There are alternatives." [641] Taylor sees his work as defining the secularization thesis "more exactly."[642] The secularization

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[633] Kent Greenawalt, "Religious Convictions and Lawmaking" (1985) 84 Michigan Law Review, 352; *Religious Convictions and Political Choice* (New York: Oxford University Press, 1988); "Religious Convictions and Political Choice: Some Further Thoughts" (1990) 39 DePaul L. Rev., 1019; "The Role of Religion in a Liberal Democracy: Dilemmas and Possible Resolutions" (1993b) 35 J Church State, 503 ["Role of Religion"]; *Private Consciences and Public Reasons* (New York: Oxford University Press, 1995); "1996 Siebenthaler Lecture: Religious Liberty and Democratic Politics" (1996a) 23 N Ky L. Rev., 629; "Religious Expression in the Public Square – The Building Blocks for an Intermediate Position" (1996b) 29 Loy. L.A. L. Rev., 1411.

[634] R. Audi & N. Wolterstorff, *Religion in the Public Square: The Place of Religious Convictions in Political Debate* (Lanham: Rowman & Littlefield, 1997); Robert Audi, "The Separation of Church and State and the Obligations of Citizenship," (1989) 18 Philosophy and Public Affairs, 259-308; "Religion and the Ethics of Political Participation" (1990) 100 Ethics, 386-97; "The Place of Religious Argument in a Free and Democratic Society" (1993) 30 San Diego Law Review, 677-702.

[635] Greenawalt, "Role of Religion", *supra* note 633 at 513.

[636] For example, the Rawlsian position would be that we defend charitable status for religious organizations not because they are based on truth claims only known to the religious adherents but rather because of non-religious claims that is accessible to the public such as the utilitarian economic benefits such organizations provide society.

[637] Cliteur, *Secular Outlook, supra* note 196 at 3.

[638] *Ibid* at 4.

[639] Williams stated that Britain is "post-Christian in the sense that habitual practice for most of the population is not taken for granted. A Christian nation can sound like a nation of committed believers and we are not that. Equally, we are not a nation of dedicated secularists. It's a matter of defining terms. A Christian country as a nation of believers? No. A Christian country in the sense of still being very much saturated by this vision of the world and shaped by it? Yes." See "Britain is a 'post-Christian' country says former Archbishop," *BBC News* (27 April 2014), online: <http://www.bbc.com/news/uk-politics-27177265>.

[640] Archbishop Justin Welby, "A Christian country?" (24 April 2014), online (blog): *The Archbishop of Canterbury, Justin Welby* <http://www.archbishopofcanterbury.org/blog.php/20/a-christian-country>

[641] Taylor, *A Secular Age*, *supra* note 619 at 3.

[642] *Ibid* at 429.

theory argues that modernity tends to repress religion.[643] As the western world becomes more educated, religion will subside. At least, that was the thinking. Peter L. Berger describes it as the "process by which sectors of society and culture are removed from the domination of religious institutions and symbols."[644] It is a "secularization of consciousness" that "means that the modern West has produced an increasing number of individuals who look upon the world and their own lives without the benefit of religious interpretations."[645] For Philip R. Wood, "[a] society secularises when its people cease to believe in supernatural religions and when these religions cease to influence the government and laws of the country and to influence the morals, the way of living and culture of the country."[646] At stake between religion and government, says Wood, "is control – control of minds, control of morality and control of the laws."[647] Wood observes the law has moved away from religious influence in multiple areas of the law including family law, for example, making divorce and abortion more readily available.[648] That's because, in his view, religion becomes a matter of individual choice rather than social obligation.[649] This was the conclusion that the Supreme Court of Canada came to when it decided the federal government had the right to redefine marriage. No longer could Christianity be the source of influence on "civil marriage".[650] Individual choice to live one's life without worry of religious or societal approval is the touchstone – the liberal democratic project.

In the *Big M Drug Mart* decision, Chief Justice Dickson declared:

> The values that underlie our political and philosophic 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.[651]

The elimination of religion's dominance, that is to say, the elimination of Judeo-Christianity's role in public policy, has been an ongoing process that has become increasingly evident since WWII. This has led to a crisis in the legal system. In Kuhnian terms, we are witnessing, indeed, we are living through, the growing crisis of the legal system's paradigm of special treatment of religion that is teetering on the cliff of collapse.

However, as the dominance of Christianity has waned in the West there is rising in its place a movement of categorical analysis that has used race, gender, and sexual orientation as its framework to criticize Western civilization. This complex development has elements of neo-Marxist, black, feminist, and queer theory. It uses group identity rather than individual identity as a means of making the case that the West is oppressive against certain groups and that the oppressed must rise up and confront their oppressors. One area where this has become evident

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[643] *Ibid.*
[644] Peter L. Berger, *The Sacred Canopy: Elements of a sociological theory of religion* (New York: Anchor Books, 1967), 107.
[645] *Ibid* at 108.
[646] Wood, *supra* note 182 at 179.
[647] *Ibid* at 180.
[648] *Ibid.*
[649] *Ibid*.
[650] *Same-Sex Marriage*, *supra* note 178 at para 22: "The reference to 'Christendom' is telling. Hyde spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution."
[651] *Big M Drug Mart*, *supra* note 4 at para 123.

is the issue of sexual identity as a touchstone. For that reason, I refer to this new development as the "Sexular Age."

5.2.4 The Sexular Age and Identity Politics

There is a second development which emerges as a motivating force behind the revolutionary zeal to rid the law of religion's special protection. That development is our increasingly "sexualized culture"[652] which may be more appropriately referred to as the "Sexular Age"[653] wherein the traditional Christian norms on sexual intimacy (i.e. heterosexual monogamy within a marriage) have become an affront to the liberalizing sexual norms of current thinking. The existence of religious prohibitions on sexual expression is a target of claims of dignitary harm and intolerance toward sexual minorities even though it occurs within voluntary religious contexts.[654]

This Sexular Age, influenced as it is by post-modern thought, is combined with an intersectional analysis[655] of identity (race, gender and sexuality) politics. Identity politics claim that sexual minorities are among the victims of the white privileged colonial class that has used religion as a means of maintaining patriarchal power structures.[656] Structures that must ultimately be abolished. I will describe what I suggest is the Sexular Age and will then discuss how the intersectional analysis of identity politics, that is motivating anti-establishment activists on university campuses, makes it increasingly difficult to allow room for dialogue between sexual minorities and religious minorities.

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[652] Feona Attwood, "Sexed Up: Theorizing the Sexualization of Culture," (2016) 9:1 Sexualities, 77-94, at 78-79 writes: "'sexualized culture', a rather clumsy phrase used to indicate a number of things; a contemporary preoccupation with sexual values, practices and identities; the public shift to more permissive sexual attitudes; the proliferation of sexual texts; the emergence of new forms of sexual experience; the apparent breakdown of rules, categories and regulations designed to keep the obscene at bay; our fondness for scandals, controversies and panics around sex; all those manifestations that indicate that in our era, 'Sex . . . has become the Big Story'."

[653] Anne Hendershott, *The Politics of Deviance* (San Francisco: Encounter Books, 2002), 109: "Of all the contested terrain in the culture wars, the subject of sex has attracted the most attention – and created the most contentious debate. Whether it is disagreement over homosexual 'normativity,' the type of sex education in our children's schools, or the portrayal of sex in popular culture, there seems to be an ongoing, often raucous conversation about sex in America. We seem, in fact, to inhabit a sexualized society."

[654] Wilson Vincent, Dominic J. Parrott, & John L. Peterson, "Effects of Traditional Gender Role Norms and Religious Fundamentalism on Self-identified Heterosexual Men's Attitudes, Anger, and Aggression Toward Gay Men and Lesbians" (2011) 12:4 Psychology of Men & Masculinity, 383–400, at 396, "[H]eterosexual men's internalization of pertinent male gender role norms and religious fundamentalism is associated with aggression toward gay men and lesbians directly and indirectly via sexual prejudice and antigay anger."

[655] Kimberlé Crenshaw has been credited with articulating the intersectional analysis in her piece, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" (1989) U. Chi. Legal F. 139.

[656] David A. J. Richards, *Fundamentalism in American Religion and Law Obama's Challenge to Patriarchy's Threat to Democracy* (Cambridge University Press, 2010). See also, Nathan R. Todd, et al, "Understanding Associations between Religious Beliefs and White Privilege Attitudes" (2015) 58:4 Sociological Perspectives, 649–65.

5.2.4.1 Describing the Sexular Age

The Sexular Age is highly influenced by post-modern[657] rejection of the classical liberal society.[658] Post-modernism rejects realism.[659] There is no objective truth an individual may know or pursue. The experience of life and one's use of reason is jettisoned in favour of social subjectivism. The Sexular Age philosophy argues that traditional sexual norms are the result of social construction and human conflict.[660] Therefore, the Sexular Age is against the inherent power[661] relationships of the capitalist patriarchy.[662] The abuse of power brought about "traditional" family structures.[663] The Sexular Age demands collective egalitarianism undergirded by the notion of a Marxist socialist ideology that anticipates and works toward the socialist/sexual revolution.

Attwood notes that "[e]arlier conceptualizations of the binding love relationship – characterized by duty, family, fate or romance – are replaced by a vision of an individual love life as a series of effortless but intensely fragile encounters."[664] The "postmodern subject" is compared to a shopper that browses the shopping mall expecting "to be easily aroused and instantly gratified, and if we see what we like, we have it and worry about paying for it later. Once the novelty wears off, we discard it and move on."[665] These encounters are "investments" which may or may not be worth it. "This form of intimacy," Attwood maintains, "makes us very

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[657] See Attwood, *supra* note 652 at 87-90.

[658] Charles Lemert, *Postmodernism Is Not What You Think* (Oxford: Blackwell Publishers, 1997), 22: "[P]ostmodernism is a culture that believes there is a better world than the modern one. In particular it disapproves of modernism's uncritical assumption that European culture … is an authentic, self-evident, and true universal culture in which all the worlds people ought to believe…[it] prefers to break things up…."

[659] My description of post-modernism is taken from my analysis of Stephen R.C. Hicks' table outlining the differences between modern and post-modernism found on p. 15 of his book, *Explaining Postmodernism: Skepticism and Socialism from Rousseau to Foucault*, expanded edition (Roscoe, Illinois: Ockham's Razor Publishing, 2011).

[660] Michel Foucault, *The History of Sexuality*, translated by Robert Hurley (New York: Pantheon Books, 1978). Foucault argues, at 5, that sexual repression was "an integral part of the bourgeois order."

[661] *Ibid* at 6-7, "[W]e are conscious of defying established power, our tone of voice shows that we know we are being subversive, and we ardently conjure away the present and appeal to the future, whose day will be hastened by the contribution we believe we are making. Something that smacks of revolt, of promised freedom, of the coming age of a different law…."

[662] This is not a new sentiment, as "[t]he confluence of intense gender anxiety, a rethinking of sexual life that broke with Victorian sexual norms, and a rebellion against bourgeois society were indeed crucial elements of the modernist moment that affected a great many figures of the period." See Charles Hatten, Book Review of *Radical Modernism and Sexuality: Freud, Reich, D. H. Lawrence & Beyond* by David Seelow (2008) 17:1 Journal of the History of Sexuality, 166-168, at 167.

[663] Foucault, *supra* note 660 at 7, "What sustains our eagerness to speak of sex in terms of repression is doubtless this opportunity to speak out against the powers that be, to utter truths and promise bliss, to link together enlightenment, liberation, and manifold pleasures; to pronounce a discourse that combines the fervor of knowledge, the determination to change the laws, and the longing for the garden of earthly delights."

Chloe Taylor describes Foucault's understanding of the heterosexual family structure as follows: "The family like the prison and the asylum, does not exist because it needs to or because we have become so enlightened as to realize that it is the 'best' way to deal with certain facts about human nature. Rather, it exists as it does as the result of power struggles in which certain people lost and whose histories of resistance have been forgotten." See "Foucault and Familial Power" (2012) 27:1 Hypatia, 201 at 215.

[664] Attwood, *supra* note 652 at 88.

[665] *Ibid*.

free, but the liquid love we pursue is a constant source of uncertainty and insecurity."[666] While there may be "a sense of our own power as we browse for love, we are also uneasily aware that, for others, we are sexual commodities … and may not retain our value for them for every long."[667]

Given the human need for belonging,[668] it is necessary that those participating in a lifestyle that creates uncertainty and insecurity[669] identify with a collective that is delineated based on sexual identity. Ironically, such markers are increasingly becoming fragmented. For example, the "LGBT" acronym is now considered a relic of the 1990s and a new acronym, "LGBTQQIP2SAA," is the preferred label for a more inclusive sexual community. But it does not stop there as more labels continuously appear.[670] The concept of labelling is important to the Sexular Age because it is an attempt at inclusiveness when sexual minorities face exclusion from the wider community. This, as we will see below, is important once an intersectional analysis is applied to these identities and their relationship with society. Ironically, the greater the number of identities, the less cohesive this group appears.

The word "sexular," though not a recognized word by the Oxford English Dictionary (OED),[671] is defined by the online Urban Dictionary (UD).[672] The top definition given to the term by UD is "A sexually-appealing woman from a repressed (and often religious) culture who is rebelious [sic], secular and fun loving." Rebellious, secular and fun-loving is an apt description of our age. It highlights three overarching principles that resonate with our cultural moment. Having already canvassed the secular development above, I will consider the concept of rebellion.

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[666] *Ibid*.
[667] *Ibid*.
[668] Roy F. Baumeister & Mark R. Leary, "The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation" (1995) 117:3 Psychological Bulletin, 497-529.
[669] See Sandhya Ramrakha, et al, "The Relationship Between Multiple Sex Partners and Anxiety, Depression, and Substance Dependence Disorders: A Cohort Study" (2013) 42 Arch Sex Behav, 863–872.
[670] Bill Daley, "Why LGBT initialism keeps growing," *Chicago Tribune* (2 June 2017), online: http://www.chicagotribune.com/lifestyles/sc-lgbtqia-letters-meaning-family-0606-20170602-story.html. Recently, Dr. Barb Perry of the University of Ontario Institute of Technology held an "LGGBDTTTIQQAAPP Inclusive Training" seminar for the Elementary Teachers' Federation of Toronto. According to the poster advertising the event, as seen on Twitter #LGGBDTTTIQQAAPP, the acronym stands for: Lesbian, Gay, Genderqueer, Bisexual, Demisexual, Transgender, Transsexual, Twospirit, Intersex, Queer, Questioning, Asexual, Allies, Pansexual, Polyamorous. For a somewhat tongue-in-cheeck discussion of the "proliferation of sexual identities" listed in the acronym, see also Fred Litwin, "Not My Rights Movement" (December 2016), online: *Convivium* <https://www.convivium.ca/articles/not-my-rights-movement>.
[671] My online search of the OED on June 9, 2015 revealed the following result: "No exact match found for "sexular" in British & World English." See *Oxford Dictionary*, (Oxford University Press, 2018) sub verbo "sexular", online*: English Oxford Living Dictionary* <http://www.oxforddictionaries.com/spellcheck/english/?q=sexular>.
[672] UD is crowdsourced but a credible indicator of language development. For example, British Medical Journal articles have used it as a reference source. See: Deborah Cohen, "Worrying World of Eating Disorder Wannabes" (2007) 335:7618 British Medical Journal, 516; and Paul Keeley, "Pimp My Slang" (2007) 335:7633 British Medical Journal, 1295. My online search on July 26, 2017 revealed the following: "TOP DEFINITION – sexular: A sexually-appealing woman from a repressed (and often religious) culture who is rebelious [sic], secular and fun loving. She often wears form-fitting clothing. *That Egyptian girl is so sexular! She doesn't mind hugging and shaking hands!* by cantdecide1007 October 22, 2010," see *Urban Dictionary*, sub verbo "sexular", online: <http://www.urbandictionary.com/define.php?term=sexular>.

Rebellion connotes a refusal to be bound by norms, whether they are legal or cultural, such as those norms founded upon religious beliefs and practices.[673] It is a rejection of the idea that individuals must be bound by historical customs and attitudes. History, for the Sexular Age, has no authority to compel modern obeisance: "What is past is not dead; it is not even past. We cut ourselves off from it; we preferred to be strangers."[674] Such a position inevitably means that the lessons of history will have to be relearned in today's age. However, given the advance of technology and the capability for intolerant abuse of such technology the stakes are all that much higher.

Rebellion is manifested in an anti-religious (more often anti-Christian) sentiment. Christianity is identified with the West and seen as complicit in, if not responsible for, colonialism. The Judeo-Christian worldview has profoundly influenced our legal and moral norms. Such norms include the binary (male and female) nature of humanity. That binary understanding has a long theological history. At the beginning of human life on earth, which Christians believe was recorded in the ancient Book of Genesis,[675] God created male and female: "So God created man in His own image; in the image of God He created him; male and female He created them."[676]

Further, the Bible states, "[t]herefore a man shall leave his father and mother and be joined to his wife, and they shall become one flesh."[677] In the Christian tradition, this biblical passage is widely understood to be God's establishment of the institution of marriage. Jesus of Nazareth further expounded upon this foundational worldview by unequivocally stating:

> Have you not read that He who made them at the beginning 'made them male and female,' and said, 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh'? So then, they are no longer two but one flesh. Therefore what God has joined together, let not man separate.[678]

Western democracies and their laws were once in accord with the Judeo-Christian principle of marriage as a heterosexual, monogamous relationship.[679] It was "a society of shared social values where marriage and religion were thought to be inseparable."[680] This is no

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[673] Emile Durkheim, the founder of sociology, was convinced that society must be present in the individual and "was led to the study of religion as one of the forces that create within individuals a sense of obligation adhere to society's demands," Hendershott, *supra* note 653 at 2.

[674] Christa Wolf, *A Model Childhood*, trans. Ursula Molinaro and Hedwig Rappolt (New York: Farrar, Straus and Giroux, 1980), 3; quoted by Kathleen A. Lahey, *Are we 'persons' yet? Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999), xi.

[675] Genesis is the first book of the Christian and Jewish Scriptures.

[676] Genesis 1:27 (New King James Version [NKJV]).

[677] Genesis 2:24 (NKJV).

[678] Matthew 19:4–6 (NKJV).

[679] Don S. Browning, "Family Law and Christian Jurisprudence," in John Witte, Jr. & Frank S. Alexander, eds, *Christianity And Law: An Introduction* (Cambridge: Cambridge University Press, 2008), 169–82. See John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (1997); see also *Hyde, supra* note 482 at 133: "What, then, is the nature of this institution as understood in Christendom? Its incidents may vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs have (however varied in different countries in its minor incidents) some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."

[680] *Same-Sex Marriage, supra* note 178 at para 22.

longer the case. The late 20th and early 21st centuries marked a turning point. No longer are the religious moral norms in sync with the law regarding sexuality and marriage.[681] The advance of equality claims based on sexual orientation and the redefinition of marriage called into question the place of religious influence on law and public policy.

Ironically, the Sexular Age has religious overtones. In many ways Christianity and its norms have been displaced by a new religion, a new religious revolution. This Age embraces the body and pursues "erotic justice" as "an unexpected yet delightful pathway for spiritual renewal and replenishment."[682] Foucault declares:

> Today it is sex that serves as a support for the ancient form – so familiar and important in the West – of preaching. A great sexual sermon – which has had its subtle theologians and its popular voices – has swept through our societies over the last decades; it has chastised the old order, denounced hypocrisy, and praised the rights of the immediate and the real; it has made people dream of a New City. The Fransciscans are called to mind. And we might wonder how it is possible that the lyricism and religiosity that long accompanied the revolutionary project have, in Western industrial societies, been largely carried over to sex.[683]

Sex, "the immediate and the real," with its ecstasy of pleasure, gives life meaning. "Jerusalem" references every metropolis of the world where pleasure is experienced without fear of judgement of an angry God. The worshiping masses are singing hymns, listening to preachers of the new faith that brings liberation to all.

The emphasis of the Sexular Age is on the individual – individual freedom is maximized. So much so that even knowledge itself is an individual experience. The individual determines what counts as knowledge – with the innate ability to decipher the chaff from the wheat in all areas of life for one's self. The individual is free from the social constraints and norms of the past but is expected to accept the "truths" of those in the shadows such as Derrida and Foucault.

The individual is purportedly free from nature and culture. One does not have to be confined by natural boundaries of body, age, race, sex, or gender. The individual is the sum of all that is – the individual is the very source of creation – in fact, the individual is the creator of themselves. This rampant individualism is finding expression in the law. The communal aspect of religious organizations with membership rules stands as an affront to this trend. The law must now accommodate how the individual "feels". Thus, in the TWU case, individual students "who *feel* they have no choice but to attend TWU's proposed law school" can demand the private religious university change its rules to ensure there is no "risk of significant harm to LGBTQ people."[684] Roger Scruton describes it thus: "[y]our disapproval of my lifestyle is your problem, not mine; should you object to homosexuality, that proves only that you suffer from homophobia, a disorder of the soul that is also a hangover from an outmoded form of life. There is therefore no room now for argument about homosexuality, still less for criticism."[685] He notes that it has now become an act of aggression to say or even think the wrong thing. "The non-discrimination movement," he explains, "is about extending to others the freedom to

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[681] Sylvain Larocque, *Gay Marriage: The Story of a Canadian Social Revolution* (Lorimer, 2006).
[682] Marvin M. Ellison, *Erotic Justice: A Liberating Ethic of Sexuality* (Louisville, Kentucky: Westminister John Knox Press, 1996), 122.
[683] Foucault, *supra* note 660 at 8.
[684] *LSBC v TWU* 2018, supra note 14 at para 103, emphasis added.
[685] Scruton, "Safe Space," *supra* note 505.

choose their own identity; to criticize this is to constrain other people in their deepest being, in those 'existential choices' that determine who they are: it is an act of aggression and not just a comment."[686]

As lawyer Wood stated, "…we may be able to beat the universe. If the universe has no plan for us, then we have to have a plan for ourselves. If the universe has no god, we will make ourselves god."[687] The individual is free to forego all of the sexual moral norms of the past and choose for "them"selves what will and will not be their sole individual view in all sexual things considered. It is a rebellion against all legal and moral norms that interfere with the realization of the self.

There is no greater manifestation of this hyper-individualist position then on the subject of "sex". The word "sex" is a rather imperfect word in English. Unfortunately, the Anglo-Saxon language does not have nuanced tools to distinguish between very different thoughts. Hence, we end up using "sex" to mean "gender," being male or female; or to mean the physical and biological intercourse between a male and female that would lead, in the ordinary course of events, to pregnancy. In recent times, "sex" has come to mean the physical interaction that has as its focus the enjoyment of pleasure as an end in itself. But it is more than that.

Sex, in all its permutations, is what defines our age. It has become the focal point not for the physical gratification alone but for all it represents – the rebellion, the revolution against the past's power structures. The demand for recognition of the value of sexual pleasure is fast becoming an argument that it is a human right. The "constitutional right of sexual intimacy and bodily autonomy"[688] requires "sex-positive law,"[689] claim the legal scholars who are taking up the cause.

The Sexular Age is iconoclastic. All references, all societal norms and notions of deviancy that would limit sex to a heterosexual union that includes the expectation for a lifelong commitment of one man and one woman has become anathema. Thus, the groupthink of the collective (ironic as that is) is becoming manifest. There is dissonance with historical norms. Such heterosexual norms are viewed as social constructs meant to maintain power relationships controlling a capitalist economy for the haves against the have-nots.

The Sexular Age seeks to remove from all public and private space any reference to norms of previous generations that would in any way limit the fundamental right of the individual to do or be whatever they want – including but not limited to identity as male, female, non-sexed, or non-gendered.[690] The individual is free to choose to be in mutual

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[686] *Ibid.*

[687] Wood, *supra* note 182 at 1.

[688] Alana Chazan, "Good Vibrations: Liberating Sexuality from the Commercial Regulation of Sexual Devices" (2008-09) 18 Tex. J. Women & L. 263-304 at 264.

[689] Margo Kaplan, "Sex-Positive Law" (2014) 89 N.Y.U. L. Rev. 89-164.

[690] For example, the Gender Free ID Coalition in Canada states on its website that its vision is "To remove all gender/sex designations from identity documents." The "Problem" it sees is this:

> "Everybody's gendered identification starts with a birth certificate. The state ascribes a sex/gender marker at birth, and then "certifies" that gender. But no one knows a baby's gender at birth since gender identity takes years to be known. So the state is predictably wrong for trans people, whether they identify as the 'other' M/F gender or whether they are non-binary. And it may be wrong for intersex people. The state knows it is certifying as true something it cannot know to be true. Trans and intersex people bear the burden of gendered ID that doesn't match their gender."

See: "Home: End State-Assigned Gender!" (last accessed October 2018), online: *Gender Free ID Coalition* <http://gender-freeidcoalition.ca/>. The Coalition claimed the world's first baby given a gender-neutral ID card, see: Zamira Rahim, "Canadian baby given health card without sex designation," *CNN* (4 July 2017),

relationships with whomever and how many they so choose, for whatever purpose, or however long. The ultimate right of the individual to choose for themselves whatever sexual identity they desire is paramount. The right to seek "freedom to experience the full range of human emotions, behavior and relationships, without gender defined constraints"[691] is championed.

The Sexular Age claims that individuals should not be forced into a pre-determined sexual identity based on biology and culture.[692] Yet, at its core, it seeks to create a collective identity based on sexual orientation. Paradoxically, it claims to be hyper-individualistic, but it is also collectivistic in telling the individual what a member of a sexual minority must believe that membership signifies. The inherent contradiction of this approach is yet to reach its apogee. Already there are signs that the coalition of minorities is strained.

Before closing this very brief introduction to "The Sexular Age," I think it is worth noting just how far our liberal democracy has strayed from its historical roots. John S. Mill, who is best known for his "harm principle," which is the touchstone of our society's emphasis on individual freedom, saw chasity as an ideal way of living.[693] Society, in his view, ought to discover "how to obtain the greatest amount of chasity."[694] For him it was "an essential part of moral training"[695] for married couples to refrain from sex. "[M]y deliberate opinion," said Mill, "[is] that any great improvement in human life is not to be looked for so long as the animal instinct of sex occupies the absurdly disproportionate place it does."[696] Put in this light, the Canadian legal profession's disdain of TWU's Community Covenant on sexual relations while in school would be held in a rather dim view by Mill, who remains arguably the most celebrated prophetic philosopher of liberal democracy.[697]

5.2.4.2 The Right Not to Be Offended

In 1993, Eden Jacobowitz, an Israeli-born student at the University of Pennsylvania, shouted out his dorm window "Shut up, you water buffalo!" at a group of noisy African-

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online: <http://www.cnn.com/2017/07/04/health/canadian-baby-gender-designation/index.html>.

[691] Sylvia A. Law, "Homosexuality and the Social Meaning of Gender" (1988) Wis. L. Rev. 187 at 232.

[692] Roger Scruton warns, "It may be that human nature, which enjoins us to love, imposes upon us the religious, civil and legal institutions that abounded everywhere in the world, until exultant intellectuals decided that the time had come to dispense with them. No account of erotic love will be either politically innocent or politically neutral. And it will be the greatest error of a political system that it overlooks the demands of love." Roger Scruton, *Sexual Desire: A Philosophical Investigation* (London & New York: Continuum, 2006), 360-361.

[693] Larsen, *supra* note 182 at 4.

[694] Letter from Mill to Lord Amberley, 2 February 1870, quoted by Larsen, *supra* note 182 at 4.

[695] Letter from Mill to Edward Herford, 22 January 1850, quoted by Larsen, *supra* note 182 at 4.

[696] J. S. Mill, diary entry for 26 March 1854, quoted by Larsen, *supra* note 182 at 4.

[697] John Robson quipped, "It's not even obvious to me how much injury a young liberal, gay or straight, would really suffer by experimenting with a few years without sex and see if they exploded, assuming they didn't sneak off and do the deed. But even if they didn't end up liking or learning from it, it would have been voluntary. Instead, the Court ruled that Canada can't have one single small remote law school where people you don't know refrain from sex you like." See John Robson, "The Supreme Court just enforced conformity ... to protect diversity, of course," *National Post*, (19 June 2018), online: <https://nationalpost.com/opinion/john-robson-the-supreme-court-just-enforced-conformity-to-protect-diversity-of-course>.

American women.[698] This incident got international press because of the university's extreme reaction in punishing the student for uttering an apparent racial slur. In fact, the term "water buffalo" is a translation of the Hebrew word, "behayma," which is a put-down describing an "uncouth individual." On May 7, 1993, the Toronto Star ran the headline, "Exactly What Race Is a Water Buffalo?"[699] Greg Lukianoff and Jonathan Haidt observe, with chagrin, that claims of a right not to be offended have continued to rise since this incident. And, unfortunately, universities have continued to privilege such claims.[700]

Anti-religion activists claim a right not to be offended. Such claimants demand the special legal status of religion be removed because of their offense taken to the religious views on sexual morality. This is evident in the TWU law school case when LGBTQ groups demanded that the university be forced to change its admissions policy because "it hurts."[701] They convinced the Ontario courts of their position but not the courts in Nova Scotia or British Columbia. The BC Court of Appeal addressed the issue head on:

> While there is no doubt that the Covenant's refusal to accept LGBTQ expressions of sexuality is deeply offensive and hurtful to the LGBTQ community, and we do not in any way wish to minimize that effect, there is no *Charter* or other legal right to be free from views that offend and contradict an individual's strongly held beliefs, absent the kind of "hate speech" described by the SCC in *Whatcott* that could incite harm against others. … Disagreement and discomfort with the views of others is unavoidable in a free and democratic society.[702]

As the BC Court of Appeal noted further, "the language of 'offense and hurt' is not helpful in balancing competing rights. The beliefs expressed by some Benchers and members of the Law Society that the evangelical Christian community's view of marriage is 'abhorrent', 'archaic' and 'hypocritical' would no doubt be deeply offensive and hurtful to members of that community."[703]

That view, however, was deemed unacceptable by the SCC, who claimed that more is at stake than simply "disagreement and discomfort" with views that some will find offensive. Religious freedom can be limited where its beliefs or practices injure the rights of others to hold their own opinions, and where it "offends the public perception that freedom of religion includes freedom from religion." That, of course, presumes the Court has a very good understanding and knowledge of "public perception" and not simply the echo chamber that is the legal profession.[704] University professors and administrators appear to be "circling the wagons" around those who claim to be offended. There is little tolerance for any questioning of

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[698] Michael deCourcy Hinds, "A Campus Case: Speech or Harassment?" *The New York Times* (15 May 1993), online: http://www.nytimes.com/1993/05/15/us/a-campus-case-speech-or-harassment.html?pagewanted=all

[699] *Ibid.*

[700] Lukianoff & Haidt, *supra* note 114 at 47.

[701] See Justice MacPherson's statement, "My conclusion is a simple one: the part of TWU's Community Covenant in issue in this appeal is deeply discriminatory to the LGBTQ community, and it hurts," in *Trinity Western University v. The Law Society of Upper Canada*, 2016 ONCA 518 at 119 [*TWU* ONCA 2016].

[702] *TWU* BCCA 2016, *supra* note 478 at para 188. See also *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467, 2013 SCC 11, paras 82, 89-90 and 111 [*Whatcott*].

[703] *TWU* BCCA 2016, *supra* note 478, at para 189.

[704] *LSBC v TWU* 2018, *supra* note 14 at para 101.

"the reasonableness (let alone the sincerity) of someone's emotional state, particularly if those emotions are linked to one's group identity."[705]

Lukianoff and Haidt note that "'I'm offended' becomes an unbeatable trump card."[706] They suggest that "[s]chools may be training students in thinking styles that will damage their careers and friendships, along with their mental health."[707]

There is virtually no limit to where this perceived right of not being offended may lead. Consider our cultural moment where the University of Virginia President was openly chastised for having the temerity to quote from Thomas Jefferson, the University's founder. The opposition came from the University's professors and students who were offended that the founder was a slave owner.[708] Gone is the critical ability to appreciate the dissonance of the past with today's morality to understand Jefferson's own ideal. His aspiration for the University was that "this institution will be based on the illimitable freedom of the human mind. For here we are not afraid to follow truth wherever it may lead, nor to tolerate any error so long as reason is left free to combat it."[709] The current logic that would reject such words of Jefferson based on our retroactive sense of morality would presumably also reject the legitimacy of the American Declaration of Independence since it was written by Jefferson.

As author Bruce Bawer observed, even though America did not live up to its creed as stated in the Declaration – "that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness" – "it was in fact the very thing that made moral progress in America not only possible but inevitable."[710]

Bawer agrees with historian Arthur Schlesinger Jr.,[711] that "[t]he most disastrous by-product of the civil rights movement was multiculturalism, a philosophy that teaches … that America is not a nation of individuals at all but a nation of groups."[712] The tragic irony is that at the point of social and economic advancement where the ideal of America was within its grasp, there has been a rejection of national identity based on individual liberty and its vision of full equality. Today's approach in the university humanities and among society's elite is not the aspiration to an ideal of individual rights but of "group identity and culture."[713]

While Bawer and Schlesinger analyse the American context, Canada is different in that s. 27 of the *Charter* has enshrined the concept of multiculturalism as a positive good for our liberal democracy. In other words, Canada embodies liberal democratic principles by promoting diverse views rather than enforcing a single state morality or culture. The irony of

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[705] Lukianoff & Haidt, *supra* note 114 at 47.
[706] *Ibid.*
[707] *Ibid* at 48.
[708] Kate Bellows, "Professors ask Sullivan to stop quoting Jefferson: Faculty, students believe Jefferson shouldn't be included in emails," *The Cavalier Daily* (13 November 2016), online: <http://www.cavalierdaily.com/article/2016/11/professors-ask-sullivan-to-stop-quoting-jefferson>.
[709] Letter from Thomas Jefferson to William Roscoe (27 December 1820), University of Virginia Press, online: *Founders Early Access* <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-04-02-02-1712>.
[710] Bruce Bawer, *The Victims' Revolution: The Rise of Identity Studies and the Closing of the Liberal Mind* (New York: HarperCollins, 2012), xiii.
[711] Arthur M. Schlesinger Jr., *The Disuniting of America: Reflections on a Multicultural Society*, revised edition (New York, W.W. Norton & Company, 1998).
[712] Bawer, *supra* note 710 at xiii, quoting Schlesinger, *supra* note 711 at 20.
[713] Bawer, *supra* note 710 at xiii.

the SCC's recent TWU decisions is that they belie that very principle and indeed have adopted the idea that the state knows best.

The groupthink approach of identity politics has rejected the liberal democratic project of maximizing individual freedom and instead has adopted a "cult of victimhood" that has cloaked itself within a Marxist ideological analysis that foments a revolution against liberal society. Gone, in America at least, is the Jeffersonian ideal of rationality and objective truth ("to follow wherever it may lead"). Instead, there is a fixation on group identity and preoccupation with the historical grievances of certain group identities.[714]

Bawer is robust in his criticism. University students are unable to say anything fresh or insightful about their experiences and observations because they are "prisoners of a mind-set and jargon." Bawer points out that the end result is the reduction of the "rich complexities and ambiguities of human life to simple formulas" such as the "oppressors and oppressed, capitalists and workers, Western imperialists and their non-Western victims." When faced with a reality outside of their paradigm they are incapable of responding to it "other than to make statements that are demonstrably untrue."[715]

The postmodern thought, Bawer explains, begins with the anthropologist Franz Boas who argued that "no culture is superior to any other."[716] Boas' thought was built upon by others such as Clifford Geertz, who doubted the universality of Western norms and principles.[717] With no universal truths or transcendent possibilities into seeking the meaning of life, individual liberty is abandoned and there is nothing but the power analysis of the "triumvirate of isms – colonialism, imperialism, capitalism – and with a three-headed monster of victimhood: class, race and gender expression." [718] The purpose of the humanities to seek the wisdom of Western civilization, thought and art – in essence the passing on of the cultural baton to the next generation – has been replaced with a self-deprecation "to unmask the West as a perpetrator of injustice around the globe."[719]

History professor Alan Charles Kors suggest that there are three works[720] that undergird today's political mentality: Antonio Gramsci's *Prison Notebooks*[721]; Paulo Freire's *Pedagogy of the Oppressed*[722]; and Frantz Fanon's *The Wretched of the Earth*.

Gramsci, a Sardinian Marxist, was imprisoned by Mussolini from 1926-1934 and wrote thirty-three notebooks while in prison. His concept of hegemony has become the basis of much political thought among today's activist groups. It holds that freedom in Western capitalist countries is an illusion. People are kept in line by an invisible power that they internalize and obey unwittingly. As a result, it is a more potent power than the power of dictatorships because it is unseen and that, in turn, makes it harder to resist. Therefore, the path to the socialist

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[714] *Ibid* at xvi.
[715] *Ibid* at 3.
[716] *Ibid* at 9.
[717] *Ibid* at 10. Clifford Geertz, *The Interpretation of Cultures* (New York, Basic Books, 1973), at 43 argues, "the notion that the essence of what it means to be human is most clearly revealed in those features of human culture that are universal rather than in those that are distinctive to this people or that is a prejudice we are not necessarily obliged to share."
[718] Bawer, *supra* note 710 at 12.
[719] *Ibid*.
[720] Arthur Herman, *The Idea of Decline in Western History* (New York: The Free Press, 1997) has a different list of three "Modern French Prophets" being the source our cultural pessimism – Sartre, Foucault and Fanon.
[721] Antonio Gramsci, *Prison Notebooks* (New York: Columbia University Press, 2011), vol 1-3.
[722] Paulo Freire, *Pedagogy of the Oppressed* (New York: Continuum Books, 1993), online: *Bob Corbett*, Webster University <http://faculty.webster.edu/corbetre/philosophy/education/freire/freire-1.html>.

revolution in the West, according to Gramsci, is through a re-education of the populace where society's current elite is replaced by a new elite. The "subaltern classes must generate their own 'organic intellectuals' capable of creating new forms of hegemony by shattering the universalistic claims of older worldviews."[723]

Freire, of Brazil, was at one time imprisoned for teaching illiterate laborers to read and write and later worked at the United Nations. His *Pedagogy of the Oppressed* rejects the West's emphasis on individualism because it suppresses individuals' ability to recognize their oppression and therefore denies them the tools to resist.[724] The oppressed need to be educated as to their oppression and revolt against the oppressors. "Violence is initiated by those who oppress, who exploit, who fail others as persons," says Freire, "not by those who are oppressed, exploited, and unrecognized… It is not the helpless … who initiate terror, but the violent."[725]

Freire states that the oppressed have the right to rebel and "the act of rebellion by the oppressed (an act which is always, or nearly always, as violent as the initial violence of the oppressors) can initiate love."[726] Since "the violence of the oppressors prevents the oppressed from being fully human," says Freire, then "the response of the latter to this violence is grounded in the desire to pursue the right to be human." Oppressors are dehumanizing those whose rights they violate as well as themselves. When the oppressed rise up and fight back they not only take away the oppressors' power but "they restore to the oppressors the humanity they had lost in the exercise of oppression."[727] Violence for Freire is thus the means of liberating the oppressed and saving the oppressors from themselves. It is an act of love for humanity.

Fanon, of Martinique, was a psychiatrist in Algeria during the rebellion against France. Fanon disdains the West's colonizing of the non-Western countries. He calls for a revolution against the colonizers and predicts the liberation that follows will usher in a time where family and tribal conflicts will pass. "[V]iolence of the colonized," will bind the people together against the violence of the colonists and the violence will be a "cleansing force. It rids the colonized of their inferiority complex, of their passive and despairing attitude. It emboldens them, and restores their self-confidence."[728] In the end truth is not of the individual – "[n]obody has a monopoly on truth, neither the leader nor the militant. The search for truth in local situations is the responsibility of the community."[729]

Both Kors and Bawer argue that the ideas of Gramsci, Freire and Fanon seeded the political ideology of the humanities in today's universities. But there are more than these three.

Edward Said describes himself as a Palestinian from Cairo and served much of his career as an American university professor. His 1978 book *Orientalism*[730] argues that European scholarship of the Orient was tainted by the cultural biases of the scholar. Any scholar builds upon the work of those before him or her. He says there is a "consensus: certain things, certain types of statement, certain types of work have seemed for the Orientalist correct." This is then

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[723] Dwight B. Billings, "Religion as Opposition: A Gramscian Analysis" (July 1990) 96:1 American Journal of Sociology, 1-31 at 7.
[724] Bawer, *supra* note 710 at 17.
[725] Freire, *supra* note 722.
[726] *Ibid*.
[727] *Ibid.*
[728] Frantz Fanon, *The Wretched of the Earth*, translated by Richard Philcox (New York: Grove Press, 1963, 2004), 51.
[729] *Ibid* at 139.
[730] Edward W. Said, *Orientalism* (New York: Vintage Books, 1978, 1994).

passed on to new scholars. Orientalism is a "regularized…writing, vision, and study, dominated by imperatives, perspectives and ideological biases ostensibly suited to the Orient. The Orient is taught, researched, administered, and pronounced upon in certain discrete ways."[731]

"In one fell swoop," says Bawer, Said's book, "scrapped the credibility of distinguished scholars who had encyclopedic knowledge of those cultures … any criticism by a Westerner of any aspect of a non-Western culture was, by its very nature, illegitimate."[732]

Gramsci's articulation of the unseen power manipulation that is evident in Western society was given further impetus with the concept of "intersectionality" that arose within Black feminist thought.

Kimberlé Crenshaw is the co-founder of The African American Policy Forum (AAPF), the USA's "leading gender and racial equity think tank."[733] In 1989 Crenshaw published an influential article[734] that introduced the concept of "intersectionality." Her article claimed that the legal categories used in discrimination law were inadequate if they could not be combined. For example, a black woman may face discrimination based on both her gender and her race as a unique combination that has separate consequences than if the grounds were "mutually exclusive categories of experience and analysis."[735] In other words, she is "multiply-burdened" by race and gender.[736]

The multiply-burdened discrimination is magnified since "intersectional experience is greater than the sum of racism and sexism" and if "any analysis" "does not take intersectionality into account [it] cannot sufficiently address the particular manner in which Black women are subordinated."[737] Crenshaw called for a rethinking of the discrimination analysis to make sure it that takes into account the intersectionality of the different categories of discrimination.

As she explained, a black woman has a very different experience than a white woman. White women, Crenshaw argues, share "many of the same cultural, economic and social characteristics" of white men and "ignore how their own race functions to mitigate some aspects of sexism and, moreover, how it often privileges them over and contributes to the domination of other women."[738]

For Crenshaw:

> … the failure to embrace the complexities of compoundedness is not simply a matter of political will, but is also due to the influence of a way of thinking about discrimination which structures politics so that struggles are categorized as singular issues. Moreover, this structure imports a descriptive and normative view of society that reinforces the status quo.[739]

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[731] *Ibid* at 202.
[732] Bawer, *supra* note 710 at 25.
[733] "Publications" (last accessed October 2018), online: *AAPF* <http://www.aapf.org/publications/>.
[734] Crenshaw, *supra* note 655. See also: S. Cho, K. Williams Crenshaw, & L. McCall, "Toward a Field of Intersectionality Studies: Theory, Applications, And Praxis" (2013) 38:4 Signs: Journal of Women In Culture & Society, 785–810.
[735] Crenshaw, *supra* note 655 at 139.
[736] *Ibid* at 140.
[737] *Ibid.*
[738] *Ibid* at 154.
[739] *Ibid* at 166-167.

Since Crenshaw's piece in 1989, "intersectionality" has been applied to many axes of social divisions "that work together and influence each other."[740] "Intersectionality as an analytic tool gives people better access to the complexity of the world and of themselves," say sociology professors Patricia Hill Collins and Sirma Bilge. It:

> examines how power relations are intertwined and mutually constructing. Race, class, gender, sexuality, disability, ethnicity, nation, religion, and age are categories of analysis, terms that reference important social divisions. But they are also categories that gain meaning from power relations of racism, sexism, heterosexism, and class exploitation.[741]

The basic assumption of intersectionality is that categories do not stand alone but are "permeated by other categories … always in the process of creating and being created by dynamics of power."[742] This assumption is then applied to another concept, common in the literature, coined by Professor Collins, the "matrix of domination."[743] The matrix recognizes the "complexity of privilege" that manifests itself in various forms based on race, gender, class, ethnicity, or sexual orientation.[744]

The matrix postulates various degrees of privilege – the middle-class, straight, white Anglo man has the unique status of being considered the "White Privileged" on the one end, with the subordinate group being the lower-class lesbian woman of colour on the other end. Most people fall in between these extremes and may yet have some form of privilege. For example, a working-class white man has vestiges of white privilege but would bristle at the idea of having any privilege (white, male, straight) because of his socio-economic status. The argument being made is that this defensive posture and blindness to privilege is a source of conflict "as subordinate groups try to organize against their own oppression."[745]

This analysis views white privilege and "whiteness as a social identity" being of a recent development from the capitalist forces and the class system of the United States in the nineteenth century.[746] The class system and capitalist forces had the effect of pitting the poorer whites against the blacks during worker unrest as a mechanism to change the focus away from the oppression emanating from the capitalists. Through this process capitalists were able to maintain control and power over the poorer classes.

The intersectional approach to public grievance for the disadvantaged groups, based on the different categorical identities, limits what those who are not of that group can express concerning any public policy matters affecting the victim group. For example, the white, straight, Anglo-male has no ability to express an opinion on a government policy that addresses the concerns of or affects the black, lesbian, woman.

This leads to an environment of hypersensitivity. Language has come under increased scrutiny to such a scale that even asking an Asian American or Latino American where they are from is taken as an aggressive interaction (a "microaggression") because it implies they are not

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[740] Patricia Hill Collins & Sirma Bilge, *Intersectionality* (Cambridge: Polity Press, 2016).
[741] *Ibid*.
[742] Cho, Crenshaw & McCall, *supra* note 734 at 795.
[743] Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness, and the Politics of Empowerment,* 2nd edition (New York: Routledge, 2000), 23. See also: Elizabeth Higginbotham, "Reflections On The Early Contributions Of Patricia Hill Collins" (2012) 26:1 Gender and Society, 23-27, at 25.
[744] Allan G. Johnson, "Matrix of Domination," in George Ritzer, *Encyclopedia of Social Theory* (Thousand Oaks, CA: Sage Publications, 2005), 484.
[745] *Ibid* at 484.
[746] Collins, *supra* note 743 at 50; and Johnson, *supra* note 744 at 484.

a true or real Americans. Greg Lukianoff and Jonathan Haidt in describing that scenario state, "Microaggressions are small actions or word choices that seem on their face to have no malicious intent but that are thought of as a kind of violence nonetheless."[747]

Thus, in the universities professors are expected to give "trigger warnings" alerting students to possible material taught by the professors that "might cause a strong emotional response."[748]

The aim of this movement according to Lukianoff and Haidt is to make university campuses "'safe places' where young adults are shielded from works and ideas that make some uncomfortable … [and] to punish anyone who interferes with that aim, even accidentally."[749] Lukianoff and Haidt coined the term "vindictive protectiveness" to describe this attitude. No longer are university students learning how to think (that method of critical thinking that undergirded Western intellectual acumen and led to the West's advances in science and technology), nor how to challenge their own presuppositions and beliefs. Instead, students are unable to cope with ideas and concepts different from their own. Lukianoff and Haidt warn that it "may be teaching students to think pathologically."[750]

Lukianoff and Haidt suggest that there are a number of possible explanations for this state of affairs.[751] They speculate that the current generation may be suffering from the effects of parental hyper-protection that came as a reaction to increasing incidents of violent child abduction; as well as the increased political polarization resulting from the demonization of partisan opponents which makes compromise impossible.

The moral judgements against the opposition in this atmosphere are reinforced by group identity so that any acknowledgement of merit to the other side is seen as a weakness. It is the "morality binds and blinds" concept referred to earlier in this book that prioritizes group identity over individual thought and analysis that may contradict the group. Social media, according to Lukianoff and Haidt, exacerbates the situation as this tech savvy generation joins in social movements that strengthen solidarity with the *cause du jour*.

Unfortunately, this development involves a tendency for "emotional reasoning" that assumes that emotions reflect the reality of things – "I feel it, therefore it must be true."[752] However, subjective feelings can never be the sole determination of reality. Lukinoff and Haidt observe that if emotional reasoning is left unrestrained then individuals will lash out at those who have done nothing wrong. To suggest that another is "offensive" is to now say they committed an objective wrong. While the sentiment underlying the prevention of hurtful speech to underprivileged groups was, as Lukianoff and Haidt note, "laudable … it quickly produced some absurd results."[753] Results such as the "water buffalo" incident.

Professor Kors observes that "[w]hat we're seeing now is a revolution of rising expectations. When you're totally oppressed, small things don't bother you. When great progress occurs, the remaining discriminations, however slight, become unbearable."[754] In

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[747] Lukianoff & Haidt, *supra* note 114 at 44.
[748] *Ibid*.
[749] *Ibid*.
[750] *Ibid* at 45. This is particularly ironic in light of accusations levelled against TWU, that a Christian environment would be inimical to critical thought or open debate. See also Roger Scruton, "Safe Space," *supra* note 505.
[751] What follows is a synopsis of Lukianoff & Haidt's discussion in "The Coddling of the American Mind" at 45.
[752] Lukianoff & Haidt, *supra* note 114 at 46.
[753] *Ibid*.
[754] Bawer, *supra* note 710 at 339.

Kors' view, university professors have not given their students "any sense of history. These kids don't understand the vast difference between being black or gay or female then – and now."[755]

The inability to see the progress made in human rights in the West and the inability to live with dissonance because of identity politics makes it very difficult for groups to reconcile differences. Economic and social progress, as Kors' comments suggest, has not alleviated discontent but has resulted in hypersensitivity toward difference. Society has become wealthier and the poverty line has increased compared to previous generations[756] but the resentments based on inequality have become more pronounced.

There is a disconnect, professor Kors points out, between what universities claim is being taught and what is, in fact, taught under the rubric of "public multiculturalism." The claim is that it will be a study to develop "a deep appreciation of the diversity of human cultures." However, universities teach that "there is one dominant culture in the West – Greek, Judeo-Christian, and Enlightenment in its sources" that is "the enemy of authentic debate, human freedom and altruism everywhere. Capitalistic, sexist, racist, and Euro-centric, spreading ignorance and injustice, despotic power, and poverty everywhere."[757] Kors jokingly suggests, "[t]hat must be why people flee the West and why no one wants in."[758]

The irony of the "multiculturalists" is not lost on Kors:

> The so-called multiculturalists do not [mean], and have never meant, the study and the appreciation of evangelical Protestant culture, of traditionalists Catholic culture, of Black-American Pentecostal culture, or, indeed, the place of faith in Black and Hispanic American life, let alone the gender roles of Orthodox Jewish culture. They do not mean the study and appreciation of any assimilationist immigrant culture, or of White southern rural cultures.
>
> They also do not mean the serious study of West-African Benin culture, or the serious study of Confucian culture. Both requiring linguistic accomplishment and rigorous inquiry to achieve understanding. All they mean is the appreciation, the celebration, and the deep study of those intellectuals who think exactly the way that they do about the nature and causes of oppression wherever they are found, or, however non-representative those thinkers are, of the broader groups they allegedly represent and speak for.
>
> Further, their view is a humanly and a morally impoverished notion of diversity. Race, sex, and sexuality, as if each of these had one appropriate worldview and voice, but not religion, class, psychological type, taste or private passions and moral commitments.
>
> In terms of what is, in fact, a far more significant diversity on our campuses, students on the one hand, who affirm life, and on the other, students who are fearful, depressed, and fatalistic, the university is exhibiting a deep racialism and misogyny themselves. [They] assume that ego, strength correlates

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[755] *Ibid* at 339-340.

[756] Lee Rainwater & Timothy M. Smeeding, *Poor Kids in a Rich Country: America's Children in Comparative Perspective* (New York: Russell Sage Foundation, 2003), at 147 defines "Poverty is the condition of being excluded from the life made possible by the customary level of consumption."

[757] Alan Charles Kors, "The Betrayal of Liberty on America's Campuses" (Spring 2016) Pope Lecture, online (video): *The Clemson Institute for the Study of Capitalism* <https://www.youtube.com/watch?v=Y_2wbC8rkzw>.

[758] *Ibid*.

to externalities and that whites, Christian men and heterosexuals have it, whereas blacks, women and gays do not.

So while Christian students are asked to bear any number of affronts to their beliefs in the name of academic freedom, as is proper, a woman or a black on our campuses must be protected from the punchline of a joke? As if women and blacks were too weak to live with freedom or with the Bill of Rights? If you come to any moral conclusion from any thing I say let it be this: no one who tells you that you are too weak to live with freedom is your friend.[759]

Kors maintains that this thinking is a rejection of "the reality of individual human life…. This is identity by blood. This is racialist fascism, in my view, not human decency of recognition of the complexity of real human life."[760]

The problem with identity as the basis of analysis is that it moves the focus away from the complexity of each person (made up of many factors including family history, experience, education, class) to a stereotype (often racist and bigoted) of the identity characteristic of the individual as being part of a collective identity. The fixation on identity that is currently manifested is more akin to tribalism. There is no allowance given to individual uniqueness that is not part of an expected tribe narrative. Such a fixation on the "tribe" ("all 'people of colour' are oppressed") is itself an oppressive ideology where truth has no currency against the pursuit of power. "Power," as Lord Acton quipped, "tends to corrupt and absolute power corrupts absolutely"[761] is on point. The pursuit of power for its own sake is destructive.

One's identity is not the sum of who one is. Experiences of life – from family dynamics, childhood locale to education – are among a myriad of things that make us who we are individually. Our race, class, sexual orientation is part of the personal matrix, but it cannot be said to be the sole determiner of who we are or have any bearing on the worth of an argument we might make. An argument rises or falls on its own right, not the person's identity who makes it. This gets us back to the Popperian view of the importance of avoiding all forms of authoritarianism – including that which is based on identity.

5.3 Crisis Applied: The Jurisprudence

"The basic nature of the common law," Justice Ivan Rand noted, "lies in its flexible process of traditional reasoning upon significant social and political matter" [sic].[762] Therefore, given the changing religio-socio-political dynamics and demographics in Canada over the last 40 years, we may expect to see the jurisprudence of the Supreme Court of Canada evolve regarding the law's definition of "religion," and religious freedom. As will be noted below, legal scholars have concluded that such an evolution has occurred. I suggest that there are at least three dramatic changes in Canada that have led to a changing definition of religion and its protection: first, the country adopted the *Canadian Charter of Rights* as part of its Constitution, being the supreme law; second, the rise of non-Christian immigrant groups; and third, the decline of religious affiliation in the population. Such dynamics were to have a profound impact on the law.

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[759] *Ibid.*
[760] *Ibid*.
[761] Lord Acton, "Lord Acton writes to Bishop Creighton" (1887), online: *Online Library of Liberty* <http://oll.libertyfund.org/quote/214>
[762] *Boucher, supra* note 380 at 286.

The religious affiliations of Canadians have morphed from a dominant Christian (Protestant and Roman Catholic) focus to a more diverse religious affiliation. According to the Pew Forum Foundation, whereas 88% of Canadians identified as Christian in 1971, that number declined to 66% in 2011. Meanwhile the "other religion" category rose to 11% and those "religiously unaffiliated" rose to 24%.[763] Indeed, if anything is certain it is that there has been a dramatic rise of the "religiously unaffiliated," also known as the "nones."[764]

This development may help explain the willingness of young lawyers who are prepared to take part in the legal revolution against the law's historic position that treated religion as special, as is evidenced in their opposition to TWU's bid for a law school. More on that later. For now, it is important to recognize two significant points: first, the law has always been willing to change with the times but to do so on the basis of "traditional reasoning." Second, the religious character of Canada is undergoing a dramatic change, but it is still a country whose citizens highly identify with the Christian religion. Therefore, it is reasonable to conclude that the law would change in its definition of and understanding of religion and ultimately its treatment of religion in light of these developments.

5.3.1 The Changing Definition and Treatment of Religion?

Richard Moon suggests that there is a distinction between religious commitment that is protected as a matter of individual autonomy to choose one's faith on the one hand; and religious identity that is a mark of one's essence, which is protected on the basis of equality on the other hand.[765] Moon posits that the pre-*Charter* and early *Charter* cases justified religious freedom on the basis of individual liberty to search for truth.

However, the current rationale is a shift toward an equality analysis that requires the state not treat the practices of one religious group differently from another; nor should the state restrict religious practices unless it has a compelling state interest.[766] "This shift in the courts' understanding of the freedom's justification," according to Moon, "has been accompanied by a narrowing of the freedom's scope or focus."[767]

Moon observes that the courts have been unevenly applying religious neutrality because of the complexity of religious adherence. Religion as a cultural identity can be viewed positively as a recognition that religion has some immutable characteristics, politically speaking, in the sense that a person is born and raised into a cultural community that inculcates a particular way of life.[768]

State neutrality ensures that no one group will be at a disadvantage from another, thereby maintaining social stability. After all, "[i]f religious belief is central to the individual's identity, then a judgment by the state that his beliefs or practices are less important or less true than others may be experienced as a denial of his equal worth and not simply as a rejection of his views and values."[769]

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[763] Pew Forum, "Canada's Changing Religious Landscape" (27 June 2013), online: *Pew Research Centre: Religion and Public Life* <http://www.pewforum.org/2013/06/27/canadas-changing-religious-landscape/>.
[764] Joel Thiessen, "The Rise of the 'Nones'" (3 December 2014), online: *Joel Thiessen, PhD* <http://www.joelthiessen.ca/single-post/2014/12/03/The-Rise-of-the-Nones>.
[765] Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014).
[766] *Ibid* at 18.
[767] *Ibid*.
[768] *Ibid* at 20.
[769] *Ibid*.

The neutrality of the state requirement may also see religion from a negative view. The increasingly skeptical world sees religious beliefs as irrational and subject to cultural socialization rather than reasoned analysis of reality. On the one hand, religion as identity would see the state not interfering with the individual right to his or her religious practices. But on the other hand, since religion is irrational, the state must be protected from religion and religion must be private.[770]

Moon's work highlights the current dilemma of the law. The lack of consistent interpretation of state neutrality is due to the competing justifications of religious freedom. Is religion a cultural phenomenon requiring respect based on a person's or group's cultural identity subject to irrational religious presuppositions; or is it a faith commitment based on a rational search for truth?

If Moon is correct in his analysis of the current state of the law in Canada, then we will have a serious problem going forward if the courts and the legal establishment decide that the appropriate definition of religion is to see it only as identity rather than the search for truth. The equality analysis will require, as Moon noted,[771] that religion be seen as a private matter. If it is a private concern, then the state will have a much easier time to meet its obligation to be neutral.

A private religion means that religion will have no political or public role. That is a straitjacket to which religion has rarely been confined. Religion has a very long history, as we have seen, of being conspicuous in the public. This Moon admits: "Religious belief systems, however, often say something about the way we should treat others and about the kind of society we should work to create."[772]

I take Moon's assertion – that the post-*Charter* analysis of religion by the Supreme Court has evolved to a view of state neutrality requiring religion to be interpreted by means of equality principles – to imply that this is a new and more informed understanding of religion in the modern context. However, I suggest that the concept of state neutrality, as posited by Moon and discussed in recent case law by the Supreme Court,[773] has its antecedents long before the *Charter*. It is found in the jurisprudence at the founding of Canada and its theoretical underpinnings go back to the best ideals of the Protestant Reformation.

What is to be observed, I suggest, is not the evolution of justifications for accommodation of religion but the different contexts in which one justification is posited over another. It is true that contexts may demand different approaches in finding a resolution to the facts of a case but that cannot be because only one understanding of what constitutes religion (i.e. identity or choice) governs the outcome. For example, the *Multani* case, involving the student who wanted to wear his kirpan at school, may be characterized as a case involving religion as identity. The Court may view his particular religious faith as part of a recognizable religious community that should be respected; rather than deciding on the basis that this is a matter of a truth claim of the boy. Therefore, the Court was correct in admonishing any student who felt Multani was being unfairly favoured by the Court.

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[770] *Ibid* 21-22.
[771] *Ibid* at 22.
[772] *Ibid.*
[773] *Saguenay, supra* note 358. See Justice Gascon at para 75: "I would add that, in addition to its role in promoting diversity and multiculturalism, the state's duty of religious neutrality is based on a democratic imperative. The rights and freedoms set out in the Quebec Charter and the Canadian *Charter* reflect the pursuit of an ideal: a free and democratic society. This pursuit requires the state to encourage everyone to participate freely in public life regardless of their beliefs".

For the Sikh, as a religious person, the kirpan must be worn at all times, even to school. The public, who are not Sikh, are not able to comprehend that that religious practise is a truth claim. The practice is foreign to the uninformed public. But the public must continue to show respect to the religious practice due to the cultural reality of different religious communities that maintain practices different from the majority.

The state's neutrality is to be expected in *Multani* because it has no legitimate claim that would permit an infringement of the religious practice, especially given the fact that there was no evidence of a kirpan ever being used in violence on a school property in the country's history.

Moon's observation may be explained, at least in part, by the changing demographics of Canada – the increase of non-Christian immigrant groups and the rise of the religious "nones". However, the shift in interpretation of religion is not something that is new *per se.* It may be new in the post-*Charter* era because the Supreme Court of Canada has not referenced such concepts until recently, but the conceptual framework of equality among religious groups has a pedigree that goes back to before Canada's founding and was certainly evident in the early Canadian jurisprudence. This is illustrated in the pre-*Charter* cases when the SCC had to deal with the struggle of accommodating Jehovah's Witnesses in Quebec during the 1940s-1960s (as discussed in Chapter 4).

5.3.2 The Crisis Conclusion

If the Sexular Age is upon us, can religious communities and individuals opt out? To what extent? What are the consequences for failure to provide such an exemption? Is it in keeping with our understanding of the law? Religious practise has often received exemption from legal norms, as will be highlighted below. Will it receive this continued treatment in the Sexular Age?

A review of the undercurrent in our cultural milieu suggests that religion is an oppressive force from which society must be liberated. The irony is that it is a forced liberation.

Taylor says we have transitioned "from a society where belief in God is unchallenged and indeed, unproblematic, to one in which it is understood to be one option among others, and frequently not the easiest to embrace."[774] Belief or non-belief is a voluntary commitment one must make concerning ultimate realities. The voluntary nature of the secular age has at its root a pluralist/multicultural buffet from which to choose.

The Sexular Age is a layer on top of Taylor's Secular Age. However, rather than a buffet of choice, the Sexular Age is authoritarian. Its articulation of truth claims about what it means to be human and thus the public good is meant to be the new norm. Accommodation of religious difference has little traction because it is viewed as a capitulation to the former 'patriarchal' norm. This lies at the heart of the legal community's opposition to Trinity Western University's bid for a law school. TWU's desire to maintain a space for the religious commitment to monogamous heterosexual marriage is offensive to the legal community. However, as Justice Campbell noted, such moral disapproval does not give the state the right to enforce its moral opinion.[775]

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[774] Taylor, *supra* note 619 at 3.

[775] *Trinity Western University v. Nova Scotia Barristers' Society,* 2015 NSSC 25 [2015] N.S.J. No. 32 [*TWU* NSSC 2015], see online: <http://decisions.courts.ns.ca/nsc/nssc/en/100659/1/document.do>. Justice Campbell stated at para 13:

The fact that sexularism is uncompromising tells us that it is extremist; it cannot allow space for a differing opinion. The irony, of course, is that religion has been accused of extremism. Indeed, there are examples of religious groups that upon entering a new territory are not willing to allow religious differences to remain in that space. Antique religious symbols are often destroyed in such communities. Former houses of worship of one religious community are taken over and ceremonially set aside as a sacred site of the new religious community.

Sexularism operates in similar fashion. A religious community that teaches a moral precept at odds with sexular thought is deemed not only inappropriate but is refused the license to operate.

The question now: is there space in a western liberal democracy to permit religious individuals, communities and their institutions to opt out of the norms, such as they are thought to exist, of the Sexular Age?

Will the Sexular Age continue the liberal democratic tradition of allowing religious communities the right of exemption? Or, will the Sexular Age be absolutist – not willing that any citizen should depart from the requirement to be "free"?

The extent to which our Sexular Age accommodates religious difference was illustrated in the law's rejection of Trinity Western University's place in legal education. It has had the unfortunate experience of being forced twice to defend its claim to opt out of the Sexular Age. TWU does not accept the hyper-individualism of our time. It does not accept the "freedom to experience the full range of human emotions, behavior and relationships, without gender defined constraints." Instead, its religious campus is governed by orthodox Christian norms that include marriage as solely between one man and one woman.

The TWU case is indicative of the struggle over religious accommodation in the complicated Sexular Age. On the one hand, there is a complex cultural milieu that highly prizes individual freedom of choice in all things, seen most dramatically in all matters sexual. This coincides with the court doctrine that "sexual conduct is an integral part of a person's very identity. One cannot be divorced from the other."[776] On the other hand, there are religious communities, as exemplified by TWU, that categorically reject this *Sitz im leben*.

Such communities and their individual members seek to maintain their own religious culture and identity separate and apart. While they must be in the world they do not want to be of the world. Such communities have very different comprehensive views and moral commitments.

The classic liberal response has, until now, allowed people the freedom to organize themselves based on their ultimate moral commitments such as religion. The state could only interfere with those organizations in the rarest of cases such as female circumcision. However, with TWU we have a community where adults voluntarily comply with certain rules of the community. There is no obligation to study at TWU.

The Sexular Age has changed that consensus. Indeed, religious groups such as TWU are viewed as having "degrading and disrespectful" policies that must be culled from the public square.

> "The NSBS through its counsel has said that it hoped that its decision, along with decisions of other law societies, would prompt TWU to change its policy on same sex marriage. It is hardly a pressing objective for a representative of the state to use the power of the state to compel a legally functioning private institution in another province to change a legal policy in effect there because it reflects a legally held moral stance that offends the NSBS, its members or the public."

[776] *Trinity Western University v. The Law Society of Upper Canada* 2015 ONSC 4250, 126 O.R. 3d 1, at para 113 [*TWU* ONSC 2015].

6 THE LEGAL REVOLUTION ON THE MARCH: THE CASE OF TWU LAW SCHOOL

6.1 Introduction

Kuhn observes that there is a point during a scientific revolution when the paradigm crisis reaches a "Eureka Moment": a moment when a scientist, or a small group of scientists, connects the dots so that a bigger picture outside of the current paradigm is seen. It's an "Aha!" discovery. Things click. These scientists realize that the research anomalies point to the fact that the current paradigm is no longer valid. A new paradigm is necessary to explain the scientific phenomena under study.

The common law is not without its own "Eureka Moments". Such moments often occur as a result of a "hard case" or a "great case" that changes the way things were. These are the cases that "push the law" along or "nudge it" toward a new way of looking at the law. For example, the *Carter*[777] case overturned the previous law against medical assistance in dying; and the *Reference re: Same-Sex Marriage*[778] said the Parliament of Canada had the jurisdiction to redefine marriage from the heterosexual norm.

The standard common law explanation is that the law is constant and evolves slowly over time, making incremental changes building upon previous precedents. The *stare decisis* principle says that the decisions made by the higher courts stand in judgement of future litigants in similar circumstances in the lower courts. Judges are bound to follow the legal principles enunciated by a higher court. Although the Supreme Court of Canada has been willing to take a more flexible approach on the doctrine, it nevertheless remains applicable.[779]

The standard argument is that any modification of a precedent requires jurists "to show that incremental adaptation is not simply a cover for radical realignment and … that the balance between stability and change is neither ad hoc nor unpredictable."[780] It cannot be simply an ideological preference.

Professor Allan C. Hutchinson argues "that the common law is more of a political, unruly, and open-ended process than traditional scholars are prepared or able to admit."[781] In his view, and one that I maintain helps explain the revolution on the legal place of religion, a great case is only great "as long as the lawyers and judges are prepared to treat it as one or as long as the broader community is not prepared to reject lawyers' animating values."[782] Kuhn similarly observed that the scientific community, as a whole, had to agree that the new scientific paradigm was what it claimed to be. The legal community, like the scientific community, is driven to some extent by the social dynamic of peer pressure. What is the

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[777] *Carter v. Canada (Attorney General),* 2015 SCC 5, [2015] 1 S.C.R. 331 [*Carter*].
[778] *Same-Sex Marriage, supra* note 178.
[779] *Canada (Attorney General) v. Confédération des syndicats nationaux*, 2014 SCC 49, [2014] 2 S.C.R. 477, at para 24, "Of course, the doctrine of stare decisis is no longer completely inflexible. As the Court noted in Bedford, [*see: Canada (Attorney General) v. Bedford,* 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras 38 and 43-46, per McLachlin C.J.)] the precedential value of a judgment may be questioned "if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" (para 42). Where, on the other hand, the legal issue remains the same and arises in a similar context, the precedent still represents the law and must be followed by the courts (Bedford, at para 46)."
[780] Allan C. Hutchinson, *Evolution and the Common Law* (Cambridge: Cambridge University Press, 2005), 125-126.
[781] *Ibid* at 126.
[782] *Ibid* at 131.

acceptable opinion on a subject will be determined by the prevailing opinion within the profession.

Hutchinson observes that "[o]nce the values that underpin a case no longer garner sufficient support or the informing context has changed substantially, a great case will fall by the wayside and be consigned to the ditch of errors, mistakes, and anomalies."[783] Instead, maintains Hutchinson, the great cases should be seen as "temporary lighthouses":

> designed with a particular purpose in mind, constructed with available materials, and with a limited working life. As society moves, the need for such construction fades, and other, more useful devices are designed to take their place … As with celebrity, greatness in law is no less dependent on passing trends and shifting contexts. Depending on the audience, today's star is yesterday's wanna-be or tomorrow's has-been.[784]

This is particularly evident in constitutional cases, says Hutchinson, where it is the "substantive effects, not formal attributes" of the cases that are the markers of whether they will be great cases.[785] In essence, neither the "canonical tradition" nor the "social tradition" can be used "to ground constitutional interpretation" as they are so "imprecise and open that they can justify almost any reading."[786] "Great cases have to earn their authority in the political squares of legal and popular opinion," say Hutchinson. "Once that opinion begins to shift, the canonical force of such cases will be affected accordingly; talk or error or mistake is a rhetorical device to justify a particular substantive position or a change in the law."[787]

The opposition to TWU's law school proposal is evidence that the legal revolution on the status of religion is now in the crisis stage.[788] There is a significant group within the legal profession that would deny TWU's right to rely upon the current legal paradigm on religion.[789] For lack of a better term I will apply to them the label "the anti-TWU group."[790] This anti-TWU

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[783] *Ibid*.
[784] *Ibid* at 131-132.
[785] *Ibid* at 139.
[786] *Ibid* at 139-140.
[787] *Ibid* at 145.
[788] While the TWU case is Canadian, I suggest the same principles are at stake for the legal profession in every liberal democratic country.
[789]For example, the Schulich School of Law OUTlaw Society, in its factum at the Nova Scotia Court of Appeal (see *The Nova Scotia Barristers' Society v. Trinity Western University*, 2016 NSCA 59 [*TWU* NSCA 2016], Factum of the intervener, C.A. No. 438894), argued, at paras 29–31, that "the fact that TWU is not subject to the *Charter* is irrelevant." In other words, the current paradigm that exempts private religious universities from *Charte*r scrutiny since the *Charter* only applies to government means nothing. The law, therefore, is apparently immaterial because "*Charter* values" of "equality and respect for human dignity" trump.
[790] By using the term "anti-TWU group" I am not meaning it in a disparaging manner. It is descriptive. This group of academics and legal professionals are of the view that TWU represents the old bigotry of years gone by. They see TWU as not only anachronistic in its religious beliefs and practices but somehow dangerous to liberal democracy. This is most unfortunate as there is every indication that TWU and its graduates have been exemplary in providing university education and service. The Law Society of BC conducted its own investigation into whether TWU graduates were involved in discriminatory conduct at BC's three public law schools. They came up empty. What they did find from the University of Victoria was that the 2011 gold medalist was a former TWU student. (See Memorandum from the Law Society of British Columbia, Policy and Legal Services Department, to The Benchers (31 March 2014), Subject "Follow up to Enquiries from February 28, 2014 Benchers Meeting," Appendix 9, online: (pdf) <https://www.lawsociety.bc.ca/Website/media/Shared/docs/newsroom/TWU-memo1.pdf>). The fact that the Law Society felt that this investigation was even necessary shows, in my view, a stereotypical anti-

group, which acts as abolitionists in that they *de facto* argue for the elimination of religious accommodation by identity politics, advocates for a new paradigm that takes away religious accommodation, as historically understood,[791] especially when religious belief and practice are at odds with its own norm on human sexuality.[792] This anti-religion faction has been highly influenced by legal academics who have advocated this position for a number of years.[793]

As indicated by the decisions on TWU in the Supreme Courts of Nova Scotia[794] and British Columbia,[795] there yet remains, at least within the judiciary, some allegiance to religion's special legal status as historically understood. Their decisions on TWU suggest that the proposal of the new paradigm is still too radical a departure from the law. However, even the judiciary is not unified, as evidenced by the decisions of the Ontario Divisional Court,[796] the Ontario Court of Appeal,[797] and now, the Supreme Court of Canada, against TWU.

As this legal revolution against religion travels on the same trajectory that scientific revolutions have in the past, there are a number of long-term implications that need to be considered. This section will outline the legal revolution on religion and consider its implications.

6.2 Paradigm

6.2.1 Trinity Western University Education Degree Accreditation

To understand the TWU law school case you first need to be aware that this is not the first time that Trinity Western University has had to face protracted litigation over its

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religious bias against TWU. It is reasonable to imagine the public outcry if a similar investigation was conducted on graduates of BC public universities. "Anti-TWU group" seems therefore appropriate but it is indicative of all academics and legal professionals who wish to expunge from the law any semblance of traditional protections given to religion in the law that TWU has been relying on in its defense.

[791] The justices of the Ontario Division Court challenged the argument that TWU's discriminatory Covenant is entitled to the protection of exemptions in human rights legislation. Said the Court, "…discrimination is still discrimination, regardless of whether it is unlawful. The fact that, for policy reasons, a Provincial Legislature has chosen not to make certain acts of discrimination actionable under human rights legislation does not mean that those acts are any less discriminatory. The Community Covenant, by its own terms, constitutes a prejudicial treatment of different categories of people. It is, therefore, by its very nature, discriminatory." See *TWU* ONSC 2015, *supra* note 776 at para 108.

[792] Paul Bramadat, "Managing and Imagining Religion in Canada from the Top and the Bottom: 15 Years After," in Benjamin L. Berger & Richard Moon, eds, *Religion and The Exercise of Public Authority* (Oxford: Hart, 2016) at 67, describes the opposition to the TWU law school on the basis that "the covenant: a) discriminates against individuals engaged in lawful sexual activities, b) is not in keeping with the ostensibly secular professional standards governing other law programmes and legal societies in Canada, and c) is contrary to the spirit and the letter of the *Charter of Rights and Freedoms* that protects same-sex relationships."

[793] See, for example, Robert Wintemute, "Religion vs. Sexual Orientation: A Clash of Human Rights?" (2002) 1 J.L. & Equal. 125; MacDougall, *supra* notes 214, 483; MacDougall & Short, *supra* note 483; Elaine Craig, "The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program" (2013) 25 Can. J. Women & L. 148 ["Rejecting Trinity"]; Elaine Craig, "TWU Law: A Reply to Proponents of Approval" (2014) 37 Dalhousie L.J. 621 ["A Reply"].

[794] *TWU* NSSC 2015, *supra* note 775; *TWU* NSCA 2016, *supra* note 789.

[795] *Trinity Western University v. Law Society of British Columbia* 2015 BCSC 2326 [2015] B.C.J. No. 2697 [*TWU* BCSC 2015]; *TWU* BCCA 2016, *supra* note 478.

[796] *TWU* ONSC 2015, *supra* note 776; *TWU* ONCA 2016, *supra* note 701.

[797] *TWU* ONCA 2016, *supra* note 701.

admissions policies. TWU's admissions policies, though wording has changed from time to time, have consistently required students to abstain from sexual relations outside of the traditional marriage relationship. Such criteria would normally be unacceptable as it violates human rights legislation. However, TWU is exempt from the B.C. human rights legislation because it is a religious university, and as such is free to determine and maintain its religious character through a faith-based code of conduct.

In 2001, the Supreme Court of Canada ruled[798] that the British Columbia College of Teachers (BCCT) was wrong to deny accreditation to TWU's education degree. The BCCT was of the view that TWU's admissions policy was discriminatory against the LGBTQ community.[799]

In particular, the BCCT argued that TWU graduates, after being educated in the TWU Christian environment, would discriminate against LGBTQ students when they became teachers in the public school system. The SCC rejected BCCT's argument, saying that "TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions."[800] So "the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence."[801] The Court recognized that TWU is a private institution, exempt from the British Columbia human rights legislation and to which the *Charter* does not apply.

Further, the Court noted that the *Charter* equality rights are not engaged when there is a "voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution."[802] The 2001 SCC's analysis made it clear:

> TWU's Community Standards, which are limited to prescribing conduct of members while at TWU, are not sufficient to support the conclusion that the BCCT should anticipate intolerant behaviour in the public schools. Indeed, if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church. The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected. The BCCT did not weigh the various rights involved in its assessment of the alleged discriminatory practices of TWU by not taking into account the impact of its decision on the right to freedom of religion of the members of TWU. Accordingly, this Court must.[803]

6.2.2 BCCT Arguments Reject Religion's Status

The BCCT denied TWU's education degree accreditation because its Council believed "the proposed program follows discriminatory practices which are contrary to the public interest and public policy which the College must consider under its mandate as expressed in the Teaching Profession Act."[804] In its May 22, 1996 letter to TWU, the BCCT specifically referenced TWU's requirement that students sign a contract of their responsibilities that

[798] *TWU* 2001, *supra* note 26.
[799] *Ibid* at para 25.
[800] *Ibid*.
[801] *Ibid*.
[802] *Ibid*.
[803] *Ibid* at para 33.
[804] *Ibid* at para 5.

included their keeping traditional sexual norms.[805] Later in a newsletter the BCCT referenced the fact that Canadian and BC human rights legislation prohibits discrimination on the basis of sexual orientation as a segue into a statement highlighting that the *Charter* and human rights acts "express the values which represent the public interest."[806] The labelling of homosexual behaviour as sinful excludes gays and lesbians.

What was said next is telling: "The Council believes and is supported by law in the belief that sexual orientation is no more separable from a person than colour."[807] It is then because of that "belief" that "Persons of homosexual orientation, like persons of colour, are entitled to protection and freedom from discrimination under the law."[808]

The use of the word "belief" is intriguing. The BCCT obviously recognized that science has yet to definitively prove[809] that sexual orientation is "no more separable from a person than colour."[810] Therefore, it was necessary for them to state it as a "belief."

In essence, BCCT demanded TWU reject its belief on the matter of human sexuality (based on Scripture) for BCCT's belief (based on its view of the "public interest"). When it comes to controversial issues, as indeed sexual orientation remains so, the best course for the courts is to allow these matters to play themselves out. This is referred to later in my reference to William Eskridge's call for courts not to "constitutionalize" these controversial matters.

Nowhere, in the 2001 case, was BCCT concerned about the state of the law in protecting TWU's religious freedom rights. Nor was there any recognition that TWU was not subject to the *Charter* or the human rights legislation. BCCT's sole concern was its "belief." It did not see any public interest in allowing TWU its belief. BCCT had no evidence of TWU graduates discriminating against public school students. But lack of evidence appeared not to be a major concern when "belief" seems to have been the motivating factor. It is ironic therefore to hear

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[805] *Ibid* at para 6.
[806] *Ibid*.
[807] *Ibid* (emphasis added).
[808] *Ibid*.
[809] There is an increasing number of studies that suggest sexual orientation is not akin to race or "skin colour" as suggested by BCCT. Here are but a few studies: Sergey Gavrilets & William R Rice, "Genetic models of homosexuality: Generating testable predictions" (2006) 273 Proceedings of the Royal Society 3031; J Michael Bailey, Michael P Dunne & Nicholas G Martin, "Genetic and Environmental Influences on Sexual Orientation and Its Correlates in an Australian Twin Sample" (2000) 78 Journal of Personality and Social Psychology 3, 524, 533-534; N E Whitehead, *"My Genes Made Me Do It": Homosexuality and the Scientific Evidence*, 4th edition (Whitehead Associates, 2016), 35-36; Lawrence S Mayer & Paul R McHugh, "Sexuality and gender: Findings from the Biological, Psychological and Social Sciences" (2016) 50 The New Atlantis 7, 39-41; Jacon Felson, "The Effect of religious Background on Sexual Orientation" (2011) 7:4 Interdisciplinary Journal of Research on Religion 9; Elizabeth M Weiss, et al, "A Qualitative Study of Ex-Gay and Ex-Ex-gay Experiences" (2010) 14:4 Journal of Gay & Lesbian Mental Health 291, 314. J Michael Bailey, et al, "Sexual Orientation, Controversy and Science" (2016) 17:2 Psychological Science in the Public Interest 45, 56.
[810] Consider the following from Mayer & McHugh's study, *supra* note 809, at 34:

> The genetic influences affecting any complex behaviours – whether sexual behaviours or interpersonal interactions – depend in part on individuals' life experiences as they mature. Genes constitute only one of the many key influences on behaviours in addition to environmental influences, personal choices and interpersonal experiences. The weight of evidence to date strongly suggests that the contribution of genetic factors [to same sex attraction] is modest. We can say with confidence that genes are not the sole, essential cause of sexual orientation; there is evidence that genes play a modest role in contributing to the development of sexual attractions and behaviours but little evidence to support a simplistic 'born this way' narrative concerning the nature of sexual orientation.

legal academics accuse TWU of being incapable of critical thought because of its religious beliefs.

The BCCT attempt to limit TWU's religious freedom was a direct challenge to the legal status given to religion and religious organizations. BCCT is a state actor that maintained a different belief on the matter of sexual orientation than TWU. Its refusal to accredit TWU's education degree was an attempt to coerce a religious institution to change its religious belief. This pattern would be repeated by the law societies when TWU sought accreditation for its law degree. Rather than accept the state of the law, BCCT thought to challenge what it considered an unjust law. That challenge ultimately failed at the SCC but it did lay the groundwork for the current struggle.

6.2.3 Religion's Status Conditionally Maintained

The Supreme Court of Canada rejected BCCT's challenge to TWU's religious requirements for its students. As a result, the SCC upheld the traditional deference the law has given to religion and religious organizations.

The factual context required an assessment of the "…place of private institutions in our society and the reconciling of competing rights and values. Freedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation."[811] The Court highlighted[812] the fact that many Canadian universities have religious affiliations; the Constitution made special provisions for religious public education; and the human rights legislation specifically made exemptions for religious institutions. The B.C. legislature also passed five bills in favour of TWU between 1969 and 1985. The reasonable conclusion is that it was not against the public interest to have post-secondary schools based on Christian philosophy. These references by the SCC to religion's role in establishing universities, the constitutional provisions for religion in education and the exemptions found in human rights legislation are tacit recognition of the special place that religion had in the law. In reconciling the rights, the Court maintained that "the proper place to draw the line in cases like the one at bar is generally between belief and conduct."[813] As there was no evidence of TWU graduates discriminating against public school students, the BCCT was wrong in its decision and the Court ordered the accreditation of the TWU teacher training program. The robust dissent of Justice L'Heureux-Dubé, in an 8-1 decision, was scathing. She maintained that in this context the "public interest" only required an evaluation of equality considerations. Other *Charter* values such as freedom of religion "…are not germane to the public interest in ensuring that teachers have the requisites to foster supportive classroom environments in public schools."[814]

For Justice L'Heureux-Dubé, the BCCT should have been given due deference as they were not a human rights tribunal and did not need to consider the human rights implications for teachers – their interest was that of the non-discriminatory atmosphere for students in the public schools. By signing the code of conduct the students of TWU, as potential teachers in the public-school system, were complicit in an act of discrimination. And there were consequences for private belief.

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[811] *TWU* 2001, *supra* note 26 at para 34.
[812] *Ibid*.
[813] *Ibid* at para 36.
[814] *Ibid* at para 60.

She also took umbrage with the claim of TWU that one can separate condemnation of the "sexual sin" of homosexual behaviour from the tolerance of the person with a homosexual orientation. The rubric is "Love the sinner but hate the sin." She challenged "the idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood."[815] The anti-TWU position does not consider it appropriate that religious communities have the ability to deprive their members of sexual pleasure.

Despite L'Heureux- Dubé's dissent, the SCC reiterated that equality rights cannot eclipse freedom of religion. There must be a proper balance as to the effects a decision would have on the respective interests. In the BCCT case, the "public interest" not only included the equality rights of the public-school students, it also included the religious freedom concerns of teachers, and religious institutions such as TWU.

The Court affirmed BCCT's role in considering the equality principles of the *Charter* and human rights law in evaluating its decisions, but reiterated that in doing so it must look at the whole context – the interrelationship with other rights and people affected. The Constitution is to be viewed from a broad perspective – s. 15 rights include not only sexual orientation but religion, s. 2(a) freedom of religion, s. 93 of the *Constitution Act 1867* educational rights – all exhibit a Canadian system of support for the widest possible tolerance of a broad spectrum of beliefs and practices.

Considering BCCT's failure to respect TWU's religious freedom it is not uncharitable to suggest that BCCT was willing to ride roughshod over the long-standing legal protections given to religion. Running through the BCCT argument and Justice L'Heureux-Dubé's dissent is the view that religion has no place in the "public sphere" when it comes to matters involving sexuality. In light of the SCC's 2018 decisions they were ahead of their time.[816] The law has now caught up to their revolutionary position.

6.3 Crisis: Trinity Western School of Law Accreditation

6.3.1 Law School Proposal

TWU's School of Law proposal is unique in that it is geared to ensuring that the TWU graduate has developed practical skills for law practice.[817] Most law schools are centred on the theoretical dimensions of law but TWU "will integrate into its curriculum the formation of professionalism including the nature of the profession of law, ethics and client relations" and will have upper year core competencies including "drafting documents, negotiation and advocacy."[818]

The TWU approach is to hire faculty who are serious about teaching the practical side of legal practice. The TWU student will also be placed in a mentorship "with a practitioner mentor

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[815] *Ibid* at para 69.

[816] Indeed, at the LSUC Convocation on 10 April 2014, politician and lawyer Marion Boyd quipped, "those of you who know Claire [L'Heureux-Dubé] know that she's fond of saying, 'Well, when I dissent, the law changes in 10 years,'" *supra* note 487 at 166.

[817] Trinity Western University, "Proposal for a School of Law at Trinity Western University" (June 2012), Submission for accreditation by the Federation of Law Societies of Canada, online (pdf): *Trinity Western University* <https://www.twu.ca/sites/default/files/assets/proposal-for-a-school-of-law-at-twu.pdf> ["Submission for Accreditation"].

[818] *Ibid*, at 10.

for the first year. Mentors will be asked to invite students to their law firm to help them see first-hand how a law practice works and the ethical and professional framework at work in law offices."[819] The purpose is to ensure that TWU graduates are confident and capable of practicing law immediately.

"What we are wanting to focus on is to graduate practice-ready lawyers like a medical school that produces ready to work doctors," said Professor Janet Epp-Buckingham in a CBC Radio interview.[820] "Right now the law schools across Canada have a more theoretical focus and they count on the articling year for law students to learn the actual practise skills. What we want to do here is to create a law school based on Christian values that's like a super high-quality medical school."[821]

Buckingham explained that while most law schools have some focus on the "hard legal skills" like legal research, writing, advocacy, and negotiating, they do not have as much focus on drafting documents. "We also want to look at 'soft skills' like teamwork, leadership, problem solving, relationship building, and at a Christian law school I would also add being a reconciler. We want to look at lawyers who can diffuse stress and conflict rather than promote it."[822]

TWU's proposal is also focused on several underserved areas of legal practice. First, in keeping with TWU's "rich history of outreach and volunteerism within needy communities," it emphasizes non-profits and charities law.[823] This is a significant sector which very few Canadian universities address.[824]

In fact, TWU would be the first and only law school in the country to offer a specialization in charity law. One intention is to advocate for marginalized groups such as those living on the streets of Vancouver's Downtown Eastside where TWU proposes a pro-bono legal clinic. Second, there will be a focus on small businesses and entrepreneurs so that its graduates will be competent to assist in small start-up enterprises. Third, TWU's emphasis on developing the practical skills of law will equip its graduates with the competencies to practice in small and medium size law firms. This is a needed shift from the current model of law schools catering to the larger urban firms.

Finally, the proposal has a strong emphasis on ethics – TWU's website explained:

> Leadership, integrity, and character development are central to TWU's Christian identity, worldview and philosophy of education. We encourage students to see the practice of law as a high calling, and for that reason we will challenge them to confront, debate, and ponder the great questions of meaning, values, and ethics. Our hope is that TWU School of Law graduates will believe in and demonstrate a different perception of

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[819] *Ibid*, at 17.

[820] Interview of Janet Epp-Buckingham by Anna Maria Tremonti (29 March 2013), on *The Current*, CBC Radio, Toronto: "Would a law school at a private Christian University discriminate against gays and lesbians?".

[821] *Ibid.*

[822] *Ibid*.

[823] "Submission for Accreditation," *supra* note 817 at 10.

[824] Only three Canadian law schools have a course in charity law: University of Ottawa, "Charities and non-Profit Organizations" (CML4122), online: <http://ottawa.courseguru.ca/cml4122-charities-and-non-profit-organizations-300-3-cr/>; University of Victoria, "Nonprofit Sector Law" (Law 396) online: https://web.uvic.ca/calendar2016-05/CDs/LAW/396.html; and the University of Manitoba, "Philanthropy and the Law" (Law 3120) online: <http://law.robsonhall.com/current-students1/course-descriptions/philanthropy-and-the-law/>. See also this student perspective for more courses and training in charity law: Benjamin Miller, "Making charity law a part of your legal education," *Canadian Lawyer Magazine* (21 November 2016), online: <http://www.canadianlawyermag.com/article/making-charity-law-a-part-of-your-legal-education-3449/>.

professionalism than the current marketplace promotes. TWU-educated lawyers will be expected to be not just legal technicians, but also trusted advisors who serve clients of every kind.[825]

Blair A. Major observes that "TWU's proposed law school pushes away from the centralized and tacit knowledge of the legal profession and toward the active engagement of legal professionals (and law students) with the foundational discourse of the legal professional community."[826] In short, TWU proposed to practically implement the practice of law's virtures in everyday life. It would do so by ensuring that the student body would not only learn the law but understand its ethical foundations in real life practical experience.

6.3.2 Federation of Law Societies of Canada

When TWU's law school proposal was submitted to the Federation of Law Societies of Canada (FLSC) in June 2012 it created a stir among legal academics. The Canadian Council of Law Deans was among the first to raise opposition against TWU's admissions policy. Dean Bill Flanagan, of Queen's University (in Kingston, Ontario), wrote, "We would urge the Federation to investigate whether TWU's covenant is inconsistent with federal or provincial law." He also asked that the Federation "consider this covenant and its intentionally discriminatory impact on gay, lesbian, and bisexual students when evaluating TWU's application to establish an approved common law program."[827]

Flanagan noted that this was "a matter of great concern" for the Law Deans, insisting "[d]iscrimination on the basis of sexual orientation is unlawful in Canada and fundamentally at odds with the core values of all Canadian law schools."[828]

Flanagan's letter is worth noting because it fails to give recognition to religious accommodation in the law. It is particularly telling that there is no mention of the Supreme Court of Canada's 2001 decision, addressing TWU's admissions policy in a similar situation. In the ordinary course, when providing a public good or service, discrimination based on sexual orientation is unlawful. However, whether an action is unlawfully discriminatory is contextually driven. As a private, religious university TWU has been granted a right to reaffirm its religious identity by the British Columbia human rights legislation.[829] This was explicitly recognized by the SCC in 2001 when it acknowledged "that a religious institution is not considered to breach the [BC Human Rights Code] where it prefers adherents of its religious

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[825] "Submission for Accreditation," *supra* note 817.

[826] Blair A. Major, "Trinity Western University Law: The Boundary and Ethos of the Legal Community," *Alberta Law Review* (2017) 55:1, 167, at 196.

[827] Letter from Bill Flanagan, President of the Canadian Council of Law Deans, to J. L. Hunter and Gérald R. Tremblay, President, Federation of Canadian Law Societies (20 November 2012), online (pdf): *Federation of Law Societies of Canada* <http://www.docs.flsc.ca/_documents/TWUCouncilofCdnLawDeansNov202012.pdf> [Bill Flanagan Letter].

[828] *Ibid.*

[829] *Human Rights Code*, RSBC 1996, c 210, s. 41 (1):

> 41 (1) If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, sexual orientation, gender identity or expression, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

constituency".[830] A decade later, there can be no doubting that the Law Deans were aware of TWU's legal history, including the SCC's declaration that TWU was not subject to the anti-discriminatory provision of the BC human rights legislation. In other words, the BC human rights legislation permits religiously-based discrimination for religious institutions such as TWU. Therefore, TWU is compliant with the legislation.

It is difficult to make sense of the Law Deans' concern about illegality given TWU's religious identity, past litigation, and success at the SCC in 2001 representing the current state of the law. The only reasonable conclusion is that the Law Deans were displeased with the law's accommodation of religious communities that have, in their view, an anachronistic understanding of human sexuality.

In other words, the law's current state, in the minds of the Law Deans, is unjust. It must be changed. There must be a challenge – or to use Kuhn's parlance, a revolution – against the law's paradigm.

This would explain the additional and most revealing claim in Flanagan's letter – the notion that TWU's discrimination is "fundamentally at odds with the core values of all Canadian law schools." Therein lies the rub. TWU would not be congruent with the other law schools that do not discriminate based on sexual orientation. To further emphasize their opposition, the Law Deans subsequently amended their constitution to ensure that TWU's law dean, if TWU were to be successful in its bid for a law school, would not be able to have a seat at the Canadian Council of Law Deans.[831] As far as the Law Deans are concerned they have drawn a "line in the sand" and they are not willing to back away from it – the law be damned.

Given that such an important and influential body as the Law Deans spoke so stridently against TWU, it did not take long for other members of the legal community to voice similar opposition.

6.3.2.1 The Canadian Bar Association

In a March 18, 2013 letter, the Canadian Bar Association Sexual Orientation and Gender Identity Conference (SOGIC) rejected the Federation's "perceived limitations," arguing the FLSC had a duty to look beyond the academic standards of TWU's proposal.[832] It suggested that the Supreme Court of Canada's decision in *Doré*[833] required law societies to "act consistently with the values underlying the grant of discretion, including *Charter* values."[834] The letter suggests that the College of Teachers case is no longer relevant. One argument given is that in the 2001 case the BCCT did not directly apply the *Charter* or human rights legislation but that *Doré* now requires it. *Doré* is therefore the preferred decision to follow, not the 2001 TWU decision.

The CBA misread the 2001 decision. The SCC did base its decision on both the *Charter* and the human rights legislation and expected BCCT to have done so. For it stated that BCCT

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[830] *TWU* 2001, *supra* note 26 at para 35.

[831] Section 2.3 was added to the Council of Canadian Law Deans Constitution to read, "Membership is limited to Deans of Law schools which are committed to principles of equality and non-discrimination in access to, and in the provision of, legal education." See "Consitution" (as amended 8 November 2013), online: *CCLD/CDFDC* <http://www.ccld-cdfdc.ca/index.php/about-us/constitution>.

[832] Letter from Amy Sakalauskas, Robert Peterson & Level Chan, Canadian Bar Association, to Gérald Tremblay (18 March 2013), online (pdf): *Federation of the Law Societies of Canada* http://www.docs.flsc.ca/_documents/TWUCdnBarAssnMarch182013.pdf [CBA Letter].

[833] *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 [*Doré*].

[834] *Ibid* at para 24.

was "also required to consider issues of religious freedom" in the *Charter*.[835] Therefore, even without *Doré*'s analysis, a similar approach was in fact followed in the 2001 ruling.

The CBA also argued that Justice L'Heureux-Dubé's dissent in 2001 was subsequently endorsed by the SCC. But, as noted above, it is not that simple. The SCC still maintains that "[g]enuine comments on sexual activity are not likely to fall into the purview of a prohibition against hate."[836] It is a misreading of the *Whatcott* case to suggest that TWU is prohibited from having its Community Covenant based on Justice L'Heureux-Dubé's dissent in 2001. As John B. Laskin noted in his letter of 2013:

> Just as in BCCT, the Supreme Court in *Whatcott* found the proper balance point between equality and freedom of religion values to be the point at which conduct linked to the exercise of freedom of religion resulted in actual harm. Absent evidence of actual harm, it held in both cases, freedom of religion values must be given effect. … lawyers in Canada are subject to ethical duties to treat others with respect and avoid discrimination. But in BCCT, the Supreme Court was acutely sensitive to the role of teachers as a "medium for the transmission of values." The Court considered it "obvious that the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers."
>
> The Court nonetheless had no difficulty concluding that graduates of TWU would "treat homosexuals fairly and respectfully."
>
> If the TWU teachers program could be relied upon to equip its graduates to be respectful of diversity, there appears to be no reason to conclude that its law program cannot do the same. It seems very unlikely that evidence could be mounted that lawyers educated at TWU would actually engage in harmful conduct.[837]

However, the CBA suggested that the 2001 case did not analyse the human rights prohibition of discrimination on the basis of sexual orientation. According to SOGIC, "in light of evolving notions of human rights and the increased legal and societal recognition afforded to LGBTT individuals and their relationships" the Covenant's compliance with human rights legislation is now "an open question."[838]

Finally, the CBA argued that removing or modifying the Covenant to allow LGBTQ students and faculty to join the campus would not threaten the beliefs or conduct of TWU's community or damage its affiliation with the Evangelical Free Church of Canada.[839] The CBA exposed a lack of understanding of the dynamics of religious communities that maintain a traditional view of sexuality. Having to abide by the CBA's understanding of sexual matters would mean TWU would not be free to pursue its religious belief and practices.[840] The CBA, like the BCCT in the 2001 case, showed its disdain for the religious views of TWU, apparently seeing

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[835] *TWU* 2001, *supra* note 26 at para 28.

[836] *Whatcott*, *supra* note 702 at para 177.

[837] Federation of Law Societies of Canada, "Special Advisory Committee On Trinity Western's Proposed School of Law Final Report" (December 2013), at 6, online (pdf): http://docs.flsc.ca/SpecialAdvisoryReportFinal.pdf ["Special Advisory Committee Report"].

[838] CBA Letter, *supra* note 832 at 4.

[839] *Ibid* at 5.

[840] As former Chief Justice Dickson noted, "If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free," in *Big M Drug Mart, supra* note 4 at para 95.

TWU's application for a law school as an opportunity to challenge the current state of the law accommodating religion.[841]

6.3.2.2 Other Legal Groups Against TWU

Similar themes surfaced in the correspondence to the Federation from other legal groups such as the Legal Leaders for Diversity (LLD), a group of some 70 general counsel from Canadian corporations, which called upon the Federation to ensure that TWU does not violate "the spirit of the legal profession and Canadian law."[842] This is reminiscent of the claims made by the CBA, as noted above.

Immediately one is confronted with the concept of the inconsistency between the law – that allows for TWU to exist and have its law school – and the "spirit" (or at least the perceived spirit as envisioned by these groups) of the *Charter* and human rights legislation that is against discrimination.

The Osgoode Outlaws, along with several other student groups from around the country, took their cues from the same song sheet,[843] and argued that since law schools "propagate the values of the Canadian legal system, including those set out in the *Charter of Rights and Freedoms*" and though the *Charter* does not apply to TWU, nevertheless "all law schools should seek to uphold it." That is a troubling position in that it would make the *Charter* applicable to private entities when it is only applicable to government actors. If successful, such an argument would make human rights legislation superfluous. The burden of the *Charter* would become the responsibility of the citizen, something that was never intended. Nor would citizens have the ability to maintain difference. For the OUTlaw students, it mattered not that the law gave TWU an exemption, based upon religious belief and practice, from the anti-discrimination laws. For them, discrimination was and is unacceptable without exception. This has become a common theme throughout the TWU struggle, as similar arguments were made in Nova Scotia, Ontario and British Columbia. In short, such a position is without precedent in our law. Yet, as will be noted below, it does appear to have found some traction in the Ontario courts.

Likewise, the University of Ottawa Outlaw group were concerned that TWU's references "to the marital union of one man and one woman exclude trans* identified people, polyamorous relationships, other forms of nonmonogamy, unmarried same-sex couples, married same-sex couples, any other form of sexual expression—effectively rendering LGBTQ

[841] After TWU lost its accreditation at the SCC, the CBA took credit that it was "ahead of the curve" in being able to present arguments that the Court ultimately adopted. My study would suggest that they were not as much "ahead of the curve" as they were part of the legal revolutionaries that refused to accept the law on religious accommodation. See: "CBA Was Ahead Of The Curve On TWU", June 26, 2018, online: <https://www.cba.org/Our-Work/cbainfluence/cbainterventions/Curve-on-TWU>.

[842] Letter from Legal Leaders for Diversity to Gérald Tremblay (16 August 2013), at 2, online (pdf): *Federation of Law Societies of Canada* http://www.docs.flsc.ca/_documents/TWULegalLeadersforDiversityAug162013.pdf.

[843] These groups had obviously collaborated in writing virtually the same letter, with minor variations, to the Federation. They include the Osgoode OUTlaws, University of Alberta OUTlaws, University of Saskatchewan College of Law Gay/Straight Alliance, and University of Victoria Law Students. See: "Submissions to the Federation regarding the Proposed Accreditation of Trinity Western University's Law Program" (last accessed 25 October 2018), online: *Federation of Law Societies of Canada* <https://flsc.ca/law-schools/submissions-to-the-federation-regarding-the-proposed-accreditation-of-trinity-western-universitys-law-program/>.

families and marginalized sexualities invisible."[844] Exactly how a private religious school would put in danger such a kaleidoscope of sexual groupings was not explained.

It is worthy of note that a group of ten UBC law students sent a letter supporting TWU, noting that "Every law school reflects a set of beliefs. As it stands, law schools have a secular emphasis in which religious views are in the minority, and are, in our experience, often openly derided." This letter suggests that the open, inclusive, and diverse public law schools in Canada may not be so open for religious students. In their view "the legal profession and the classrooms of Canada's law schools would benefit greatly from the expansion of legal education in institutions that hold non-mainstream views."[845]

Professors Roderick A. MacDonald and Thomas B. McMorrow observed that "Over the years, one of us has heard dozens of conservative Christians lament their sense of exclusion at McGill [University] and the hostility they feel from their classmates and even professors."[846] They concluded that these religious students described their barriers to participate in law school life in "language very similar to the claims of silencing advanced by women, people of colour, and the LGBTQ communities."[847] For these authors the "decision to close ranks by the Canadian Council of Law Deans in opposing TWU's proposed law school [is] evidence of how swiftly and definitively the movement of the herd can be. Moreover, we consider it a sign of how the intense pressure to conform, both within and among law schools, militates against a legal educational landscape reflective of the diversity of belief and aspiration of those who people it."[848]

The evidence of these professors suggest that indeed Christian law students are now ostracized by the secular law schools. They are the ones no longer "safe" in the hostile environment of the public law schools. The anti-TWU sentiment, being proxy for anti-Christian sentiment, suggests evangelical Christians would benefit from their own institutions including their own law school.

6.3.2.3 Decision of Federation

Despite the opposition, and an investigation by the special Advisory Committee,[849] the Federation decided on December 16, 2013 to give its approval to the TWU law school.[850] "The

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[844] Letter from University of Ottawa OUTlaws to Gérald R. Tremblay, et al (18 March 2013), online (pdf): *Federation of Law Societies of Canada* <http://www.docs.flsc.ca/_documents/TWUUofOttawalawstudentsOUTlawsMarch182013.pdf>.

[845] Letter from UBC JD Candidates & Graduates to Gérald R. Tremblay, et al (19 March 2013), online (pdf): *Federation of Law Societies of Canada* <http://www.docs.flsc.ca/_documents/TWUUBCJDcandidatesgraduatesMarch192013.pdf>. The letter also astutely notes that "Students at TWU law school would be taught the law, and will be required to uphold the law. To suggest otherwise does not accord with how our justice system works: judges and lawyers, regardless of their personal beliefs, are expected to apply the law" (at 2).

[846] Roderick A. MacDonald & Thomas B. McMorrow, "Decolonizing Law School" (2013-14) 51 Alta. L. Rev. 717, 733 at note 54.

[847] *Ibid.*

[848] *Ibid* at 733-734.

[849] "Special Advisory Committee Report", *supra* note 837.

[850] *Ibid* at 19: "It is the conclusion of the Special Advisory Committee that if the Approval Committee concludes that the TWU proposal would meet the national requirement if implemented as proposed there will be no public interest reason to exclude future graduates of the program from law society bar admission programs."

Federation followed a fair, rigorous and thoughtful process", said Federation President Marie-Claude Bélanger-Richard, Q.C. She added, "We took into account and listened very carefully to all points of view that were expressed about this proposal."[851] In the end, the Federation accepted the current state of the law. "Public interest" did not extend to evaluating the admissions criteria of a law school. What mattered was the competence of the law graduates to take the bar licensing exams at the respective law societies.

6.3.3 Law Society of British Columbia

Once the FLSC gave preliminary approval to TWU's proposed law school, that meant the school became an approved faculty of law for the purposes of enrolment in the Law Society of British Columbia's (LSBC) admissions program. This operated as a matter of course since the LSBC had delegated its authority on approving new law schools to the FLS. On December 17, 2013, the BC Minister of Advanced Education approved TWU's proposed law program and authorized TWU to grant JD degrees.

However, academics, such as Professor Elaine Craig, called for the individual law societies to "show more courage" and take back authority from the FLS to conduct their own investigation into the TWU's proposal.[852]

Accordingly, the LSBC decided to conduct its own investigation and encouraged the public to send in written submission as to whether it should approve TWU's proposal. To my knowledge, nothing like this has ever been done for any other law school proposal. The invitation for a public response was emulated by other law societies. The society received approximately 138 submissions were in favour of TWU with some 150 opposed. Those submissions represented many more people as some had scores of signatures.

6.3.3.1 Review of Federation's Decision

On April 11, 2014 the LSBC Benchers voted down (20-6) the motion[853] that would have removed TWU's faculty of law approval. In addition to the public input, the LSBC commissioned a number of reports and legal opinions to assist the Benchers.

The Approval Committee followed with its own approval, stating: "TWU's proposed school of law will meet the national requirement if implemented as proposed. The proposed program is given preliminary approval." See Canadian Common Law Program Approval Committee, "Report on Trinity Western University's Proposed School of Law Program" (December 2013), online (pdf): *Federation of Law Societies of Canada* <http://docs.flsc.ca/ApprovalCommitteeFINAL.pdf>.

[851] Federation of Law Societies of Canada, News Release, "Federation of Law Societies of Canada Grants Preliminary Approval of Trinity Western University's Proposed Law Program" (16 December 2013), online (pdf): <http://docs.flsc.ca/FederationNewsReleaseFIN.pdf>.

[852] Elaine Craig, "Law societies must show more courage on Trinity Western application," *The Globe and Mail* (18 December, 2013), online: <http://www.theglobeandmail.com/opinion/law-societies-must-show-more-courage-on-trinity-western-application/article16023053/> ["More Courage"].

[853] The motion read: "Pursuant to Law Society Rule 2-27(4.1), the Benchers declare that, notwithstanding the preliminary approval granted to Trinity Western University on December 16, 2013 by the Federation of Law Societies' Canadian Common Law Program Approval Committee, the proposed Faculty of Law at Trinity Western is not an approved faculty of law." See Law Society of British Columbia Bencher Meeting, Transcript (11 April 2014), at 7, online (pdf): <https://www.lawsociety.bc.ca/docs/newsroom/TWU-transcript.pdf> [LSBC Bencher Transcript].

The transcript of the debate reveals a very thoughtful and considered approach to the question at hand. Overwhelmingly, the Benchers were convinced that they had a duty to protect the public interest and that included upholding the law despite their personal views on TWU's discriminatory admissions policy. They were persuaded by the various legal opinions about the applicability of *TWU* 2001 to the current case. This sense of duty to the law is remarkable, in hindsight, given what unfolded in the following months. The Benchers would go from the April 11 meeting confirming that the rule of law required TWU's approval, to, a few months later, reversing that decision on October 31. This was remarkable. Despite their commitment to the law they ultimately succumbed to the popular opinion of their membership. Politics within the legal community ultimately won at the Law Society level. It would take the BC courts to re-establish the primacy of law, which was short-lived until the SCC ruled in favour of the Law Society.

During the debate on the motion, Joseph Arvay, Q.C., a very well-respected and competent human rights lawyer, objected to what he described as "the metaphorical sign at the gate of the law school which says, 'No LGBT students, faculty or staff are welcome.'"[854] Since the Law Society is required to respect the rights and freedoms of everyone in BC it must refuse TWU. He noted that the Federation's report recognized that TWU would be "an unwelcome place for LGBT students and faculty even if it was not a complete ban."[855] Thus, "a sign that says 'LGBT are not welcome' is as bad as a sign that says 'you cannot apply.'"[856]

Mr. Arvay had no problem with a religious law school, even one with a core belief "that same-sex marriage and sexual intimacy that this entails being a sin."[857] Rather he opposed "that belief being imposed on those who do not share that belief."[858]

"We are the law," Arvay declared later in the meeting, after listening to a number of his fellow benchers say they had to keep with the law even though they decried TWU's admissions policy. "I am nonetheless very troubled by the very many comments to the effect that the community covenant is repugnant, it's hurtful, it's discriminatory, it's hypocritical, it's heartless, but we're bound by the law," said Arvay.[859] He continued with resolve, "I don't recognize that law, that kind of law in this country. I don't recognize a law that is so divorced from justice that we are bound by it. We are the law; we are the law-making body charged with making a decision at hand."[860]

Arvay's comments reiterates my point in this work – advocates for equality are so adamant in their position that they are willing to knock down any legal impediment that would deny the dominance of their definition of sexual equality. It matters not that the law provides a space for private religious institutions, like TWU, to believe and practice traditional marriage on campus.

Even those who felt bound by the law to support TWU were strident in their criticism of TWU. That contemptuous attitude toward TWU ultimately led to the events that were to follow in BC – the referendum and the rejection of TWU's accreditation by the same Benchers. They had so compromised their support of the law through their vilification of TWU that they

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[854] *Ibid* at 8.
[855] *Ibid*.
[856] *Ibid*.
[857] *Ibid* at 10.
[858] *Ibid* at 11.
[859] *Ibid* at 46.
[860] *Ibid*.

poisoned the chalice going forward. Just a few examples of this attitude should suffice in explaining why Mr. Arvay could say what he said.

David Mossop, Q.C. described a sinister reality regarding the state of the BC Bar and its relationship to TWU. While TWU has "a great curriculum" that is not enough. "[T]o be a successful law school in British Columbia or in Canada, you have to have broad support within the legal community. You do not have that broad support. There are significant members of this profession who are against your approval. There is nothing the Law Society can do about that."[861] In other words, BC lawyers will not hire qualified TWU graduates simply because of opposition to the Community Covenant. The CCA will be "a millstone around your neck."[862] Using such language to ostracize a religious minority law school for doing something that it has a legal right to do appears harsh.

Elizabeth Rowbotham hardly supported the current state of the law when she found "…it very disturbing that people can be discriminated against on the basis of sexual orientation simply because an institution is a private institution. However, that is our law in Canada and I think that if it's to be challenged, this is not the forum to do so."[863]

Cameron Ward insisted:

> In my view, making people feel unwelcome anywhere because of their personal characteristics is a particularly repugnant form of discrimination. As a Bencher, as a lawyer, and as a Canadian citizen, I feel I have the duty to oppose such discrimination, not to promote or to condone it. In my opinion, TWU's community covenant is an anachronism, a throwback that wouldn't be out of place in the 1960s. The Law Society recently invited the university to amend it, to remove its discriminatory language. TWU refused. The Trinity Western University is stubborn enough to stick to its principles, I'm stubborn enough to stick to mine. I will proudly be voting in favour of the resolution."[864]

David Crossin, Q.C., felt that, although "[TWU] chose a path that is effectively discriminatory, certainly hurtful, and to many highly hypocritical" he nevertheless was bound by the law.[865]

Pinder Cheema, Q.C., likewise asserted:

> In my opinion, TWU's perspective is antithetical to Canadian values of tolerance and respect that are enshrined in our *Charter*. I find this covenant abhorrent and objectionable and it saddens me greatly that TWU has persisted in this outdated, outmoded view. However, as has been echoed by a number of my fellow Benchers, it is our obligation above all else to uphold the rule of law.[866]

Jamie Maclaren declared, "It is TWU's institutional and apparently non-negotiable act, in other words conduct of discrimination, that is an affront to the human dignity of LGBTQ people

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[861] *Ibid* at 21.

[862] *Ibid*. He predicted, "That's an individual thing for individual lawyers. That will be, if I could use the biblical example, a millstone around your neck. And over time, the pressure will come from the faculty and from the student bodies at the law school to change the covenant. Maybe eight to 15 years from now, you will change the covenant and at that time, those people in charge will say, why did we ever do this in the first place?"

[863] *Ibid* at 30. Note that Rowbotham ignores the deeper importance of maintaining private institutions: the fact that privacy is an indication of freedom. By contrast, in totalitarian regimes, there is no "private" – everyone must conform to the same rules.

[864] *Ibid* at 31-32.

[865] *Ibid* at 37.

[866] *Ibid* at 42.

and it diminishes their public standing, that demands our disapproval in the name of equity and fairness."[867]

Dean Lawton noted, "I suspect why this caused so much concern among those opposed to accreditation is not the pledge of celibacy, but the statement of marriage being sacred exclusively between a man and a woman. Were it not for the statement about marriage, I expect we would not be considering this matter today."[868] Dean Lawton's view is indeed my point.

Given such statements it is not surprising that Mr. Arvay said what he did. Indeed, his position is a common one among the anti-TWU elites. They have no problem with a religious law school and its beliefs if the school does not "impose" those beliefs on others who do not share the same convictions. Context is everything here – we are talking about a religious law school, not a secular law school. That is key. A religious law school, such as TWU, is not imposing on anyone but is saying, "If you believe as we do on these issues you are welcome to join us. If not, then there are other options for you."[869] *TWU* 2001 certainly understood this basic idea. Yet, Mr. Arvay and the many other anti-TWU advocates refused to accept that position as an answer. They argued it was not fair that those LGBT students who were offended by TWU's policies would be ineligible for those law student positions. Such students, they maintained, would be in an unequal position and the Law Society should not give its imprimatur to such a school.

There are many reasons why this position is untenable. First, a religious school does not cease to be a religious school because it teaches law or has its degrees recognized by the state. Second, state accreditation of TWU degrees is not state endorsement of TWU's religious beliefs or practices. It is simply an acknowledgement that academic requirements have been met. The same principle applies when a church-run nursing home is licensed to operate; the state is not endorsing the religious motivations or the religious practices of that nursing home, merely its capacity to provide adequate care. Third, it is curious why in this discussion there is no mention of the fact that TWU offers many other academic programs, including history, business, education, theology and nursing. If it is wrong for the Law Society to approve TWU then it is also wrong for the province of British Columbia to approve other degrees for the same reasons. Such logic taken to its ultimate conclusion would mean that it is unacceptable to even have a religious school such as TWU.[870] That outcome does nothing for diversity in a liberal

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[867] *Ibid* at 43.

[868] *Ibid* at 24.

[869] Despite ultimately agreeing with the law societies in *TWU 2018*, *supra* note 14, Chief Justice McLachlin pointed out at para 133 that "Students who do not agree with the religious practices do not need to attend these schools. But if they want to attend, for whatever reason, and agree to the practices required of students, it is difficult to speak of compulsion."

[870] Further, it would lead to excluding individuals from the profession on the basis of one's faith or church affiliation. The SCC expressed that view in *TWU* 2001, *supra* note 26 at para 33: "Indeed, if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church. The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected." Justice Jamie S. Campbell, of the Nova Scotia Supreme Court, was aware of this at para 17 of his decision, *TWU* NSSC 2015, *supra* note 775. He also noted at para 15: "There is a difference between recognizing the degree and expressing approval of the moral, religious, or other positions of the institution. The refusal to accept the legitimacy of institutions because of a concern about the perception of the state endorsing their religiously informed moral positions would have a chilling effect on the liberty of conscience and freedom of religion. Only those institutions whose practices were not offensive to the state-approved moral consensus would be entitled to those considerations".

democracy. It seems that the field of law is being singled out as somehow special from the other areas of study. That reeks of legal arrogance.

6.3.3.2 Ultimate Rejection of Federation's Approval

After the April 11, 2014 vote, some LSBC members requisitioned a Special General Meeting which was held on June 10, 2014 to vote on a non-binding resolution calling on the Benchers to declare that TWU was not an approved faculty of law. The resolution passed 3,210 to 968.

On September 26, 2014, the Benchers voted to hold a referendum on the issue and agreed that the results would be binding on the LSBC. The October 30, 2014 results were 5,591 votes against TWU and 2,088 for. The next day, the Benchers reversed their April 11, 2014 approval of TWU and refused to approve TWU's JD degree. TWU went to the BC Supreme Court for judicial review.

6.3.3.3 Judicial Review

6.3.3.3.1 BC Supreme Court[871]

Chief Justice Hinkson allowed TWU's judicial review of the LSBC decision. The court held that the Benchers improperly fettered their discretion under the Legal Profession Act (LPA) and acted outside their authority in delegating to the LSBC's members the question of whether TWU's proposed faculty of law should be approved for the purposes of the admissions program. Further, the decision was made without proper consideration and balancing of the *Charter* rights at issue, and therefore could not stand.

Unlike the Ontario Divisional Court, Hinkson was not persuaded that the circumstances or the jurisprudence respecting human rights had so fundamentally shifted the parameters of the debate as to render *TWU* 2001 other than dispositive of many of the issues in this case. He was bound by *TWU* 2001 to apply the correctness standard to the question of the LSBC's jurisdiction to disapprove of TWU's proposed faculty of law.

The LSBC has the jurisdiction to use its discretion to disapprove the academic qualifications of a common law faculty of law in a Canadian university, so long as it follows the appropriate procedures and employs the correct analytical framework in doing so.

The evidence was clear to Justice Hinkson that the Benchers permitted a non-binding vote of the LSBC membership to supplant their judgment. In so doing, the Benchers disabled their discretion under the LPA by binding themselves to a fixed blanket policy set by LSBC members. The Benchers thereby wrongfully fettered their discretion.

TWU was entitled to but was deprived of a meaningful opportunity to present its case fully and fairly to those who had the jurisdiction to determine whether the JD degrees of the proposed law school's graduates would be recognized by the LSBC.

The LSBC decision infringed TWU's right of religious freedom. The LSBC had the constitutional obligation to consider and balance the religious freedom rights of TWU and the equality rights of the LGBT community.[872] The Benchers weighed the competing *Charter* rights

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[871] *TWU* BCSC 2015, *supra* note 795.

[872] It is unfortunate in the TWU law school case the courts, in all three jurisdictions, did not recognize the fact that religion is an equality right as much as sexual orientation. Religious freedom vis a vis equality right is not the complete picture as there is also the issue of equality rights being plural – religion and sexual orientation.

of freedom of religion and equality before voting on the April Motion, but the record does not permit such a conclusion to be reached with respect to the Benchers' vote of October 31, 2014. In light of the inappropriate fettering of its discretion by the LSBC and its failure to attempt to resolve the collision of the competing *Charter* interests in the October Referendum or the subsequent decision, the appropriate remedy was to quash the decision and restore the results of the April 11, 2014 vote.

6.3.3.3.2 BC Court of Appeal[873]

In dismissing the Law Society's appeal, the Court ruled that the Law Society had authority, under the Legal Profession Act (LPA or Act), to consider factors beyond academic education in approving a law school. The Benchers were wrong in passing a resolution that regardless of the referendum results those results would be consistent with their statutory duties.

When *Charter* values are implicated and *Charter* rights might be infringed as a result of an administrative decision, the decision maker is required to balance, or weigh, the potential *Charter* infringement against the objectives of the administrative regime. The October 31, 2014, declaration of the Benchers did not engage in any exploration of how the *Charter* values at issue could best be protected in view of the objectives of the Act. The Benchers conflated the role of the courts with their own role.

The Court held that the Law Society did not balance the *Charter* rights in accordance with the *Doré*[874] decision. The September 26, 2014 resolution to accept the referendum results was not only an improper fettering of their discretion by binding themselves to the decision of the majority but it abdicated their duty as an administrative decision-maker to properly balance the objectives of the Act and the *Charter*. While the *TWU* 2001 decision is not dispositive, its essential legal analysis has not changed appreciably with respect to the obligation to balance statutory objectives with the *Charter* rights affected by an administrative decision.

The starting premise cannot be that equality rights advocated by the BC Law Society trump TWU's religious freedom. The *Charter* rights must be balanced against the statutory objectives of the Law Society. The balancing exercise goes beyond considering the competing rights and choosing to give greater effect to one or the other, with either course of action being equally reasonable. The nature and degree of detrimental impact on the rights must be considered.

In reviewing the respective impacts, the Court held that the impact on the religious freedom of TWU is "severe."[875] TWU graduates would not be able to practice law, nor would TWU be able to operate a faculty of law contrary to what the Ontario Court of Appeal assumed. The main function of a faculty of law is to train lawyers. On the other side of the ledger, the impact on sexual orientation equality rights, should TWU be accredited, would be insignificant in real terms.

In the Court's view, while in principle LGBTQ students would be discriminated against, there is no evidence that their access to law school and the legal profession would be impeded.[876] The Special Committee of the Federation of Law Societies of Canada found that

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[873] *TWU* BCCA 2016, *supra* note 478.
[874] *Doré, supra* note 833.
[875] *TWU* BCCA 2016, *supra* note 478 at para 168
[876] *Ibid* at para 175.

TWU's law school would not result in any fewer choices for LGBT students. Rather, an overall increase in law school places in Canada seems certain to expand the choices for all students. It is incontrovertible that refusing to recognize the TWU faculty will not enhance accessibility. So, it is the Covenant's refusal to recognize same-sex marriage that is at issue here. The Law Society was prepared to approve the law school if the Covenant was amended to remove the offensive portions. Even without that, few LGBTQ students would wish to apply.

The Court rejected the argument that to approve the law school would be an endorsement of the Covenant. Such a view "is misconceived". TWU is not seeking a public benefit as in the Bob Jones University Case.[877] Accreditation is not a benefit but a regulatory requirement to conduct a lawful business. Even if the Covenant were amended and the school was approved TWU's beliefs on marriage would remain. This underscores the weakness of the Law Society's premise that it would be endorsing TWU's religious beliefs by accrediting the school. In a diverse and pluralistic society, this argument must be treated with considerable caution. Licensing of religious care facilities and hospitals would also fall into question.[878]

Ultimately, the Court was of the view that "state neutrality and pluralism lie at the heart of this case."[879] Said the Court:

> State neutrality is essential in a secular, pluralistic society. Canadian society is made up of diverse communities with disparate beliefs that cannot and need not be reconciled. While the state must adopt laws on some matters of social policy with which religious and other communities and individuals may disagree (such as enacting legislation recognizing same-sex marriage), it does so in the context of making room for diverse communities to hold and act on their beliefs. This approach is evident in the *Civil Marriage Act* itself, which expressly recognizes that "it is not against the public interest to hold and publicly express diverse views on marriage".[880]

The Court recognized that while the Covenant is deeply offensive and hurtful to the LGBTQ community as noted by the Ontario Court of Appeal, which is not to be minimized, there is no *Charter* or other legal right to be free from views that offend or contradict an individual's strongly held beliefs absent hate speech.[881] The Court was aware that hurtful commentary was also levelled at TWU:

> Indeed, it was evident in the case before us that the language of "offense and hurt" is not helpful in balancing competing rights. The beliefs expressed by some Benchers and members of the Law Society that the evangelical Christian community's view of marriage is "abhorrent", "archaic" and "hypocritical" would no doubt be deeply offensive and hurtful to members of that community.[882]

The TWU community has a right to hold and act on its beliefs absent evidence of actual harm. The Law Society's decision to not approve TWU's faculty of law denies these evangelical Christians the ability to exercise the fundamental religious and associative rights of s. 2 of the *Charter*. Given the severe impact of non-approval and the minimal impacts on LGBTQ persons along with the fact that *Charter* rights are to be limited no more than is necessary, the Law Society's decision was unreasonable. In conclusion the court noted:

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[877] *Bob Jones University v. United States*, 461 U.S. 574 [*Bob Jones University*]. See discussion in Chapter 6.
[878] *TWU* BCCA 2016, *supra* note 478 at para 184.
[879] *Ibid* at para 132.
[880] *Ibid* at para 185.
[881] *Ibid* at para 188, also quoted earlier.
[882] *Ibid* at para 189.

> A society that does not admit of and accommodate differences cannot be a free and democratic society — one in which its citizens are free to think, to disagree, to debate and to challenge the accepted view without fear of reprisal. This case demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is in itself intolerant and illiberal.[883]

Not surprisingly the Law Society of British Columbia appealed the decision to the Supreme Court of Canada.[884] However, this decision, along with the decision of Justice Jamie S. Campbell of the Nova Scotia Supreme Court, gave the TWU position the best results in a long saga of legal wrangling. It was the last appellate decision to be made. Eighteen provincial judges (6 each in BC, ON, and NS) heard the TWU case. Twelve of those judges ruled in TWU's favour. The six who went against TWU were all in Ontario.

The Ontario Courts[885] adopted the interpretation of the *Charter* that was publicized by the law deans in their letter to the Federation and by Professor Elaine Craig. As noted above, Dean Bill Flanagan's letter avowed, "Discrimination on the basis of sexual orientation is unlawful in Canada and fundamentally at odds with the core values of all Canadian law schools."[886] There was no acknowledgement of the necessary religious exemptions from generally applicable law. This academic thinking has resulted in what William Galston calls "civic totalism."[887] The law deans and other academics were willing to broker no other view of discrimination but their own. Five members of the BC judiciary rejected the elite view of constitutional law. That is sobering. Up until the BCCA's decision, the deans and their faculty controlled the narrative on TWU. The BCCA ruling can be interpreted to mean that the law deans' decision has been reviewed and found wanting.

Iain T. Benson was prescient in an article published in BC's *The Advocate* when he chided the law deans, stating, "it is wrong in principle to seek to impose one's views on others under the guise of 'liberalism' or 'equality,' both of which should admit of different approaches, depending upon the context." Otherwise, "without context-sensitive exceptions to general rules of equality or discrimination, religious differences and associational liberty would not long exist." The BCCA's view parallels Benson's approach.[888]

6.3.4 The Law Society of Upper Canada (Ontario)

The Law Society of Upper Canada (LSUC) went through a two-step decision making process. On April 10, 2014, the Benchers discussed TWU's application and raised questions for TWU. TWU was then given an opportunity to respond in time for a second meeting on April 22, 2014 when a decision was made based on all the information. The Benchers voted 28-21 rejecting TWU's proposed law school. TWU sought judicial review at the Ontario Divisional

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[883] *Ibid* at para 193.
[884] LSBC News Release, "Law Society to seek leave to appeal TWU decision to the Supreme Court of Canada," (8 November 2016), online: <https://www.lawsociety.bc.ca/page.cfm?cid=4289&t=Law-Society-to-seek-leave-to-appeal-TWU-decision-to-the-Supreme-Court-of-Canada>.
[885] *TWU* ONSC 2015, *supra* note 776; and *TWU* ONCA 2016, *supra* note 701.
[886] Bill Flanagan Letter, *supra* note 827.
[887] Galston, *supra* note 621 at 46-47.
[888] Iain T. Benson, "Law Deans, Legal Coercion and the Freedoms of Association and Religion in Canada" (2013) 71 The Advocate, Part 5, 671-675.

Court which was dismissed. An appeal of that decision was also dismissed at the Ontario Court of Appeal. TWU then appealed that decision to the Supreme Court of Canada.

The Ontario decisions exhibit the extent to which the legal revolution against the special status of religion has gone. They reject the current paradigm accommodating religion. Both courts have made it clear that supporting the traditional, heterosexual norm of marriage is no longer an acceptable opinion (or practice) for religious organizations to maintain. Their refusal to provide religious accommodation deserves a close examination.

6.3.4.1 Ontario Divisional Court[889]

The Ontario Divisional Court dismissed TWU's judicial review application to overturn the LSUC's decision. The Divisional Court held that though the religious freedom of TWU was infringed, the LSUC's decision was justified because it was reasonable to take into consideration the discriminatory nature of TWU's admissions policy when deciding to accredit the proposed school. However, the Court did say that the LSUC "will be duty bound to properly consider" the individual accreditation requests of TWU graduates to ensure their religious rights are minimally impaired.[890]

The Divisional Court appears to have adopted the view that state actors can be preferential for or against religious beliefs and, based on that view, can refuse to accredit religious institutions. This is revealed in its determination that TWU cannot compel the Law Society to accredit its law school "and thus lend [the Law Society's] tacit approval to the institutional discrimination…."[891] Otherwise, "TWU could compel the [LSUC], directly or indirectly, to adopt the world view that TWU espouses."[892]

That telling statement is out of place with the recent comments of the Supreme Court of Canada. Like the BCCA the SCC said the state cannot take sides on religious matters – it must be neutral.[893] It cannot deny a service to a citizen because it disagrees with that citizen's worldview. Herein lies the heart of this case. It is a matter of competing "worldviews". The Divisional Court appears to be saying that if the Law Society does not like TWU's worldview on marriage (which is legally valid), then it can deny accreditation. This view runs contrary to the SCC's *Saguenay*[894] decision requiring the state to be neutral on religious beliefs. "By expressing no preference," said the SCC:

> the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally. I note that a neutral public space does not mean the homogenization of private players in that space. Neutrality is required of institutions and the state, not individuals (see *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at paras. 31 and 50-51). On the contrary, a neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity. The neutrality of the public

[889] *TWU* ONSC 2015, *supra* note 776.
[890] *Ibid* at para 128.
[891] *Ibid* at para 115.
[892] *Ibid*.
[893] *Saguenay, supra* note 358 at para 75. The SCC said there is a "democratic imperative" which is "the pursuit of an ideal: a free and democratic society." The state is required to "encourage everyone to participate freely in public life regardless of their beliefs."
[894] *Saguenay, supra* note 358.

space therefore helps preserve and promote the multicultural nature of Canadian society enshrined in s. 27 the Canadian *Charter*. Section 27 requires that the state's duty of neutrality be interpreted not only in a manner consistent with the protective objectives of the Canadian *Charter*, but also with a view to promoting and enhancing diversity.[895]

6.3.4.1.1 Discrimination

The Divisional Court took issue with the term "discrimination". It noted that the belief system of TWU does discriminate and rejected TWU's argument that it was not discriminating. TWU argued that because its admission's policy is not unlawful it cannot be considered legally discriminating. Unfortunately, TWU's position has only confused the matter. Of course, TWU is discriminatory and it is entitled to be. However, the Divisional Court appears to be taking the concept further and is openly challenging the Supreme Court of Canada's 2001 decision that recognized that TWU is not for everyone.[896]

The Divisional Court took umbrage at TWU's position "To assert that that result [to attend TWU means to disavow one's beliefs and, for LGBTQ, their identity] is not, at its core, discriminatory is to turn a blind eye to the true impact and effect of the Community Covenant."[897] Indignation was not only directed at TWU but at the very reasoning of *TWU* 2001 that recognized TWU's right to discriminate on its campus.

Further, the Divisional Court was not impressed by TWU's position that it treats everyone with fairness, courtesy and open-mindedness. Such "does not change the fact that notwithstanding TWU's stated benevolent approach … in order for persons, who do not hold the beliefs that TWU espouses, to attend TWU, they must openly, and contractually, renounce those beliefs or, at the very least, agree not to practise them. The only other option … is to engage in an active deception … with dire consequences if their deception is discovered."[898]

The Divisional Court's discomfort with the TWU Community Covenant is a discomfort with religious institutional rights.[899] Religious institutions by their very nature establish rules

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[895] *Ibid* at para 74.

[896] *TWU* 2001, *supra* note 26 at para 25:

> "TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions. That said, the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence. It is important to note that this is a private institution that is exempted, in part, from the British Columbia human rights legislation and to which the Charter does not apply. To state that the voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution, is sufficient to engage s. 15 would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality."

[897] *TWU* ONSC 2015, *supra* note 776 at para 106.

[898] *Ibid* at para 112.

[899] The BC and NS courts appeared not to be worried about the concept of TWU having religious freedom in its corporate capacity. The NSSC noted, "The NSBS resolution and regulation infringe *on the freedom of religion of TWU* and its students in a way that cannot be justified. The rights, *Charter* values and regulatory objectives were reasonably balanced within a margin of appreciation" (emphasis added, see *TWU* NSSC 2015, *supra* note 775, at para 270). The BCCA stated, "As Justice Abella made clear in *Loyola*, the *Charter* right to freedom of religion recognizes and protects the 'embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions', including private educational institutions" (*TWU* BCCA 2016, supra note 478 at para 167). The SCC referred to the "communal"

of admission based upon religious beliefs and practises. The Court noted that "sexual conduct is an integral part of a person's very identity," but so too are the religious beliefs and actions of a person and the religious institution to which she belongs. The Divisional Court's uneasiness with the internal administration of TWU is a challenge to the very idea of religious community and its institutions. The fact that the Court may find certain beliefs abhorrent gives it no right to deny TWU every benefit of the law including the exemption from the *Charter* and from human rights legislation. This the Court did not do.

6.3.4.1.2 Why Should a Religion Run A University

The Divisional Court expressed reservations about whether evangelical Christians should have a right to claim protection of religious freedom for religious beliefs and practises that are not mandatory, such as running a university. Said the Court:

> There is no evidence before us that the ability of an evangelical Christian to gain a legal education requires that they study at a law school that only permits the presence of evangelical Christian beliefs and only permits the attendance of those persons who commit to those beliefs. Indeed, the contrary would appear to be obvious from the fact that evangelical Christians have been attending secular law schools, and successfully becoming lawyers, for decades, if not longer.[900]

That rationale runs contrary to the current paradigm of religious accommodation. First, the Divisional Court appears to have misunderstood TWU's position. It is not that evangelical Christians are required by their religious beliefs to study law at a Christian law school. Rather, it is that they choose to do so, and they have that right. Second, the Divisional Court appears to be directly at odds with the *Amselem* decision[901] of the Supreme Court of Canada where the Court stated:

> Consequently, both obligatory as well as voluntary expressions of faith should be protected under the Quebec (and the Canadian) *Charter*. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection. An inquiry into the mandatory nature of an alleged religious practice is not only inappropriate, it is plagued with difficulties.[902]

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aspect of religious freedom (see *LSBC v. TWU* 2018, *supra* note 14 at para 64). See also, Kathryn Chan, "Identifying the Institutional Religious Freedom Claimant" (2017) 95 The Canadian Bar Review, 1.

[900] *Ibid* at para 78. There is a lack of historical understanding of Christian involvement in university education both in the running of law schools and in the study of law (see Pierre Riché, *Education and Culture in The Barbarian West Sixth Through Eighth Centuries* (Columbia, South Carolina: University of South Carolina Press, 1976). TWU's School of Law is in line with the traditional Christian pursuit of legal academic scholarship. Law and religion scholar, Harold J. Berman, observed that Western legal systems, "are a secular residue of religious attitudes and assumptions which historically found expression first in the liturgy and rituals and doctrine of the church and thereafter in the institutions and concepts and values of the law. When these historical roots are not understood, many parts of the law appear to lack any underlying source of validity." See Berman, *supra* note 46 at 166. To say that evangelical Christians do not need a Christian law school to gain a legal education is beside the point. TWU has every right to operate a Christian law school in accordance with its religious beliefs and when it does so it is following the very long tradition of Christian communities running their own law school. This is further evidenced by the multitude of Christian law schools around the world.

[901] *Amselem*, *supra* note 7 at para 47.

[902] *Ibid*.

"Plagued with difficulties" is an apt description of the Divisional Court reasoning. To limit religious freedom by suggesting, in essence, that since law schools are not required by the evangelical Christian community, they are therefore not something to be protected under the *Charter*, is to totally ignore the *Charter* right of religious freedom. However, as will be seen, SCC Justice Rowe accepted this view. In the end, the Divisional Court did not allow this rationale to deny protection under s. 2(a) of the *Charter* but it nevertheless reveals an underlying pre-supposition that regards the current paradigm of religious freedom with scepticism.

The Divisional Court's unorthodox approach, vis a vis the current paradigm, is incongruent with the decisions of Justice Jamie S. Campbell[903] (whom the Ontario Division Court snubbed as "a judge in Nova Scotia") and the BC Court of Appeal. But this perspective ultimately found favour at the SCC. The Ontario decision has called into question the right of a religious institution to determine its own internal operations in accordance with its religious beliefs and practices.

The Divisional Court held that the *TWU* 2001 decision is not binding because it involved different facts, a different statutory regime, and a fundamentally different question.[904] It is debatable that the differences between the 2001 case and the current case were so significant. However, what is not different, which the BC Court of Appeal and the Federation recognized:

> Just as in BCCT, the Supreme Court in *Whatcott* found the proper balance point between equality and freedom of religion values to be the point at which conduct linked to the exercise of freedom of religion resulted in actual harm. Absent evidence of actual harm, it held in both cases, freedom of religion values must be given effect.[905]

That is what the Divisional Court did not do. There was no proper analysis of the actual harm that the LGBT community would suffer if the Law Society of Upper Canada accredited TWU. The Divisional Court's assertion that LGBT students' "likelihood of gaining acceptance to any law school is decreased" if TWU were accredited because of its discriminatory policies[906] simply does not constitute as serious a consequence when compared to the failure of TWU gaining accreditation. TWU's school would not exist.[907] That is very harsh compared to the fact that prospective LGBT applicants would have no different outcome should TWU be accredited.

Further, the Divisional Court stated that even without the LSUC accreditation, TWU graduates could still become members of the bars in those provinces where TWU's law school has been accredited.[908] That is a remarkable position because the TWU graduates would still have access to apply to LSUC through the National Mobility Agreement.[909] The Court appears to be suggesting that TWU can still have its school, albeit in a limited capacity since its graduates would not be able to practice law right away in Ontario, and that the main effect of the LSUC's

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[903] *TWU* NSSC 2015, *supra* note 775.
[904] *TWU* ONSC 2015, *supra* note 776 at para 60.
[905] John B. Laskin, "Memorandum Re: Trinity Western University School of Law Proposal – Applicability of Supreme Court Decision in *Trinity Western University v. British Columbia College of Teachers*," to Gérald R. Tremblay & Jonathan G. Herman, Federation of Law Societies of Canada (21 March 2013), at 6, being Appendix C of the Special Advisory Committee Final Report, online (pdf): <http://docs.flsc.ca/SpecialAdvisoryReportFinal.pdf> [Laskin Memo].
[906] *TWU* ONSC 2015, *supra* note 776 at para 67.
[907] The Minister of Advanced Education revoked TWU's approval after the Law Society in BC refused accreditation. "Statement on Trinity Western University's School of Law" (11 December 2014), online: *BC Gov News* <https://news.gov.bc.ca/07542>.
[908] *TWU* ONSC 2015, *supra* note 776 at para 68.
[909] "National Mobility Agreement" (August 2002), online (pdf): *Federation of Law Societies* <http://flsc.ca/wp-content/uploads/2014/10/mobility1.pdf>

decision is to make a statement or send a message that it did not agree with TWU's position on marriage. Otherwise, as the Court stated, "Condoning discrimination can be ever much as harmful as the act of discrimination itself."[910] They would rather be seen as supporting LGBTQ individuals (though it will have no effect on increasing their law school seats) rather than a religious belief and practice perceived as discriminatory.

This is also evident in the Court's reasoning that "TWU can hold and promote its beliefs without acting in a manner that coerces others into forsaking their true beliefs in order to have an equal opportunity to a legal education. It is at that point that the right to freedom of religion must yield."[911] This description of the limits of religious freedom is a non-sequitur. It does not logically follow from all of our previous understandings of religious freedom. First, it only makes sense if TWU is subject to the *Charter* as a government actor. That is because remaining neutral and ensuring equal opportunities for education are the responsibilities of the government, not a private school like TWU. TWU, being private, has the right to require its students to agree to abide by a Community Covenant as the basis of attending the school. Religious freedom does not yield in such a case. Second, the Divisional Court is taking a position against TWU's beliefs on religion. That has never been the position of the law. A court may find a religious belief distasteful but if the belief does not result in criminal activity a court has no jurisdiction to deny a community a right to practice its faith. Again, religious freedom does not yield in such a case.

The Divisional Court's decision is the first decision since the Marc Hall case[912] that outlines in distinct terms the legal revolution against the special status that the law has historically given to religion. In both cases the issue that has brought about this change has been the issue of sexuality. The traditional sexual norms that have been practiced by religious communities for thousands of years have become the flashpoint. It is the place where the law now finds itself in crisis.

6.3.4.2 Ontario Court of Appeal[913]

The Ontario Court of Appeal upheld the Divisional Court's decision. It agreed that the *TWU* 2001 involved different facts, a different statutory regime, and a fundamentally different question. And, that the regulator's argument is different because the BCCT argued discrimination of the TWU graduates but the LSUC argues it is not in public interest to accredit a law school that prevents access through a discriminatory policy. However, *TWU* 2001 is still relevant to solve some of the issues in balancing the rights.

The standard of review is that of reasonableness and not correctness as it was in *TWU* 2001. There is no qualitative difference between decisions of Law Society discipline tribunals and the decision to accredit a law school. Administrative tribunals are required to take account of and to act consistently with *Charter* values as they make decisions. There is no question of jurisdiction here. Adequacy of reasons is not a standalone basis for quashing a decision.

The Ontario Court of Appeal held that LSUC's decision was reasonable.

The *Charter* right of religious freedom was engaged individually by members of the TWU community and collectively, though the Court did not elaborate on the extent of TWU's corporate *Charter* right to religious freedom. The Court was of the view that LSUC cannot

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[910] *TWU* ONSC 2015, *supra* note 776 at para 116.
[911] *Ibid* at para 117.
[912] *Hall v. Powers* (2002), 59 O.R. 3d 423, [2002] O.J. No. 1803.
[913] *TWU* ONCA 2016, *supra* note 701.

compel TWU to do anything. Even absent accreditation TWU is free to operate its law school in the manner it chooses. There is no evidence that the LSUC decision would have so dramatic an effect as closing TWU's law school. The decision's interference is more than trivial as TWU would face an increased burden in attracting students. While freedom of religion is not absolute it is appropriate to adopt a broad definition of freedom of religion at this stage and consider impact at the second stage of the analysis.

Statutory objectives of LSUC as contained in s. 4.1 and 4.2 of the Law Society Act[914] requires that it govern the legal profession in the public interest. In maintaining standards of learning, professional competence and conduct it can include the promotion of a diverse profession. Quality of those who practice law is based on merit and it excludes discriminatory classifications. The LSUC is subject to the *Charter* and the Human Rights Code (HRC) and it is appropriate for the LSUC to consider its statutory objective informed by the values found in the *Charter* and HRC.

To assess accreditation in the public interest the LSUC was required to balance the statutory objectives based on merit and exclude discriminatory classifications with religious freedom. The LSUC decision interfered with religious freedom. The Community Covenant discriminates against the LGBTQ community contrary to s. 15 of the *Charte*r and s. 6 of the Human Rights Code. TWU's Community Covenant is "deeply discriminatory to the LGBTQ community and it hurts."[915]

The process adopted by the LSUC to consider TWU's application was excellent. The record had TWU's application and supporting material, material reports of the Federation of Law Societies of Canada, 3 legal opinions for guidance and 210 submissions from the profession and the public. It took place in two stages with TWU having opportunity to address Convocation for 1.5 hours; with 4.5 hours of 29 Bencher speeches. The Benchers understood the historic significance of their decision and engaged in a fair balancing of the conflicting rights. Not all Benchers engaged in the precise style of reasoning as the *Doré* analytical framework but all received and reviewed a legal opinion on the topic and heard all the speeches. To focus on Benchers' speeches in minute detail misses the bigger picture of a group that is mostly democratically elected undertaking a democratic process. The appellants' argument that the Benchers ignored their legal obligation to balance the *Charter* rights with the statutory objectives is rejected.

Was the LSUC's decision reasonable? The answer is 'Yes', indeed 'Clearly yes', for the following reasons: first, the LSUC is one of two gatekeepers to the legal profession – law schools and law societies. There is nothing wrong with a law society, acting in its jurisdiction, scrutinizing the admissions process to decide whether to accredit a law school. LSUC could pay heed to the fact that a homosexual student would not be tempted to apply to TWU. All law schools currently accredited provide equal access to all applicants. TWU would be an exception. Second, TWU may not be subject to HRC but the LSUC is. Third, there is an important distinction when a religious institution exercises its religious beliefs in a manner that discriminates against others. LSUC was entitled to consider the discriminatory policy against LGBTQ community as in the example of the US case of Bob Jones University (BJU). TWU, like BJU is seeking access to a public benefit – accreditation. LSUC must meet its statutory mandate to act in the public interest. The decision does not prevent TWU the practice of a religious belief itself rather it denies a public benefit because of the impact on the LGBTQ community. Fourth, human rights law and international treaties bind Canada. Fifth, religious neutrality does not

[914] *Law Society Act*, R.S.O. 1990, c. L.8.
[915] *TWU* ONCA 2016, *supra* note 701 at para 119.

mean that the state must refuse to take positions on policy disputes that affect religion. LSUC was entitled to take a position and it was reasonable. While TWU may find it more difficult to operate its law school the LSUC decision does not prevent it from doing so. Instead, it denies a public benefit that LSUC was entrusted with bestowing based on concerns in line with its statutory objectives.

6.3.5 Nova Scotia Barristers' Society

On April 25, 2014, the Nova Scotia Barristers' Society (NSBS) refused approval of TWU's law school unless TWU either exempted law students from signing the Community Covenant or amended the Community Covenant for law students in a way that would cease to discriminate.[916]

On July 23, 2014, the Society's Council amended its regulations so, notwithstanding FLSC approval, the Council had the discretion to act in the public interest and determine whether a law school "unlawfully discriminates" in its law admissions or enrolment policies or requirements on grounds prohibited by either or both the *Charter of Rights and Freedoms* and the *Nova Scotia Human Rights Act*.[917]

TWU applied to the Court for a judicial review, claiming NSBS did not have authority to make the decision and that it violated TWU's religious freedom as guaranteed by the *Canadian Charter*. The hearing was held during the week of December 16-19, 2015, in Halifax.

6.3.5.1.1 Nova Scotia Supreme Court

On January 28, 2015 Justice Jamie Campbell exposed and soundly rejected a blind spot of Canada's legal academia when he held that the Nova Scotia Barristers' Society (NSBS) had no authority to reject Trinity Western University's law degree.[918] TWU had been described by the Law Society in the December hearing as a "rogue" law school. Campbell, J. objected to this characterization. The school could only be so considered "…in the sense that its policies are not consistent with the preferred moral values of the NSBS Council and doubtless many if not a majority of Canadians."[919] However, he noted, "The *Charter* is not a blueprint for moral conformity. Its purpose is to protect the citizen from the power of the state, not to enforce compliance by citizens or private institutions with the moral judgments of the state."[920]

Justice Campbell recognized that Canadians have the right to attend a religious university that imposes a religiously based code of conduct, even if that code excludes or offends others who will not or cannot comply. He observed, "Learning in an environment with people who promise to comply with the code is a religious practice and an expression of religious faith. There is nothing illegal or even rogue about that. That is a messy and uncomfortable fact of life in a pluralistic society."[921] To demand that right to be sacrificed for

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[916] Nova Scotia Barristers' Society, "Council votes for Option C in Trinity Western University law school decision," (accessed 18 October 2018), online: <http://nsbs.org/news/2014/04/council-votes-option-c-trinity-western-university-law-school-decision>.
[917] *Human Rights Act*, RS 1989, c 214 as amended by 1991, c 12; 2007, c 11; 2007, c 14, s 6.
[918] *TWU* NSSC 2015, *supra* note 775.
[919] *Ibid* at para 10.
[920] *Ibid*.
[921] *Ibid* at para 11.

state recognition of professional education is an infringement of religious freedom that cannot be justified.

Campbell, J. was also rigorous in his assessment of the Society's error in refusing to recognize the TWU law school and its degree. He rejected the position that the Community Covenant was "unlawful discrimination." "It is not unlawful," said Campbell, J. "It may be offensive to many but it is not unlawful. TWU is not the government. Like churches and other private institutions, it does not have to comply with the equality provisions of the *Charter*."[922] He noted that TWU "was not in breach of any human rights legislation that applies to it."[923]

What Justice Campbell's decision laid bare for all to see is the moral judgement against religion by the legal profession. It is a blind spot that sees religion and religious views as having absolutely no place outside of the churches, mosques, and synagogues of the nation. By attempting to bifurcate religious practise into a "public" and a "private" sphere, it misapprehends what religious beliefs and practices mean to the believer. Trinity Western's application for recognition of its law school has been characterized as moving into the "public" sphere. As University of Victoria Law School Dean, Jeremy Webber, argued, a private institution cannot "escape scot-free, especially if they want to enjoy public recognition."[924] However, that position fails to recognize that religion permeates every aspect of a believer's life with a long history of legal protection. TWU provides academic education in an institution that is Christian in character which, as Campbell, J. noted, is not an insignificant part of who evangelical Christians are. He went on, "Being Christian in character does not mean excluding those of other faiths but does require that everyone adhere to the code that the religion mandates. Going to such an institution is an expression of their religious faith. That is a sincerely held believe [sic] and it is not for the court or for the NSBS to tell them that it just isn't that important."[925]

Given the stark contrast between Justice Campbell's decision and the public pronouncements of the legal profession – particularly the legal academics – it makes one wonder whether the profession was taken aback by the decision. Perhaps this is the result of the academic assumption that religion will become less of a force as society becomes more secular. This secularization theory has permeated a number of fields of study including law. The Canadian Council of Christian Charities stated in its brief to the Nova Scotia Court that the decision of the NSBS "amounts to nothing less than a rejection of Canada's religious heritage. It strikes a devastating blow to the very heart of religious civil society and has the effect of reducing the rich tapestry of Canadian society. The long-term preservation of freedom, diversity, integrity and Canada's social capital requires the law to be willing to accept differences of belief and practise on such controversial issues as marriage."[926]

> Lawyers for the NSBS took umbrage at that characterization, stating:
> Needless to say all of those words are very strong words, all of those words are very negative words, and all of those words are about an institution that has regulated the legal profession in this province for more than two hundred years. So how did it come

[922] *Ibid* at para 10.
[923] *Ibid.*
[924] Jeremy Webber, "Opinion: Religion vs. Equality: Issue of accreditation of TWU's Law program is complicated" *Vancouver Sun* (8 April 2014), online: <http://www.vancouversun.com/life/Opinion+Religion+equality/9715430/story.html>.
[925] *TWU* NSSC 2015, *supra* note 775 at para 230.
[926] *Ibid* (Brief of the Intervener, Canadian Council of Christian Charities, Hfx. No. 427840, online (pdf): https://www.cccc.org/documents/courtdocs/cccc_intervener_s_brief_filed_twu_v._nsbs.pdf).

> to be that the Nova Scotia Barristers' Society, a statutory entity charged with regulating the public interest and upholding the public interest in the practise of law – how did it come to be that the Society stands here today on the receiving end of a judicial review application where it is alleged that it has done nothing less than reduced the rich tapestry of Canadian society and rejected Canada's rich religious heritage?[927]

The answer, I propose, is as blunt as it is simple – professional arrogance. As legal professionals we all suffer from this same occupational hazard from time to time. It would be arrogant, said Campbell, J., to suggest that British Columbia "has a less genuine respect for human rights values than Nova Scotia"[928] when you consider the fifty years that Trinity Western University has been offering degrees and has never been found in violation of the BC human rights legislation. Campbell, J. reiterated the fact that TWU is a private university to which the *Charter* does not apply.

Arrogance may also be seen in the manner in which the Nova Scotia Barristers' Society refused to be governed by *TWU* 2001. The NSBS argued that the 2001 decision was no longer good law or at least not applicable to the facts before it. In one sense, we might not want to be too harsh on the NSBS for taking that position for two reasons: first, they were buttressed by academic opinion that the 2001 decision did not apply;[929] and second, they were evidently inspired by the opinion, which has been especially persuasive since the *Charter*, that "A good lawyer needs to understand and assist the evolution of the law."[930] However, as Campbell, J. rightly points out in his decision, the argument against the 2001 decision is simply an unacceptable reach.

"On its face, the *TWU v. BCCT* decision is very much on point,"[931] Campbell, J. held. It was on point because, in both cases, (1) the regulatory bodies were required to make a decision about accreditation acting in the public interest; (2) the central concern was about requirements to abstain from behaviour that restricted LGBT students; (3) there was no evidence that a TWU graduate would act in an intolerant or discriminatory manner. However, Campbell, J. recognized that the NSBS argument was "somewhat more subtle" than the arguments of the College of Teachers in the 2001 case. The NSBS was not saying that TWU graduates would be discriminatory. Rather, they were concerned that "accepting a law degree from the institution would amount to condoning discrimination."[932] It was a matter of public perception.

Justice Campbell's view is either that of a lone wolf crying in the judicial wilderness or a correct and just interpretation of the law. It is the latter realization that is bound to be disconcerting to all those who have publicly declared that the law of equality has advanced to such a degree that it eclipses the right of a religious university to set admissions criteria in harmony with its creed.

Justice Campbell's assessment is bound to raise questions about the prevailing opinion in the law faculties that are opposed to TWU's Law School. Questions about one's position can be an unsettling experience. However, none of us are immune to probing questions. That is what makes our society so great – we question, we critically analyze to determine what is right

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[927] Marjorie Hickey, Q.C., in *TWU* NSSC 2015, transcript *supra* note 477 (Oral hearing, 18 December 2014).
[928] *TWU* NSSC 2015, *supra* note 775 at para 245.
[929] Craig, "Rejecting Trinity," *supra* note 793.
[930] Webber, *supra* note 924.
[931] *TWU* NSSC 2015, *supra* note 775 at para 193.
[932] *Ibid* at para 194.

and what isn't, and we analyze what works and what doesn't. No doubt, there will be a significant amount of questioning legal positions that have, up until now, relegated religion to the back row of rights talk.

Justice Campbell's decision has painted a bright line of demarcation between the current state of the law that allows for religious belief and practise and the emerging legal theories such as "deep equality" which suggests that accommodating religious practises such as traditional marriage "is a framework that continues unfair and unjust power relations that impede rather than promote the equality of minority groups."[933] Deep equality demands an "assumption of equality, rather than … the notion that one group is entitled to give and another to receive."[934] It is a process "owned" by ordinary people in everyday life and "is a vision of equality that transcends law, politics, and social policy…."[935] Deep equality requires identities, including religious identity, to be fluid. "[R]eligious identities," says Lori Beaman, "block our vision to the complexities of social life and press us into corners that trap us in identities that we often ourselves do not recognize, want, or know how to escape."[936] Such a concept is inimical to our understanding of religious freedom as discussed in this book.

How is it that we are in such a predicament? I suggest that the legal faculty is so enamoured by the promise of equality that they see the law only through the "equality lens." We are witnessing a "groupthink" phenomena with only one preferred interpretation of the *Charter* – all other interpretations are now deemed passé, save that which promotes equality, as they understand it.[937] Surprisingly, even the rule of law safeguard is not enough to hold back the passionate opinion that equality trumps religion. But the irony goes further. Religion is also an equality right. Not only are the critics elevating one right over another right enumerated in the *Charter*, but they are conveniently emphasizing only one portion of that right.

Returning to the closing submissions of the NSBS at the December hearing, the appropriate question is: "…how did it come to be that the Society stands here today on the receiving end of a judicial review application where it is alleged that it has done nothing less than reduced the rich tapestry of Canadian society and rejected Canada's rich religious heritage?"[938] While appropriate for the Nova Scotia Barristers' Society it is also appropriate for the law faculties and law deans across the land who opposed TWU.

Arrogance is a problem both for the religious as well as the non-religious. It is a fact of our existence. Campbell, J. eloquently described the blinding light of arrogance that flows from the moral judgements that favour religion or equality. One moral matrix makes it possible to say: "Homosexual acts are a sin. That is the word of God. There is nothing to debate here."[939] The other moral matrix makes it possible to say, "A law school that discriminates is just wrong. There is nothing to debate here."[940]

Tolerance is a process that engages both moral views while accepting the discomfort of views that may be "incomprehensible … contemptible or … detestable" to our own.[941]

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[933] Lori Beaman, ed, *Reasonable Accommodation: Managing Diversity* (Vancouver: UBC Press 2012), 220.
[934] *Ibid* at 212.
[935] Beaman, *Deep Equality in an Era of Religious Diversity* (Oxford: Oxford University Press, 2017), 13.
[936] *Ibid* at 197.
[937] What is left out in much of the analysis is the fact that religion is also an equality right under s. 15 of the *Charter*.
[938] Hickey, *supra* note 927.
[939] *TWU* NSSC 2015, *supra* note 775 at para 273.
[940] *Ibid* at para 272.
[941] *Ibid* at para 275.

Ironically, the legal blind spot exposed by Justice Campbell's decision suggests that we need to make more room, not less, for academic enquiry that views the law from different lenses. Therefore, a law school such as the one proposed by Trinity Western University would add a fresh counterweight of critical legal analysis to the present legal orthodoxy amongst Canada's current common law schools.[942] The overwhelming opinion of the law faculties, at the court of first instance, was weighed and found wanting. Campbell's view became the prominent view of the courts in BC and Nova Scotia. The Ontario judiciary thought otherwise, as we have seen.

6.3.5.1.2 Nova Scotia Court of Appeal[943]

The NSBS appealed Justice Jamie Campbell's decision to the Nova Scotia Court of Appeal (NSCA) which decided the matter on administrative law issues and did not address the constitutional issue. NSCA focused on the NSBS's Amended Regulation that gave the Society power to determine whether a proposed law school "unlawfully discriminates … on grounds prohibited by either or both of the Charter of Rights and Freedoms or the Nova Scotia Human Rights Act."[944] In the end the Court held that the Amended Regulation is ultra vires the *Legal Profession Act*[945] (LPA).

The Court stated that there is a presumption of validity of the impugned regulation and that it is ultra vires only if it is irrelevant, extraneous or completely unrelated. The LPA aims to uphold and protect the public interest in the practice of law, allowing NSBS to enact regulations on education and other requirements for membership, improve administration of justice and pass resolutions consistent with the Act.

In this case the NSBS resolution states that the NSBS "determines" whether the University "unlawfully discriminates." If the University has a sustainable defence to a hypothetical challenge under the *Charter* or the *Nova Scotia Human Rights Act* (HRA) the University would not act "unlawfully". The resolution directs the NSBS Council to make a free-standing determination whether the University "unlawfully" contravened the HRA and the *Charter.*

However, the Court noted that the *Charter* does not apply to TWU since it is a private institution. TWU's conduct occurred in BC not Nova Scotia. The Nova Scotia HRA applies to acts in Nova Scotia. Without expressing a supportive word in either the LPA or the HRA, the legislature could not have intended that the Society's Council had autonomous jurisdiction concurrent with that of a human rights board of inquiry. Neither does the LPA contemplate Council may enact a regulation establishing itself as a court of competent jurisdiction under the *Charter* with the authority to rule that someone's conduct in British Columbia unlawfully violated the *Charter*. On April 25, 2014, the Council did not adjudicate the "unlawfulness" of TWU's conduct since that criterion did not yet exist in the regulations. After April 25, 2014, there was no adjudication of anything, merely the enactment of the Amended Regulation by

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[942] Pippa Feinstein & Sarah E. Hamill, "The Silencing of Queer Voices in the Litigation Over Trinity Western University's Proposed Law School" (2017) 34 Windsor Y B Access Just, 156 ["Silencing of Queer Voices"]. At 157 the authors simultaneously argue against TWU while asserting that "Canadian law schools and law societies are increasingly recognizing that a diverse legal profession that is representative of minorities will better fulfil the obligations of the profession". Evidently diversity and plurality are laudable only if the minority views are agreeable to the legal elite. The courts in Nova Scotia and British Columbia beg to differ.

[943] *TWU* NSCA 2016, *supra* note 789.

[944] *Ibid* at para 37.

[945] *Legal Profession Act,* (Nova Scotia) Chap. 28, of the Acts of 2004, amended 2010, c. 56.

Council on July 23. The Amended Regulation's key criterion that Council "determines" that the University "unlawfully discriminates" is completely unrelated to the Council's regulation-making authority under the LPA.

The NSBS Resolution itself was invalid because, first, it is premised entirely on the Amended Regulation which is ultra vires the LPA. Second, it assumed that TWU contravened the standard of "unlawfully discriminates" in the Amended Regulation. The *Charter* does not apply to TWU nor does the HRA apply. Therefore, the resolution is unauthorized and unreasonable.

The Court respectfully declined NSBS's invitation to redraft the regulation. The Court held that the NSBS does not have stand-alone authority over the public interest in the administration of justice. The Court agreed with Justice Campbell's holding that NSBS has no authority to regulate a law school outside of Nova Scotia. Any attempt to fashion requirements for membership based on features of the law graduate's institution, as opposed to the law degree, is ultra vires the LPA.

The Court pointed out that the NSBS' concern is with TWU's Community Covenant not with TWU law graduates. Trinity Western's law graduate is not Trinity Western's alter ego to be punished by NSBS. The graduate is a vital stakeholder in his or her own right and must be protected from the unauthorized action of the Society.

6.3.6 The Supreme Court of Canada

The Supreme Court of Canada's decisions in the TWU law school matter are given extra review and analysis here given their importance to the basic argument of this work: that there is a legal revolution against the special status of religion in the law. The SCC's decisions have solidified the argument. There is now little doubt that the legal elites, offended by religious beliefs and practices on fundamental human life issues such as marriage, are intent on limiting the special status once given to religion.

6.3.6.1 Intervention Decisions

On November 30 and December 1, 2017, The Supreme Court of Canada held two days of hearings on the case. Originally, only one day was set aside for the hearing by Chief Justice Beverley McLachlin. The story of how the second day got added to the Court's agenda is both telling and relevant to this work. It involved the Court's decision on who could intervene in the case. An intervening party is not directly subject to the litigation and is thought not to have any role in supporting one litigator as against the other, but is to share its concerns with the court about the potential impacts the litigation will have on those who are not parties, like the intervener. Whether an intervener can participate is at the discretion of the Court based on long-established criteria.[946]

On July 27, 2017, in an initial decision[947] that surprised many lawyers, Justice Richard Wagner denied seventeen intervener applications (comprising twenty-three groups) for

[946] See SC Rules, (SOR/2002-156) Part 8, r 42(3), Appeals and Cross-appeals, Factum on Appeal, online: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-156/FullText.html#s-42> and see Eugene Meehan, Q.C., Marie-France Major & Thomas Slade, "Getting In, Getting Heard, Getting Practical: Intervening In Appellate Courts Across Canada" (January 2017) 46:3 The Advocates' Quarterly, 261.

[947] *Law Society of British Columbia v. Trinity Western University, et al.,* SCC 37318; and *Trinity Western University, et al. v. Law Society of Upper Canada*, SCC 37209; online: <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37318>.

intervener status. The LGBTQ group applicants were denied. Several religious groups were also denied. Justice Wagner did not provide written reasons for his undoubtedly principled decision, which is the normal course for the Supreme Court on interventions. Intervention has always been understood as being within the complete discretion of the Court. However, one could infer that Justice Wagner was motivated by a desire to save time and avoid duplicate arguments and not by some nefarious or misguided position against any particular group.

With only one day set for the hearing, Justice Wagner evidently decided the Court did not have the time to hear all twenty-six applications. It was likely the case, as can be gleaned from the news release of the Court,[948] that Justice Wagner was initially told that there would be one full day hearing. Two appeals plus twenty-six intervener applications simply cannot be crammed into a single day. Justice Wagner's selection could be viewed as giving priority to those interveners who were more education-oriented and less advocacy-oriented.

Whatever the rationale, the Court granted intervener status to only nine groups. Seven of the groups were related to the legal profession in some capacity, such as the Christian Legal Fellowship and the Canadian Bar Association. Only two of the nine, the Association for Reformed Political Action (ARPA) and the National Coalition of Catholic School Trustees, were not associated with the legal profession. ARPA addressed its arguments on the relationship between the equality rights (s. 15 of the *Charter*) and religious freedom rights (s. 2(a) of the *Charter*). The National Coalition of Catholic School Trustees argued that there needed to be a proper balance with competing rights; there is no hierarchy of rights and not priviledging one right over another respects all rights.

6.3.6.2 Groups Denied

None of the various LGBTQ groups that applied were granted intervener status at the Court. The Court may have concluded that the two law societies (along with the granted interveners Canadian Bar Association, the Advocates' Society, the Lawyers Rights Watch, the Criminal Lawyers' Association, and the Canadian Civil Liberties Association) were adequately advancing the LGBTQ groups' arguments. Indeed, it was the opposition from the LGBTQ advocates that successfully persuaded the British Columbia, Ontario, and Nova Scotia law societies to reject the approval of TWU by the Federation of Law Societies Canada. All three accepted the LGBTQ arguments that TWU's admissions policy was discriminatory and, though TWU would provide competent legal education to its students, that policy was sufficient reason to deny TWU's Law School accreditation.

In addition, the Evangelical Fellowship of Canada, the Seventh-day Adventist Church in Canada, Canadian Council of Christian Charities, the Canadian Conference of Catholic Bishops and the Roman Catholic Archdiocese of Vancouver were among the religious communities that were denied intervener status.

Given the positions of TWU, and the religious interveners in the lower courts, perhaps the Supreme Court was of the view that there was enough on the record for the judges to mull over. Further, perhaps the various arguments and counter-arguments were sufficient for justice to be served in this matter.

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[948] As Chief Justice McLachlin noted, "[t]he hearing of these appeals, previously set down for one day, will occupy two days," *supra* note 947, online: <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37209>. See also: Judgments of the Supreme Court of Canada, News Release (2 August 2017), online: <https://scc-csc.lexum.com/scc-csc/news/en/item/5590/index.do>.

Whatever the rationale, to grant only nine out of twenty-six applications is significant for two reasons. First, this was a very high profile case that garnered a lot of media attention; and second, "the Court typically grants more than 90 per cent of the requests to intervene."[949] In fact, Professors Alarie and Green concluded upon an empirical study of interventions at the SCC that the Court "appears to be using the interventions to better understand the impacts of its decisions."[950] From their perspective "[t]he increase in the number of interveners" at the Court "seems to be a positive development."[951] One has to conclude that the restriction was unusual, especially since it was so quickly reversed.

6.3.6.3 Second Decision – Chief Justice McLachlin – July 31, 2017[952]

Chief Justice McLachlin "varied" Justice Wagner's order after only four days, following a weekend of protests, primarily by upset members of the LGBTQ community.[953] All twenty-seven groups were allowed to file a ten-page factum and make a five-minute oral argument at the hearing. Because some of the groups filed jointly the total number of intervener briefs was to be twenty-six (twenty-seven counting the Attorney General of Ontario). Given that the number of participants at the hearing tripled, the Court extended the hearing to two days.

While there was some confusion as to the first decision, from a legal standpoint it was even more perplexing as to why the Court changed its mind.[954] To see the SCC being influenced by such public pressure is a first – or, at least, it is a first to observe the Court being influenced in such a blatantly obvious manner.[955] Unlike what we saw in the lower courts of this case, the SCC initially did not issue reasons for its decisions on intervention. The Court's statement to explain what occurred emphasized that it "does not give reasons for decision in motions for intervention. To do so would disproportionately burden the Court's workload. In this instance, however, the concerns raised by some LGBTQ+ groups and others call for a response. … [S]cheduling issues informed Justice Wagner's decision not to grant all applicants the right to intervene."[956]

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[949] Benjamin R. D. Alarie & Andrew J. Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48 Osgoode Hall L. J. 381, 383.
[950] *Ibid* at 410.
[951] *Ibid*.
[952] *Supra* note 947, online: <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37318>.
[953] Paula Kulig, "Chief justice's rare order in Trinity Western case ensures 'all voices could be heard'" (2017) *Lawyers Daily*, online: <https://www.thelawyersdaily.ca/articles/4375>.
[954] Perhaps to address the confusion, the SCC did issue a news release on August 2, 2017, clarifying its decisions, *supra* note 947.
[955] In truth, the Court has always been sensitive to public opinion. However, this case has brought it to a whole new level because of the speed with which the Court reacted. See the discussion below on the Chief Justice's response to the public criticism his Court received for not opening the intervention policy. What, in the 1980s, took years to resolve, in the TWU case took one weekend. Interestingly enough, in an interview in 2000, Chief Justice Beverley McLachlin, Justice Michel Bastarache and Justice John Major denied that interveners were "hijacking" the Court's decisions, arguing the Court still had a "sense of responsibility", and noting that "the reason the court has opened its doors to listen to special interest groups after the *Charter* was adopted was because we had a new type of legislation which forced the court really to adopt a really contextual approach." See Luiza Chwialkowska, "Rein in lobby groups, senior judges suggest: 'We've opened the door probably too widely,' Supreme Court justice tells Post," *National Post* (6 April 2000), online: <http://www.fact.on.ca/news/news0004/np000406.htm>
[956] *Supra* note 948 at para 3.

By the Court's own admission, it was the "concerns raised by some LGBTQ+ groups" that moved the Court to action. Sean Fine of the *Globe and Mail* noted that Justice Wagner "chose nine [interveners], among which he believed the views of LGBTQ advocates were well represented. But when he was made aware of concerns on social media, he sought out Chief Justice McLachlin to see what could be done."[957] This entire event appears to be an anomaly. It was a historical reversal of fortunes for interveners in *Charter* litigation. The Court was not prepared, as were the courts in BC (and Nova Scotia), to adopt a "liberal approach" at first instance. After all, the Court had plenty of notice for those applications to enable it to have made an extra day available long before it faced its embarrassing weekend of regret.

It is reasonable to assume that had there been no outcry from the LGBTQ community the Court would have gone on with the one-day hearing as planned. No one would have thought more of it. But the indignation of the activists and the reaction of the Court to that criticism requires us to contemplate its meaning. The Court's response was to open the doors for all interveners without exception and allow all to file up to a ten-page brief and have a five-minute oral presentation. There appeared to be no considered thought on who should or should not be given the priviledge. This could have long term implications for the Court as it will have a hard time squaring future restrictions, if it so chooses, with the open policy it gave in the TWU case after the public complaints that elicited such a complete reversal.

The role of interveners is, at least partially, to bolster public faith in the legal system. One could argue that in this case, the Court took public perception into serious consideration and acted immediately to correct it. That may be beneficial to the Court's image. Eugene Meehan observes that, "having let every intervener in, the Court is now free to do whatever it wants, and no one can complain they were not heard."[958]

There were, no doubt, unambiguous lines of reasoning that went into Justice Wagner's first decision, as noted above. However, because the Court, as a general practice, does not give reasons for its decisions on interventions we are left in the dark as to what those deliberations were. This incident may give the Court some reason to pause about the effectiveness of its current policy in not providing reasons. Perhaps, given time and reflection, this policy may evolve to the point that a future Court will give reasons for its use of discretion in granting or not granting interventions.

However, for the purpose of this work, this series of events does suggest that the Court's hypersensitivity to the public perception of how it handled this case was a harbinger of the Court's final decisions to come: decisions that have confirmed the legal revolution against religion is at full throttle.

6.3.6.4 Decision: Law Society of British Columbia v. Trinity Western University[959]

The Supreme Court of Canada rejected the BCCA's decision and ruled against TWU in a notably fractured 7-2 decision, with a 5-justice majority, 2 concurring opinions, and a vigorous dissent. Justices Abella, Moldaver, Karakatsanis, Wagner, and Gascon formed the majority opinion while Chief Justice McLachlin and Justice Rowe each wrote their own concurring opinions. Justices Côté and Brown wrote a robust dissenting opinion.

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[957] Sean Fine, "Supreme Court justice offers explanation for LGBTQ decision," *Globe and Mail* (2 August 2017), online: <https://www.theglobeandmail.com/news/national/supreme-Court-justice-offers-explanation-for-lgbtq-decision/article35870614/>.

[958] Interview of Eugene Meehan by the author, 5 June, 2018.

[959] *LSBC v TWU* 2018, *supra* note 14.

6.3.6.4.1 Majority Decision

The majority ruled that the LSBC was entitled to consider TWU's admissions policies apart from the academic qualifications and competence of individual graduates. The Law Society benchers have an overarching objective of upholding and protecting the public interest in the administration of justice in reviewing admission requirements to the profession. The governing body of the legal profession, being a self-regulating profession, is to be given deference in carrying out the public interest.

The heart of the appeal, the Majority noted, was the Covenant's prohibition "on sexual intimacy that violates the sacredness of marriage between a man and a woman."[960] The Majority's decision paid careful attention to the negative response of the LSBC membership to TWU's application. They described the "considerable response"[961] from the LSBC membership when the LSBC April 11, 2014 meeting upheld approval for the school, forcing a Special General Meeting on June 10, 2014. That meeting had a vote of 3210 to 968 against TWU. Then the October 2014 referendum resulted in a 5951 to 2088 vote against TWU. The Majority's emphasis on the large numbers opposed to TWU is striking. While such opposition forms part of the facts, a case involving *Charter* rights is not a numbers game. *Charter* rights are meant to protect against the tyranny of the majority.[962]

The Majority saw the LSBC decision as not a rejection of TWU's graduates but a rejection of a law school with a mandatory covenant that violates the public interest.[963] The LSBC's statutory mandate as a "gatekeeper to the profession"[964] requires it to broadly uphold and protect the public interest.[965] How it carries out that mandate, as a self-regulating profession, is to be given deference.[966] Professional regulation through licensing "is directed toward the protection of vulnerable interests – those of clients and third parties."[967] The delegation of statutory power maintains the independence of the bar, is a hallmark of a free and democratic society,[968] and recognizes the institutional expertise to interpret public interest.[969]

The LSBC was entitled to be concerned about the Covenant that "effectively imposes inequitable barriers on entry to the school."[970] It risks decreasing the diversity of the bar and harming LGBTQ individuals.[971] Its decision to deny TWU accreditation was reasonable as TWU's denial of LGBTQ students who could not sign the Covenant limited access to the legal profession based on personal characteristics, not merit, which is "inherently inimical to the

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[960] *Ibid* at para 6.
[961] *Ibid* at para 17.
[962] Former Chief Justice Dickson noted, "What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of 'the tyranny of the majority'." See *Big M Drug Mart, supra* note 4 at para 96.
[963] *LSBC v TWU* 2018, *supra* note 14 at para 27.
[964] *Ibid* at para 29.
[965] *Ibid* at para 32.
[966] *Ibid* at para 34.
[967] *Ibid* at para 36.
[968] *Ibid* at para 37.
[969] *Ibid* at para 38.
[970] *Ibid* at para 39.
[971] *Ibid* at para 39.

integrity of the legal profession."[972] As a public actor its overarching interest is to protect the "values of equality and human rights in carrying out its functions" in line with "*Charter* values."[973] *Charter* values are "[f]ar from controversial" but are "accepted principles of constitutional interpretation" and in administrative decision-making must be complied with.[974] The potential harm to the LGBTQ community is a factor for the LSBC to consider. [975] This does not amount to LSBC regulating law schools or being confused with a human rights tribunal.[976]

As to the referendum, the Majority were of the view that as a self-governing body it was consistent with its authority to receive "guidance or support of the membership as a whole."[977] Nor did it need to give formal reasons for its decision as the LSBC benchers are elected representatives and were alive to the issues of balancing the rights.[978] This is perhaps one of the most troubling aspects of the decision. Peter Gall, Q.C., Counsel for the LSBC, admitted to the SCC in oral testimony that he agreed with the BCCA's view the Law Society failed "to consider its statutory obligation to determine whether the special resolution was consistent with its statutory mandate."[979] In other words, the LSBC admitted it did not exercise its authority to ensure that there was a proportionate balance between the severe limits on TWU's *Charter* rights and the statutory objectives governing the LSBC. Despite that failure, the Society called upon the SCC to do it for them. Incredibly the SCC obliged rather than sending it back to the LSBC for its own determination. This fact suggests that the SCC's trust in state regulators to carry out a robust *Doré* and *Loyola* analysis is misplaced. And, as Côté and Brown observed, the Majority's assertion that the Benchers believed their decision "would benefit from the guidance or support of the membership as a whole" was "pure historical revisionism."[980] A very sad commentary indeed on the lengths to which the Majority (acting as legal revolutionaries against religious accommodation) was willing to go to ensure they were "on the right side of history."

The *Doré* and *Loyola* analysis of administrative decisions that engage the *Charter* "are binding precedents of this Court."[981] The first part of the analysis asks, is freedom of religion engaged? It is not necessary to decide if TWU, as an institution, has a religious freedom right.[982] The test is whether the claimant sincerely believes in a practice or belief that has a nexus with religion and if so, whether the state conduct interferes in more than a trivial or insubstantial manner with the claimant's ability to act in accordance with the belief and practice.[983] "It is clear from the record that evangelical members of TWU's community sincerely believe that studying in a community defined by religious beliefs … contributes to their spiritual development."[984] And this right was engaged by the LSBC decision.[985]

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[972] *Ibid* at para 40.
[973] *Ibid* at para 41.
[974] *Ibid*.
[975] *Ibid* at para 44.
[976] *Ibid* at para 45.
[977] *Ibid* at para 50.
[978] *Ibid* at paras 54-56.
[979] *TWU* 2018, *supra* note 14 (Transcript of oral hearing, SCC vol 2, 1 December 2017, at 340).
[980] *LSBC v TWU* 2018, at para 298.
[981] *Ibid* at para 59.
[982] *Ibid* at para 62.
[983] *Ibid* at para 63.
[984] *Ibid* at para 70.
[985] *Ibid* at para 75.

Under the *Doré* and *Loyola* framework the administrative decision-maker is in the best position to weigh the *Charter* protections and strike the right balance with the statutory mandate.[986] This "is not a weak or watered-down version of proportionality – rather, it is a robust one."[987] The decision-maker does not need to choose the option that limits the *Charter* protection the least but the option can be within a range of reasonable outcomes.[988]

The LSBC limit on religious freedom is of minor[989] significance because the mandatory covenant is not absolutely required for the religious practice of studying law in a Christian learning environment.[990] The interference is limited because the belief is "preferred" "rather than necessary" for spiritual growth.[991] However, on the other side, the LSBC decision furthered the statutory objective of maintaining equal access and diversity of the profession.[992] The Covenant "effectively closed" LGBTQ students from the school and "may discourage qualified candidates from gaining entry to the legal profession."[993] They would have fewer opportunities relative to others.[994] "The public confidence in the administration of justice may be undermined if the LSBC is seen to approve a law school that effectively bars many LGBTQ people from attending."[995] TWU can determine the rules of conduct for its members but in balancing the rights the decision-maker can take into account that this was a case where TWU was enforcing its rules on others.[996] To be "required by someone else's religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful."[997]

In the end, the LSBC's decision is not a serious limitation on TWU's religious freedom as it "does not suppress TWU's religious difference".[998] It means that TWU is "not free to impose those religious beliefs on fellow law students, since they have an inequitable impact and can cause significant harm." The decision ensures equal access to the profession and prevents the risk of significant harm to LGBTQ who feel they have no choice but to attend TWU's proposed law school," and maintains public confidence.[999]

The LSBC "decision amounted to a proportionate balancing and was reasonable."[1000]

6.3.6.4.2 Chief Justice Beverley McLachlin

In a concurring judgement with the majority, Chief Justice McLachlin agreed that discretionary administrative decisions that engage *Charter* rights are to be reviewed on the *Doré* and *Loyola* framework, which is less onerous than the *Oakes* test. However, she is

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[986] *Ibid* at para 79.
[987] *Ibid* at para 75.
[988] *Ibid* at para 81.
[989] The Majority's view is very similar to Robin Elliot & Michael Elliot, "Striking the Right Balance: Rethinking the Contest Between Freedom of Religion and Equality Rights in Trinity Western University v. The Law Society of British Columbia," (2017) 50:3 University of British Columbia Law Review.
[990] *LSBC v TWU* 2018, *supra* note 14 at para 87.
[991] *Ibid* at para 88.
[992] *Ibid* at para 92.
[993] *Ibid* at para 93.
[994] *Ibid* at para 95.
[995] *Ibid*.
[996] *Ibid* at para 99.
[997] *Ibid* at para 101.
[998] *Ibid* at para 102.
[999] *Ibid* at para 103.
[1000] *Ibid* at para 105.

concerned with the proportionality test, i.e. weighing the benefit that came as a result of infringing the right verses the negative impact on that right. If the benefit is greater than the infringement, then the government action is proportional and therefore the limit is reasonable. The proportionality test has three elements: first, the state objective must be rationally connected to the decision; second, the impairment must be minimal, that is, there was no alternative, less-infringing decision possible; and third, the impact assessment of the decision must determine whether the effects of the decision are proportionate to the state objective.

McLachlin raised four concerns:[1001] first, the initial focus must be on the rights, not on the *Charter* values. Second, the *Charter* right must be consistently interpreted regardless of the state actor. In other words, a state administrator is still a state actor just as much the executive government. Third, the onus is on the state actor to demonstrate that the limits on the rights are reasonable and demonstrably justified. Fourth, use of "deference" and "reasonableness" are not helpful. Where an administrative decision-maker's decision has unjustifiable and disproportionate impact on a *Charter* right it is always unreasonable.

McLachlin agreed that TWU's freedom of religion was infringed. She disagreed with the majority decision not to analyse TWU's claims of freedom of expression and association. Such freedoms, she maintained, are part of freedom of religion.[1002] She rejected TWU's equality claim on the basis that the Law Society's decision was not from religious prejudice but to ensure equal access to all prospective law students.[1003]

As to the negative impact of the denial of accreditation McLachlin felt the majority was wrong to hold it "of a minor significance" as it interfered with religious practice, freedom of expression and association. "These are not minor matters," McLachlin observed; "Canada has a tradition dating back at least four centuries of religious schools which are established to allow people to study at institutions that reflect their faith and their practices."[1004] The majority's view that the impact is only interfering with the "*optimal* religious learning environment … is to deny this lengthy and passionately held tradition."[1005] "We cannot, on the one hand, acknowledge the deep sincerity of the belief in a religious practice and then, on the other, doubt that sincerity by calling the practice relatively insignificant."[1006] Further, she noted that "the fact that some individuals may be prepared to give up the religious practice does not make it a minor infringement."[1007]

McLachlin rejected the majority's position that the mandatory Covenant be devalued because it compels non-believers to follow TWU's religious practices. "There is a deep tradition in religious schools of welcoming non-adherents as students, provided they agree to abide by the norms of the community," she observed.[1008] "Students who do not agree with the religious practices do not need to attend these schools. But if they want to attend, for whatever reason, and agree to the practices required of students, it is difficult to speak of compulsion."[1009]

For McLachlin, "the most compelling law society objective is the imperative of refusing to condone discrimination against LGBTQ people, pursuant to the LSBC's statutory obligation

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[1001] *Ibid* at paras 115-119.
[1002] *Ibid* at para 122.
[1003] *Ibid*.
[1004] *Ibid* at para 130.
[1005] *Ibid*, emphasis in the original.
[1006] *Ibid* at para 131.
[1007] *Ibid* at para 132.
[1008] *Ibid* at para 133.
[1009] *Ibid*.

to protect the public interest."[1010] Though the *Charter* does not apply to TWU, the mandatory covenant is discriminatory as it "imposes burdens on LGBTQ people on the sole basis of their sexual orientation."[1011] "[It] singles out LGBTQ people as less worthy of respect and dignity than heterosexual people, and reinforces negative stereotypes against them."[1012] LGTBQ students have less access to law school and the practice of law than heterosexual students.[1013]

For McLachlin, the LSBC has a statutory duty to uphold the public interest to protect the rights and freedoms of everyone including LGBTQ people.[1014] This interest is broad and involves more than the competence of the law graduate.

The onus is on LSBC to show that the serious negative impacts on TWU are proportionate to the benefits of its decision. In the end, "[t]he LSBC cannot abide by its duty to combat discrimination and accredit TWU at the same time."[1015]

McLachlin, unlike the majority, did not ignore the *TWU* 2001 decision. That 2001 decision was distinguishable, in McLachlin's view, as it dealt with teachers and the possibility of TWU education graduates bringing discrimination into the classroom. But here the LSBC sought "to avoid condoning or even appearing to condone discrimination."[1016] For her "LSBC operates under a unique statutory mandate – a mandate that imposes a heightened duty to maintain equality and avoid condoning discrimination."[1017]

6.3.6.4.3 Justice Malcolm Rowe

Justice Rowe held that the question is whether the LSBC infringed the *Charter* by withdrawing the approval of TWU's proposed law school because of the effect of the Covenant on prospective students.[1018] He concluded it did not.

He agreed with the Majority that the LSBC's statutory mandate allowed it to consider the effect of the Covenant on prospective students.

He differed on the approach in assessing how the *Charter* rights were infringed. He agreed with the McLachlin, Côté and Brown that the *Doré* and *Loyola* analysis needs clarification. He agreed with TWU that the Doré framework leaves many unanswered questions.[1019] He proposed three clarifications.

First, *Charter* rights, not *Charter* values, are to be the focus of inquiry as the "reliance on values rather than rights has muddled the adjudication of *Charter* claims in the administrative context."[1020] The use of *Charter* values makes sense when the *Charter* is not directly implicated, as in developing principles of the common law, but where the *Charter* applies there is no need to have recourse to *Charter* values.[1021] The confusion comes, says Rowe, "when *Charter* values are used as a standalone basis for the adjudication of *Charter* claims." This is because the scope

[1010] *Ibid* at para 137.
[1011] *Ibid* at para 138.
[1012] *Ibid*.
[1013] *Ibid*.
[1014] *Ibid* at para 140.
[1015] *Ibid* at para 147.
[1016] *Ibid* at para 149.
[1017] *Ibid* at para 150.
[1018] *Ibid* at para 153.
[1019] *Ibid* at para 165.
[1020] *Ibid* at para 166.
[1021] *Ibid* at para 168.

of *Charter* values is undefined. In some cases, the value aligns with a right but in others it does not line up with *Charter* jurisprudence and that lack of clarity "heightens the potential for unpredictable reasoning."[1022]

Rowe held that the Majority's use of the language of *Charter* "protections" to mean both rights and values "does little to clarify the role of *Charter* values in the adjudication of *Charter* claims." By equating "rights and values" with "*Charter* protections," "the majority undermines the view that rights and values are distinct in scope and function."[1023] Rowe explains:

> In cases where *Charter* rights are plainly at stake, courts and other decision-makers have a constitutional obligation to address the rights claims as such and to do so explicitly. An analysis based on *Charter* values should not eclipse or supplant the analysis of whether *Charter* rights have been infringed. Where *Charter* rights have been infringed by administrative actors, reviewing courts must determine whether the state meets the burden of justifying the infringement according to s. 1. This is not a matter of doctrinal preference. It is a constitutional obligation imposed by the *Charter*.[1024]

Rowe noted that the initial burden is on the claimant to show that the state-actor's decision infringes his or her *Charter* rights.[1025] The court is to take a purposive approach to rights but not to give "undue attention to the historical meaning of rights and freedoms as understood when the *Charter* was enacted."[1026] This allows the *Charter* to keep pace with societal change. At the same time, the courts must not extend the meaning of the constitutional text beyond "'the limits of reason' so as not to 'overshoot the actual purpose of the right or freedom in question'"[1027] but "based on considerations that are intrinsic to the rights themselves."[1028]

Rowe raised concerns about the Court's approach in cases where it "avoids delineation and relies instead on s. 1 to ensure that rights are exercised within proper bounds."[1029] This approach allows claimants to quickly discharge their proof of infringement and shift the burden to government to justify its actions.[1030] But the problem with that is "[i]f infringements are too readily found on the basis of activities that fall outside of the protective scope of the rights then courts may well too readily find that the government has met the justificatory burden set out in *Oakes*."[1031] This "erodes the seriousness of finding *Charter* violations" and "increases the role of policy considerations," thereby distorting "the proper relationship between the branches of government by unduly expanding the policy making role of the judiciary."[1032] It means the entire adjudication of *Charter* claims are dealt with by balancing "whereby rights and justifications are considered in a type of blended analysis." This results in "an unstructured, somewhat conclusory exercise that ignores the framing of the *Charter* and departs fundamentally from the foundational *Charter* jurisprudence of this Court."[1033]

[1022] *Ibid* at para 171.
[1023] *Ibid* at para 173.
[1024] *Ibid* at para 175.
[1025] *Ibid* at para 176.
[1026] *Ibid* at para 179.
[1027] *Ibid* at para 182.
[1028] *Ibid* at para 185.
[1029] *Ibid* at para 186.
[1030] *Ibid* at para 188.
[1031] *Ibid* at para 191.
[1032] *Ibid* at para 192.
[1033] *Ibid* at para 193.

Justice Rowe was troubled by the fact that in the administrative law context the applicant is required to demonstrate that an impugned decision should be overturned.[1034] Thus the decision is deemed reasonable unless the claimant shows otherwise. "This would provide for less robust protection of *Charter* rights."[1035] Rowe maintains that "the justificatory burden must remain on the government once an infringement of rights is demonstrated."[1036] The Court's desire to streamline the review of administrative decisions must not have the "effect of diluting the protection afforded to *Charter* rights."[1037] Rowe agrees that *Doré* and *Loyola* are binding precedents but need to be clarified.[1038]

On the matter of religious freedom in s. 2(a) of the *Charter*, Rowe held that TWU's claim does not fall within the scope of freedom of religion. The scope of the right is that it is based on the exercise of free will,[1039] and defined by the absence of constraint.[1040] The focus is on the choice of the believer regardless of whether the belief or practice is recognized as part of an official religion.[1041] While there is also a communal aspect of religious freedom it "is premised on the personal volition of individual believers."[1042] Rowe declined to find that TWU, as an institution, has a right to religious freedom. Even if it did, he maintained, such rights "would not extend beyond those held by the individual members of the faith community."[1043]

The religious belief or practice at issue is the proscription of sexual intimacy outside heterosexual marriage and the imposition of this on all TWU students.[1044] Rowe questions the Majority's view that the claimants can have a preference for this belief as it is not required but is protected by the *Charter*; but since it is not required its infringement is of little consequence.[1045] This is an overbroad delineation of the right leading to the infringement being justified too readily.[1046] He prefers the view that the claimants did not advance a sincere belief or practice required by their religion[1047] but he will assume it to be satisfied.[1048]

As to whether the state interference is more than trivial or insubstantial Rowe held that TWU claims protection for their ability to study law in an academic environment that requires all students to abide by the Covenant.[1049] But the school is open to non-believers and its attempt to coerce religious practices on those outside of its community is not protected by the *Charter*.[1050] Since religious freedom is a function of personal autonomy and choice it does not allow individuals or communities to impose adherence on those who do not share that faith.[1051] Therefore, what the claimants seek falls outside the scope of freedom of religion.

[1034] *Ibid* at para 197.
[1035] *Ibid*.
[1036] *Ibid*.
[1037] *Ibid* at para 206.
[1038] *Ibid* at para 207.
[1039] *Ibid* at para 212.
[1040] *Ibid* at para 213.
[1041] *Ibid* at para 214.
[1042] *Ibid* at para 219.
[1043] *Ibid* at para 219.
[1044] *Ibid* at para 228.
[1045] *Ibid* at para 234.
[1046] *Ibid*.
[1047] *Ibid* at para 233.
[1048] *Ibid* at para 235.
[1049] *Ibid* at para 237.
[1050] *Ibid* at para 242.
[1051] *Ibid* at para 251.

The statutory authority of the *LPA* did not preclude the LSBC from holding a referendum and choosing to be bound by the results; nor was it unreasonable given the deference due to the LSBC to interpret its own statute.[1052] However, if there was a *Charter* infringement, "I do not see how it would be possible for the LSBC to proceed by way of a majority vote while upholding its responsibilities under the *Charter*."[1053]

The LSBC decision came within a range of reasonable outcomes, which is informed by the mandate to regulate the legal profession in the public interest, and the deference given to the LSBC. It was reasonable not to accredit TWU's law school because of the LSBC's mandate to promote equal access to the profession, support diversity, and prevent harm to LGBTQ law students.[1054]

6.3.6.4.4 Justice Suzanne Côté and Justice Russell Brown

Côté and Brown suggest the real question is who controls the door to the public square? The liberal state must foster pluralism by accommodating difference but where does public life begin? They held that it is the public regulator who controls the door and owes that obligation.[1055] A private denominational university, not subject to the *Charter* and exempt from human rights legislation, does not. By restricting access to the public square, as it has, the LSBC "profoundly interfered with the constitutionally guaranteed freedom of a community of co-religionists to insist upon certain moral commitments from those who wish to join the private space within which it pursues its religiously based practices."[1056] The denial of access based on religious grounds "merits judicial intervention, not affirmation."[1057]

TWU is not for everybody and LGBTQ students could only sign the Covenant at a considerable personal cost.[1058] At stake is also the personal self-identity of TWU community members. Courts must strive to see claims from the perspectives of all sides.[1059] Constitutionally protected rights, like religious freedom, exists "to *protect* right-holders from values which a state actor deems to be 'shared', not to give licence to courts to defer to or impose those values."[1060] A court of law ought not to be concerned, as was the Majority, with the "public perception" of what freedom of religion entails.[1061] Its responsibility is "not to produce social consensus, but to protect the democratic commitment to live together in peace."[1062]

The *Doré/Loyola* framework "betrays the promise of our Constitution that rights limitations must be demonstrably justified."[1063] The only proper purpose for the LSBC decision on TWU, as permitted by its governing statute, was to ensure TWU graduates met the minimum

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[1052] *Ibid* at para 255.
[1053] *Ibid* at para 256.
[1054] *Ibid* at para 258.
[1055] *Ibid* at para 261.
[1056] *Ibid*.
[1057] *Ibid*.
[1058] *Ibid* at para 262.
[1059] *Ibid* at para 264.
[1060] *Ibid* at para 265, emphasis in original.
[1061] *Ibid*.
[1062] *Ibid*, quoting M. A. Waldron et al., "Developments in law and secularism in Canada", in A. J. L. Menuge, ed, *Religious Liberty and the Law: Theistic and Non-Theistic Perspectives* (Routledge, 2018), 106 at 111.
[1063] *Ibid* at para 266.

competence and ethical conduct standards.[1064] Even if the statute's "public interest" mandate allowed for considerations other than fitness, the decision to deny TWU approval because of a Covenant restriction, which is protected by the provincial human rights legislation, "is a profound interference with religious freedom, and is contrary to the state's duty of religious neutrality."[1065] Even if "public interest" were to be understood broadly, the accreditation of TWU would not be inconsistent with the public interest as "[t]olerance and accommodation of difference serve the public interest and foster pluralism."[1066]

There is nothing in the governing statute that is ambiguous such that it was necessary to resort to "*Charter* values" to determine LSBC's public interest mandate.[1067] "Public interest" is itself "vague and difficult to characterize."[1068] The Majority's approach is "untethered from the express limits to the LSBC's statutory authority" which was to ensure licensing applicants are fit to practice law.[1069] There is no discretion for considerations that are improper or irrelevant.[1070] The scope of LSBC's mandate is "limited to regulating the legal profession, starting at (but not before) the licensing process."[1071] The Majority misconstrues the purpose underlying the LSBC's discretionary power to approve a law school.[1072] The purpose "does not rationally extend to guaranteeing equal access to law schools."[1073] Admissions criteria is left up to the law schools. The Majority's logic would mean the LSBC would be entitled to consider the inequitable barrier of tuition fees in accrediting law schools to promote competence of the bar.[1074] "The LSBC is not a roving free-floating agent of the state. It cannot take it upon itself to police such matters when they lie beyond its mandate."[1075]

Côté and Brown disagreed with the Majority's approval of the LSBC Benchers' decision to be bound by the results of a referendum.[1076] "[T]he Benchers abdicated their duty as administrative decision-makers to properly balance the objectives of the LPA with the *Charter* rights implicated by their decision."[1077] The Majority was engaged in "pure historical revisionism to suggest that the Benchers believed their decision 'would benefit from the guidance or support of the membership as a whole.'"[1078] In short, "the LSBC's decision is completely devoid of any reasoning."[1079]

The Majority's justification for deferring to the LSBC despite the lack of reasons is "untenable" because it is never sufficient to consider the outcome alone.[1080] The majority replaces the non-reasons of the LSBC with its own and makes the outcome the sole

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[1064] *Ibid* at para 267.
[1065] *Ibid* at para 268.
[1066] *Ibid* at para 269.
[1067] *Ibid* at para 270.
[1068] *Ibid* at para 272.
[1069] *Ibid* at para 273.
[1070] *Ibid* at para 274.
[1071] *Ibid* at para 284.
[1072] *Ibid* at para 285.
[1073] *Ibid* at para 289.
[1074] *Ibid* at para 289.
[1075] *Ibid* at para 291.
[1076] *Ibid* at para 294.
[1077] *Ibid*.
[1078] *Ibid* at para 298.
[1079] *Ibid* at para 299.
[1080] *Ibid* at para 300.

consideration.[1081] Second, the Majority cannot point to any basis that the Benchers conducted any balancing after the referendum.[1082]

Côté and Brown find the lack of rationale for insisting on a distinct *Doré/Loyola* framework for administrative decisions troubling where the *Oakes* test is already context-specific,[1083] and has been applied to many administrative law decisions prior to *Doré*.[1084] The Majority said its *Doré* framework is a "robust" rather than a weak version of proportionality, but Côté and Brown note, "saying so does not make it so."[1085] As they note, it subverts our Constitution's promise to ensure that *Charter* rights are subject only to reasonable limits.[1086] The Majority has effectively said that under *Doré*, "*Charter* rights are guaranteed *only so far as they are consistent with the objectives of the enabling statute*."[1087] But the Constitution has it the other way around: rights trump statutory objectives.

Moreover, the Court's silence on who bears the onus in the administrative law context is "a conspicuous and serious lacuna in the *Doré/Loyola* framework."[1088] "[T]his hardly bolsters the credibility of the *Doré/Loyola* framework."[1089]

The Majority's reliance on "values" is troubling – "resorting to *Charter* values as a counterweight to constitutionalized and judicially defined Charter rights is a highly questionable practice."[1090] *Charter* values are "entirely the product of the idiosyncrasies of the judicial mind that pronounces them to be so."[1091] One judge's understanding of "equality" might be a "shared value" with all or even most Canadians but another judge's might not. Indeed, "One person's values may be another person's anathema."[1092] This is not problematic as long as each person agrees to the other's right to hold and act on those values in a manner that maintains civic order.[1093]

In Côté and Brown's view, "*Charter* 'values', as stated by the majority, are amorphous and, just as importantly, undefined."[1094] They lack doctrinal structure which the courts have crafted for over 35 years in giving substantive meaning to *Charter* rights. Instead, "*Charter* values like 'equality', 'justice', and 'dignity' become mere rhetorical devices by which courts can give priority to particular moral judgments, under the guise of undefined 'values', over other values and over *Charter* rights themselves."[1095] For instance, equality is too nebulous a notion to form the basis of concrete decision-making. The Majority cannot point to a specific legal rule or right to ground the application of the value of equality here. It is purely abstract and could mean virtually anything. After all, "equality in an absolute sense is also perfectly compatible with a totalitarian state, being easier to impose where freedom is limited."[1096]

[1081] *Ibid*.
[1082] *Ibid* at para 301.
[1083] *Ibid* at para 302.
[1084] *Ibid* at para 303.
[1085] *Ibid* at para 304.
[1086] *Ibid*.
[1087] *Ibid* at para 305.
[1088] *Ibid* at para 312.
[1089] *Ibid*.
[1090] *Ibid* at para 307.
[1091] *Ibid* at para 308.
[1092] *Ibid*.
[1093] *Ibid*.
[1094] *Ibid* at para 309.
[1095] *Ibid*.
[1096] *Ibid* at para 310.

Côté and Brown agree with the majority that the LSBC's decision infringes the religious freedom of members of the TWU community and also agree not to determine whether TWU, *qua* institution, has a right to religious freedom.[1097] They reject Justice Rowe's narrowing of the scope of activity protected by the right.[1098] Relying on *TWU* 2001, they note that the restriction on the freedom can be justified by evidence that there will be a detrimental impact on the statutory decision-maker's ability to carry out its mandate.[1099] That would mean in this case that the TWU graduates would be unfit to practice law. But there is no evidence here to justify the limit.

Côté and Brown held that the LSBC decision "undermines the core character of a lawful religious institution and disrupts the vitality of the TWU community" – "it is substantially coercive in nature."[1100] The Covenant is protected by the BC Human Rights Code but the LSBC decision makes its approval contingent on TWU "manifesting its beliefs in a *particular* way."[1101] This demonstrates "highly intrusive conduct by a state actor into the religious practices of the TWU community."[1102]

The majority failed to appreciate that the unequal access that results from the Covenant "is a function of accommodating religious freedom, which itself advances the public interest by promoting diversity in a liberal, pluralist society."[1103] It is "the state and state actors – not private institutions like TWU – which are constitutionally bound to accommodate difference in order to foster pluralism in public life."[1104]

State neutrality requires the state to refrain from espousing "values" that undermine what is necessary for the participation of all. "[A]ccommodating diverse beliefs and values is a precondition to secularism and pluralism."[1105] The view of marriage espoused by TWU was recognized by Parliament in the *Civil Marriage Act*. Legislators recognized that the public interest is served by promoting the accommodation of difference. So "[t]he LSBC's decision repudiates this wisdom and is unworthy of this Court's affirmation."[1106]

Côté and Brown rejected the concept that the LSBC's approval of TWU would be condoning the Covenant or discrimination against LGBTQ persons. Law schools do not exercise a public function on behalf of LSBC. "Equating approval to condonation turns the protective shield of the *Charter* into a sword by effectively imposing *Charter* obligations on private actors,"[1107] thereby excluding religious communities from the public square because they exercise their *Charter*-protected religious beliefs.

Côté and Brown noted that both Parliament and British Columbia's legislature recognized the so-called "discriminatory" (McLachlin C.J.'s Reasons, at para 138) and "degrading and disrespectful" (Majority reasons, at para 101) practices of TWU's Covenant "as consistent with the public interest, legal and worthy of accommodation."[1108] These practices

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[1097] *Ibid* at para 315.
[1098] *Ibid* at para 317.
[1099] *Ibid* at para 321.
[1100] *Ibid* at para 324.
[1101] *Ibid*.
[1102] *Ibid*.
[1103] *Ibid* at para 327.
[1104] *Ibid* at para 330.
[1105] *Ibid* at para 334.
[1106] *Ibid* at para 337.
[1107] *Ibid* at para 338.
[1108] *Ibid* at para 340.

cannot then be cited as a reason justifying the exclusion of a religious community from public recognition. The approval of TWU would not be state preference for evangelical Christianity but a recognition of the state's duty "to accommodate diverse religious beliefs without scrutinizing their content."[1109] The only decision reflecting a proportionate balancing of the rights and state objectives would be to approve TWU's law school.

6.3.6.5 Decision: Trinity Western University v. The Law Society of Upper Canada[1110]

In a 7-2 decision the Court ruled that the LSUC's decision to deny accreditation to TWU was reasonable. Justices Abella, Moldaver, Karakatsanis, Wagner, and Gascon formed the majority opinion while Chief Justice McLachlin and Justice Rowe each wrote their own concurring opinions. Justices Côté and Brown wrote a robust dissenting opinion.

6.3.6.5.1 The Majority

The Majority noted that LSUC did not deny TWU law graduates but denied TWU accreditation with a mandatory covenant.[1111] The issues were whether the LSUC was entitled to review TWU's admissions policies; whether the decision limited a *Charter* protection; and if so, whether there was a proportionate balance of the *Charter* protections and the statutory objectives.[1112]

The LSUC's mandate from the Law Society's Act[1113] (LSA) was to provide an overarching objective of protecting the public interest in admission to the profession that included whether to accredit a law school.[1114] The LSA (s. 4.2) tasked the LSUC with advancing the cause of justice, the rule of law, access to justice, and protection of the public interest.[1115] The LSUC was entitled to be concerned about the inequitable barriers on entry to law schools as these impose inequitable barriers on entry to the profession and risk decreasing diversity within the bar and causing harm to LGBTQ individuals.[1116] This is part of its duty to uphold the public interest in accreditation as well as a positive public perception of the legal profession.[1117] "[T]he LSUC has an overarching interest in protecting the vales of equality and human rights in carrying out its functions."[1118]

The Majority referenced its reasons in the LSBC case in noting that the LSUC did not need to give reasons, since "the Benchers were alive to the question of the balance to be struck between freedom of religion and their statutory duties."[1119]

In reviewing administrative decisions, the *Doré/Loyola* framework is used because it "is concerned with ensuring that *Charter* protections are upheld to the fullest extent possible given

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[1109] *Ibid*.
[1110] *TWU v LSUC* 2018, *supra* note 14.
[1111] *Ibid* at para 11.
[1112] *Ibid* at para 12.
[1113] *Law Society Act*, R.S.O. 1990, c. L.8.
[1114] *TWU v LSUC* 2018, *supra* note 14 at para 14.
[1115] *Ibid* at para 17.
[1116] *Ibid* at para 19.
[1117] *Ibid* at para 20.
[1118] *Ibid* at para 21.
[1119] *Ibid* at para 28.

the statutory objectives within a particular administrative context. In this way, *Charter* rights are no less robustly protected under an administrative law framework."[1120]

Freedom of religion is engaged for the same reasons as the LSBC case. The LSUC has interfered with the TWU religious community's beliefs and practices which are more than trivial or insubstantial.[1121] However, the LSUC's interpretation of the public interest precluded it from accrediting TWU as it would not have advanced the statutory objectives.[1122] Its decision "reasonably balanced the severity of the interference with the benefits to the statutory objectives" as the impact on religious freedom was minor "because a mandatory covenant is not absolutely required to study law in a Christian environment in which people follow certain religious rules of conduct, and attending a Christian law school is preferred, not necessary," for TWU students.[1123] On the other side of the scale its decision significantly advanced statutory objectives of ensuring equal access and diversity in the profession and preventing harm to LGBTQ people. The Majority asserted, "[t]he reality is that most LGBTQ individuals will be deterred from attending TWU… and those who do attend will be at risk of significant harm."[1124]

Religious freedom can be limited when it interferes with the rights of others. Hence, "TWU's community members cannot impose those religious beliefs on fellow law students, since they have an inequitable impact and can cause significant harm." LSUC's decision "prevents *concrete*, not abstract harms to LGBTQ people and to the public in general."[1125] The decision gives effect as fully as possible to the Charter protections given the statutory mandate and was therefore reasonable.[1126]

6.3.6.5.2 Chief Justice Beverley McLachlin

The Chief Justice concurred with the Majority and adopted her reasons of the companion decision.

6.3.6.5.3 Justice Malcolm Rowe

Justice Rowe concurred with the Majority, noting that deference is required in reviewing the decisions of law societies as they self-regulate in the public interest.[1127] The LSUC did not err in denying accreditation because of the discriminatory barrier to legal education created by "effectively excluding LGBTQ students from studying law at TWU."[1128]

Justice Rowe adopted his reasons in the companion appeal, holding that there was no infringement of Charter rights.[1129] The decision fell within a range of possible acceptable outcomes, and there was no need for formal reasons as the Court can look to the record to

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[1120] *Ibid*.
[1121] *Ibid* at para 34.
[1122] *Ibid* at para 37.
[1123] *Ibid* at para 38.
[1124] *Ibid*.
[1125] *Ibid* at para 41.
[1126] *Ibid* at para 42.
[1127] *Ibid* at para 49.
[1128] *Ibid*.
[1129] *Ibid* at para 50.

assess the reasonableness of the decision which was evident.[1130] The LSUC decision was reasonable.

6.3.6.5.4 Justice Suzanne Côté and Justice Russell Brown

This appeal and its companion appeal entail who controls the door to the public square. "[W]ho owes an obligation to accommodate difference in public life? We say that this obligation lies with the public decision-maker."[1131] TWU, being a private denominational institution, not subject to the *Charter* or to judicial review, exempt from provincial human rights legislation, "owes no such obligation."[1132] The only purpose of the LSUC accreditation decision was to ensure the TWU graduates were fit for licensing. Not to accredit TWU was "a profound interference with the TWU community's freedom of religion."[1133] Even if the public interest were as broad as the majority said then it would not have been inconsistent with the statutory mandate to accredit TWU since "[i]n a liberal and pluralist society, the public interest is served, and not undermined, by the accommodation of difference."[1134]

Sections 4.1 and 4.2 of the LSA set out the LSUC's primary function and it is clear that "the setting of standards for the provision of legal services in Ontario is the LSUC's *primary* function."[1135] That regulation begins "at (but not before) the licensing process – that is, starting at the doorway to the profession."[1136] It "is *crystal clear* that the provisions in *By-Law 4* relating to the accreditation of law schools are meant *only* to ensure that individual applicants are fit for licensing" and it "is not for this Court to extend *By-Law 4*'s scope beyond the limits of the LSUC's mandate."[1137] Nor do the LSUC's arguments based on s.62(0.1)23 of the LSA extend authority over law schools – and even if it did, it would not apply to a school outside of Ontario.[1138]

Contrary to the majority position, "'upholding a positive public *perception* of the legal profession' … is not a valid basis for the LSUC's decision."[1139] The objective to ensure equal access to and diversity to the profession does not fall under LSUC's duty to ensure competence.[1140] If it were otherwise the LSUC would be obliged "to regulate law school tuition fees which, arguably, create inequitable barriers to the practice of law."[1141] The only defensible exercise of its statutory discretion for a proper purpose would have been to approve TWU.[1142]

The Ontario Court of Appeal Justice MacPherson's finding that TWU's admission policy discriminates against the LGBTQ community contrary to s. 15 of the *Charter* "reveals the fundamental and serious error in the Court of Appeal's understanding of [the] balancing exercise. TWU is a private institution. And, at the risk of stating trite law, private actors are not

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[1130] *Ibid* at para 51-54.
[1131] *Ibid* at para 56.
[1132] *Ibid*.
[1133] *Ibid* at para 57.
[1134] *Ibid*.
[1135] *Ibid* at para 60, emphasis in original.
[1136] *Ibid* at para 62.
[1137] *Ibid* at para 66, emphasis in original.
[1138] *Ibid* at para 73.
[1139] *Ibid* at para 75, emphasis in original.
[1140] *Ibid* at para 76.
[1141] *Ibid*.
[1142] *Ibid*.

subject to the *Charter*."[1143] "[T]he Court of Appeal's manifestly erroneous understanding of a basic premise, not only of our constitutional order but of the particular balancing the court was called upon to exercise in this case, taints its entire assessment of the matter."[1144]

The Majority errs in stating that limits on religious freedom are often unavoidable when the decision-maker pursues its statutory mandate in a multicultural and democratic society. Such a "categorical and unelaborated statement" is rooted in the:

> fundamental misconception: that, even where the rights of others are not actually infringed because private actors do not owe obligations to refrain from infringing them, a private actor's religious freedom will 'unavoidab[ly]' be limited solely on the basis that its exercise 'negatively impacts' the interests of others. But the point is this simple. The *Charter* binds state actors, like the LSUC, and *only* state actors. It does not bind private institutions, like TWU.[1145]

Côté and Brown, unlike the Majority, do not see the religious interference as minor. Rather, the LSUC decision "disrupts the core character of the TWU community by interfering with its ability to determine the biblically grounded code of conduct by which community members will abide."[1146] When the Majority said that the LSUC did not deny graduates but TWU's law school with a mandatory covenant, it is "a highly formalist description" that "belies the majority's claim … that it is applying '*substantive* equality'. In *substance*, TWU is seeking accreditation of its proposed law school for the benefit of its graduates."[1147]

Finally, the "unequal access resulting from the Covenant is a function not of condonation of discrimination, but of accommodating religious freedom, which freedom allows religious communities to flourish and thereby promotes diversity and pluralism in the public life of our communities."[1148]

In short, "[t]he appeal should be allowed. We therefore dissent."[1149]

6.3.7 Analysis of SCC's TWU Decisions

6.3.7.1 The Increasing Power of Identity Politics

From the moment TWU filed its application with the Federation, the political realities of the legal profession were exposed. As noted above, the CCLD and legal academics were adamant in their disdain for TWU's Community Covenant. "Religion" and "religious freedom" have evidently become, within the profession, regressive concepts that are associated with discrimination and inequality.

Justice Karakatsanis, during the *TWU* 2018 oral argument on November 30, 2017, complained that the BC Court of Appeal's decision, which favoured TWU, did not look at the controversy "from the perspective of *substantive equality*, they don't consider whether they have less opportunity than others for those seats."[1150] Justice Karakatsanis was willing to sacrifice the TWU law school because the LGBTQ population theoretically would not have the

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[1143] *Ibid* at para 78.
[1144] *Ibid*.
[1145] *Ibid* at para 79.
[1146] *Ibid* at para 80.
[1147] *Ibid*.
[1148] *Ibid* at para 81.
[1149] *Ibid* at para 82.
[1150] *TWU* 2018, *supra* note 14, (transcript of oral hearing, SCC vol 1, 30 November 2017, at 58).

exact same number of open seats as evangelical Christians. The Christian TWU school would be open to those Christians who could sign the Community Covenant but not to the LGBTQ students who could not or would not sign the Covenant. However, was the number of seats for entry to law school a proper comparator in determining equality in the circumstance? Professor Rex Ahdar points out, "We cannot know whether two things or two people are alike, and hence deserving of similar treatment, until we work out the criterion of likeness and like treatment."[1151] Neither Justice Karakatsanis nor the rest of the SCC majority established the criterion of likeness – for example, if the SCC is using evangelical Christians and LGBTQ people as the comparator groups, what might we consider like treatment? What about "substantive equality" among law clerks at the SCC? Or, as deans or faculty members of the law schools across Canada?

Professor Alexandra V. Orlova argues that the courts have a role "to engage in transformational legal strategies to work towards achieving substantive equality."[1152] Courts are to eradicate "systemic inequality" in order to assist in changing the landscape of social, economic and political conditions. This will involve shaping the public's "feelings and challenging existing norms" like the "hetero-normativity of the 'public good'" to reduce "law's violence." [1153] The courts then, as envisioned by Orlova, are agents of change. They are a "political organ" to implement the public interest.[1154] The public interest is fluid, in keeping with the changing norms, but also "firmly grounded in the principle of equality".[1155]

The views of Orlova and Karakatsanis regarding the TWU law school controversy are proof positive of my assertion that there is a paradigm shift underway in the profession against the legal accommodation of religious practice. The reliance upon political identity politics for constitutional adjudication is not to be applauded as much as it is to be feared. The rejection of the law of religious accommodation by the courts and academics in order to show solidarity with the hurt feelings of certain groups presumes that the emotional hurt is due to "social corruption" and that such corruption must be solved by "cultural restructuring." Warns Dr. Jordan Peterson, "[o]ur society faces the increasing call to deconstruct its stabilizing traditions to include smaller and smaller numbers of people who do not or will not fit into the categories upon which even our perceptions are based. That is not a good thing".[1156] Peterson argues, "Each person's private trouble cannot be solved by a social revolution, because revolutions are destabilizing and dangerous."[1157] However, the SCC has steered the law unequivocally into the murky and dangerous waters of revolutionary identity politics.

And all political shifts can shift back given the right circumstances. Until the SCC's TWU decisions, the law has, by and large,[1158] been generous in its accommodation of religious

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[1151] Rex Ahdar, "The Empty Idea of Equality Meets the Unbearable Fullness of Religion" (2016) 4 Journal of Law, Religion and State, 146-178, at 148.

[1152] Alexandra V. Orlova, "Public Interest, Judicial Reasoning and Violence of the Law: Constructing Boundaries of the Morally Acceptable," (2017) 9 Contemp. Readings L. & Soc. Just. 51 at 71.

[1153] *Ibid* at 72.

[1154] *Ibid* at 59.

[1155] *Ibid* at 63.

[1156] J. Peterson, *supra* note 265 at 118.

[1157] *Ibid.*

[1158] The notable exception is the SCC's very troubling decision in *Hutterian Brethren, supra* note 5, where the SCC ruled that the Hutterite colony's objection to their photograph being taken for the Alberta drivers' license could not be accommodated, despite the Alberta government's accommodation of that very thing for over 29 years. That decision was referred to by the Majority to justify its positions in the TWU law school cases.

practices.[1159] That is no longer the case. The growing consensus within the legal profession is that there can be no tolerance for religious views or practices that offend sexual equality claims. The Ontario Court of Appeal's declaration that the TWU Covenant "hurts"[1160] suggests that emotive language has supplanted legal principles. There no longer appears to be, in the legal profession, any recognition of the historical, philosophical, or practical imperatives for accommodating religious difference within a liberal democratic society.[1161] A private religious community is the sole arbiter of who can and cannot be a member of its community.[1162] The fact that non-members are required to abide by religious rules when seeking to be part of that community should not alter that principle.[1163] Indeed, one has to question why the law societies are owed deference because of their mandate to self-define in the interests of the legal profession, but religious groups are clearly not permitted the same latitude to self-define according to their religious beliefs? Guests on private property do not get to change the lawful rules of the owner.

However, politics – sexual identity politics – has moved the conversation to mean just that: non-members are demanding the privilege of entering a private religious community, receiving all benefits, such as a university education (despite rejecting the community's principles) and nullifying those beliefs and practices they find offensive. The advocates are adamant that the law destroy offensive difference. Entities that refuse to acquiesce to political demands are deemed discriminatory and are not permitted to operate in the public square. In short, opponents of religious accommodation require nothing less than total compliance with their social values. The BCCA declared, "there is no *Charter* or other legal right to be free from views that offend and contradict an individual's strongly held beliefs."[1164] That may change.

Intentional or not, the political movement sweeping the legal community may make the currently non-existent *Charter* right "not to be offended" into a reality by virtue of "*Charter* values". The fact the *Charter* does not have such language is immaterial in this new era. Politics makes all things possible just by "the vibe of the thing."[1165] The SCC has now shown itself sympathetic to sexual identity politics and creative in reaching what it deems the public

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[1159] In *Same-Sex Marriage*, *supra* note 178, para 53, the SCC stated, "The protection of freedom of religion afforded by s. 2(a) of the Charter is broad and jealously guarded in our Charter jurisprudence." In that case the SCC held that clergy could not be compelled to perform marriages that violated their faith – even though they were state actors. Nor were church buildings required to be used for celebration of marriages that violated the beliefs of the religious community.

[1160] *TWU* ONCA 2016, *supra* note 701 at para 119.

[1161] Further, it must be pointed out that to suggest that the law societies have a duty to protect "the values of equality and human rights" which precludes them from accrediting TWU is to imply that religious beliefs are not compatible with equality or human rights/dignity. That view is distorted, and hurtful to religious adherents. It also dismisses the profound contributions of religious principles and practices to law, democracy, and civil rights. As was observed by the BCCA, "the language of 'offense and hurt' is not helpful in balancing competing rights"; see *TWU* BCCA 2016, *supra* note 478, at para 189.

[1162] It is ironic that only a few weeks before, the SCC released a decision supporting the principle that religious communities are free to decide who can and cannot be a member: *Wall, supra* note 368.

[1163] This is a function of freedom of association. See Derek Ross, "Trinity Western and the Endangerment of Religious Pluralism in Canada" (22 July 2018) online: *The Witherspoon Institute* <thepublicdiscourse.com/2018/07/22222/>.

[1164] *TWU* ONCA 2016, *supra* note 701 at para 188.

[1165] Bruce Pardy, "The Supreme Court's TWU ruling is a cruel joke played on all Canadians," *The National Post* (29 June 2018), online <https://nationalpost.com/opinion/bruce-pardy-the-supreme-courts-twu-ruling-is-a-cruel-joke-played-on-all-canadians>/

desires.[1166] Recently, Chief Justice Richard Wagner referred to the long-held principle that the Canadian Constitution is "like a living tree, it evolves, so that we don't necessarily keep to the strict definition of a word when it was drafted 150 years ago. We look at it against the backdrop of an evolving society with the perspectives, outlooks, moral values of that society, and the context in which the issue comes up at the time the Court is making its decision."[1167]

I suggest, as is evident by *TWU* 2018, that it is not so much Canadian society that has changed,[1168] but the legal community which has changed in its views toward the law's accommodation of religion. Consider, for example, Joseph Arvay's comments, noted above, that as Benchers they were the law.[1169] The SCC agreed with Arvay.

The most obvious problem with identity politics being the basis of law is that politics change. The future is unknown: what is considered to be on the "right side of history" today may not be so tomorrow. Should a new ideology take control, different from the current sexual identity power dynamic, then the law will be forced to follow its new political masters. Liberal democratic pluralism was meant to be a check against the dramatic swings of politics by accommodating, as much as possible, the religious (and other) differences of its citizens. William Galston writes, "liberal democracies rely on cultural and moral conditions that cannot be taken for granted. To remain 'liberal,' however, these regimes must safeguard a sphere in which individuals and groups can act, without state interference, in ways that reflect their understanding of what gives meaning and value to their lives."[1170] The SCC has chosen politics and exclusion rather than jealously guarding a place for difference.

6.3.7.2 The Diminishing Power of Law

Law matters. For peace, order, and good government, it must matter. But it no longer appears to matter as much as the politics of the law. The rule of law has been a bedrock principle of liberal democratic countries.[1171] However, if a court is more concerned with political popularity than the rule of law, then the net effect is that established law will be sacrificed on the altar of political correctness. Hence, in *TWU* 2018 the majority did not allow any legal rule to impede its progress towards the "right" decision of denying TWU a law school.

[1166] Professor Bezanson states "the social and political climate favours extending aspects of the dissenting arguments of Justice L'Heureux-Dubé in that [*TWU* 2001] case in favour of equality [in the *TWU* 2018 case]." See Kate Bezanson, "Reconciling Rights in Tension: Freedom of Religion and Equality in Trinity Western University," online: <https://www.academia.edu/36173486/Reconciling_Rights_in_Tension_Freedom_of_Religion_and_Equality_in_Trinity_Western_University>.

[1167] Wagner, "First News Conference," *supra* note 38.

[1168] Obviously, Canadian society has been leaving Christianity in droves as noted by Clarke & Macdonald, *supra* note 31. My point is that it is the legal community, not simply society at large, whose views have evolved. And when I consider the opposition to TWU's law school bid I observe that it was lawyers and legal academics who were vocal – not the average Canadian.

[1169] LSBC Bencher Transcript, *supra* note 853 at 46.

[1170] William Galston, "Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory," 40 Wm and Mary L. Rev. 869, 907.

[1171] Tom Bingham, *The Rule of Law* (London: Penguin, 2011). The Canadian *Charter* specifically refers to it in the Preamble: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."

6.3.7.3 Stare Decisis

We have come a long way from what one keen observer, in the 1950s, noted was the SCC's penchant to be "bound by its own previous decisions, subject to the meaningless 'exceptional circumstances' qualification."[1172] In other words, it was once rare for the SCC to oppose its previous decision(s). In recent years, the concept has met with criticism and a call to the SCC to loosen *stare decisis's* grip.[1173] The SCC responded with a new test.[1174] Yet, in *TWU* 2018, not only did the SCC feel it was not bound by its *TWU* 2001 decision, it virtually ignored it. The majority did not even bother to take the time to distinguish it or apply its *Bedford* test.

It is ironic, therefore, that after ignoring *TWU* 2001, (not to mention other occasions in the recent past where it overturned its own decisions[1175]) the SCC felt it necessary to repeatedly emphasize that the administrative law analyses in *Doré* and *Loyola* are binding precedents.[1176] Justices Côté and Brown appeared taken aback by the majority's insistence on that point; they observed that the majority could not even change those precedents to clarify who (the decision-maker or the claimant) had burden of proof in the analysis.[1177] It seems that some cases are more binding than others. We are left not knowing why *TWU* 2001 was ignored by the majority in *TWU* 2018.[1178]

6.3.7.4 Constitutional Protection Nullified by Charter Values

TWU is not a state actor – it is a private religious university. TWU is to be protected from state actors' decisions by *Charter* guarantees. Further, it is exempt from the scrutiny of human rights legislation in BC as was noted by *TWU* 2001, not to mention that the rights of religious communities with these beliefs and practices are referenced in the *Civil Marriage Act,*[1179] and are protected from having their charitable status removed in the *Income Tax*

[1172] Andrew Joanes, "Stare Decisis in the Supreme Court of Canada" (1958) 36 Can. B. Rev. 175, 189.
[1173] Neil Guthrie, "Stare Decisis Revisited" (2006) 31 Advoc. Q. 448.
[1174] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para 42, *per* McLachlin C.J.: "In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate."
[1175] For example, *Carter, supra* note 777, overturned the decision of *Rodriguez v. British Columbia (Attorney General),* 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519.
[1176] *LSBC v TWU* 2018, *supra* note 14 paras 58, 59, 207.
[1177] *Ibid* at para 313: "the majority's invocation of stare decisis ("*Doré* and *Loyola* are binding precedents") is no answer to good faith attempts in concurring and dissenting judgments to clarify precedent. A precedent of this Court should be strong enough to withstand clarification of who carries the burden of proof."
[1178] CJ McLachlin did briefly reference *TWU* 2001. In *LSBC v TWU* 2018, *supra* note 14, para 122 she recognized parallels between the two cases (referencing freedom of association and freedom of expression) and in paras 149-50 she distinguished *TWU* 2001 from *TWU* 2018.
[1179] *Civil Marriage Act,* SC 2005, c 33, assented to 20 July 2005. See the Preamble where it states unequivocally:

> "WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;
> WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage…"

Act.[1180] Finally, these same views were protected in the SCC's own *Same-sex Marriage Reference*.[1181] The non-discussion of these points by the majority is telling.

So is the Majority's refusal to address the incomprehensible Ontario Court of Appeal decision that TWU's Covenant violated s. 15 of the *Charter*.[1182] As Côté and Brown JJ observed, it is trite law that a private actor cannot violate the *Charter*.[1183] Yet, the majority let the Ontario decision stand without a whisper of contradiction. The majority stated that the use of "*Charter* values" in constitutional interpretation is "[f]ar from controversial."[1184] However, the concurring and dissenting opinions belie that assertion.[1185] If anything, the use of "*Charter* values" is more controversial than ever as a result of *TWU* 2018. Côté and Brown's robust dissent criticized the doctrine which elevates "the idiosyncrasies of the judicial mind" to such an extent that these judicially-imposed "values" limit a constitutionally protected right.[1186] A cursory look at the legal literature makes it indisputable that "*Charter* values" are controversial.[1187] Even the Ontario Court of Appeal has recognized that "*Charter* values lend themselves to subjective application because there is no doctrinal structure to guide their identification or application."[1188] This "is particularly acute when *Charter* values are understood as competing with *Charter* rights."[1189]

For all of the reasons that the concurring judgements and the dissent raise, the emphasis on "*Charter* values" is misplaced and worrisome especially for Christian institutions that hold to the same theological beliefs and practices as TWU.

> And s. 3.1 of the Act: "3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom."

[1180] *Income Tax Act* RSC, 1985, c 1 (5th Supp) (6.21): "For greater certainty, subject to subsections (6.1) and (6.2), a registered charity with stated purposes that include the advancement of religion shall not have its registration revoked or be subject to any other penalty under Part V solely because it or any of its members, officials, supporters or adherents exercises, in relation to marriage between persons of the same sex, the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms*."

[1181] See *Same-Sex Marriage*, *supra* note 178, paras 58-59.

[1182] *TWU* ONCA 2016, *supra* note 701, para 115.

[1183] *TWU v LSUC* 2018, *supra* note 14, para 78.

[1184] *LSBC v TWU* 2018, *supra* note 14, para 41.

[1185] *Ibid*, Chief Justice McLachlin, para 115; Justice Rowe, paras 166-175; dissent of Justices Côté and Brown, paras 307-311.

[1186] *Ibid*, para 308.

[1187] For example, see: Audrey Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter", in J. Cameron, B. Berger and S. Lawrence, eds, (2014) 67 S.C.L.R. (2d), 561; Mark S. Harding and Rainer Knopff, "Constitutionalizing Everything: The Role of 'Charter Values'" (2013) 18 Rev. Const. Stud. 141; Iain T. Benson, "Do 'values' mean anything at all? Implications for law, education and society" (2008) Journal for Juridical Science 33 (1): 1-22; Matthew Horner, "Charter Values: The Uncanny Valley of Canadian Constitutionalism" (2014) The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference, 67 at 361.

[1188] *Gehl v. Canada (Attorney General)*, [2017] O.J. No. 1943, 2017 ONCA 319, para 79.

[1189] *Ibid*.

6.3.8 Eureka Moment

As we saw in Kuhn's analysis of scientific revolutions, there comes a point during the crisis stage that there is a "light bulb" moment or an epiphany. Some scientists say their "Ah ha!" moment came while taking a shower – a flash of insight when the scientist connects the dots of the issues at stake. That moment is a recognition that the paradigm itself must be replaced with a new understanding. The old paradigm is obsolete. A new paradigm comes to take its place.

The Supreme Court of Canada's decision on the TWU law school case is the enforcement of the "Eureka Moment" in the legal revolution against the special status of religion in Canadian law that has been brewing for some time. Indeed, one could argue that the Court's two decisions have carried the law well beyond its flash of enlightenment, from speculation to reality: across the Rubicon of religious freedom into a new territory of secular uniformity.

The SCC Majority had a no-holds-barred approach in its pursuit of sexual equality. The Majority did not let any legal rule – including centuries of religious accommodation – stop it in its path to arrive at the "right" decision. There simply was no way it was going to allow a Christian law school with the traditional teaching and practice of marriage to be accredited – to be a legitimate member of the legal fraternity. In time we may expect a further "Eureka Moment" when there will be a widespread recognition of just how disastrous this decision was. Consider the following.

There are a number of obvious and daring omissions in the *TWU* 2018 decisions. First is the SCC's absolute disregard for basic constitutional principles, as highlighted above, as well as its inconsistent application of *stare decisis*. Second, there was no appreciation whatsoever for religious difference on fundamental human life issues as being necessary in a liberal, democratic society.

It seems clear that the SCC was anxious to reach its desired conclusion without the bother of legal impediments. It is my position that this lack of respect for the current law was founded on and facilitated by the Court's recognition that a preponderance of legal academics, practitioners, and law societies had reached a Eureka Moment: religious accommodation in Canada, as it was understood prior to June 15, 2018, was no longer morally acceptable. The Majority concurred.

I will now proceed to explain, based on my research, how this SCC decision was made possible within the framework of the legal revolution against the place of religion. First, the secularization theory that religion would decline with the advancement of education has not materialized, except for the societal elites. Second, the legal profession and the legal academia have shown that there is no room for accommodation of religious practice as the law once stood. Third, the SCC's decisions have confirmed what had been fermenting within the profession for a while – the belief that religion should no longer to be treated as special. The argument will consider the SCC's decision as it relates to public perception, public interest, and the accentuation of harm on the LGBTQ community versus the diminishment of effects on TWU within a framework that favours "*Charter* values" over "*Charter* rights".

6.3.8.1 The Legal Elite In the Secularization Theory

If religion has shown anything over the millennia of human existence, it is that it has staying power. So much so that many have come to recognize that the secularization thesis is no longer persuasive. That theory suggested religion would fade as societies became more

educated – "where secularism gradually displaces religiosity in much the same way that adulthood displaces childhood."[1190] However, that thesis has failed to materialize.

Sociologists such as Peter Berger not only recognized that the secularization theory does not stand up to current reality, but that despite the secularization of society, there are many vibrant religious communities that have successfully resisted secular influence. Indeed, TWU's continued insistence on maintaining its religious identity is a testament to religion's resistance. However, this fact has not yet been picked up by certain segments of society. Berger writes:

> There exists an international subculture composed of people with western-type higher education, especially in the humanity and social sciences that is indeed secularized. This subculture is the principle 'carrier' of progressive, enlightened beliefs and values. While its members are relatively thin on the ground, they are very influential, as they control the institutions that provide the 'official' definitions of reality, notably the educational system, the media of mass communication and the higher reaches of the legal system.[1191]

"What this means," suggests legal scholar Iain T. Benson, "is that when we are dealing with the law and the media we must recognize that these sectors are heavily over-represented by those, such as many Western journalists, judges and lawyers, who have little time for religion at best and actively wish to attack it at worst."[1192]

Lawyer Philip R. Wood argues that as the priest falls in esteem in the West the lawyer rises.[1193] Wood recognizes the foundational role of religion in organizing life on the planet,[1194] but feels its retreat from a public role to a more private character in the West has left a gap. That gap, says Wood, will be best filled by law and lawyers. "The law is the one universal secular religion which practically everybody believes in," he maintains.[1195] It has "no burdensome rituals" like religion. There is no sacrifice; no prostrating before the law or uttering words of devotion or singing of hymns. Further, law has the advantage of changing when necessary and its content, "[i]n ideal conditions", is derived from the "consensus and will of the people."[1196] While law may not offer the consolations of religion it does empower:

> and liberates us and makes it possible for us to do things in peace which otherwise we would never be able to do. It enables us to pursue happiness. It gives us the order and freedom to pursue a greater goal. We control it. The law is our servant not our master. The law at its best is the most important ideology we have.[1197]

[1190] Andrea Paras & Janice Gross Stein, "Bridging the Sacred and the Profane in Humanitarian Life," in Michael Barnett and Janice Gross Stein, eds, *Sacred Aid: Faith and Humanitarianism* (Oxford: Oxford University Press, 2012), 212

[1191] Peter L. Berger, *The De-Secularization of the World* (Grand Rapids; Eerdmans, 1999), 34.

[1192] Benson, "Attack on Western Religions" *supra* note 468 at 11.

[1193] Wood, *supra* note 182.

[1194] "Religions," said Wood, "provided an explanation of the universe and the meaning of life" by answering the question of creation and providing purpose to our lives, a rationale for morality, and codes for "peace with ourselves and with others," *supra* note 182 at 1-2.

[1195] *Ibid* at 3.

[1196] *Ibid* at 4.

[1197] *Ibid*.

6.3.8.2 No Room For Religion in the Legal Inn

During the TWU law school crisis a number individuals from the ranks of practicing lawyers;[1198] the Benchers and staff of the law societies; the law school faculty members; and law students came to a "eureka moment." They have decided that the law's accommodation of religion as currently understood and practiced no longer fits their understanding of how the law ought to operate when traditional religious norms conflict with the new sexual norms. University of Calgary professor Alice Woolley, clearly troubled by the debate, recognized the pros and cons of both sides but decided against religious accommodation, confessing:

> From my own perspective the proposed TWU law school defies satisfactory resolution. I reject the perspective that religious belief obviously justifies this sort of discriminatory practice. At the same time, constraining expressions of human sexuality to monogamous heterosexual marriage is a mainstream religious belief. I see some weight to the argument that freedom of religion protects even bad religious practices. If forced to choose I would pick equality over religious freedom, but in doing so I would recognize the sacrifice of the freedom at the right's expense, and would feel the weight of that loss.[1199]

In short, the law of religious accommodation must be replaced. It is wrong. As LSBC bencher Joe Arvay stated, "I don't recognize that law." The Supreme Court of Canada has now solidified the consensus in the legal profession against religion.

Perhaps the most comprehensive description of the Eureka Moment is contained in the comments of Heather Burchill, Deputy Judge Advocate for the Canadian Forces. In her letter of opposition against TWU to the Nova Scotia Barristers' Society she argued that the legal profession is "the guardian of the law in Canada. … We are bound by the rule of law…. Should we, as a profession, set ourselves above the law, we lose the moral authority to champion for it."[1200]

She contends that TWU's Code "condemns an entire population as 'lesser', as unholy…. Trinity's narrow interpretation of marriage is not shared by many Christians. More to the point, Trinity's narrow definition of marriage is not shared by the highest Court in Canada, nor by our own Provincial Legislature."[1201]

This is fascinating in light of the fact that Parliament, when it passed the *Civil Marriage Act*, went to great lengths to point out that religious groups were entitled to have a different opinion on marriage. And, further the SCC in its Marriage Reference decision was unequivocal in its protection of religious communities that did not agree with same-sex marriage.[1202] Yet Burchill insists:

[1198] Elliot & Elliot, *supra* note 989.

[1199] Alice Woolley, "Equality Rights, Freedom of Religion and the Training of Canadian Lawyers" (2014) 17:3 Legal Ethics, 437-441.

[1200] Email from Heather Burchill to René Gallant (21 January 2014) in Nova Scotia Barristers' Society, "Trinity Western University Submissions" (2014) at 13, online (pdf): <http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-02-10_ExecPkg_TWU_Submissions.pdf> [NSBS Submissions].

[1201] *Ibid*.

[1202] In *Same-Sex Marriage*, *supra* note 178 at paras 58-59, the Court stated:

> It therefore seems clear that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s.

> Let us not ignore that religion offers one of the few remaining pulpits from which Canadian community leaders can communicate and promote anti-LBGT messages without retribution. Thankfully, there is a separation of church and state in Canada. For this reason, it is contrary to the Charter to harness the resources and influence of our public institutions to impose exclusionary and discriminatory views upon others, to deprive a minority of their rights and privileges – hard earned and for too many, still out of grasp.[1203]

Burchill has confused the legal concept of state neutrality with the American separation of church and state. And she clearly makes the assertion that to accredit an institution is to expend public resources and thereby somehow make the *Charter* applicable to a private organization. This is a dramatical reversal of how our law has worked until now. However, it is this revolutionary thinking that was ultimately accepted by the SCC. Her prescience of the SCC's thinking is noteworthy. She continues:

> Surely the connection between religious intolerance and homophobia is not lost on our profession. The history of exclusion and persecution of sexual minorities is inextricably tied to religious expression. Let me be clear, within the confines the church, and outside a public institution, the faculty are entitled to express their beliefs and practice their religion. However, once they act for the state, or their degree program is accredited by it, the expression of their religious rights cannot be allowed to perpetuate stereotypes and discrimination. … Trinity's application, if accepted by the Federation, would condone religious-based intolerance and discrimination by an accredited law school. This cannot be countenanced. … If they want to be a member of our club, *they will need to play by our rules* – and these include the *Charter of Rights and Freedoms*. I belive [sic] that accepting Trinity's application would strike a blow to the heart of our profession.[1204]

Burchill's presentation reads like a manifesto for those favouring the revolutionary position against the law's historic accommodation of religious practice. By addressing Burchill's outline of grievances with religion and its legal protection I will outline what the opposition to TWU is advocating. It will be shown that their position is not only aggressive, it repudiates the law's accommodation of religion. This repudiation was, as we now know, accepted by the SCC in its TWU decisions. It is remarkable that Kuhn's theory – applied to the legal system on the place of the law's treatment of religion and the revolution that has occurred within the legal community – fits so very well.

2(a) of the Charter. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the *Charter*.

The question we are asked to answer is confined to the performance of same-sex marriages by religious officials. However, concerns were raised about the compulsory use of sacred places for the celebration of such marriages and about being compelled to otherwise assist in the celebration of same-sex marriages. The reasoning that leads us to conclude that the guarantee of freedom of religion protects against the compulsory celebration of same-sex marriages, suggests that the same would hold for these concerns.

[1203] Burchill, *supra* note 1200 at 14.

[1204] *Ibid* at 14-15, emphasis added.

6.3.8.2.1 The Elitism of Law

The familiar line from Shakespeare, "The first thing we do, let's kill all the lawyers,"[1205] has been the inspiration of many jokes. However, contained within that slogan is a deep meaning about the order of society. Dick the Butcher was the wisecracking henchman who spoke this line in favour of Jack Cade who wanted to be king. The point was that if you want to radically change the present order of things you must first deal with the law that keeps all in order. The "guardian" of the law, as Burchill and Shakespeare noted, is the legal profession. Lawyers, while not held in high esteem in some sectors, are necessary. That has given the profession a sense of self-importance.

As Peter Berger noted above, the secularization theory has a strong hold on the legal profession. While Berger notes the secularization theory has proven false, that is not how the legal profession sees it. For them, as is evidenced by their anti-religious attitude toward TWU, religion is a relic of the past and has no place in university campuses – even private religious campuses.[1206] The emotive nature of the arguments against TWU is significant.[1207] Revulsion and ridicule left little room for the rule of law. The legal profession was determined to ensure that no discrimination, as they described it, would be permitted in a law school. To the extent that the law differed, it would have to be changed. The law could never sanction such a law school.

The legal profession was remarkably docile some twenty years ago when the British Columbia College of Teachers locked horns with Trinity Western University over its education degree. There were a few voices of opposition against TWU among the legal academics[1208] but that was it. Perhaps that is not surprising given that the profession was not directly involved – it was an education degree that was contested, not a law degree. However, it does seem peculiar that the legal profession came out so forcefully against TWU's law school proposal when there already existed a 2001 SCC decision on very similar facts. The difference between then and now appears to be, as suggested by the BC and Ontario benchers above, the acceptance of non-traditional sexual norms as evidenced by same-sex marriage.

The 2001 decision was not popular in the legal profession and there was a sense that the SCC ought to revisit it. For instance, Lisa Teryl, legal counsel to the Nova Scotia Human Rights Commission, called on the Nova Scotia Barristers' Society not to approve TWU's law

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[1205] William Shakespeare, *Henry VI*, Part II, Act IV, Scene II, Line 73.

[1206] For instance, Patricia McFadgen of the Nova Scotia Department of Justice described TWU's law school as "institutionalized humiliation of LGBT persons" and expressed her hope that "the lens of time" would show Trinity's religious beliefs to be one of the "absurd relics of history" (email, 5 February 2014 in NSBS Submissions, *supra* note 1200 at 168). Similarly, lawyer Susan McGrath characterized Trinity's admission's policy as "personally abhorrent to most of us in this day and age," in LSUC Convocation, *supra* note 487 at 108.

[1207] As only one of many expressions of horror against TWU, take George Gregory's confession that "I do not know whether to feel disgusted or disheartened when I think that the Law Society of British Columbia may permit TWU to train future lawyers while blatantly indulging its homophobic intolerance," email to LSBC, February 11, 2014, in "LSBC Submissions to the Law Society" at 487.

[1208] Richard Moon, "Sexual Orientation Equality and Religious Freedom in the Public Schools: A Comment on Trinity Western University v. B.C. College of Teachers and Chamberlain v. Surrey School Board" (2003) 8 Rev. Const. Stud. 228 ["A Comment"]; Macdougall, "Separation of Church and Date," *supra* note 214.

school in order to "trigger" TWU's judicial review of the decision leading to a Supreme Court review of its 2001 decision.[1209]

The concept of a Christian law school that maintains a traditional definition of marriage evidently kindled a primordial fear in large sectors of the profession. The spectre of Christian lawyers entering the profession was a clear threat to the present hegemony. As Burchill noted, "If they want to be a member of our club, they will need to play by our rules." This is not unlike the BCCT opposition. Intriguingly, if "our rules" mean the laws of the country, then TWU was in full compliance with the requisite rules. TWU followed the law in this respect: it was entitled to discriminate based on religious practices since it is exempt from BC human rights legislation and further, it is not subject to the *Charter*.[1210] It applied for accreditation to the Federation of the Law Societies of Canada, and despite the opposition it was found not to violate the "public interest."[1211]

However, if "our rules" encompass the profession's ideological leanings, then that is a different matter. Given that Burchill mentions one such "rule" being that "the *Charter of Rights and Freedoms*" is applicable to TWU, even though the 2001 Supreme Court of Canada clearly said it was not – then the professional "club" was outside of the very law it claimed to embody. Therefore, it would be more accurate to conclude that the expectation was not for TWU to follow the rules, meaning the law, but for TWU to accept what many in the legal profession *wanted* the law to be. That interpretation was not consistent with the Supreme Court of Canada in the 2001 case, nor with at least 12 of the 18 superior court judges who heard the TWU law school case.[1212]

With the backing of the Supreme Court firmly in hand, this model of "pushing" or "nudging" the law has now become an acceptable means of "advancing the law." However, the danger of this approach is that it ignores the current status of the law in order to forge ahead with a political (as opposed to a legal) interpretation of the law. The problem, as noted previously, is that politics can change very quickly. And if one political movement can alter the law to suit its agenda, without regard for precedent, there is little to deter another political movement from repeating the process. After all, the last time the SCC dealt with TWU was only 17 years ago – anything is possible 17 years hence given the right machinations. The legal profession may consider itself unique; however, politics, as Dick the Butcher declared, can change all things. The legal profession is an elite profession with the ability to make laws that affects society at large. Unlike educators, the subject of the 2001 case, law graduates may become judges. Judges not only interpret the law, they make law.[1213]

And this legal elitism made it clear that a tiny Christian university was going to have no place in a society that had evolved. In the words of former president of the Federation of Law Societies, John Campion, "It is astonishing to see, when I think of where I was when I went

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[1209] "The Nova Scotia Barristers' leadership may also have the additional benefit of triggering a judicial review by TWU. A judicial review would open up the possibility of the Supreme Court of Canada revisiting its reasoning. The High Court could consider the issues reframed in terms of the preservation of democratic state values of maintaining a separation of church and state for secular activities that conflict with discriminatory religious beliefs." See letter from Lisa Teryl, Legal Counsel, Nova Scotia Human Rights Commission, to Executive Committee and Council Members, in NSBS Submissions, *supra* note 1200.

[1210] *TWU* 2001, *supra* note 26 at para 25.

[1211] "Special Advisory Committee Report," supra note 837 at 19, para 66.

[1212] Being the judges in BC and Nova Scotia.

[1213] See Chief Justice Wagner's assertion that the constitution evolves as society evolves, in "First News Conference," *supra* note 38, also quoted in Chapter 6.

downtown with my father in 1950 compared to today. There is no comparison in terms of the issues of tolerance and diversity, and I don't think we should take even a millimetre step backwards. We can't do it."[1214] The law had to change.

6.3.8.2.2 Legal Academy

A primary source of opposition to TWU's law school proposal was the legal academy.[1215] It was the law deans who first voiced opposition to the Federation and every common law faculty in the country passed resolutions condemning TWU.[1216] One of the key academic voices against TWU has been Professor Elaine Craig of Dalhousie University (in Halifax, N.S.) who wrote two influential papers on the subject.[1217] Her writing is worth focusing on for a number of reasons. First, she is an articulate and influential advocate who exhibits a passionate

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[1214] John Campion, in Transcript, Convocation of the Law Society of Upper Canada, Public Session (24 April 2014), at 70, online (pdf): <https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/c/convocationtranscriptapr242014twu.pdf>.

[1215] Those critical of TWU include: Elaine Craig, "Rejecting Trinity" and "A Reply," *supra* note 793; Dianne Pothier, "An Argument against Accreditation of Trinity Western University's Proposed Law School" (2014) 23 Const. F. 1, 1-8; Sheila Tucker & Emily Snow, "Public Interest and the Trinity Western Law School Trilogy" (2016) 74 Advocate (Vancouver) 539-550; Feinstein & Hamill, "Silencing of Queer Voices," *supra* note 942; Elliot & Elliot, *supra* note 989.

Those sympathetic to TWU include: Dwight Newman, "On the Trinity Western University Controversy: An Argument for a Christian Law School in Canada" (2013) 22:3 Const. Forum 1-14 ["Argument for a Christian Law School"]; Thomas M. J. Bateman, "Trinity Western University's Law School and the Associational Dimension of Religious Freedom: Toward Comprehensive Liberalism" (2015) 66 U.N.B.L.J. 78-116; Mark A. Witten, "Tracking Secularism," *supra* note 566; Diana Ginn & Kevin Kindred, "Pluralism, Autonomy and Resistance: A Canadian Perspective on Resolving Conflicts between Freedom of Religion and LGBTQ Rights" (2017) 12 Religion & Hum. Rts. 1-37; Blair Major, "Translating the Conflict over Trinity Western University's Proposed Law School" (2017-18) 43 Queen's L.J. 175-21; Blair A. Major, "Trinity Western University Law: The Boundary and Ethos of the Legal Community" (2017-18) 55 Alta. L. Rev. 167-198.

[1216] For a sampling of the statements against TWU from the law faculties, see:

Dalhousie University: Letter from Vaughan Black, Chair of Faculty Council, Schulich School of Law, to René Gallant (13 January 2014), online (pdf): http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-01-24_FacultyCouncil_TWU.pdf [Schulich Faculty Letter];

University of British Columbia: "Motion addressed to Law Society of BC as passed" (January 2014), online (pdf): <http://news.ubc.ca/wp-content/uploads/2014/01/Motion-addressed-to-Law-Society-of-BC-as-passed1.pdf> and Simmi Puri, "BC Law asks B.C.'s Law Society to consider impact of Trinity Western's 'covenant' on LGBT community" (28 January 2014), online: *UBC News* <http://news.ubc.ca/2014/01/28/ubc-law-asks-b-c-s-law-society-to-consider-impact-of-trinity-westerns-covenant-on-lgbt-community/>;

University of Manitoba: Nick Martin, "U of M Faculty Joins Fight Against Christian Law School: Pledge required of students is discriminatory: dean," *Winnipeg Free Press* (25 April 2014), online: <http://www.winnipegfreepress.com/local/u-of-m-faculty-joins-fight-against-christian-law-school-256651921.html>, and Zachary Pedersen, "Manitoba Law School Calls for Action on TWU Covenant," *Canadian Lawyer Magazine* (15 April 2014), online: <https://www.canadianlawyermag.com/legalfeeds/author/na/manitoba-law-school-calls-for-action-on-twu-covenant-5688/>.

[1217] Craig, "Rejecting Trinity" and "A Reply," *supra* note 793. Her work was referenced by a number of groups and individuals against TWU including the BC Humanist Association in its letter to the FLSC (14 August 2013), online (pdf): <http://www.docs.flsc.ca/_documents/TWUBCHumanistAssnAug142013.pdf>; and the CBA letter, *supra* note 832 at 2.

argument; second, her writing covers fairly well the expanse of the positions taken by opponents of TWU; third, her writing was quoted and referred to extensively by a number of anti-TWU individuals and groups. Indeed, many of her arguments resurfaced in submissions to the law societies and then later in court documents. Her later writing was also quoted with approval in the Ontario Court of Appeal decision (one of only two court decisions, prior to the SCC, that decided against TWU).[1218] And, though her writing was not directly referenced by the SCC, the gist of her arguments was ultimately accepted by Canada's highest court.

Craig argued that the Federation should not approve programs that have discriminatory admissions policies "that are antithetical to fundamental legal values." Such institutions "are not competent providers of legal education."[1219]

The Federation took the position that it did not have the authority to review a proposed law school's hiring and admissions policies but only whether the law program was compliant with the national requirement. Craig said that was "insufficient".[1220] If the Federation failed in its duty by "not exercising its delegated authority in a manner that protects the public interest and reflects the academic requirements the law societies have agreed upon," said Craig, "then its authority to approve new programs should be withdrawn."[1221] Otherwise, a law society would be found endorsing a discriminatory law school.[1222] Thus, was outlined a plan of action. If the Federation "failed" by approving TWU then it was up to the individual law societies to conduct their own investigations.

As it turned out, the Federation ultimately did "fail," in the minds of many academics, including Craig, by approving TWU. For Professor Craig, that decision was "disappointing".[1223] The Federations' "recommendation represents a refusal to act in the interests of equality and justice. As lawyers, we lack the courage of the B.C. College of Teachers more than 10 years ago." [1224] Noting the "important moment in Canadian legal history and for the pursuit of justice" she queried whether the law societies would "embrace their commitment to the principles of equality, as did the B.C. College of Teachers" when they decided against TWU in the late 1990s in the *TWU* 2001 case. [1225] This clarion call was heeded by three law societies, The Law Society of Upper Canada (Ontario); The Nova Scotia Barristers' Society, and The Law Society of British Columbia.

Professor Craig argued that TWU's policies "would certainly violate human rights law protections" but for its exemption from such legislation as a religious institution.[1226] She also suggested that it might be unlawful in other jurisdictions, saying this was something that law societies should keep in mind – they could be found to be in violation of their home human rights legislation by approving a discriminatory law school.[1227] Craig's argument was forcefully made by the law societies, including the Nova Scotia Barristers' Society before Justice Jamie S. Campbell.

[1218] *TWU* ONCA 2016, *supra* note 701 at para 134.
[1219] Craig, "Rejecting Trinity," *supra* note 793 at 152.
[1220] *Ibid* at 154-155.
[1221] *Ibid* at 154.
[1222] *Ibid*.
[1223] Craig, "More Courage," *supra* note 852.
[1224] *Ibid*
[1225] *Ibid.*
[1226] Craig, "Rejecting Trinity," *supra* note 793 at 156.
[1227] *Ibid* at 157.

Justice Campbell held that it simply made no sense for the Law Society in Nova Scotia to be concerned about whether a law school in BC would be in violation of human rights legislation in Nova Scotia. "The legal authority of the NSBS cannot extended to a university because it is offended by those policies or considers those policies to contravene Nova Scotia law that in no way applies to it," said Justice Campbell. He continued, "[t]he extent to which NSBS members or members of the community are outraged or suffer minority stress because of the law school's policies does not amount to a grant of jurisdiction over the university."[1228] Campbell's arguments were rejected by the SCC, who declared that the LSUC is "entitled to consider whether accrediting law schools with inequitable admissions policies promotes the competence of the bar as a whole."[1229]

Professor Craig also used the case of Bob Jones University[1230] (BJU) as a comparator to TWU. BJU had a policy that prohibited interracial dating among its students based on its religious beliefs. In 1983, the US Supreme Court refused to recognize a religious exemption for BJU from the Internal Revenue Service's policy that had denied charitable status to BJU because of its discriminatory policy. Professor Craig, and subsequently a number of interveners and academics, claimed that "A religiously based anti-miscegenation policy is analogous to TWU's anti-gay policy."[1231] The Ontario Court of Appeal agreed that BJU was a comparable situation. "TWU, like Bob Jones University," said the court, "is seeking access to a public benefit – the accreditation of its law school. The LSUC, in determining whether to confer that public benefit, must consider whether doing so would meet its statutory mandate to act in the public interest. And like in Bob Jones University, the LSUC's decision not to accredit TWU does not prevent the practice of a religious belief itself; rather it denies a public benefit because of the impact of that religious belief on others – members of the LGBTQ community."[1232]

However, the British Columbia Court of Appeal firmly rejected the BJU comparison. "TWU is not seeking a financial public benefit [like the tax break sought in BJU] from this state actor," said the court.[1233] Instead, "Accreditation is not a 'benefit' granted in the exercise of the largesse of the state; it is a regulatory requirement to conduct a lawful 'business' which TWU would otherwise be free to conduct in the absence of regulation."[1234] There is a practical benefit to TWU from regulatory approval but that is not a funding benefit. The BC court observed, "the reliance on the comments of a single concurring justice in the Bob Jones case is misplaced." Finally, the court did not see the BJU case "as supporting a general principle that discretionary decision-makers should deny public benefits to private applicants."[1235]

The SCC's decision did not directly address the BJU case, though it was raised by the LSBC in its factum[1236] and during oral argument by Justice Gascon[1237] on the first day; and by legal counsel Susan Ursel, representing the Canadian Bar Association, during the hearing on the

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[1228] *TWU* NSSC 2015, *supra* note 775 at para 8.
[1229] *TWU v LSUC* 2018, *supra* note 14 at para 22.
[1230] *Bob Jones University, supra* note 877.
[1231] Craig "Rejecting Trinity," *supra* note 793 at 159.
[1232] *TWU* ONCA 2016, *supra* note 701 at para 138.
[1233] *TWU* BCCA 2016, *supra* note 478 at para 182.
[1234] *Ibid.*
[1235] *Ibid.*
[1236] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (Factum of the Appellant, SCC No. 37318, at para 199, online (pdf): https://www.lawsociety.bc.ca/Website/media/Shared/docs/newsroom/TWU-factum-appellant-SCC.pdf).
[1237] *TWU* 2018, *supra* note 14 (Transcript of oral hearing, SCC vol 1, 30 November 2017, at 47).

second day.[1238] Although the SCC did not explicitly mention the BJU case, it did frame TWU's policy as being on par with racism, suggesting that "The Covenant singles out LGBTQ people as less worthy of respect and dignity than heterosexual people, and reinforces negative stereotypes against them."[1239] Noticeably, there was no evidence given for those assertions by the Court – nevertheless, the BJU analogy did appear to influence the SCC.[1240]

Professor Craig also argued that the legal context has changed since 2001 as a result of the SCC's decision in *Doré v. Barreau du Québec*.[1241] In *Doré*, the SCC held that administrative tribunals are not to be held to a standard of "correctness" but of "reasonableness" when making decisions in their area of expertise. This means, says Craig, that the 2001 TWU case would be decided differently today; if the SCC had used the reasonable standard test it would have supported the BCCT's decision to deny TWU's teacher training program. Thus, she argues, the Federation could reasonably deny TWU's law school application because of its concerns with TWU's discrimination. Craig points out that "as societal values change, what constitutes a reasonable balance between protecting freedom of religion and protecting against discrimination on the basis of sexual orientation also changes."[1242] Craig believes that today's decision makers are expected to be much more protective of gay and lesbian equality than the decision makers of the past.[1243]

According to Craig, "Freedom of religion would not trump these equality interests as easily as it did when the College of Teachers case was decided." [1244] In other words, the appropriate balance now, as opposed to twenty years ago, would be for religious freedom to yield to the overriding right of equality as defined by the rights advocates. When a religious entity ventures outside its walls of worship and runs institutions like universities that require public accreditation, it must surrender its religious beliefs and practices. There is no private sphere immune from public scrutiny. Craig was prescient: this analysis did persuade the SCC.

In short, Craig argued that the evolution of societal values have reached the point where a religious organization has absolutely no jurisdiction to define for itself what is or is not acceptable behaviour on fundamental human life issues such as marriage. It is curious that the only issue at stake for the critics of TWU was that the school allegedly discriminates against those who engage in sexual activity outside of the traditional one man–one woman marriage. Underlying this criticism is an inability to appreciate what constitutes a diverse society that allows for differences of opinion (and belief) concerning acceptable sexual behaviour. Unlike Professor Robert Wintemute's assertion, as noted below, that in time there will be no need for religious accommodation as religious institutions will "voluntarily" change their views, Craig speaks for those advocates who would see the use of the state as the means to ensure the "appropriate balance". The SCC agreed.

The legal opinion of constitutional lawyer John B. Laskin, commissioned by the Federation, disputed Craig's assertion. Laskin held to the notion that the Supreme Court of Canada continued to apply the same balancing approach of competing rights that it took back

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[1238] *TWU* 2018, *supra* note 14 (Transcript of oral hearing, SCC vol 2, 1 December 2017, at 282).
[1239] *LSBC v TWU* 2018, *supra* note 14 at para 138.
[1240] For a rebuttal of the BJU analogy see: Mary Anne Waldron, "Analogy and Neutrality: Thinking about Freedom of Religion," in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016), at 252.
[1241] *Doré, supra* note 833.
[1242] Craig, "Rejecting Trinity," *supra* note 793 at 168.
[1243] *Ibid*.
[1244] Craig, "More Courage," *supra* note 852.

in the *TWU* 2001 case.[1245] The BC Court of Appeal adopted Laskin's opinion on that point as their own when they balanced the two rights and found in TWU's favour.[1246] In a robust manner, Justice Campbell of the Nova Scotia Supreme Court likewise noted that although there has been widespread public acceptance of gay and lesbian rights over the last few decades, that did not render the 2001 case out of step with current legal thought and social values. The case involved not only LGBTQ rights, but also freedom of religion and conscience. Therefore, he concluded:

> The conversation between equality and freedom of conscience has not become old fashioned or irrelevant over the last 14 years, and the Supreme Court's treatment of it can hardly now be seen as archaic or anachronistic. Equality rights have not jumped the queue to now trump religious freedom. That delineation of rights is still a relevant concept. Religious freedom has not been relegated to a judicial nod to the toleration of cultural eccentricities that don't offend the dominant social consensus.[1247]

In a review of the case law since 2001, Justice Campbell concluded that "Religious rights have not been marginalized or in any way required to give way to a presumption that equality rights will always prevail."[1248] There remains in the law significant room for religious freedom and religious expression, even if or where that offends secular concerns and equality rights.

However, with the SCC's decision, we now know that indeed religious freedom has been relegated to a mere judicial nod, since religious practices that are deemed offensive are no longer to be tolerated. The law as understood by the Courts in BC and NS and by constitutional expert Laskin has been dramatically altered – just as the legal academics have been demanding.

Finally, Craig asserted that TWU's Community Covenant would not allow the law program to teach the skill of critical thinking, since "Academic staff are required to teach students that the Bible is the ultimate, final, and authoritative guide by which all ethical decisions must be made."[1249] Craig maintains, "To teach that ethical issues must be perceived of, assessed with, and resolved by a pre-ordained, prescribed, and singularly authoritative religious doctrine is not to teach the skill of critical thinking about these issues."[1250]

Dwight Newman, a law professor in Saskatchewan, points out that Craig's argument falls short on three accounts. First, there is scholarly literature examining the development of critical thinking skills among those educated in evangelical Christian environments. Newman observes:

> Some evidence points toward an equal or possibly even greater acquisition of critical thinking skills than in secular environments. Admittedly, sometimes the focus on critical thinking skills in Christian education is to help in the defence of claims against non-Christian challenges, but there are also strong human developmental reasons within Christian traditions for a commitment to critical thinking.[1251]

Second, there are ongoing scholarly conversations within the Christian community about the place of law in private and public life. Third, evangelical scholarly work is entirely

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[1245] Laskin Memo, *supra* note 905 at 8.
[1246] *TWU* BCCA 2016, *supra* note 478 at para 159.
[1247] *TWU* NSSC 2015, *supra* note 775 at para 196.
[1248] *Ibid* at para 200.
[1249] Letter from Elaine Craig to Rene Gallant (5 February 2014) at 11, in NSBS Submissions, *supra* note 1200 at 65.
[1250] *Ibid*.
[1251] Dwight Newman, "Argument for a Christian Law School," *supra* note 1215 at 4.

consistent with the possibility of engaging with the Bible in a variety of ways within a faith tradition. Newman points out:

> The fact that somebody commences with faith of some sort should not be a basis for excluding that individual from the realm of critical thinking—especially with all the disturbing parallels that this argument has to techniques of dehumanization used in the past with other marginalized groups to legitimate discrimination against them.[1252]

Craig's argument, notes Newman, displays a lack of engagement with the Christian scholarly environment. Further, other scholars suggest that there is, in fact, a lack of critical thinking at secular law schools.[1253]

Newman succinctly describes the robust tradition of critical thinking and animated debate within the Christian tradition and its institutions regarding biblical interpretation and the applicability of faith to current moral and legal issues. This reality weakens the suggestion that TWU, being an inheritor of that tradition, is a place where rigid, "pre-ordained, prescribed, and singularly authoritative religious doctrine" is emphasized at the expense of critical thinking. Nothing could be further from the truth.

Professor Craig later retracted the impact of her suggestion by clarifying that she was not saying that all Christian institutions are incapable of providing legal education nor that the Christian worldview is antithetical to critical thinking. Rather, the "specific institutional policies" of TWU, as stated in the Community Covenant and the Statement of Faith, are inconsistent with the ethical duty not to discriminate and with critical thought.[1254] She argued that there is a distinction between other Christian universities, such as the University of Notre Dame in the United States, and TWU. "The distinction, and it is an important one," according to Craig, "is that these institutions do not impose policies that discriminate on the basis of sexual orientation or mandate a statement of faith that is inconsistent with creating an institutional environment consistent with some aspects of the requirements that the law societies have arrived at in accrediting Canadian common law degrees."[1255] This distinction was accepted by the Ontario Court of Appeal.[1256] Given the SCC's emphasis on "TWU's proposed law school *with a mandatory covenant,*"[1257] it would appear that it too sympathized with Craig's position.

What is striking about the academic arguments leading up to the Supreme Court of Canada's decision is their absolute confidence that the law's accommodation of religion as outlined in the *TWU* 2001 case and onward, including the *Reference Re Same-Sex Marriage*, was fundamentally wrong. Those with a different view, including the courts, were not on the right side of history.[1258]

[1252] *Ibid.*

[1253] Carissima Mathen & Michael Plaxton, "Legal Education, TWU, and the Looking Glass" (2016) 75 Supreme Court Law Review (2d) 223. In the abstract it states, "We argue that many of the early criticisms directed at TWU's proposed law school would apply, in some measure, to many or all of its secular counterparts, and that it is inappropriate for critics to hold TWU to a standard to which they are unwilling to hold themselves. Furthermore, there is no reason to think that law graduates would fail to appreciate the force and authority of positive legal norms and doctrines, merely because they were studied from a religious point of view."

[1254] Letter from Elaine Craig to Timothy McGee, Q.C. (1 March 2014), at 12.

[1255] *Ibid* at 13.

[1256] *TWU* ONCA 2016, *supra* note 701 at para 134.

[1257] *LSBC v TWU* 2018, *supra* note 14 at para 27, emphasis added.

[1258] This continues to be the ubiquitous rallying call of those advancing sexual equality. For example, Bramadat, *supra* note 792, at 61, 68 (quoting Frances Mahon, a lawyer for Out On Bay Street, an LGBTQ advocacy group, who supported the Law Society of Upper Canada's decision against TWU: "[The decision] suggests to me [the Law Society of Upper Canada] chose to be on the right side of history"); Elaine Craig,

The academics assumed that discrimination, *ab initio*, is wrong, even in the realm of a private religious university and even if it is lawful. This view was echoed in the Ontario Divisional Court when it proclaimed, "discrimination is still discrimination, regardless of whether it is unlawful."[1259] Remaking the law in the image of radical equality removes space for institutional religious freedom. That is an aggressive stance which met considerable headwind in the Nova Scotia and British Columbia courts but was embraced by the Ontario Courts and the Supreme Court of Canada.

What can be gleaned from this case is that the legal academic world plays a very important role in matters of public policy. Canadian legal scholars have been outspoken and in many respects antagonistic toward TWU. The antagonism was evident in the SCC's decisions.[1260] Additionally, these scholars have had a major influence upon all the decision bodies that addressed TWU's law school proposal. Consider that but for the academic opposition, led by the law deans, the Federation would have dealt with the TWU application as it had done with the previous law school proposals. It would have considered the academic plan in light of the National Requirement[1261] and passed the proposal without controversy. However, the anti-TWU opposition caused the Federation to set up a special committee to deal with the concerns raised about TWU's discriminatory admissions policy. That delayed the accreditation process by a number of months at additional cost.

Yet, it did not stop there. Once the Federation approved TWU the academics called on the law societies to have the "courage" to disregard the Federation's decision and to independently review the proposal. So convinced were they in their cause that they made the bold claim that the accommodation of religion in this case was unjust and that the law societies must lead society by example to change the law. Three law societies accepted that challenge. The taxation on the skills, time and effort of the bureaucratic apparatus of each society had to be immense. It is one thing for larger societies such as Ontario and British Columbia to engage in litigation but for the smaller Nova Scotia Barristers' Society it was obviously too much. The NSBS did not appeal its loss at the Nova Scotia Court of Appeal, perhaps because the cost of such an appeal was prohibitive.[1262]

The common law faculties across Canada joined the chorus and publicly denounced TWU. Reading through their statements, it is evident that the current equality rights paradigm on the campuses of the law schools cannot comprehend a religious university legitimately operating a law school while holding to the traditional view of marriage as part of its admissions criteria. The very concept of such a school goes against everything they stand for, even though their conviction is in direct opposition to the law's accommodation of religion. The Faculty Council of Dalhousie University called on the NSBS to "properly apply a human rights

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"Rejecting Trinity," *supra* note 793 at 170 ("In deciding whether to approve a law degree from TWU, the Federation and its member law societies will need to choose on which side of legal history they wish to stand."). Similarly, Martha McCarthy reminisced that, during her fight to redefine marriage, "[t]here were low moments," but what kept her going was the "knowledge that we were on the side of the angels", in Ellen Vanstone, "Redefining the Family" (2005) Canadian Law. Mag. at 22.

[1259] *TWU* ONSC 2015, *supra* note 776 at para 108.

[1260] Calling the Community Covenant "degrading and disrespectful" was an unfortunate use of terms by the SCC and clearly expressed its uninformed view of what the Covenant was about.

[1261] "National Requirement" (last accessed October 2018), online (pdf): *Federation of Law Societies of Canada* <http://docs.flsc.ca/National-Requirement-ENG.pdf>.

[1262] Nova Scotia Barristers' Society, "Update on the Trinity Western University matter" (15 August 2016), online: *NSBC* <http://nsbs.org/news/2016/08/update-trinity-western-university-matter>.

lens" to refuse TWU approval. They insisted that the religious freedom issues "are outweighed by equality concerns regarding sexual orientation."[1263]

The equality norm has become so comprehensive in legal analysis at Canada's law schools that it allows little room for religious practise. The advancement of equality rights under the Charter in recent years appeared to confirm their presupposition that religion must inevitably fade into the background. However, the TWU law school proposal totally upset the academic worldview. As one "disturbed" and "stunned" professor at the Schulich School of Law wrote, "I … was absolutely blind-sided when the [TWU] report was released."[1264] Not accustomed to the world of private religious universities, the academics assumed that, "Yes, such universities may exist, but they are really anachronisms of a bygone era. We have nothing to fear: they will never reach our level of expertise." Suddenly TWU shows up and presents not only a law school proposal but one that is unique. A proposal that challenges the myopic, theoretically-focused establishment with a curriculum concentrated on practical, legal competence so that its graduates are ready to begin work at a law firm immediately upon graduation. It promises to fill an important gap in legal education – challenging the current law school hegemony.

Though TWU is but a very small institution, its legitimate proposal for a law school, within the context of a Christian environment, was seen as a threat. A threat to the one worldview of equality rights. A worldview that has made no place for serious religious organizations that actually mean what they say. The academic world was quiet while TWU churned out nurses, history teachers and business graduates. However, to produce law graduates who might someday sit on the judicial bench or be eligible for high public offices in government bureaucracy – that was apparently a totally different matter. Religion, that nemesis of equality,[1265] was about to stride in on the legal fraternity. That was a scary proposition for those who see equality as the highest human right. Hence, Claire L'Heureux-Dubé's view that a fundamental right can't be reasonable if it's not compatible equality.[1266] The trump of sexual equality rights at the expense of religious freedom seems just about assured.

6.3.8.3 The Redefinition of Marriage Changes Everything

There is now evidence that part of the "Eureka Moment" for many is the idea that the redefinition of marriage has changed the dynamic so drastically that the law can no longer grant religious accommodation as it once did. This was evident in the oral arguments before the British Columbia Court of Appeal,[1267] where counsel for the LGBTQ Coalition said that if the Law Society of British Columbia accredited TWU it would be complicit in TWU's emphasis on traditional marriage which is "an unconstitutional definition of marriage."[1268] To suggest that heterosexual marriage is unconstitutional is curious to say the least, especially given the

[1263] Schulich Faculty Letter, *supra* note 1216.
[1264] Email from Constance MacIntosh to René Gallant (28 December 2013) in NSBS Submissions, *supra* note 1200 at 153.
[1265] Baines, *supra* note 19.
[1266] Siddiqui, *supra* note 20.
[1267] *TWU* BCCA 2016, *supra* note 478.
[1268] My personal notes at the time of the hearing.

history of marriage in the West.[1269] However, it clearly expresses the extent to which advocates understand what has taken place in the law on marriage.

Gavin MacKenzie, a Bencher with the Law Society of Upper Canada, explained it well when he said:

> I do think that it bears mention that there is probably no issue on which public attitudes have changed more in the last fifteen years or so than the question of public attitudes towards discrimination based on sexual discrimination [sic], and there have been intervening events that may well lead to a different legal conclusion today than was formed by Supreme Court of Canada in the BCCT case when it was decided. Perhaps, most importantly, the enactment in 2005 of the *Civil Marriage Act*, which recognizes the legitimacy of same sex marriage throughout Canada.[1270]

In the minds of those opposed to TWU, the redefinition of marriage was a watershed moment that required the re-evaluation of religious communities that did not accept the new public norm. As Professor Moon insists, public commitment to sexual orientation equality (in public schools) "will involve nothing less than a repudiation of the religious view that homosexuality is sinful."[1271]

6.3.8.4 Is the Enemy the Christian Religion?

To reiterate, the so-called "elephant in the room" in this discussion about religion is the Christian definition of marriage. Christian marriage, as noted in *Hyde* above, is characterised by monogomy and opposite-sex partners. The *TWU* 2018 cases centred around the issue of the heterosexual requirement of TWU's policy. However, the arguments of the anti-TWU groups could as easily been applied to the other Christian requirement of marriage – monogamy. Since marriage was redefined in Canada, the conversation has shifted. What ought to be done to those religious entities which still insist on maintaining the traditional heterosexual definition? Again, as Burchill's manifesto proclaims:

> Trinity's narrow interpretation of marriage is not shared by many Christians. More to the point, Trinity's narrow definition of marriage is not shared by the highest Court in Canada, nor by our own Provincial Legislature.[1272]

However, such a position suggests that there is only one accepted framework through which to view sexual norms: the public (i.e. government-approved) framework. Religion, the academics and legal professionals maintain, must not differ from the "sexular" public. That, of course, means there can be no real religious freedom. One may believe something different only as long as those beliefs are kept "within the confines of the church" and not acted upon.

Religion is viewed, by some TWU opponents, as being "one of the few remaining pulpits" left from which leaders can communicate and promote anti-LGBT messages. Hence, it must be dealt with, especially given the redefinition of marriage. What is particularly problematic for those who hold this position is not so much that religious organizations believe

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[1269] John Witte, Jr., *From Sacrament to Contract: Marriage, Religion and Law in the Western Tradition*, 2nd edition (Louisville, KY: Westminster John Knox Press, 2012).
[1270] Gavin MacKenzie, LSUC Convocation, *supra* note 487 at 27.
[1271] Richard Moon, "The Supreme Court of Canada's Attempt to Reconcile Freedom of Religion and Sexual Orientation in the Public Schools," in David Rayside & Clyde Wilcox, eds, *Faith, Politics, and Sexual Diversity in Canada and the United States* (Vancouver: UBC Press, 2011), 321 ["Religion and Sexual Orientation in the Public Schools"].
[1272] Burchill, *supra* note 1200 at 13.

in traditional marriage, but that such organizations refuse, within their communities, to accommodate same-sex relationships.[1273] It hardly seems right, according to this perspective, that the public must accommodate religion, but religion does not have to accommodate the public and its norms.

That sentiment was expressed by Peter Rogers, counsel for NSBS. He argued that part of the rationale for the NS Barristers' Society not to accept TWU law graduates was that such refusal would hopefully compel TWU to change its admissions policies. During oral argument he suggested:

> It may induce TWU to make what the Society submits is a very small adjustment to its process that would remove the situation where we now have a new law school coming in that is reserving places, in effect, for heterosexual students and increasing the disadvantages experienced by LGB students.[1274]

The point of refusing TWU's accreditation was to force the university to wake up to modern reality. We now live in a brave new world where anachronistic religious views on sexuality are to be eradicated. As BC Law Society Bencher David Mossop argued, while TWU has a legal right to maintain its community covenant, "it doesn't mean you should do it."[1275] "The present trend in Christian churches is to accept gay marriage," Mossop continued, "it's happened in the Anglican Church." By implication, his message is that TWU will follow suit, given enough time and pressure.

Peter Rogers' view was that TWU only needed to make "a very small adjustment to its process" to fall in line with the public's expectations: simply make the Community Covenant voluntary. However, what appeared to be very small in the eyes of the public was a very big deal to TWU in that it was willing to fight all the way to the Supreme Court of Canada. The Law Society of BC asked TWU whether there could be an amendment to the Community Covenant to bring it more in line with the public norms. TWU responded, "TWU cannot simply disavow those beliefs in the hope or expectation of a positive result from the Benchers and should not be asked to do so."[1276] The Covenant, said TWU:

> is an expression of the religious beliefs of TWU and its community that is necessary for TWU to live out its purposes as a Christian university. It is critical for TWU, as a private religious educational community, to be able to define its important religious values consistent with its biblical beliefs.[1277]

TWU's response was perceived by the anti-TWU group as unreasonable stubbornness, a recalcitrance that should not be accommodated. What is missing from their analysis is the reality that just because marriage was redefined, that did not mean that religious communities

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[1273] As Justice Rowe argued, "the decision of the LSBC does not interfere with the claimants' freedom to believe [in heterosexual marriage]. The claimants remain free to hold this belief;" however, they are *not* free to "impose adherence to their religious beliefs or practices on others who do not share their underlying faith" (*TWU* 2018, at paras 226, 251).

[1274] Peter Rogers, counsel for NSBS, in *TWU* NSSC 2015, transcript *supra* note 477 (Oral argument, 18 December 2014).

[1275] LSBC Bencher Transcript, *supra* note 853 at 21.

[1276] *TWU* BCCA 2016, *supra* note 478 at para 19.

[1277] *Ibid.* It is worth noting that, even though TWU has made the covenant voluntary for students as of August 2018, it is still mandatory for faculty and staff, and the beliefs expressed in the covenant have not been altered. The university remains "a Biblically-based, mission-focused, academically excellent university, fully committed to our foundational evangelical Christian principles." See Robert G. Kuhn, "TWU Reviews Community Covenant" (14 August 2018), online: *Trinity Western University* <https://www.twu.ca/twu-reviews-community-covenant>.

or organizations were required to give up their traditional views and practices on marriage. As noted earlier, this is evident in both the Supreme Court of Canada's decision in the *Same-Sex Reference*[1278] and the *Civil Marriage Act*.[1279]

If the redefinition of marriage meant that religious communities would have to change their beliefs and practices on marriage, then the SCC itself was wrong when it stated:

> state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(a) of the *Charter*. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the *Charter*.[1280]

Further, the SCC noted that conferring an equality right on one does not take away religious freedom rights from another.[1281]

6.3.8.5 TWU is a State Actor

There is a settled opinion among those against TWU that TWU is a state actor and therefore subject to the state. As Burchill argued:

> Let me be clear, within the confines the church, and outside a public institution, the faculty are entitled to express their beliefs and practice their religion. However, once they act for the state, or their degree program is accredited by it, the expression of their religious rights cannot be allowed to perpetuate stereotypes and discrimination.[1282]

The "elephant in the room," so to speak, with the TWU case is the propriety of a religious community maintaining a traditional sexual norm in its operation of a "public" institution. While there have been other cases that dealt with the right of a religious charity to enforce a lifestyle and faith commitment on its employees, such as Christian Horizons,[1283] the TWU case has gone beyond that. TWU requires not only its employees but also its students—in other words, its "clientele"—to adhere to its strict moral view on sexuality.

This is not unusual. It has been the practice of many religious universities since their inception.[1284] In 2001, the SCC recognized this practice as a part of religious freedom. The SCC

[1278] *Same-Sex Marriage*, *supra* note 178 at para 56.

[1279] *Civil Marriage Act,* SC 2005, c 33, assented to 20 July 200, Preamble, ss 3 & 3.1.

[1280] *Same-Sex Marriage*, *supra* note 178 at para 58.

[1281] *Ibid* at para 46, "The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another."

[1282] Burchill, *supra* note 1200 at 14.

[1283] *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105, 102 O.R. 3d 267 [*Christian Horizons*].

[1284] Religious universities do not see themselves as simply peddling knowledge for knowledge's sake but are concerned with educating the individual "for the purpose of illuminating the Divine," Emily Longshore, *Student Conduct Codes at Religious Affiliated Institutions: Fostering Growth* (Master of Education Thesis, University of South Carolina, 2015, UMI 1589324). This is evident in many university codes such as Baylor University's sexual conduct policy, BU-PP 031, wherein it is stated, "Baylor will be guided by the biblical understanding that human sexuality is a gift from God and that physical sexual intimacy is to be expressed in the context of marital fidelity," online: *Baylor University* <https://www.baylor.edu/content/services/document.php?id=39247>. See also Brigham Young University's Honor Code where students are expected to "Live a chaste and virtuous life," where it states: "the Honor Code requires all members of the university community to manifest a strict commitment to the law of chastity. Homosexual behavior is inappropriate and violates the Honor Code. Homosexual behavior includes not only

was able to justify TWU's religious freedom to mean "that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost" because "TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions."[1285]

As a private institution, TWU is exempted, in part, "from the British Columbia human rights legislation and … the *Charter* does not apply."[1286] It was therefore inconceivable, at least within the established legal paradigm, for the SCC to require a section 15 equality rights analysis on the voluntary adoption of a code of conduct in a private institution. Such a position "would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality."[1287] In other words, it would be against the legal paradigm of religious freedom to deny TWU its accreditation based on its code of conduct.

Canadian jurisprudence once acted as a jealous mistress, ensuring that religion and religious freedom maintained special status. This was evident in the pre-*Charter* jurisprudence[1288] and was greatly enhanced during the early years of the *Charter* with the elimination of state-imposed religious holy days[1289] and with the accommodation of religious practice in a number of areas including the workplace,[1290] the school,[1291] and condominiums.[1292] The religious paradigm worked well with the *Charter*. However, the paradigm became strained in trying to reconcile religious freedom and human sexuality interests.

When the SCC recognized the constitutional protection of "sexual orientation" as an analogous ground[1293] in section 15 of the *Charter*, although a welcome relief for the LGBTQ community, it resulted in friction between sexual orientation and religion. The drafters of the *Charter* were aware of the anticipated, widespread challenges that the addition of "sexual orientation" as a protected ground from discrimination was going to have. They decided not to include sexual orientation but drafted the language so that the courts would deal with it in due course.[1294]

Over the ensuing years, the SCC has been navigating uncharted waters by trying to juggle three major constitutional principles: protection of religion, protection of sexual orientation, and the constitutional doctrine that there is no hierarchy of rights.[1295] The growing consensus among legal scholars is that the SCC's attempt to balance these interests to date has

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sexual relations between members of the same sex, but all forms of physical intimacy that give expression to homosexual feelings." Online: *BYU University Policies* <https://honorcode.byu.edu/>.

[1285] *TWU* 2001, *supra* note 26 at para 25.

[1286] *Ibid*.

[1287] *Ibid*.

[1288] *Saumur, supra* note 6 at 329 (emphasis added).

[1289] *Big M Drug Mart*, *supra* note 4.

[1290] *Simpson-Sears*, *supra* note 8.

[1291] *Multani*, *supra* note 9.

[1292] *Amselem, supra* note 7.

[1293] *Egan v. Canada*, [1995] 2 S.C.R. 513.

[1294] Barry L. Strayer was Assistant Deputy Minister of Justice under the Pierre E. Trudeau government that brought in the *Charter*. Strayer was instrumental in the design of the *Charter*. He writes, "The addition of the words "in particular" [of s.15] was thought to make the grounds of discrimination open-ended: it left open the possibility that non-enumerated grounds could also be found by the courts in the future, such as sexual orientation and matters on which there was no consensus in 1981." See Barry L. Strayer, *Canada's Constitutional Revolution* (Edmonton: U of Alberta Press, 2013), 265.

[1295] *Dagenais v. Canadian. Broadcasting Corp*., [1994] 3 S.C.R. 835, at 877.

been the equivalent of trying to "square the circle."[1296] This reconciliation attempt has been difficult, and it would appear that the future will not be any easier. The inconsistencies of affirming sexual equality while at the same time respecting religious pluralism without passing judgment on the religious norms of sexuality appear to have come to a head in the TWU law school case.

The SCC was faced with a crucial decision: whether to reject its long-held no-hierarchy principle and allow either equality or religion to trump the other, or to maintain the status quo by protecting both religious freedom and equality rights while recognizing that there will be, by necessity, a palpable dissonance on the views and practices of human sexuality, and that such differences must be respected in a plural and liberal democratic society. This book argues that it is the latter position that makes the most sense going forward.[1297] However, in the end, the SCC decided otherwise by limiting the promise of religious freedom and siding with the equality claim.

[1296] Richard Moon, "Comment," *supra* note 1208 at 283.

[1297] This is precisely the view expressed by the British Columbia Court of Appeal in *TWU* BCCA 2016, *supra* note 478 at para 193: "A society that does not admit of and accommodate differences cannot be a free and democratic society — one in which its citizens are free to think, to disagree, to debate and to challenge the accepted view without fear of reprisal. This case demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is in itself intolerant and illiberal."

7 CONSOLIDATION OR CHAOS

According to Kuhn, the scientific revolution's "Consolidation" phase is the transition process from the old to the new. Widely accepted, the revolutionary concepts are now in the process of being consolidated as the mainstream. However, there are still those who hang on to the old ideas and refuse to acquiesce. It may take until the old scientists die off before the revolutionary view becomes the new orthodoxy.

In the matter of the legal revolution on the place of religion some may suggest that "this dissertation is an attempt to defend the old paradigm against the new." A response to that objection is this: unlike the discovery of scientific truth, the protective place of religion in the law as contained in the constitutions of Western democracies is not an old idea that ought to be cast out because of a new and better understanding of the nature of religion that has currently gained fashion in the legal community. Instead, the constitutional protections granted to religion remain the new idea.

As we scan the millennia of human government, the freedom granted to religion in the West is, indeed, novel. It was only in 1791, a mere 227 years ago, that the American Bill of Rights was ratified and protected religious freedom. In Canada, a formulation of religious freedom was granted by the British Crown 258 years ago in 1760 and elaborated in the Quebec Jehovah's Witnesses cases of the 1950s and 1960s before it was enshrined in the *Charter* in 1982. Religious freedom, the protection of religion in the constitution and all that it entails, is a very new concept in human history.

Given the extent of the violence of the modern period, as exemplified by the Reformation, the protection of religion and its practices has done much to alleviate the violent tendencies of the grab for power.

The Legal Revolution Against the Place of Religion, as this dissertation asserts, is a revolution that has failed to consider the historical importance of religion, which forms part of human experience. Further, it is highly influenced by current political debate concerning identity politics as it relates to the issue of sexuality. Given the long historical battle to obtain legal protection of religious practice, this dissertation suggests that it is premature to reject the special status of religion. The argument that religious accommodation must be removed due to claims of oppression is yet to be satisfactorily made, given the strides that have been made by sexual minorities in the march for greater equality.

It is helpful to be reminded that there is a parallel between freedom of religion and freedom of speech. George Orwell noted, "If liberty means anything at all, it means the right to tell people what they do not want to hear."[1298] In the age of 'no-platforming'[1299] speakers, Orwell's adage is as revolutionary today as it was prescient when he said it.

If freedom of religion means anything at all, it means the freedom to believe what other people do not want to believe. Religious freedom is only possible when mainstream society respects that other people have different opinions and practices. What we have seen in this book is that this freedom is under severe attack. The reason for this attack is that society has forgotten the spirit of tolerance inherent in Voltaire's adagium, "I disapprove of what you say,

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[1298] George Orwell, "The Freedom of the Press" (8 October 1972) *New York Times*, SM12, online: <https://www.nytimes.com/1972/10/08/archives/the-freedom-of-the-press-orwell.html>.

[1299] In Britain, for example, the National Union of Students have a "no-platforming" policy whereby "people or groups on a banned list for holding racist or fascist views are not given a platform to speak on student union premises." See Sarah Bell, "NUS, 'Right to Have No Platform Policy'" (25 April 2016) BBC, online: <https://www.bbc.com/news/education-36101423>.

but I will defend to the death your right to say it." The same holds true for the religious practice of monogamous, heterosexual marriage as carried out in Christian communities.

TWU's position is a minority position. While there is a theoretical disparity of seats available to the LGBTQ individuals who did not want to sign the Covenant there was not a scincilla of evidence that that fact would have limited the chances of LGBTQ people entering the legal position through attending other public universities.

7.1 TWU's Change of Heart

The legal revolution against the place of religion in the law will either be consolidated around the *TWU* 2018 decisions of the Supreme Court of Canada, or there will be a chaotic battle of wills between the legal profession and the Christian community.

On August 9, 2018, less than two months after the SCC decisions, TWU's Board of Governors voted to no longer require students to sign the Community Covenant Agreement. Their motion read:

> In furtherance of our desire to maintain TWU as a thriving community of Christian believers that is inclusive of all students wishing to learn from a Christian viewpoint and underlying philosophy, the Community Covenant will no longer be mandatory as of the 2018-19 Academic year with respect to admission of students to, or continuation of students at, the University.[1300]

President Bob Kuhn stated, "the University will actively work to determine ways in which our Christian identity, Mission and ministry can continue to be strengthened, communicated and better lived-out in the context of the TWU community – while simultaneously welcoming and affirming the unique value of each member of our diverse student body." [1301]

> He also emphasized that there is to be:
> no confusion regarding the Board of Governors' resolution; our Mission remains the same. We will remain a Biblically-based, mission-focused, academically excellent University, fully committed to our foundational evangelical Christian principles. We will continue to be a Christ-centred community; one that is defined by our shared pursuit of seeking to glorify God by revealing His truth, compassion, reconciliation and hope to a world in need.[1302]

It was a dramatic development given the extent to which TWU fought not once but twice all the way to the Supreme Court of Canada. There was speculation that this was not only a response to the SCC ruling, but a defensive move to protect the school from being harassed by other professional accrediting bodies for their nursing and education degree programs.[1303] However, even with the change in policy, commentators made it clear that the concession did not go far enough. TWU must not only remove the requirement from the students but it must remove it from the faculty and staff.[1304] Further, there was discussion by Professor Richard

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[1300] R. Kuhn, *supra* note 1277.

[1301] *Ibid*.

[1302] *Ibid.*

[1303] During an interview with an Ottawa area journalist in August 2018, the reporter suggested this as a possibility. I concurred that indeed that would be a plausible explanation for the turnabout.

[1304] Aline Bouwman, "Trinity Western University drops contentious covenant, but LGBTQ staff still face discrimination," *CBC News* (16 August 2018), online: <https://www.cbc.ca/news/canada/british-columbia/trinity-western-university-drops-contentious-covenant-but-lgbtq-staff-still-face-discrimination-

Moon who expressed concern that preserving the Christian status of the school would "favour Evangelical students and, in effect, disfavour non-Evangelicals." Moon was concerned that "discriminating based on religious commitment raises similar problems as discriminating based on sexual orientation."[1305] As this book has pointed out, rights claims are inflationary. The claims of sexual equality are no different from any other rights claim. Once one win is in the record books, there is another to be chased.[1306]

Lost in all of this speculation is the reality that TWU is a private religious institution designed and built by and for Christians. This is what Professor Moon and others fail to appreciate. As noted earlier, there is confusion between making a distinction (lawful discrimination) and engaging in unlawful discrimination. To make a distinction means there are objective differences between different objects. An institution is Christian or it is not Christian. Someone is a Canadian or she is not a Canadian – and the Canadian government discriminates in favour of Canadian citizens all the time, as with pensions. Indeed, we make distinctions all the time. It is part of being human. However, unlawful discrimination is unlawful because some distinctions are not legitimate. Distinguishing between a lawyer who has a diploma and one who does not is very different than distinguishing between a lawyer with brown skin and one with white skin. In its *TWU* 2001 decision, the SCC was correct in recognizing the right of TWU to distinguish between students who were willing to sign the Covenant and those who would not.

Given the lack of understanding for TWU's unique identity and need for distinction, and in light of the extraordinary leeway given by the SCC to the law societies to define their own "public interest" mandate, the societies could very well make the same decision (to deny accreditation) even without the mandatory Covenant. Therefore, it is abundantly clear that if TWU were to file again for a law school it would still have a bumpy ride to get it.[1307]

1.4786673>. This author made a fascinating admission in the piece noting that they attended the school with the mandatory covenant, stating "I chose TWU at a time when my values aligned with those described in the Community Covenant. I might have even found it a bit too 'liberal.' But I changed. As an institution of higher learning, I would expect TWU to encourage its students to experience such change and development and start to question and criticize its leaders when they see or experience discrimination within their community." She continued, "But as long as TWU cannot itself call into question the Community Covenant it has held onto for decades, I don't foresee any real change." This author is emblematic of the Sexular Age – change in sexual identity can be made at anytime and religious institutions must "get with the program" and likewise change with the times.

[1305] Joseph Brean & Chris Selley, "Still seeking law school, Trinity Western drops sexual 'covenant' for students," *National Post* (14 August 2018), online: <https://nationalpost.com/news/canada/still-seeking-law-school-trinity-western-drops-sexual-covenant-for-students>.

[1306] Elaine Craig, "After the Trinity Western decision, let's hope all law societies stand up for diversity," *Globe and Mail* (18 June 2018), online: https://www.theglobeandmail.com/opinion/article-after-the-trinity-western-decision-lets-hope-all-law-societies-stand/ stated, "While the decision's recognition of the dignity and equality interests of sexual minorities in Canada is cause for celebration, its broader acknowledgment that to regulate in the public interest requires ensuring diversity within the profession is a rallying cry. … Let's hope that the court's TWU decision encourages law societies across the country to accept and act on their responsibility to protect and promote diversity within the legal profession." Given that the Christian community was shut out of having their own law school one must question the commitment to "promote diversity within the legal profession."

[1307] Cristin Schmitz, "Lawyers foresee bumpy road ahead if TWU renews its bid for law school accreditation," *The Lawyer's Daily* (17 August 2018), online: https://www.thelawyersdaily.ca/articles/7141/lawyers-foresee-bumpy-road-ahead-if-twu-renews-its-bid-for-law-school-accreditation-

The continued opposition to religious universities running a law school is further evidence, I suggest, of the legal revolution against religion. The Canadian legal profession is now forced to make a choice between consolidating the revolution against religious freedom as it relates to sexual identity; or, face chaos in a time of indecision; or, allow for accommodation.

The level of anti-religious sentiment exhibited during TWU's law school application does suggest that the legal profession is in for a protracted time of uncertainty. In 2006, the SCC encouraged schools to teach that "[r]eligious tolerance is a very important value of Canadian society," and that "[it is] at the very foundation of our democracy."[1308] The legal profession, as a whole, no longer appears to be of that view.

Religious accommodation is seen by many in the profession as accommodating intolerance rather than providing space for diversity. Perhaps, as a profession, it does not fully grasp what it means to be religious in all spheres of life. This lack of understanding, ranging from apathy to outright vilification, helps explain how TWU, a private religious community, could have its Constitutionally protected religious freedom denied by the SCC, despite not being subject to the *Charter*, and being exempt from human rights legislation. The same court that protected TWU's religious rights only seventeen years earlier has now endorsed the expansion of the state-actor's "public interest" to enforce nebulous "*Charter* values" on TWU. This is nothing short of a legal miracle earning the applicable term: "revolutionary."

7.2 Law's Religion

Professor Benjamin Berger suggests that the current "commitment to legal multiculturalism and rights-based toleration is that law is a means of managing or adjudicating cultural difference but enjoys a strong form of autonomy from culture."[1309] Law as the curator sitting above and apart from the culture is the prevailing presupposition that makes possible the "conventional story" that explains the interaction of law and religion.[1310] However, that convention preserves rather than resolves the tensions between law and religion.

This conventional story fails, says Berger, because it does not adapt to the "fraught political experience of the meeting of law and religion."[1311] There is more going on "than the evolution of an increasingly sensitive and refined legal doctrine or the working pure of the concept of the secular."[1312] It also fails in not providing a satisfactory explanation for the angst, the dissatisfaction, and the quarrelling parties. Religious communities are increasingly feeling marginalized by their interaction with the law.

In short, the conventional story is "[u]nable to account for the durability of the structural tensions, unable to explain the felt force of law's rule… [and] fail[s] to capture salient dimensions of the social, historical, and political experience of the interaction of religion and the constitutional rule of law."[1313]

Berger posits a characterization of law as a cultural form:

[1308] *Multani, supra* note 9.

[1309] B. Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015), at 12 [*Law's Religion*]. He references Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton, NJ: Princeton University Press, 2006) at 166ff.

[1310] *Ibid* at 13.

[1311] *Ibid* at 15.

[1312] *Ibid*.

[1313] *Ibid* at 16-17.

> …that is, an interpretive horizon composed of sets of commitments, practices, and categories of thought, that both frames experience and is experienced as such. … The goal … is to make the culture of constitutionalism, with its symbolic, behavioural, and aesthetic claims, visible as an object of inquiry in the analysis of the interaction of law and religion.[1314]

When law is viewed as "one complex cultural system among others" it levels law and religion so that the force of law is brought into "clear view," generating difficult questions about the quality and ethics of constitutional adjudication.[1315]

The interaction of law and religion, according to Berger, is not a juridical or a technical problem to be resolved by better laws but is "profitably understood" as a cross-cultural interaction that is "endlessly unstable and provocative."[1316] This approach, Berger maintains, will allow law to better understand itself and its relationship with religion. He adopts Paul Kahn's view that "law's claim upon us is not a product of law's truth but of our own imagination – our imagining its meanings and our failure to imagine alternatives."[1317] This superfluous language makes it difficult to ascertain what is being argued. It appears to be a justificatory argument for a relativistic approach toward the meaning of law. That can be problematic given the citizen's need for a concrete understanding of what her duty is in society that the law represents.

If law is not a "truth," but is of "our own imagination," what hope is there for law to provide a reference point for all citizens? Law will be for the imagination of the powerful elite, since the average citizen's imagination will certainly not be persuasive in and of itself. Rather than being a "cross-cultural interaction," it will be one group dominating another.

Further, to analyse the experience of law in its interaction with religion that "structures our understanding of space and time, self and community"[1318] is equally unclear. Space and time are two reference points in the analysis but to what end?

Kahn notes that law's rule begins with the imagination of jurisdiction.[1319] "Jurisdiction," says Berger, "is the guiding metaphor for law's understanding of space, serving as the conceptual means of 'mapping' authorities within the legal world."[1320] It organizes and interprets territorial or spatial relations. "The experience of the social space of the law is one of moving within multiple domains of authority. Space matters to the law since it is called upon to answer the question, who has authority or jurisdiction here and over what?"[1321] While there are physical, territorial claims within geographical boundaries there are other spatial intuitions of the law that include the moral and the ethical. The law therefore, according to Berger, has a metaphysical capability to establish categories of authority that organizes social life referencing time and space.

Law's organization of space includes the private/public divide. Private space is that area where "the state has the weakest claim to authority. The public, by contrast is the domain of state power and, concomitantly, governed by the demands of public reason over personal

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[1314] *Ibid* at 17.
[1315] *Ibid*.
[1316] *Ibid* at 18.
[1317] Paul Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999), at 39.
[1318] *Ibid* at 86.
[1319] *Ibid* at 55.
[1320] B. Berger, *Law's Religion, supra* note 1309 at 46.
[1321] *Ibid* at 46.

interest or preference."[1322] When law interacts with religious practice that has entered a spatial category imagined by the constitutional rule of law then religious freedom is subject to the court's ability to reconcile that practice within that space.[1323] "Religion has a claim within the law … because it is an autonomous and private expression of one important set of preferred tastes and chosen pursuits."[1324] The culture of law then "packages, organizes, and presents the world" thus framing experience and impacting the experience of religious communities.[1325]

The Berger/Kahn characterization of law assumes religion "is quintessentially private."[1326] Yet all human experience has shown just the opposite. While religion is at times private it is also very public. The failure to account for the public nature of religion is to the law's detriment and has created confusion as to when or how religion or religious institutions are to operate in the public square.[1327]

Law, in a certain sense, also organizes time. Law takes the rules from the past and implements them in the present. Berger explains that "Legal time … is a compendious reception of all those moments in the life of the community bound by law that might serve as authority for the present."[1328] "[L]aw," Berger explains further, "is not on a steady trajectory of progressive discovery, nor is it neatly sequenced, with the past falling away into historical fact, making room for the authority of the present."[1329] Thus, law is a compendium of the community's life that remains authoritative in the present.

Legal time, the time of the constitutional rule of law, says Berger, is a species of mythical time rather than historical time.[1330] History, as seen by historians, takes facts as belonging to the past – they are gone forever. Mythical time, however, has its past always in the here and now, providing a political narrative "whose moral is its own legitimacy."[1331] The aesthetics of religious freedom, says Berger, is "the shaping of the boundaries of religious freedom in light of the history of a given community."[1332] These cultural boundaries are framed within time and space references.

Berger argues that Canadian constitutional law's imagining of religion has three components: religion is based within the individual; religion is valuable and deserving of protection because it expresses personal autonomy; and religion is a private matter centred on the individual's personal choices and preferences not reason.[1333]

It is uncertain that Berger has resolved what he set out to do, namely, account for the structural tensions and explain the felt force of law's rule. He rightly calls out the liberal democratic conceit that claims to be neutral toward religion when it is not. Law is not neutral. It remains a very interested player in maintaining a dominant position over and against any religious practice that challenges the current power structure that has centred its rhetoric on

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[1322] *Ibid* at 48.
[1323] *Ibid* at 50-51.
[1324] *Ibid* at 98.
[1325] *Ibid* at 51.
[1326] *Ibid* at 98.
[1327] For a critique of religion as private see, Rafael Domingo, *God and the Secular Legal System* (Cambridge: Cambridge University Press, 2016).
[1328] B. Berger, *Law's Religion, supra* note 1309 at 57.
[1329] *Ibid* at 58.
[1330] *Ibid* at 59.
[1331] *Ibid* at 60.
[1332] *Ibid* at 61.
[1333] *Ibid* at 99.

the concept of individual freedom. The legal revolution that I describe in this work goes further, seeking to dominate religious belief.

Berger reaffirms what several critics have observed for some time concerning religious freedom: to the extent a religious culture harmonizes with the law's assumptions about the value and nature of religion (which Berger rightly notes has "deep sympathies" with Protestantism) religious practice will not be as problematic.[1334] However, the moment religious practices are dissonant with the law's underlying assumptions of religion, then all bets are off. Law will at that moment be antagonistic.

Berger's position is not new. It is reminiscent of Professor Roland Bainton's observation, as noted above, that religious freedom "has come to depend upon a diversion of interest."[1335] As long as the religious concern is of a lesser importance than other issues of state, the liberal state will leave religions to their own devising unhindered. However, the moment the religious issues become politically salient to the affairs of state, one can always expect the liberal state to interfere in its own self-interest.

Deep within the heart of liberal democratic theory – and the modern incarnations of it – is a fear of religion's claim upon the conscience of the individual. The state has long held the claim that it must have sole authority – indeed it demands sole allegiance. Religion is, or at least can be, a check against the all-powerful state, especially when the individual is firm in her conviction. However, the individual is more capable to stand because she is part of a wider religious community that provides personal support against the state. James Davison Hunter points out:

> Constituted by powerful ideals, truths, and narratives, patterns of behaviour and relationship, social organization, and a wide range of resources, institutions are a social reality that are larger than the sum total of individuals who make them up. Only within strong communities can one find the relational means to sustain the difficulties endemic to life in the modern world. Only within strong institutions can one find the resources to resist its destructive influences and pressures.[1336]

Of course, there have been many non-religious people who have stood up against injustice or the abuse of power. Further, it is true that states have manipulated religion for power. However, the list of religiously-motivated people who resisted state aggression is long and impressive.[1337] And it is the religious motivation that is the peculiar focus of this book.

It is no coincidence that totalitarian regimes have sought to destroy religion. Religious communities have consistently been targeted by states. The most brutal means have been commissioned against those who dare to swear allegiance to their divinity in defiance of state dictatorial madness. It was this madness that was condemned in the wake of the upheaval of the early modern period that had to suffer through the European wars of religion.

[1334] *Ibid* at 101.

[1335] Bainton, *supra* note 293 at 15.

[1336] James Davison Hunter, *To Change the World* (Oxford: Oxford University Press, 2010) at 282.

[1337] Martin Gilbert, *The Righteous: The Unsung Heroes of the Holocaust* (New York: Henry Holt, 2003). Gilbert's work shares hundreds of stories about the rescuers of Jews in WWII. Some were "humanists," but his account is peppered with those who had religious motivations. "The laws of life are stronger than man-made laws," said Agnes Hirschi, a Jewish survivor given sanctuary in Budapest by Carl Lutz. Lutz was an "engaged Christian" who could not tolerate the Jewish people being killed. "He had to protect and help these people. He felt, God gave him this task…." Said Gilbert, "Those Christian values … were central to the actions of many thousands of rescuers" (at 435-435).

Berger rejects the argument that the law's use of equality language is an appeal to religion as a cultural or identity-based concept. Rather, when you dig deeper as to why the law protects individuals from identity-based harm, the answer falls back to the focus on autonomy and choice.[1338] The current legal imagination understands religion to be about "respect for choices made as an autonomous agent."[1339] This is why there is difficulty in cases dealing with children, the elderly, or the disabled: "if the genuineness of the choice is in question, the force of religion's claim dissipates in the legal imagination."[1340] The emphasis on choice does not leave much room for the right of cultural identity that is often claimed by the religious.

Berger's explanation of law as culture suggests that law has a mesmerizing quality that seeks to fashion "religion in its own cultural image and likeness."[1341] Thus, law does not necessarily accept religion where it is but seeks to move religion along toward its own definition of what it would prefer religion to be – that is, to be a private affair of the individual. This insight is particularly helpful for this project, especially in light of TWU's decision to remove the requirement that students must sign the Community Covenant Agreement upon admission. This mandatory agreement was the main sticking point with the SCC. After the *TWU* 2018 decisions TWU succumbed to the law's demand. Therefore, Berger's observation that the law fashions religion is particularly apt.

The argument this book makes is that there is an attempt to redefine the relationship between law and religion with respect to the relationship between religion and sexual equality. Berger's insight allows us to better comprehend the complex machinations of law when it does not appreciate or respect the religious claims for deference in how it manages institutional codes of conduct – even when such codes have the effect of limiting those who cannot or will not abide by such codes to gain entrance to religious institutions. Thus, if the law accepts the presuppositions of the sexual equality claimants that TWU's code is discriminatory, then the logical conclusion is that it violates *Charter* "values" (even though the *Charter* itself is not engaged). The law's intuition, at least from Berger's assessment, would be to force TWU into its likeness, demanding compliance with non-discriminatory principles. That is indeed what happened.

From Berger's argument, we may extrapolate further how law may indeed become susceptible to revolutionary ideas that remove an old paradigm. It would not be out of the realm of possibility for conceptual frameworks that are presently inimical to the legal status quo to become popular among legal institutions. Intellectual seeding of the legal infrastructure of radical ideas, once germinated, will, over time, obtain sufficient gravitas to bring about change – or as termed here, a legal revolution against the current state of the law. That seeding occurs at the law school and it helps explain why, among the current legal academy, having a Christian law school challenged their hegemony.

Thus, we may see this as an apt description of the relationship between the law's adoption of the sexual equality claims vis a vis the long-held claims of religious tolerance. The legal establishment would have to be convinced that religious tolerance that would discriminate on the basis of sexual identity is no longer foundational to a liberal democracy. The liberal democratic state's tolerance for diversity and pluralism is evolutionary,[1342] which

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[1338] B. Berger, *Law's Religion, supra* note 1309 at 87.

[1339] *Ibid* at 89. See also Justice Rowe's opinion, *TWU* 2018, *supra* note 14 at para 251, in which the emphasis on "profoundly personal beliefs" and "voluntary choice" were used to deny TWU's religious freedom as an institution.

[1340] B. Berger, *Law's Religion, supra* note 1309 at 89.

[1341] *Ibid* at 19.

[1342] *Bruker v Marcovitz*, 2007 SCC 54 at para 1, [2007] 3 SCR 607.

must make way for the deeper understanding of sexual equality as society progresses. Once the establishment is convinced it has obtained the greater equitable understanding and commitment to diversity and plurality it then has the requisite tools (professorships in law schools, benchers in law societies, positions in bar associations, judicial positions, federal and provincial cabinet positions) to move the law along toward its view of a greater fulfilment of the democratic project evidenced by the implementation of the sexual equality claims in the law. Religious claims to the contrary would now be seen as incompatible with the more "enlightened" understanding of equality. Berger's insight thus allows us to see that law is itself a cultural force and seeks to make religion in its own image. Given that TWU made the change it did certainly has become more like the new legal paradigm's view of religion – it no longer has the special status to demand accommodation.

7.3 Religion as Nemesis

When considered from a macro perspective, religious scruples about sex outside of the traditional institution of marriage have become but a whimper in today's cultural milieu of Western democracies. Consider the fact that censorship of movies, pornography, bathhouses, and prostitution based upon religious norms have become virtually a non-issue.[1343] In the truest sense, the attitude has become "live and let live." As long as there is mutual consent on any sexual adventure involving more than one person, "you do your thing and I'll do mine" sums up contemporary society.

Therefore, it seems odd that such a liberal and permissive democratic society would have government actors who find it necessary to investigate, criticize, and demand a private religious university[1344] put away its voluntary code of conduct requirement that its student body agree to abide by a traditional moral code on sex. No one is forced to attend TWU. No ongoing government support is given to the institution. No one suggests that the quality of

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[1343] Emile Durkheim was convinced that religion was "one of the forces that create within individuals a sense of obligation to adhere to society's demands," noted Anne Hendershott, *supra* note 653 at 2. However, Hendershott describes the fact that the concept of deviance is no longer part of our social lexicon. She claims, "[t]he commitment to egalitarianism, along with a growing reluctance to judge the behaviour of others, has made discussions of deviance obsolete" (at 3). Yet Hendershott concludes her work with the provocative statement, "Perhaps we will begin to recognize that a society that continues to redefine deviance as disease, or refuses to acknowledge and negatively sanction the deviant acts our common sense tells us are destructive, is a society that has lost the capacity to confront evil that has a capacity to dehumanize us all" (at 163.)

[1344] Even though TWU is private, it is also a charity. Some suggest that, because of its charitable status, TWU is a public actor that relies on the state and therefore should follow public norms. For an example of this type of reasoning, see Saul Templeton, "Re-Framing the Trinity Western University Debate: Tax, Trans and Intersex Issues" (last accessed 22 October 2018), online: *Canadaian Bar Association*, <http://www.cba-alberta.org/Publications-Resources/Resources/Law-Matters/Law-Matters-Summer-2015-Issue/Re-Framing-the-Trinity-Western-University-Debate>. However, the fact that a religious institution is a charity, or that it is issuing state recognized degrees, or that it receives other state acknowledgement does not change the analysis – it is still entitled to *Charter* protection. Otherwise, there is no end to where such an argument may go – for example, the state recognizes TWU's property rights and will send in police to protect it from violence – is that state recognition contingent upon TWU's acceptance of public norms on marriage? It runs into the absurd. Also, only a few weeks before the release of the *TWU* 2018 decisions the SCC released its Randy Wall decision (*Wall, supra* note 368) that reaffirmed church entities, not being state actors, are not subject to the *Charter* – see para 39.

education at TWU is anything but exemplary. The graduates in other disciplines, such as education, have not been found to discriminate against the LGBTQ community.

The legal profession insists that TWU law school not be accredited based on the following rationale: first, TWU's Covenant creates an inequality of access to legal education against the LGBTQ community. However, the BCCA agreed with the Federation's finding that was not the case,[1345] but the SCC, following the lead of the revolutionaries, found otherwise. Second, the religious belief regarding traditional marriage has become such a controversial issue that the legal community is embarrassed to have a bona fide law school that stands for that belief in its midst.[1346] Finally, there is an inherent harm in recognition of such a law school.[1347] Such harm may be seen as dignitary harm resulting from being offended.[1348] However, as the BCCA noted, "there is no *Charter* or other legal right to be free from views that offend and contradict an individual's strongly held beliefs."[1349]

So offensive is the traditional marriage belief and practice of TWU that law societies are willing to ignore a 2001 SCC ruling that remains authoritative in the opinion of BC Chief Justice Hinkson.[1350] The *Charter* does not apply, nor does the applicable human rights legislation;[1351] yet, three law societies insist that they do – or, if not, then malleable *Charter* values will suffice.

In her piece "Equality's Nemesis?",[1352] Queen's University law professor Beverley Baines argues for an interventionist, three-pronged approach to deal with religion and sex equality. While she argues in the context of women's equality, her contention that religion is equality's nemesis is applicable to equality rights generally. Her first assertion is that there should be a hierarchy of rights wherein religious and cultural claims are subject to the guarantee of equality.[1353] She stated, "no reason exists to immunize [religious societies] from the constitutional guarantee of sex equality."[1354] Second, she asserts that religious communities should operate jointly with the state in certain areas.[1355] If a member of the religious community does not have his or her equality right accepted by the religious community, then he or she can appeal to the state for redress forcing the religious community to permit his or her right.[1356] Her third argument advocates the privatization of religion. Since religious

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[1345] *TWU* BCCA 2016, *supra* note 478 at paras 171-180.
[1346] Justice Campbell suggested that perhaps the NSBS "is motivated by the question, 'What will people think?' If the NSBS allows students from a law school that discriminates against LGB people it will appear hypocritical in light of its strong advocacy for equality rights" in *TWU* NSSC 2015, *supra* note 775 at para 225.
[1347] Consider that running throughout the litigation the law societies have argued that if they accredit TWU they would be seen as endorsing TWU's discriminatory practices. The Ontario Divisional Court, in *TWU* ONSC 2015, *supra* note 776 at para 116, stated that accreditation would be condoning discrimination which "can be ever much as harmful as the act of discrimination itself." Former Chief Justice McLachlin reiterated the same point at para 137 of the *TWU v LSBC* 2018 decision, *supra* note 14.
[1348] Justice MacPherson of the ONCA held that the Covenant "is deeply discriminatory to the LGBTQ community, and it hurts," in *TWU* ONCA 2016, *supra* note 701 at para 119.
[1349] *TWU* BCCA 2016, *supra* note 478 at para 188; also, the BCCA at para 184 noted that such fear of endorsement makes little practical sense since "no religious faculty of any kind could be approved. Licensing of religious care facilities and hospitals would also fall into question."
[1350] *TWU* BCSC 2015, *supra* note 737 at paras 78, 90.
[1351] *TWU* 2001, *supra* note 26 at para 25.
[1352] *Supra* note 19.
[1353] *Ibid* at 76.
[1354] *Ibid* at 75.
[1355] *Ibid* at 77.
[1356] *Ibid* at 77.

communities are private by nature, they should not be given any special protections such as those found in the *Charter*.[1357] Rather, religious communities should rely on the freedoms of expression and association. Unfortunately, this argument ignores the fact that religion is an enumerated ground in section 15 of the *Charter* and therefore has its own equality rights.

Framing religion as equality's nemesis seems to be a stretch, given its long sociopolitical history in the evolution of human rights.[1358] However, the diminution of religion is beginning to take shape. Baines's three-pronged approach is not too far from becoming reality. In the SCC case *Loyola High School*,[1359] Justice Abella asked the counsel for the private Catholic school whether a religious community is exempt from having to teach a course that it says violates its religious freedom when that religion's "ethical framework" contradicts what the Court considers "national values."[1360]

> Justice Abella wrote the majority decision and referenced those values:
>
> …These shared values—equality, human rights and democracy—are values the state always has a legitimate interest in promoting and protecting. They enhance the conditions for integration and points of civic solidarity by helping connect us despite our differences. … This is what makes pluralism work. … [a] multicultural multireligious society can only work … if people of all groups understand and tolerate each other. … Religious freedom must therefore be understood in the context of a secular, multicultural and democratic society with a strong interest in protecting dignity and diversity, promoting equality, and ensuring the vitality of a common belief in human rights.[1361]

Notice the national values therefore are "equality, human rights and democracy" and "a common belief in human rights."

The groundwork is now set for future decisions to elaborate on how those "values" interact with religious freedom. It would not be difficult to find scenarios where national values may be at odds with long-held and well-understood religious norms.[1362] For example, consider the struggle that religious communities face when hiring or firing individuals who do not share their religious norms. Will the national values of "equality" and "human rights" force such communities to hire those who no longer believe and practice in accordance with the religious employer? While there are exemptions for religious communities in human rights legislation, courts have narrowed those exemptions considerably.[1363]

For Justice Abella, these values enhance "integration" and "civic solidarity" by ensuring that we connect despite our differences.[1364] There can be no doubt that a multicultural society needs to have means of creating a civic understanding of mutual responsibilities. Religious communities, by their nature, tend to be absolutist in their truth claims, as *Loyola* demonstrated.[1365] However, the legal profession and the media are increasingly scrutinizing

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[1357] *Ibid* at 78.
[1358] John Witte, Jr. & M. Christian Green, *Religion and Human Rights: An Introduction* (Oxford: OUP, 2011).
[1359] *Loyola, supra* note 156.
[1360] *Ibid* (Transcript, 24 March 2014, by StenoTran, at 7, lines 16–22).
[1361] *Ibid* at para 47 (citations omitted).
[1362] Consider, for example, that Roman Catholic clergy is limited to unmarried men.
[1363] *Christian Horizons*, *supra* note 1283; *Hutterian Brethren, supra* note 5.
[1364] *Loyola*, *supra* note 156 at para 47.
[1365] Loyola, as a Catholic institution, "continued to assert the right to teach Catholic doctrine and ethics from a Catholic perspective" (*Loyola*, *supra* note 156 at para 31).

that idea as they become progressively intolerant of religious organizations as they operate in the "public sphere."[1366]

A hierarchy of rights implies a generally accepted norm as to which right is to be ranked above another. Such homogeneity of thought will be difficult to obtain and maintain in a multicultural society. However, some suggest that it ought to be tried. University of Windsor law professor Richard Moon writes:

> It is unrealistic to expect the individual to leave her or his religious beliefs or values behind when she or he enters public life. If religious values are part of public debate and decision-making, then the values of some individuals will lose out—for example, will not be included in the curriculum. If we believe that this is consistent with religious pluralism then we may have less sympathy for the demands of a parent, based on religious belief, that his or her children not be exposed to any affirmation of the value of same-sex relationships, or for the claim of an individual, who is opposed to the conception of human dignity or equality that informs the civic curriculum, to work as a teacher, or for the claim to accreditation of a teacher training program that affirms anti-gay/lesbian views.[1367]

According to Moon, the right of a religious parent would "lose out." In other writings, he is more emphatic when, as noted earlier, he calls for "nothing less than a repudiation of the religious view that homosexuality is sinful."[1368] He has also argued that any religious narratives about the battle between good and evil that make claims that the gay lobby attempts to corrupt society and its children, can justify "extreme action against gays and lesbians and so ought to be treated as hate speech."[1369] It is one thing to make the argument that homosexuality is not sinful, as Professor Moon suggests, but it becomes problematic to require everyone else, by means of state action, to accept that view. In other words, these are matters on which reasonable people may disagree. As Voltaire is apocryphally purported to have opined, "I disapprove of what you say, but I will defend to the death your right to say it."[1370] Or have we come to the point where the legal profession is of the view that there is only one view?

As noted earlier, in the 2001 TWU case, Justice L'Heureux-Dubé wrote a forceful, dissenting opinion. "I am dismayed," she exclaimed, "that at various points in the history of this case the argument has been made that one can separate condemnation of the 'sexual sin' of 'homosexual behaviour' from intolerance of those with homosexual or bisexual orientations. This position alleges that one can love the sinner, but condemn the sin."[1371]

In rejecting the "love the sinner and hate the sin" view, Justice L'Heureux-Dubé agreed with the intervener EGALE, who argued that "[r]equiring someone not to act in accordance with their identity is harmful and cruel. It destroys the human spirit. Pressure to change their behaviour and deny their sexual identity has proved tremendously damaging to young persons seeking to come to terms with their sexual orientation."[1372]

[1366] Orlova, *supra* note 1152 at 51.
[1367] Moon, "Comment," *supra* note 1208 at 283–84.
[1368] Richard Moon, "Religion and Sexual Orientation in the Public Schools," *supra* note 1271 at 338.
[1369] Richard Moon, *Putting Faith in Hate: When Religion Is the Source or Target of Hate Speech* (Cambridge: Cambridge University Press, 2018), 151.
[1370] S. G. Tallentyre (pseudonym of Evelyn Beatrice Hall), *The Friends of Voltaire* (1906), 199.
[1371] *TWU* 2001*, supra* note 26 at para 69.
[1372] *Ibid*.

The SCC affirmed Justice L'Heureux- Dubé's dissenting opinion on this point in the context of the 2013 *Whatcott* case.[1373] The court reasoned that Mr. Whatcott's flyer did not make a meaningful distinction between sexual acts and sexual orientation, and that the flyers' condemnation of the sex acts was therefore hateful.[1374] While the court appears to have kept the distinction between the condemnation of sexual acts and the condemnation of sexual orientation, it nevertheless chills the environment for freedom of expression on the issue because there is bound to be contention over the court's interpretation. The court stated that "[g]enuine comments on sexual activity are not likely to fall into the purview of a prohibition against hate."[1375] However, confusion will naturally arise over what is "genuine." For example, the court said that if "Mr. Whatcott's message was that those who engage in sexual practices not leading to procreation should not be hired as teachers or that such practices should not be discussed as part of the school curriculum, his expression would not implicate an identifiable group."[1376] But the reality is that non-procreative sex acts are what a same-sex couple engages in. Therefore, focusing solely on non-procreative sex implicates same-sex couples. Perhaps the court is saying, "you can use general comments on non-procreative sex but just don't link the dots to an identifiable group." I am not sure that is sufficient to allow religious citizens the comfort to actively engage in such conversations when they have to maintain such a narrow and esoteric distinction. The chilling effect of this decision remains.

Professor Bruce MacDougall of the University of British Columbia states, "[r]eligious ideology cannot be used to determine what people who are not of that religion can do or how they should lead their lives."[1377] The problem, of course, is that "religious ideology" in a pluralistic society ought to be given the same right as any other "ideology" in advancing a position in the public discourse. It is in the process of deliberative democracy that society is able to establish its norms. Even when there is a consensus, that does not mean that debate suddenly stops. Public debate on issues must continue if we are to remain free and democratic. That a particular opinion advanced in public debate is rooted in a religious worldview should not prevent it from being considered.

However, for some in the legal academy, the fact that marriage has been redefined and religious communities had an opportunity to participate in the public debate means that all further discussion must cease. Religious communities must now be silent. Such a posture makes no room for the reality that religious communities differ and maintain the traditional definition of marriage within their own sphere.

MacDougall further argues that religions should not be able to maintain their religious views on marriage and sexuality even within their own communities. In the footnote to the above statement, he says:

> In my opinion, [religious ideology] should not even be used to judge those who are of that religious persuasion. Even children being raised in a particular religious tradition should not be exposed to ideology that excludes and refuses to accommodate homosexuality in their education. The state has an interest in all education of the young and this ideal should prevail.[1378]

[1373] *Whatcott*, *supra* note 702 at para 176.
[1374] *Ibid* at para 177.
[1375] *Ibid*.
[1376] *Ibid*.
[1377] Bruce MacDougall, "Celebration of Same-sex Marriage" (2000-01) 32 Ottawa L. Rev. 235, 247–48.
[1378] *Ibid* at 248 n 63.

Suddenly the distinction between the "private" and "public" sphere becomes obsolete when it comes to human sexuality. There is no distinction. The public norm of human sexuality must prevail because "the state has an interest." There is then no allowance for the individual to recognize the sovereignty of God in matters of sexuality; instead, the sovereignty of the state is now supreme.[1379] It is a totalitarian concept that rejects any notion of accommodation of religious belief and practice as it affects sexual equality. MacDougall argues, "[o]nce the religious characterization is removed from an issue of racial or gender discrimination, the issue becomes much more straightforward. So it should be with homosexuality."[1380]

The problem with framing the issue this way is that it does not present the complete picture. From the very beginning of human experience, humanity has struggled over the issue of sovereignty wherein states have demanded sole allegiance at the expense of the individual conscience. Therefore, it is germane to the conversation to consider that liberal democracies replaced the absolutist state paradigm with one wherein state sovereignty made provisions for religious belief and practice. The special status given to religion was what made other rights possible—it was "prototypical," as noted above.[1381]

Virtually all of the "fundamental freedoms" had their origin in the protection of religion and its practice. Therefore, to suggest that religious views that do not accept nontraditional sexual norms are somehow a "negative animus"[1382] and not worthy of protection flies in the face of liberal democratic history and theoretical thought. Rather, there is an anti-religious bias that refuses to accept the reality of religion's legal protection on matters of sexuality. Religion is now seen as the nemesis that must be eliminated.

7.4 The Way Forward

The legal community's revolt against the paradigm of religious accommodation has created a heightened sense of incompatibility between the current legal norm on sexuality and the traditional religious sexual norm (as exemplified in the Trinity Western University case). It raises two very important questions about how the law is to address this crisis.

First, how should the law balance religious and secular interests going forward? The solution cannot be a zero-sum result where one is removed or restricted at the expense of the other. Religious communities can be expected to continue with their traditional teachings and practice on sexuality for some time to come. A two-thousand-year-old foundational understanding of human relationships does not simply disappear overnight, nor even over a

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[1379] David L. Corbett, "Freedom From Discrimination on the Basis of Sexual Orientation Under Section 15 of the Charter: An Historical Review and Appraisal," in Debra M. McAllister & Adam M. Dodek, eds, *The Charter at Twenty: Law and Practice* (Toronto: Ontario Bar Association, 2002), 415. David Corbett has characterized the tension between religion and sexual orientation as "a struggle to protect our public policy from being infused with religious ideals for the purpose of denying a particular and disapproved group their equal place within Canadian society. … It is a conflict between the fundamental principles of our secular state – the Rule of Law, the principle of equality, and the primacy of the Constitution on the one hand, and a religiously based negative animus against homosexuality on the other."

[1380] Bruce MacDougall, "Silence in the Classroom: Limits on Homosexual Expression and Visibility in Education and the Privileging of Homophobic Religious Ideology" (1998) 61 Sask. L. Rev. 41, 78.

[1381] That does not mean that religious teachings have not been distorted to support racist or misogynist views. Political actors, always interested in power, have been willing to use whatever means to obtain power. Religion is not unique in being manipulated by political actors – other ideologies, movements, etc. have been co-opted or perverted by ambition.

[1382] Corbett, *supra* note 1379 at 415.

generation. Further, a liberal society that seeks to impose a sexual ethic against the traditional religious view does strike at the very heart of religion's status in the law.

Second, what does society do with a voluntary community of members who establish internal rules of conduct? The emerging consensus on liberalism's new moral understanding on sexuality will have no choice but to address whether religious communities may have space to continue their internal governance on sexual lifestyles that are anchored in ancient religious texts, opinions and religious cultures.[1383]

7.5 Be Strategic: Don't Rock the Boat – Nudge It

Yale law professor William Eskridge suggested the way forward is to give religious communities time and space to get on the right side of history. He made an astute observation. "The double role of religion," he says, "as both engine of prejudice and bearer of redemption" requires a "double strategy" that both confronts "discriminatory policies endorsed by religions" and accommodates "the faithful where possible."[1384] Eskridge has ably made the argument that religions change on moral issues. That certainly was the case in the US on the issues of slavery, inter-racial marriage, and civil rights. Therefore, there is every indication, in his view, that religious objections to sexual equality may well change, too.

In Eskridge's view we are traversing a period of transition from a "homosexual terror" to a "soon-to-be-achieved future where gay people and their families are considered normal."[1385] "During the transition period," he says, "the Court not only ought to ensure that core religious institutions retain freedom to exclude, but also ought to allow the states ample room to insist on gay tolerance within public programs."[1386] Over time the religious community will come to an appreciation of their prejudice in the same way that Bob Jones University now apologizes for "conforming to the 'segregationist ethos of American culture' and failing to accurately represent the Lord" in loving others.[1387]

Indeed, Eskridge aptly points out that there has already been a change in several American religious communities regarding sexual equality rights. The current "Maginot Line" for the Roman Catholic Church, Southern Baptists and the Church of Jesus Christ of LDS is now the opposition toward gay marriage. But they no longer oppose gay civil rights nor the removal of sodomy laws.[1388] However, other communities such as the Reformed Jews, the Unitarian Universalist Church, the United Church of Christ, the Quakers and the US Episcopal Church have recognized gay marriages.[1389] Meanwhile, others such as the Evangelical Lutheran Church of

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[1383] Marjorie Hickey, Counsel for Nova Scotia Barristers' Society, in oral argument before Justice Jamie S. Campbell, was indignant at a TWU deponent's Biblical references comparing sexual immorality to murder, theft, false testimony, and slander. "So that's the language, my lord, of the Covenant. In the context of a Canada that now recognizes same-sex marriage and has enshrined sexual orientation as a protected right in the *Charter of Rights and Freedoms*, that's the language that has brought us to this intersection of freedom of religion, various other freedoms, and equality rights," see *TWU* NSSC 2015, transcript *supra* note 477 (Oral hearing, 18 December 2014) at 55.

[1384] William N. Eskridge Jr., "Noah's Curse: How Religion Often Conflates Status, Belief, and Conduct to Resist Antidiscrimination Norms" (Spring 2011) 45:3 Georgia Law Review, 657 at 664.

[1385] *Ibid* at 664.

[1386] *Ibid*.

[1387] *Ibid* at 683.

[1388] *Ibid* at 708.

[1389] *Ibid*.

America and the Presbyterian General Assembly are softening their stances.[1390] Movements are being made toward the goal of sexual equality.

Eskridge maintains that "religion, society, and the state are mutually constitutive – each influences the others, and none evolves without reference to the others."[1391] While the respective moral shifts in society, state, or religion may not be in lockstep they nevertheless "show striking synchronicity."[1392] In the past, as society changed its views on race, soon religion followed suit as did the state. The same phenomenon is now occurring with sexual equality. Religion can be both critical and redemptive as it launders "social prejudice into respectable discourse,"[1393] thereby easing the "transition from a hysterical antihomosexual state of terror to one that is gay-friendly and accepting."[1394]

Eskridge encourages the gay community to "attend to organized religion, which has been an important barometer for society's acceptance of gay rights," noting that "[w]hen the mainline denominations uniformly condemned sexual relations as sinful sodomy reform was impossible but once the denominations backed away from that position then it was easy for the US Supreme Court to strike down anti-sodomy laws. [1395]

The US has not settled the sexual equality debate. The religious legacy against non-traditional sexual issues still holds a "deep, primordial significance for millions of Americans".[1396] And until society has come to terms with this debate, Eskridge suggests the courts ought to lie low. "Judges are incompetent to resolve these issues where the nation is closely but intensely divided, but they can and ought to lower the stakes of such primordial politics."[1397] For Eskridge that would mean three propositions.

First, do not rush to constitutionalize the issue. "Neither the Court nor the political process should try to settle the matter one way or the other, either invalidating or firmly entrenching old rules."[1398] Second, interpret antidiscrimination rules to accommodate core religious institutions. Using his expertise in statutory interpretation, Eskridge argues that judges should prefer statutory resolutions to constitutional ones. Therefore, the courts should construe antidiscrimination legislation "to allow some leeway when normative organizations or relationships are in play."[1399] Third, favour narrow, as-applied constitutional rulings over broad facial invalidations. The point here is that if the constitution must be adjudicated it is not for the judges to resolve the "issues at which society is not at rest."[1400]

Like Eskridge's position is the tongue-in-cheek, yet serious, description of the future envisioned by Professor Robert Wintemute. On the one hand, he states that LGBT individuals are to respect freedom of religion "by not asking the law to intervene to change the internal doctrines of religions as to who may be a religious leader, or who may enter a religious marriage". At the same time, he presents a much more ambitious project of going about changing the internal doctrines of religion. In other words, he is an advocate for the incremental, inflationary approach of equality rights:

[1390] *Ibid* at 708-709.
[1391] *Ibid* at 712.
[1392] *Ibid*.
[1393] *Ibid* at 714.
[1394] *Ibid*.
[1395] *Ibid*.
[1396] *Ibid* at 716.
[1397] *Ibid*.
[1398] *Ibid* at 717.
[1399] *Ibid* at 718.
[1400] *Ibid.*

> Ultimately, as a result of the courageous efforts of LGBT and heterosexual individuals working from within to change internal doctrines, *I believe that religious institutions will realize* one by one that they have been wrong all these years about discrimination based on sex, sexual orientation, and gender identity, and *will voluntarily change their internal doctrines*. They were wrong with regard to their persecution of Jews, their forced conversion of Indigenous peoples, and their support for slavery and apartheid, and they have acknowledged and learned from these mistakes. As sex, sexual orientation, and gender identity discrimination in religious institutions wither away, *the need for an exemption for the religious private sphere will disappear*. Although it is unlikely to occur within my lifetime, I look forward to the day when, for example, the *first lesbian Pope issues her apology for the sins of the Roman Catholic Church against LGBT persons around the world.*[1401]

This position appears to be an accurate description of what the equality revolution is aspiring toward. It is the inevitable march of history toward eradicating traditional religious norm on sexuality. Like Eskridge, Wintemute advocates a non-violent approach – he is willing to allow the religious community space, for the time being, to continue in their current (though regressive) ways which will be changed in time by the "courageous efforts of LGBT and heterosexual individuals working from within to change internal doctrines."

Eskridge and Wintemute's rational approach to accommodating religious opposition to changing sexual norms does appear to appreciate and respect religion but crucially it is only for the moment – during the transition period. Their approach presupposes that religion will eventually "get through" this transition period and reach a new paradigm as it has with the issues of race and slavery. However, both may be too optimistic in their prophetic interpretations of religion.

Sexual norms were not contested in Christian circles in the same way as were slavery and racial relations. Eskridge's analysis assumes that the public discussion on race and slavery is parallel to the sexual equality debate. This is understandable given the fact that in both cases there were, and are, religious arguments and communities for and against the respective positions. However, the current divisions within the religious communities concerning sexual norms are a recent development. There is no longstanding religious argument in favour of changing the traditional sexual norm.

Indeed, this is a significant difference between the two situations. Slavery and race relations have a long, controversial history of religious debate. In the early Christian church slavery was a sin.[1402] Although, as Eskridge points out, there was a religious minority in the US South that argued that slavery was somehow in keeping with the faith, that was never a widespread belief in Christendom. Whereas, sexual moral norms and the hermeneutical understandings of them within the Judeo-Christian scripture have been very consistent

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[1401] Wintemute*, supra* note 793 at 154, emphasis added.

[1402] See, for example, Aurelius Augustine, *The City of God*, vol 2, edited by Marcus Dodd (Edinburgh: T & T Clark, 1870), at 324, online: *Project Gutenberg* <https://www.gutenberg.org/files/45305/45305-h/45305-h.htm>:

> God … did not intend that His rational creature, who was made in His image, should have dominion over anything but the irrational creation,—not man over man, but man over the beasts… we believe, that the condition of slavery is the result of sin.

throughout the Christian era,[1403] Eskridge and Wintemute's comments to the contrary notwithstanding.

However, given that TWU has, since the *TWU* 2018 decisions, decided to step back and remove the mandatory requirement that students sign the Covenant, Eskridge and Wintemute's approach appears to be prescient.

The question remains: "what if?" What if there are religious communities that do not comply with the state definitions of moral norms such as marriages? Will the state be compelled to act against those non-compliant religious groups and their institutions?

Before I attempt to answer that question, I want to address a second option for the future: a no holds barred enforcement of the new sexual norms.

7.6 Be Dogmatic: No Holds Barred Enforcement of State Sexual Norms

In the aftermath of the redefinition of marriage there is a growing consensus among the advocates of same-sex marriage that the public debate has been held – the debate is therefore over, and everyone must now be in alignment with the new reality. In other words, there can be no longer any opposition or perceived opposition to the new definition of marriage. Same-sex marriage advocates, such as Michelangelo Signorile, argue that mainstream media must no longer allow religious leaders who support traditional marriage on their talk shows.[1404]

He contends that such a public campaign is not "censorship" since it is not government that is stepping in to prevent voices being heard. Instead, "we are asking media corporations to be responsible, to treat all groups equally, and to stop legitimizing defamation as rational debate, particularly when genuine debates on many of these issues have long since ended."[1405] According to Signorile, "it's about no longer agreeing to disagree; that debate has come to an end. … Every individual has a constitutional right to free speech – but no one has a right to appear on a television talk show."[1406]

Religious objections to homosexuality are seen as a threat to all groups.[1407] The strategy is to demand "something big," "even outlandish," and then fight it out to walk away with what you can get, which is often more than what you originally sought.[1408] Religious exemptions should not be permitted as they allow continued discrimination by the very institutions that do most of the discriminating.[1409]

Harvard law professor Mark Tushnet's May 6, 2016 blog piece, "Abandoning Defensive Crouch Liberal Constitutionalism,"[1410] created a stir when it was posted.[1411] His 1200-word

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[1403] Robert A. J. Gagnon, *The Bible and Homosexual Practice: Texts and Hermeneutics* (Nashville: Abingdon Press, 2001); Richard M. Davidson, *Flame of Yahweh: Sexuality in the Old Testament* (Peabody, MA: Hendrickson Publishers, 2008).

[1404] Michelangelo Signorile, *It's Not Over: Getting beyond tolerance, defeating homophobia, & winning true equality* (Boston: Houghton Mifflin Harcourt, 2015), 126-137.

[1405] *Ibid* at 137.

[1406] *Ibid* at 178.

[1407] *Ibid* at 75.

[1408] *Ibid* at 142.

[1409] *Ibid* at 143.

[1410] Tushnet, "Defensive Crouch," *supra* note 30.

[1411] Randy Barnett, "Abandoning Defensive Crouch Conservative Constitutionalism," *Washington Post* (12 December 2016), online: https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/12/abandoning-defensive-crouch-conservative-constitutionalism/?utm_term=.caa0d2e73efd; Servando Gonzalez, "Did We Lose the Culture War?" (15 July

essay heralded the end of "Defensive-crouch constitutionalism" that saw proponents of liberal positions "looking over their shoulders for retaliation by conservatives." He called for the end of such posturing by presenting six points that establish the fact that the liberals have won the culture wars and no longer need to cater to the critical conservatives. In short, Tushnet advocates an aggressive stance not only to challenge legal decisions they disagree with on the basis that it was "wrong on the day it was decided,"[1412] but to take a hard line (i.e. "You lost, live with it") on the losers of the culture wars.

After all, "trying to be nice to the losers didn't work well after the Civil War, nor after Brown. (And taking a hard line seemed to work reasonably well in Germany and Japan after 1945.)." He does not end there:

> I should note that LGBT activists in particular seem to have settled on the hard-line approach, while some liberal academics defend more accommodating approaches. When specific battles in the culture wars were being fought, it might have made sense to try to be accommodating after a local victory, because other related fights were going on, and a hard line might have stiffened the opposition in those fights. But the war's over, and we won.

Tushnet insists there is no need to cater to swing vote judges such as Anthony Kennedy.[1413] Just "[s]top it," he says. It is no longer necessary.[1414]

Tushnet, by his own account, received a lot of "hate mail" over that post. In a December 20, 2016 post,[1415] he responded to the criticism. He now claims that the May 6 post was misread "as advice to liberal judges rather than to liberal academics." However, as law professor Paul Horwitz noted, "it does not read as giving advice to judges" nor is it addressed to a "'we' composed entirely of 'liberal academics,' or at least of liberal academics acting as actual academics." Rather, "it reads as advice to a 'we' composed of liberals actually engaged in wielding power…."[1416] The main concern, says Horwitz, was Tushnet's "advocacy of an

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2016), online: *Servando Gonzalez* <http://www.intelinet.org/sg_site/articles/sg_culture_war.html>; Greg Weiner, "Crouching Congress, Hidden Judges" (20 December 2016), online: *Law and Liberty* http://www.libertylawsite.org/2016/12/20/crouching-congress-hidden-judges/; Ryan T. Anderson, "Absurd Idea: Harvard Professor Says Treat Conservative Christians Like Nazis" (9 May, 2016), online (blog): *The National Interest* <http://nationalinterest.org/blog/the-buzz/absurd-idea-harvard-professor-says-treat-conservative-16110>.

[1412] In the TWU context see Richard Moon, "A Comment," *supra* note 1208 at 229-230: "In *TWU* and *Chamberlain*, the Supreme Court tries to avoid choosing one right over another or favouring one group over another. The Court wants to affirm sexual orientation equality but also to respect deeply held religious opposition to homosexuality, or to remain neutral on such issues of fundamental value. It can do both only by adopting an artificially narrow view of sexual orientation equality and an implausible approach to religious inclusion or neutrality."

[1413] Indeed, Tushnet suggested that liberals ought to "fuck Anthony Kennedy" – but of course he "didn't mean that liberals should treat [Kennedy] with disrespect."

[1414] He then made this curious comment, "Of course all bets are off if Donald Trump becomes President. But if he does, constitutional doctrine is going to be the least of our worries." This seems to suggest that Tushnet was concerned that with a change in government the liberals would be in a precarious position. However, that implies that what is at stake is political power. That is problematic because if we are only concerned with power then liberal democratic society will be unstable as various factions do all they can when they have power to avenge perceived wrongs against the opposition.

[1415] Mark Tushnet, "Doubling Down (on 'The Culture Wars Are Over')" (20 December 2016), online (blog): *Balkinization* <https://balkin.blogspot.ca/2016/12/doubling-down-on-culture-wars-are-over.html>.

[1416] Paul Horwitz, "Doubling Down AND Walking Back on 'Abandoning Defensive Crouch Liberal Constitutionalism,'" (21 December 2016), online (blog): *PrawfsBlawg*

aggressive, uncompromising consolidation and advance" on the liberal agenda.[1417] Many US voters, said Horwitz, were against the "idea of having centralized establishment elites entrenching their own power and using it by hook or crook to push their victories into new territories on new positions and take a 'hard line' against those 'losers.'"[1418]

While Tushnet has toned down his rhetoric considerably in the face of the Trump presidency that has seen the US make a very hard turn to a conservative agenda, he remains defiant. Indeed, he argues that gay marriage is a reality, multicultural education is entrenched, and the current fight over transgender rights appears to be a "winning" issue for the liberals. He also pointed out, even on the issues of affirmative action and abortion, the law is not going to change unless Trump appoints two new judges. Tushnet's fear has now been realized.[1419]

With Trump's appointment of two new US Supreme Court justices, the conservatives have a majority. Therefore, it is reasonable to assume that conservative decisions will be reflected in the Court's jurisprudence. However, it is unlikely that there will be a wholesale, reckless change to the law on "the culture war" issues because of the US reverence for legal precedent.[1420] A more likely scenario will be a chipping away of the law's edges, shifting toward the conservative view. The philosophical respect for the concept of judicial precedent is unlikely to see radical change in the short term. This was evident in the the US *Masterpiece Cakeshop* decision that avoided the cultural war over accommodating religious objections to

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<http://prawfsblawg.blogs.com/prawfsblawg/2016/12/doubling-down-and-walking-back-on-abandoning-defensive-crouch-liberal-constitutionalism.html> ["Doubling Down"].

[1417] Tushnet references gay marriage, multicultural education, transgender rights, gay rights more generally, affirmative action, abortion and limiting religious accommodations to those issues.

[1418] Horwitz, "Doubling Down," *supra* note 1416.

[1419] Adam Liptak, "Trump Visits Supreme Court for Neil Gorsuch's Formal Welcome," *New York Times* (15 June 2017), online: https://www.nytimes.com/2017/06/15/us/politics/neil-gorsuch-supreme-court.html; Sheryl Gay Stolberg, "Kavanaugh Is Sworn In After Close Confirmation Vote in Senate," *New York Times* (6 October 2018), online: https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html>.

[1420] Senator Susan Colins gave a poignant summary of Justice Brett Kavanaugh's view on legal precedent when she addressed the US Senate outlining why she voted in favour of the maligned justice:

> "Judge Kavanaugh is the first Supreme Court nominee to express the view that precedent is not merely a practice and tradition, but rooted in Article III of our Constitution itself. He believes that precedent 'is not just a judicial policy … it is constitutionally dictated to pay attention and pay heed to rules of precedent.' In other words, precedent isn't a goal or an aspiration; it is a constitutional tenet that has to be followed except in the most extraordinary circumstances.
>
> The judge further explained that precedent provides stability, predictability, reliance, and fairness. There are, of course, rare and extraordinary times where the Supreme Court would rightly overturn a precedent. The most famous example was when the Supreme Court in *Brown v. Board of Education* overruled *Plessy v. Ferguson*, correcting a "grievously wrong" decision—to use the judge's term—allowing racial inequality. But, someone who believes that the importance of precedent has been rooted in the Constitution would follow long-established precedent except in those rare circumstances where a decision is 'grievously wrong' or 'deeply inconsistent with the law.' Those are Judge Kavanaugh's phrases.
>
> As Judge Kavanaugh asserted to me, a long-established precedent is not something to be trimmed, narrowed, discarded, or overlooked. Its roots in the Constitution give the concept of *stare decisis* greater weight such that precedent can't be trimmed or narrowed simply because a judge might want to on a whim. In short, his views on honoring precedent would preclude attempts to do by stealth that which one has committed not to do overtly." See Press Release, "Senator Collins Announces She Will Vote to Confirm Judge Kavanaugh," (5 October 2018), online: <https://www.collins.senate.gov/newsroom/senator-collins-announces-she-will-vote-confirm-judge-kavanaugh?page=4>.

expressive content for a gay wedding cake by dealing with state anti-religious animus.[1421] Nevertheless, a conservative US majority may provide a reprieve to the legal revolution against religious accommodation in the American context. However, even with that there is significant dissonance between the academic discussions, as I have canvassed in this book, and any conservative court. The US then, using Kahn's terminology, is in the crisis stage of the paradigm shift. How it will play out in the coming years will be riveting and contentious.

In the meantime, in Canada, if religious institutions such as TWU refuse to adopt the secularist understanding of marriage and sexual equality then it will not be surprising if similar opinions akin to those of Professor Tushnet gain currency – opinions that lean toward state coercion. Ultimately, that is where the inflationary demands of equality rights lead us (whether they advocate a gradual or immediate transition). It is, I maintain, where the anti-TWU side now stands. They have refused to accept the current state of the law that has allowed TWU to exist and carry out its function as a religious university granting accredited degrees and they have won the full support of the Supreme Court of Canada in doing so.

Tushnet has long maintained that religion is not special.[1422] Given his consistent stance that the "culture wars are over, and we won," there is little doubt that his triumphal stand would see, if given the power, the removal of religious freedom accommodation as we know it.

While history may not repeat itself, it often rhymes. If Tushnet's dogmatic approach holds sway, then we may well encounter a time that rhymes with the religious upheavals not seen since the Reformation and its aftermath.[1423] While this may appear speculative I think what we are currently observing in the United States is proving my argument. PresidentTrump is following a very familiar pattern of populist politicians.[1424] As Richard Wolin observes, these politicians give simple answers to marginalized groups. The intellectual elites have so ridiculed and diminished the religious sentiment of the working class that when an establishment outsider arrives with an answer to their struggle in language they understand and he or she wraps rhetoric in that religious identity they are then convinced the politician speaks for them. The personal shortcomings of the politician are minimized as he or she is the class's representative. Charles Taylor's work reminds us that religion remains a motivating force.[1425] While religious fervour may not be what it once was, there is no guarantee that it will lie dormant forever. Waves of religiosity and opportunistic politicians who see through the groupthink of the "chattering classes" may rise at the most inopportune time for those whose interests prefer it to remain quiet and still. However, carrying a heavy stick against religious communities that refuse to accept the state's version of the good life has never been the genius of the liberal democratic society. Instead, liberalism's strength has been the tradition of accommodation. The ability to compromise and allow space for religious expression has given us a deep tradition of freedom.

[1421] *Masterpiece Cakeshop, supra* note 24.
[1422] Tushnet, "Redundant," *supra* note 469.
[1423] As former SCC Chief Justice Brian Dickson noted, "the origins of the demand for such [religious] freedom are to be found in the religious struggles in post-Reformation Europe," *Big M Drug Mart, supra* note 4 at para 118.
[1424] Richard Wolin, "How Did Trump Get Elected? Take a Look in the Mirror," (2016) 63:14 Chronicle of Higher Education, online: <https://www.chronicle.com/article/How-Did-Trump-Get-Elected-/238385>.
[1425] Daniel Baird, "Spiritual Exercises: Charles Taylor's *A Secular Age* shows why religion remains a powerful force" (12 April 2008), *The Walrus*, online: <https://thewalrus.ca/spirital-exercises/>.

7.7 Be Accepting: Of Differences

Both Tushnet's or Signorile's "hard line" strategy and Eskridge and Wintemute's vision of voluntary change (without state enforcement) may well be frustrated. The reason is simple. History does not always go the way revolutionaries expect. The Christian religion has been an advocate of traditional marriage for two milennia. It is unlikely that there will ever be a time when there does not exist, somewhere in a liberal democracy, a Christian community holding traditional marriage as its cultural identifier. Christians run organizations in accordance with traditions and principles which have endured for thousands of years. And if we are to remain a liberal democratic society, such organizations are entitled to protection of their beliefs and practices.[1426]

The ramifications of the emerging legal revolution against the current legal paradigm regarding religion will bring disruption to law, society, and the democratic project. To what level of disruption remains to be seen, but it will not be an approach that encourages ongoing dialogue and respect between competing views on the public good. We need a deliberative approach that accepts dissonance as a strength, not a failure. The following suggestions introduce an attempt to move forward.

7.7.1 Religion Matters

In 1953, Justice Ivan Rand's observation, quoted above but worth repeating, was that "a religious incident reverberates from one end of this country to the other, and there is nothing to which the 'body politic of the Dominion' is more sensitive."[1427] However, there is a terrible lack of understanding about religion today. Throughout the world, the number of conflicts with religious overtones are significant.[1428] So much so that John Kerry, the former US Secretary of State, stated, "if I went back to college today, I think I would probably major in comparative religion because that's how integrated [religion] is in everything that we are working on and deciding and thinking about in life today."[1429]

Religion matters because people believe and are willing to pay a high personal cost to practice their beliefs. In the past, the law made sense of this reality by seeking accommodation. Today is no different. There must be a willingness to engage in conversation that does not simply put religion in a private corner as if it has no bearing on our mutual well-being. Given the importance of religion to our increasingly diverse and plural society, the law must yet again

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[1426] *Loyola, supra* note 156, per McLachlin CJC, "The individual and collective aspects of freedom of religion are indissolubly intertwined. The freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith," at para 94.

[1427] *Saumur, supra* note 6 at 97.

[1428] Conflicts are by nature multifaceted involving politics, economics, social status and historical contexts. Religion is part and parcel of the mix. For a list of 25 conflicts involving religion see B. A. Robinson, "Religious Peace, Violence, and Genocide" (2015), online: *Religious Tolerance* <http://www.religioustolerance.org/curr_war.htm>

[1429] Secretary John Kerry announced that Shaun Casey would lead the launch of the State Department's Office of Faith-Based Community Initiatives, see "Faith-Based Community Initiatives" (7 August 2013), online (video): *C-PAC* <http://www.c-span.org/video/?314438-1/sec-state-kerry-launches-faithbased-community-initiative>.

turn its mind to allowing religious individuals and their institutions to continue to operate without fear of state reprisal.[1430]

7.7.2 Legal Knowledge of Religion

The legal profession ought to become knowledgeable about religion and its societal impact. It is not helpful to characterize religion as equality's nemesis when even a cursory review of history and the development of the law and public policy will show a number of religiously motivated individuals who sought to break down barriers of inequality. Examples of such include Mahatma Ghandi, Martin Luther King Jr.,[1431] and Nellie McClung,[1432] one of the "Famous Five" who championed women's equality in the Persons Case.[1433]

There needs to be an understanding of the historic and current place of religion in the law. Religion will not disappear with continued secular university education, as if education were some kind of cure for religion. Religion may change over time to some degree, but its basic principles will remain salient for a significant group in society. By maintaining religion's legal status, the state can never be the sole determiner of the individual conscience.[1434] By necessity, our society is and will be one where not every person will agree on such intimate issues as human sexuality. Those with whom we disagree will continue to live out their lives as they see fit. Maintaining an attitude of tolerance is a practical application of the Golden Rule: do unto others as you would have them do unto you. All human beings, religious or non-religious, have the right to be respected and allowed to live as their consciences dictate. No state actor, such as a law society, has a right to impose its view on human sexuality on another.

Third, protection of religious freedom does not depend on whether an individual's "beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make."[1435] However, courts, lawyers, and legislators need to be mindful of the importance which individuals attach to their beliefs. In other words, our law must be willing to see through the eyes of the believer—not to be "the arbiter of religious dogma,"[1436] but to understand the sincerity of belief. Therefore, the law must ask, given the sincerely held belief of the claimant, what does it mean (in the case of TWU) that evangelical Christians have a university that maintains a synchronicity with their belief in traditional marriage? It is here that the law must be willing to see as TWU (and all Christians of like mind who have such institutions) sees. This is exactly what Justice Campbell of the Supreme Court of Nova Scotia did. He clearly understood that evangelical Christians have:

> [A] religious faith [that] governs every aspect of their lives. When they study law, whether at a Christian law school or elsewhere, they are studying law first as Christians. Part of their religious faith involves being in the company of other

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[1430] Of course, the current state of the law is also effective not only at accommodating sincere faith, but also prohibiting unlawful behaviour. Liberal democracies are well adapted to ensuring that religion does not stray into illegal activity.

[1431] Martin Luther King, Jr., *The Trumpet of Conscience* (New York: Harper & Row, 1967).

[1432] Nellie L. McClung, *Clearing in the West: My Own Story* (Toronto: Thomas Allen & Son, 1945).

[1433] *Edwards v. Attorney General of Canada* [1929] UKPC 86, [1930] AC 124 (Oct. 18, 1929) (PC) (appeal taken from Canada).

[1434] This is true whether the state maintains accommodation of religion or not – there will always be individuals and communities who acknowledge a higher sovereign than the state, be it self or God.

[1435] *Amselem*, *supra* note 7 at para 43.

[1436] *Ibid* at para 50.

> Christians, not only for the purpose of worship. They gain spiritual strength from communing in that way. They seek out opportunities to do that. Being part of institutions that are defined as Christian in character is not an insignificant part of who they are. Being Christian in character does not mean excluding those of other faiths but does require that everyone adhere to the code that the religion mandates. Going to such an institution is an expression of their religious faith. That is a sincerely held believe [sic] and it is not for the court or for the NSBS to tell them that it just isn't that important.[1437]

7.7.3 State Neutrality

The Western state should be neutral in matters of religion while permitting religion a public role. That does not mean the state does not consider the practical impact of religious practices, but it does emphasize the state's reluctance to interfere with religion. Justice LeBel stated, "[t]he concept of neutrality allows churches and their members to play an important role in the public space where societal debates take place, while the state acts as an essentially neutral intermediary in relations between the various denominations and between those denominations and civil society."[1438]

This book argues that when religious communities run enterprises such as universities, the state has a "democratic imperative," to use the words of Justice Gascon,[1439] to ensure that it does not favour "certain religious groups and is hostile to others. It follows that the state may not, by expressing its own religious preference, promote the participation of believers to the exclusion of non-believers or vice versa."[1440]

7.7.4 Historical Recognition

The Christian community has maintained the teaching and practice of traditional marriage for over 2,000 years. The length of time a community carries on a practice cannot, in and of itself, give it license to continue that practice if it violates basic human decency. However, the fact that such a community has practiced a religious belief for so many centuries does entitle that community to have, at the very least, a rebuttable presumption that it should be free to continue that practice. The religious practice of marriage as being between one man and one woman has never been held to violate human rights. Even the UN Declaration of Human Rights in Article 16 recognizes the right to heterosexual marriage.[1441]

[1437] *TWU* NSSC 2015, *supra* note 775 at para 230.

[1438] *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine*, [2004] 2 S.C.R. 650, para 67. Also, note the Randy Wall decision where the SCC held, "In the end, religious groups are free to determine their own membership and rules; courts will not intervene in such matters save where it is necessary to resolve an underlying legal dispute," *supra* note 368 at para 39.

[1439] *Saguenay, supra* note 358 at para 75.

[1440] *Ibid*.

[1441] *Universal Declaration of Human Rights*, GA Res 217 (III) A, UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) art 16, online: <http://www.un.org/en/universal-declaration-human-rights/>:

> (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.
>
> (2) Marriage shall be entered into only with the free and full consent of the intending spouses.
>
> (3) The family is the natural and fundamental group unit of society and is entitled to protection by

7.6.5 Democratic Dissonance

A citizen of a modern Western democracy can expect to have dissonance between his or her beliefs and practices and those of fellow citizens – or even those of the state. The fact that another believes and practices differently in matters as intimately private as sexuality must not put that citizen, or the religious institution with which he or she is affiliated, at a disadvantage. This is similar to the Supreme Court of Canada's discussion about a public school student facing cognitive dissonance between the way she was raised and the way other students live their lives. Said the Court, it "is simply a part of living in a diverse society. It is also a part of growing up. Through such experiences, children come to realize that not all of their values are shared by others."[1442] So too must we all learn to accept that we are not all the same. The SCC continued:

> [T]he demand for tolerance cannot be interpreted as the demand to approve of another person's beliefs or practices. When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right. Learning about tolerance is therefore learning that other people's entitlement to respect from us does not depend on whether their views accord with our own.[1443]

7.7.5 Maintaining Accommodation

When an institution such as TWU is private, peaceable, non-commercial, and presents no "grave and impending public danger,"[1444] and there is no evidence of abuse of private power,[1445] then the law ought to continue its indifference toward that institution's peculiar discrimination to maintain an ambiance that respects its religious sensibilities. The choice comes down to whether we are a free and democratic society that allows for difference and the expression of that difference, or whether we will require sameness in all areas. Entities such as TWU depend upon the ability to discriminate for their very existence.[1446] The fact that TWU felt compelled to change its mandatory Covenant for students does not change the analysis. First, the Covenant remains in effect for faculty and staff, thereby keeping the same Christian ambiance. Second, while TWU has loosened its position as a result of state coercion we must ask ourselves if having a state dictate to religious communities in this manner is really the kind of democracy we want. The implication of this one move may well lead to further impositions in the future. Third, the fact that TWU modified its admissions policy does not take away from the fact that there are many other religious institutions that will continue to resist the state.[1447]

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society and the State.

[1442] *Chamberlain, supra* note 441 at para 65.

[1443] *Ibid* at para 66.

[1444] *Thomas v. Collins*, 323 U.S. 516, 532 (1945).

[1445] John D. Inazu, *Liberty's Refuge: The Forgotten Freedom of Assembly* (New Haven: Yale University Press, 2012), 184.

[1446] *Ibid*.

[1447] For example, the Seventh-day Adventist Church in Canada intervened in the *TWU* 2018 litigation and operates Burman University in Lacombe, Alberta.

Christopher J. Eberle observes, "[s]ince freedom of religion underwrites pluralism, and since pluralism enhances the vitality of religion, members of religious groups have a deep and abiding interest in affirming a political culture that values freedom of religion and a constitutional order that enshrines it."[1448] Former Chief Justice Brian Dickson of the SCC observed that the emphasis on individual conscience and individual judgement "lies at the heart of our democratic political tradition." Each citizen's ability to "make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government".[1449]

Therefore, limiting religious accommodation is taking away the religious individual's incentive to maintain support of the political system itself. This is not to be taken lightly, as the health of our democratic project depends upon each citizen's support.

[1448] Eberle, *supra* note 309 at 44.
[1449] *Big M Drug Mart, supra* note 4 at para 122.

8 CONCLUSION

8.1 Introduction

This study began with five questions: What characteristic(s) of religion, if any, justifies the law's special protection of religious practice? What other historical, practical or philosophical factors justify the law's special protection of religious practice? Do those characteristics and/or factors justify religion maintaining its legal status? What may we reasonably expect the consequences to be should the special status of religion be removed? What is the attitude of the legal profession to the accommodation of religion?

8.2 The Legal Accommodation of Religious Practice

This dissertation posits that religion has a special status in the law of liberal democratic countries, based on the incontrovertible evidence that religion, and more particularly the Christian religion, has formed the basis of western states and societies. Under the Christian banner we have developed science, democracy and the rule of law.

Religious freedom has been recognized as a foundational right and principle that was instrumental in creating the modern liberal democratic state with its emphasis on individual civil liberties.[1450] Given that we do not know whether other civil liberties can survive without being undergirded by freedom of religion, it behooves us to be very wary toward the legal revolution taking place against religion. The historical, practical, and philosophical realities of liberal democracies justify maintaining religion's special treatment in Canadian law.

8.3 Justification of Maintaining Religious Accommodation in the Law

Emanating from this study, one can draw together the overarching strands of justification for the law maintaining religious accommodation even in cases involving sexual equality claims. As a minimum, religious practices involving fundamental human life issues, such as marriage, are to be accommodated in liberal democracies. When they are, freedom in general is advanced for the religious and non-religious alike.

8.3.1 The Historical and Practical Argument

As discussed in this work, the historical reality can be summed up with the concept of sovereignty. The one who decides the exception, as Schmitt argued, is sovereign.[1451] Throughout human history there has been a battle between the state on the one hand, personified at times by a supreme (divine) ruler or a popular legislature; and the individual on the other. I have briefly discussed how, to one degree or another, the state has tended to demand sole allegiance. The individual in his or her own right (or as associated together within a religious community) has resisted such a demand in the name of personal and collective religious freedom. Historically, this obstinency was met with state violence. However, by 1700, nearly two centuries after the Reformation began, and following the devastating Thirty Years

[1450] For the role of Christianity and freedom see Timothy Samuel Shah & Allen D. Hertzke, *Christianity and Freedom: Volume 1: Historical Perspectives* and *Volume 2: Contemporary Perspectives* (Cambridge: Cambridge University Press, 2016).
[1451] *Supra* note 225.

War, Euope realized that, for a number of reasons – pragmatic rationalism and theological understandings – religious practices had to be tolerated in order to maintain peace. If we have learned anything from history, it is that religious persecution does not foster well-being.

8.3.2 The Philosophical Arguments

The resulting stability confirmed that the modern state could not continue to murder people simply because they did not share the same beliefs as the majority. Enlightenment philosophers, reflecting on a post-Reformation society, paved the way for classical liberalism. Political ideologies expressed by such thinkers as Kant, Mill, and others, advocated for maximum individual freedom that nevertheless respected religious difference and pluralism within liberal democracy. These arguments are briefly summarized below.

8.3.2.1 The Argument from Tolerance

As we have seen, liberal democratic thought recognized that the polity must be neutral in matters of religion. The state works best, i.e. allows greater freedom, when it is agnostic. Permitting "the other" to speak and act even though it may be offensive is the high-water mark of liberalism. Citizens are not afraid of dissonance with their views on how life ought to be lived. Rather, they are secure knowing that, if they accept differences of belief and practice, then they, in turn, will have their own differences respected and not suppressed. There is a reciprocity of trust. Trust that as I give you the benefit of the doubt you will do the same for me. And, through ongoing dialogue, we will grow to appreciate and respect each other. Unfortunately, as we have seen, identity politics have rammed a dagger into this conception of liberal democratic thought. This is evident in the *TWU* 2018 case, where suppression of diversity regarding sexual norms became the modus operandi, rather than tolerance. Failure to suppress difference is, in the elite view, intolerance – Voltaire and his famous epigram be damned.[1452] TWU was deemed intolerant for being the evangelical Christian university that it is. TWU did not engage in suppression of any group – including those who could not sign its community covenant – it simply wanted the right to continue to maintain a different standard (a distinction or a lawful discrimination) than the prevailing sexual norms outside its religious community. But that was, apparently, too much to ask.

8.3.2.2 The Argument from Pluralism

Multiculturalism is protected in s. 27 of the *Charter*.[1453] The pluralist nature of Canada is, to use the words of Rodney Stark, "the natural state of the religious economy. … To the extent that religious freedom exists, there will be many organized faiths, each specializing in certain segments of the market. Moreover, this market will be dynamic, with a constant influx of new organizations and the frequent demise of others."[1454] In other words, there must be

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[1452] "I disapprove of what you say, but I will defend to the death your right to say it," *supra* note 1370.
[1453] "Today, we may rightly say that, in s. 27 of the *Charter*, Canada accepts the importance of multiculturalism in its social life. In s. 27, Canada signals its acceptance that it's changing through every day of its history." *R. v. N.S.,* [2012] 3 SCR 726, 2012 SCC 72, para 72.
[1454] Stark & Bainbridge, *supra* note 309. While Stark was speaking about the United States, I am of the view that his comments are applicable to Canada as well.

freedom for the rise and fall of organisations in accordance with the voluntary preferences of the citizenry without state interference to prefer one over others.

Isaiah Berlin observed that pluralism is "the conception that there are many different ends that men may seek and still be fully rational, fully men, capable of understanding each other and sympathizing and deriving light from each other".[1455] Different cultures are capable of communicating because what makes us human is the common bond and acts as a bridge. "We are free to criticise," says Berlin, "the values of other cultures, to condemn them, but we cannot pretend not to understand them at all, or to regard them simply as subjective, the products of creatures in different circumstances with different tasts from our own, which do not speak to us at all."[1456] In Berlin's understanding, "civilisations clash;" there are bound to be incompatibilities. "We can discuss each other's point of view, we can try to reach common ground," he argues, "but in the end what you pursue may not be reconcilable with the ends to which I find that I have dedicated my life."[1457] Berlin's analysis is clear that there can be no "perfect world" in which "all good things can be harmonised".[1458] We live on the earth where we believe and act and it is here that not all can coexist in a perfect whole.

If we are to be serious about pluralism, we must live with dissonance. Each cultural entity needs to be given the space to grow and flourish without state interference. Included would be the evangelical Christians who want to open their own law school in accordance with their beliefs and practices. The fact that different groups and individuals are able to disagree with their respective beliefs and practices and still live in peace is indicative of a free society. However, demanding state actors prevent the operation of that school because its religious opinions are unpopular does not bode well for the long-term stability of society as a whole.

8.3.2.3 The Argument from Liberalism

The liberal democratic project is to maximise the freedom of the individual while ensuring civil peace. Or, as J. S. Mill so aptly stated, "…that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[1459] Nor is it acceptable to do so for the person's own good, to make him happier, or because people are of the view it is wise or right.

Mill's harm principle has formed the basis of liberal thinking since the 19th century. But, as this study has shown, it is complicated when applied to specific facts such as *TWU* 2018. Yet, it is fair to say, that Mill's thinking would permit TWU to have its law school even though it has a Community Covenant that offends certain groups of people. I take Mill's writing to be appreciative of different points of view on how to live one's life. He is conscious of the tyranny of the majority's opinion that does not suffer any opposing view.

Currently the thinking of the "majority", at least within the legal profession, is that any fettering of the sexual impulse by a religious community's rules is unacceptable. Any such religious opinion and practice in a "public" enterprise, that is to say a publicly regulated entity,

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[1455] Isaiah Berlin, *The Proper Study of Mankind: An Anthology of Essays* (New York: Farrar, Straus, and Girous, 1998), 9.
[1456] *Ibid*.
[1457] *Ibid* at 10.
[1458] *Ibid* at 11.
[1459] Mill, *On Liberty*, *supra* note 500 at 1.

must accept the legal profession's view of the public interest and not "discriminate" against the sexual minority – even if that "discrimination" is lawful in a private religious setting. As Justice Karakatsanis and the SCC majority made clear, "substantive equality" of sexual minorities is a must. There can be no differences or perceived differences of treatment of sexual minorities between evangelical Christian institutions such as TWU and public universities. The presupposition is that the views and practices of TWU on marriage are wrong and must not be permitted. Herein lies the problem. Just because the majority of the legal profession is of that view does not give it the right to demand all institutions accept the same view and practice. It is not "self-protection," as required by Mill's harm principle, to demand state interference against those with whom you disagree – however much they offend – if what they are doing is living lawfully. That is not "self-protection," nor is it "substantive equality." It is totalitarian.

8.3.2.4 The Argument from Identity Politics

We have seen that contemporary identity politics is based on the idea that every group has the right to develop its own identity. TWU frequently and repeatedly expressed its desire to develop a law school that was consistent with its Christian identity.[1460] In an era that is sensitive to one's personal identity and cultural grouping, it is ironic that TWU was not permitted to advance in the logical next step in the evolution of the university. Denying TWU that right violates its core identity and the identity of its individual community members. South African Justice Albie Sachs observed:

> For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions … religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights.[1461]

Throughout the *TWU* 2018 debates among the law societies and academics, the *TWU* 2001 dissent of Justice L'Heureux-Dubé was seen as being "on the right side of history"[1462] when she described TWU's Community Covenant as an affront to the human dignity and personhood of LGBTQ people. This proved to be a prescient vision of the SCC's *TWU* 2018 comment that TWU's policy was "degrading and disrespectful."

Justice L'Heureux-Dubé's criticism of TWU Community Covenant can also be turned around to call into question the zeal with which the legal profession attacked the religious beliefs and practices of TWU. In other words, the arguments of identity politics used by L'Heureux-Dubé and today's legal profession can also be used to condemn and call out the animosity against TWU. Denigration of their Christian beliefs and practices is an affront to the human dignity and personhood of the university community. Professor Richard Moon, though unsympathetic to TWU's position,[1463] admitted, "[i]f religion is an aspect of the individual's identity, then when the state treats his or her religious practices or beliefs as less important or

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[1460] "Submission for Accreditation," *supra* note 817.

[1461] *Christian Education South Africa v. Minister of Education* [2000] 4 SA 757 (Constitutional Court), 36.

[1462] L'Heureux-Dubé J. in *TWU* 2001, *supra* note 26, in dissent at para 69, wherein she challenged "the idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood."

[1463] See Richard Moon, "A Comment", *supra* note 1208.

less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual's views and values, it is denying her or his equal worth."[1464] Though Professor Moon would not agree with my characterisation, it is my position that denying TWU accreditation cannot be anything other than marginalization of the religious community.

It seems then that we have two views of affronting human dignity and personhood in this case. It could be argued, using L'Heureux-Dubé's analysis, that in 2001 the SCC affronted the LGBTQ community but in 2018, I argue the SCC affronted the TWU community. The difference between 2018 and 2001 is that the legal profession (ultimately vindicated by the SCC), decided that the law outlining the accommodation of TWU's identity could no longer be supported politically. In other words, a revolution has occurred in the law in 2018. As noted already, given that identity politics is now playing a majour role in religious freedom accommodation, one can reasonably expect that, given the right circumstances, a change in future politics may call for yet another reversal of this affront to the human dignity and personhood of the religious community. However, the ultimate goal, I suggest, should not be raw political power on either side. We have to be cognizant of the fact that social structures and institutions have an inherent rationality due to the fact that they have survived a long process of societal evolution. This reality was observed by Edmund Burke when he commented on the French Revolution, and by Abraham Kuyper in his sphere sovereignty analysis. Both were aware that the issue is not simply power. It goes much deeper to concepts that we are yet to fully understand. Hence, we ought to strive for a solution that supports the equal worth of all players in civic society. That is a far better approach than that taken by the SCC in its condemnation of TWU's position as "degrading and disrespectful." Such a zero-sum game is not in our mutual long-term benefit.

8.4 The Legal Status of Religion Ought to be Maintained

Law, in a certain sense, represents the collective wisdom of our forebearers. Their wisdom gives us a head start in living a meaningful and purposeful life in a very complex world. We are not able to know all there is that we do not know. That is why our legal heritage is so significant. Society without law is blind. It does not know where it is going. "Where there is no vision, the people perish."[1465] The law is our collective vision. The law gives us our societal boundaries. Being fallible we are driven by forces that we do not understand despite our technological advances. Professor Dr. Jordan Peterson observes:

> We have learned to live together and organize our complex societies slowly and incrementally, over vast stretches of time, and we do not understand with sufficient exactitude why what we are doing works. Thus, altering our ways of social being carelessly in the name of some ideological shibboleth (diversity springs to mind) is likely to produce far more trouble than good, given the suffering that even small revolutions generally produce.[1466]

The grand historical arch gave us religious protection in the West. This work has highlighted the various ways in which the law has treated religion as special. Accommodation

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[1464] Richard Moon, "Freedom of Religion Under the Charter of Rights: The Limits of State Neutrality" (2012), 45 U.B.C. L. Rev. 497, at 507. Despite this articulation of the problem, Professor Moon makes it clear, as we have seen in this dissertation, that he in no way supports TWU's position.

[1465] Proverbs 29:18, KJV.

[1466] J. Peterson, *supra* note 265, at 118-119.

of religious practice became the norm. Exemptions for religious holidays, religious symbolic dress, refusal to have photographs taken, employment standards for hiring and firing employees, and admittance to religious communities in churches and schools were, and still are, commonplace.

However, in recent decades there has been a steady stream of academic and popular discussion that has challenged the legal status of religion. While the secularization thesis, that confidently proclaimed the end of religion as the populace became more educated, has not materialized, there has been in its stead a continuous assault on religion, Christianity in particular. The rise of identity politics has ushered in a Sexular Age emphasizing radical individualism that eschews any societal conceptualization of personal sexual norms. Such radicalism manifests into an absolute demand for inclusion in what were once considered private religious institutions. The legal profession's opposition toward Trinity Western University's School of Law proposal is representative of the *zeitgeist*. The law's accommodation of religious practices that were evident in *TWU* 2001 could no longer apply in *TWU* 2018. Times have changed.

The SCC's *TWU* 2018 decisions represents what I have referred to as the legal revolution against the law's accommodation of religion. Rather than follow its own 2001 precedent, the SCC majority simply ignored it without any explanation. The law is no longer willing to stand against the *zeitgeist* in favour of the law's liberal democratic wisdom of accommodation.

As time marches on we are bound to re-learn why it was that religious freedom was considered by former Chief Justice Brian Dickson as the the "prototypical" right. It will, as I have already discussed, come at a cost. Far better to have taken the cautious approach and in humility seek to understand why we were given what we were.

8.5 Attitude of the Legal Profession Toward Religious Accommodation

Using Kuhn's model as a framework for analysis allows us to recognize the revolutionary shift underway in the legal community. Religion's critics were of the view that the law's accommodation of religious institutions, such as TWU, which continue to uphold traditional marriage even in a context where same-sex marriage is legal, was inadequate. The judiciary and the legal profession, it might be said, were embarrassed by the law's protection of religious communities with "degrading and disrespectful" views and practices according to the elites. As Justice Campbell pointed out, the law societies were more concerned with "What would people think?"[1467]

The growing academic literature against Christian institutions, as highlighted in this work, has sought to ensure that the legal fraternity is on "the right side of history." The strident opposition of the legal profession was exhibited in the letters, the testimony to the Federation of Canadian Law Societies and to the law societies in British Columbia, Ontario, and Nova Scotia. The condescending attittudes expressed in the decisions of both the Ontario Courts and the Supreme Court of Canada are indicative of a judiciary that has rejected any semblance of respect for the sincerely held beliefs of religious communities that hold to and practice, in all respects, traditional, monogamous heterosexual marriage. Professor Faisal Bhabha warned that the denial of TWU's law school "would be like saying 'evangelical Christians are not

[1467] *TWU* NSSC 2015, *supra* note 775 at para 255. "[W]hat matters is the anti-equality message that would be conveyed," asserted Dianne Pothier, *supra* note 1215, at 6.

welcome' in the legal profession."[1468] Remember in *TWU* 2001 the SCC stated "TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions."[1469] Denying accreditation to the law school said, in effect, "TWU is not for anyone." The 2001 case also recognized that the same logic that denied accreditation of the education degree because of the Community Standards could be applied to denying teachers who were members of a particular church with the same views.[1470] But, there should be respect, said the 2001 SCC, for a "diversity of views."[1471] Since the legal profession has no room for TWU then what is to prevent the profession from turning on those legal practitioners who hold the same views as TWU? Already the Law Society of Ontario is seeking to impose a "diversity" policy.[1472] Those lawyers with divergent opinions from the Law Society of Ontario are put on notice. The concerns of the SCC in *TWU* 2001 about the education profession are soon to be realized in the legal profession.

8.6 Consequences of Removing the Special Status of Religion

The Legal Revolution has already destroyed TWU's law school proposal. TWU would have made a significant contribution to the legal profession with "practice ready"[1473] graduates. Instead of accreditation, TWU faced yet another attack because of its religious beliefs. Even though, after the SCC decision, TWU no longer made the Covenant obligatory for the student body, the legal community continued to say that that concession was not good enough. Such inflationary demands suggest the anti-TWU critics will not be satisfied until TWU no longer maintains its religious identity. Hardly a position that supports diversity. As Professor Benson notes, "[e]quality is not homogeneity and requires a respect for diversity."[1474]

TWU's subsequent decision to make the Covenant voluntary was no doubt a pre-emptive attempt to hold off the onslaught of the now emboldened academic regulators of its other degrees such as education, nursing and accounting.

The SCC *TWU* 2018 decisions crossed the fast-moving Rubiconian waters of identity politics. No longer is the court neutral on the matters of sexual politics and religious freedom. It has decided that the internal religious practices that expect conformity with traditional marriage are no longer worthy of state respect but are "degrading and disrespectful." Sexual identity politics demands "diversity" be interpreted as everyone (religious and non-religious individuals and institutions) accepting its view of what "equality" means. In essence, "diversity" is Orwellian doublespeak. There is no diversity. "National values" have become totalitarian. State divinity has resurfaced.

[1468] Faisal Bhabha, "Hanging in the Balance: The Rights of Religious Minorities," in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016), 265 at 283.
[1469] *TWU* 2001, *supra* note 26, at para 25.
[1470] *Ibid* at para 33.
[1471] *Ibid.*
[1472] For the policy see: https://lso.ca/about-lso/initiatives/edi/human-rights-and-diversity-policy; for opinion against the policy see: Marty Gobin, "The Law Society's diversity policy doesn't include diverse views," (9 April 2018) *Ottawa Citizen*, online: <https://ottawacitizen.com/opinion/columnists/gobin-the-law-societys-diversity-policy-doesnt-include-diverse-views>; Ryan Alford, "An arm of the state should not be forcing lawyers to declare their values," (25 November 2017) *CBC News*, online: https://www.cbc.ca/news/opinion/law-society-statement-1.4418125.
[1473] Janet Epp-Buckingham described this in her 2013 interview on the CBC Radio program "The Current," *supra* note 820.
[1474] Benson, "Foreword," *supra* note 234 at xxvi.

Public/Private Sphere.

When it comes to human sexuality, there is no longer a public or private sphere. Sexual identity politics has breached the ramparts of religious institutions just as Wintemute and Eskeridge expected it would. Religious beliefs, especially the practice of heterosexual normativity, are deemed harmful by academic and judicial opinion as expressed in the SCC *TWU* 2018 decisions. The claim is that religious communities have no right to maintain their own distinctive nature when operating in "public."[1475] The premise of the argument is that religion, religious individuals, and religious communities have no business bringing their religious beliefs and practices into the so-called public sphere. Religion should only be confined to "the context of actual religious worship and observance."[1476] Otherwise, any person could, on the basis of genuinely held belief, "demand an exemption from non-discrimination norms in the provision of services to the public."[1477] If religious communities are involved in "public" enterprises, they must either yield to public norms or vacate the public field.

This argument requires a definition of "public" that describes the provision of any services or endeavors outside of "actual religious worship and observance."[1478] Thus, religion is limited to a very narrow "private sphere," while the "public sphere" expands into much broader territory "where the rights of others ought not to be affected by religious beliefs."[1479] In essence, this argument demands that religion be confined to the four walls of a church, mosque, or temple. Any involvement of religion outside of the church is to be curtailed. This was the approach taken by the Ontario courts in their rulings against TWU. There is no guarantee it will stop there. For if religious beliefs and practices are by definition harmful, why would the state stop at the doors of the church? The logic now unleashed by the SCC is that the state must be able to enter the very sanctuary. Consider that state regulators decide whether to grant registered charitable status to churches. Should Canada Revenue Agency also deny such status for similar reasons as the law societies denied TWU accreditation?

The argument that religion should be given no public space in which to operate is an attempt to re-imagine religion as a "harmful" force rather than a positive force that has contributed to the well-being of liberal democratic societies. To eliminate all opposition to modern sexual equality norms requires a concerted effort to destroy the legitimacy of religion and religious institutions in the public eye.That is because religious faith on sexual norms remains persistent. Some academics suggest that religious institutions could discriminate against those with deviant sexual norms "only in the specific contexts where those tenets are actually being instilled."[1480] Such arguments are intolerant of difference and use the law "as the means of forcing one set of beliefs to be dominant."[1481]

MacDougall and Short argue that it is alarmist to suggest that accepting sexual orientation equality claims will result in interference with religious worship on the issue of marriage.[1482] However, if it is improper to be involved in a public enterprise and follow one's religious convictions on human sexuality, then should it not follow that it is improper for clergy,

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[1475] MacDougall & Short, *supra* note 483 at 138.
[1476] *Ibid* at 134.
[1477] *Ibid.*
[1478] *Ibid.*
[1479] *Ibid* at 138.
[1480] *Ibid* at 140.
[1481] Benson, "Attack on Western Religions" *supra* note 468 at 113.
[1482] MacDougall & Short, *supra* note 483 at 145–46.

performing a public function of marrying people, to refuse to perform a marriage based on religious scruples? In other words, the SCC's *TWU* 2018 decisions are inconsistent with its holding in the *Marriage Reference* that clergy are protected from having to perform their public function of marrying people if it interferes with their religious beliefs.[1483] I suggest that the refusal to allow marriage commissioners in Saskatchewan[1484] an exemption from performing marriages to which they are morally opposed is not much different in principle than the ministers of religion or clergy who were given that right in the *Same-sex Marriage Reference*. Both the clergy and marriage commissioners are acting as public officials. Both are refusing to perform on the basis of religious grounds. The only difference is that one is employed by the church and the other by the state. Professor Richard Moon characterizes the marriage commissioners as making a political statement against the rights of other and suggests, "…freedom of religion does not support the accommodation of religious views about the rights and freedoms of others."[1485] I disagree. At issue is not the view of marriage commissioners' opinions of the rights of others. Rather, it is their being forced to act against their will, in violation of their religious beliefs, in the same way as the clergy refused to act against their will. In any event, there remains a dissonance between how the law treats clergy and marriage commissioners.[1486]

The Loss of Religious Freedom.

Without an opportunity to practice one's beliefs, how meaningful is religious freedom? Religious communities, such as TWU, and their constituent members do not hold religious views lightly. Such beliefs are their very identity. The SCC's ruling, which effectively bans them from operating their university in accordance with their religious belief on marriage, is not simply rebuking the belief but also the institution and the individuals. The religious community is no longer truly free. The fact that TWU changed its position subsequent to the SCC's decisions does not alter that fact. The SCC's denial is to deny the right of religious communities to establish their own institutions based on their religious beliefs.

In fact, respect for religious freedom as it accommodates religious practice is necessary for the practical implementation of liberal democratic theoretical ideals of justice and equality.

[1483] *Same-Sex Marriage*, *supra* note 178 at para 58.

[1484] Three cases in Saskatchewan have ruled that marriage commissioners opposed to performing same-sex weddings cannot be accommodated. They are: *Nichols v. Dept of Justice, Government of Saskatchewan* (25 October 2006, Sask HRT); *Nichols v. MJ and the Sask HRC* 2009 SKQB 299; *Re Marriage Commissioners Appointed Under The Marriage Act* 2011 SKCA 3.

[1485] Richard Moon, "Conscientious Objections by Civil Servants: The Case of Marriage Commissioners and Same-Sex Civil Marriages," in Benjamin L. Berger & Richard Moon, eds, *Religion and The Exercise of Public Authority* (Oxford: Hart, 2016) at 165. Also see Richard J. Moon, "Conscientious Objection in Canada: Pragmatic Accommodation and Principled Adjudication" (2018) 7 Oxford Journal of Law and Religion, 274–295.

[1486] Professor Moon suggests the difference is that marriage commissioners are state actors and their opposition cannot be protected as religious freedom under s. 2(a) of the *Charter* because their opposition is really not about religion but a political position about the rights of others in the public sphere (see 163). I take Prof. Moon's position to be that once a person, like a marriage commissioner, takes a public role then personal conscience can no longer be protected under the *Charter*. While I do not have the space to adequately rebut that position it appears to suggest that those with religious conscientious positions against public norms need not apply to public offices. That, in my respectful view, cannot be positive for the long-term health of a democratic society, especially when there are ample ways to accommodate public officials without having to cause any substantive harm to anyone's sexual equality rights.

This is because religious freedom is a prototypical right, which helped forge the path for the legal recognition of other rights such as freedom of assembly,[1487] freedom of speech, and the right to a fair trial beyond a reasonable doubt.[1488] The tenacity with which human beings adhere to their religious beliefs, convictions, and practices has resulted in liberal democratic societies acknowledging the absolute necessity to provide religious accommodation. Such accommodation forms part of the "democratic project" that may be defined as maximizing individual freedom while at the same time maintaining civil peace.

The SCC has now given license to public authorities to enquire into the beliefs and practices of religious communities and pass judgement. Those beliefs and practices deemed not in harmony with government sanction will result in the denial of government regulatory approval for the religious entity under review. This could impact licenses, grants of money, building permits, accreditation of schools (elementary, secondary, and post-secondary), and special exemptions. Should the SCC's *TWU* 2018 decisions embolden other state regulators then Canada as a free and democratic society is in peril.

State Supremacy Over Individual Conscience.

The loss of an individual's ability to follow his or her conscience is the point at which the state becomes the sole sovereign. As noted above, throughout Western civilization there has been tension between the state claiming the sole allegiance of its subjects and the claim of an individual conscience to follow his or her duty to divine sovereignty. The discussion in Chapter 3 on the Reformation also showed that the bifurcation of sovereignty allowed for religious (and other) freedom as we know it today. Religious freedom was the prototypical right in modern states that blazed the trail for other basic human rights. The reduction of religious freedom by the rise of state supremacy over the individual conscience is, if history is any indication, a troubling development.

State supremacy over individual conscience presupposes that the state has the power to force the will of society on the individual. The individual, and by extension fellow believers in a religious community, will either be denied the right to follow his or her conscience or be punished by the state for paying homage to divinity as he or she feels is their responsibility. The state would then be determining who will be sovereign in an individual's life. This approach takes on the characteristics of those ancient Roman emperors who demanded allegiance as both God and king to their citizens.

Religious Charities Will Close.

Other Christian universities across the country with similar policies or positions as TWU regarding marriage can be expected to either fall in line with the new political and legal reality of sexual identity politics or face similar retribution for being "on the wrong side of history." Our legal system will undertake a systematic recalibration as religion's protection and special status is removed from the law. Should such institutions be forced to comply with government dictates, then we as a society lose more of our diversity. The anti-religious critics

[1487] Inazu, *supra* note 1445 at 164. Inazu notes that in the United States it was the work of William Penn and Roger Williams that ensured dissenting religious groups could exercise their freedom in opposition to majoritarian norms.

[1488] James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven: Yale Univerity Press, 2008). Whitman presents the history of the concept of reasonable doubt, which was of theological origin meant to protect the souls of jurors. A person who experienced doubt yet convicted an innocent defendant was committing a mortal sin. As long as their doubts were not reasonable they were safe.

would suggest diversity which is "harmful" is not worth having. However, as pointed out throughout this work, the definition of "harm" is driven by identity politics ideology.

It is the religious character of these institutions that establishes the very root of who and what they are as "a living faith tradition."[1489] TWU's claim to operate with its Community Covenant "is a claim simply to live out the educational dimension of that Christian community's life," as Professor Dwight Newman so aptly put it. He continues, "The TWU claim is not a claim to isolationism but a claim to manifest religious belief in community, well within the core of religious freedom."[1490] If the religious organization cannot be what it was set up to be, it will cease to exist. Religious communities have no interest in cloning public institutions. An example of what we may expect can be found in the Massachuetts Roman Catholic child adoption agency which was denied its religious freedom.[1491] It mattered not to the political identity ideologues that the Catholic adoption agency provided the lion's share of special-needs children with adoptive homes.[1492] The equality argument was such a potent force that it demanded full compliance with no opportunity for compromise. Massachusetts sacrificed "one value judgment, the right of homosexuals to adopt, for another, the role of religion in determining a child's best interests."[1493] Offended feelings over sexual identity took precedence over the very practical reality of special-needs children in want of homes. The SCC adoption of identity politics meant that those offended by TWU's views on marriage were accommodated rather than those holding religious freedom rights.

The SCC's *TWU* 2018 decisions mean we must relearn the wisdom of the past. Religious accommodation evolved slowly; it is now being rapidly destroyed. Our collective memory of the religious struggle for equality is dim. When political expediency during WWII demanded Canadian citizens of Japanese ancestry be incarcerated and then later deported, the religious communities rose up in fierce opposition to such "false, cruel, un-British and above all, un-Christian"[1494] plans. Scholars Michael Barnett and Janice Gross Stein observed, "it is only a slight exaggeration to say 'no religion, no humanitarianism.'"[1495] The number of religious-based entities in humanitarian work is on the rise globally.[1496] It is ironic that while the rest of the world benefits from faith-based humanitarian charities, the West is being denied such services because the legal revolution cannot accept religious agencies operating within a structure that supports traditional sexual ethics.

This is not to belittle the obvious pain that members of the LGBTQ community have experienced within religious communities, as is evidenced by a number of LGBTQ advocates in the TWU law school case.[1497] However, the point remains that religious communities, despite all

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[1489] Dwight Newman, "Ties That Bind: Religious Freedom and Communities," in Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016), 18.

[1490] *Ibid*.

[1491] Matthew W. Clark, "The Gospel According to the State: An Analysis of Massachusetts Adoption Laws and the Closing of Catholic Charities Adoption Services" (2007-08) 41 Suffolk U. L. Rev. 871, 873, 895.

[1492] *Ibid* at 896.

[1493] *Ibid.*

[1494] Stephanie Bangarth, *Voices Raised in Protest: Defending North American Citizens of Japanese Ancestry, 1942-49* (Vancouver: UBC Press, 2008), 80.

[1495] Michael Barnett and Janice Gross Stein, eds, *Sacred Aid: Faith and Humanitarianism* (Oxford: Oxford University Press, 2012), 4.

[1496] Paras & Stein, *supra* note 1190 at 212.

[1497] See the evidence of Professor Elaine Craig before the Nova Scotia Barristers' Society, wherein she stated, "In my first year of law school, I came out to my family. My parents rejected me, disowned me, because of their belief that homosexuality is disgusting and perverted, vile and shameful, you might say", in "Meeting Of

of their shortcomings, are contributors to the social good and they ought not to be diminished, denied equal treatment, or maligned because they maintain traditional sexual norms within their own communities even though they are engaged in what is now perceived as "public" endeavours. As lawyer and LGBTQ rights advocate Kevin Kindred stated, "What troubles me the most when I try to come to terms with questions like this [accreditation of TWU Law School] is the fear that sometimes the arguments for equality for gays and lesbians are used as a sword and are used in order to attack the valued place that religious dissenters and religious minorities ought to occupy in Canadian culture."[1498] Kindred was not suggesting that there could be no opposition to TWU but that the opposition should be "moral and theological" not "with state-imposed negative consequences."[1499]

The Removal of Benefits and Accommodations.

Religion has been accommodated in a myriad of ways in Canadian law. The removal of religious freedom from its protected status will lead to the removal of the law's rebuttable presumption that religion is to be accommodated. A hierarchical regime where equality rights trump religion will mean that where there is a conflict, perhaps even only a perceived conflict, between religion and equality, the result will be the diminution of the perceived "religious privilege."

Clergy Accommodation.

The first religious areas to face challenges will be where religion conflicts with equality. One cannot make an exhaustive list, but certainly the most obvious would be the removal of the accommodation given to clergy who cannot marry a couple because of religious scruples. In *Marriage Reference*, the SCC stated:

> [S]tate compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(a) of the *Charter*. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the *Charter*.[1500]

At first blush, this holding appears to be immovable. However, it is immovable only in the current legal paradigm that treats religion as special and worthy of constitutional protection. Once religion has been determined to be the nemesis of equality, religion will be seen in a very different light. Allowing the clergy a marriage exemption is fundamentally inconsistent with the new paradigm. In the new paradigm, the state act of granting authority to clergy to perform a public action would be legitimizing the religious beliefs underlying the clergy's refusal to marry. In the same way, the Law Society would be condoning and accepting the worldview of TWU by allowing TWU graduates to practice law in its jurisdiction.

Charitable Status for Advancement of Religion.

As noted above throughout the *TWU* 2018 litigation, the law societies and/or their allies

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The Executive Committee of the Council of the Society" (13 February 2014), at 13, online (pdf): <http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-02-13_NSBSTrinityWesternU.pdf>.)

[1498] *Ibid* at 150.

[1499] Unless, of course, "TWU's views are expressed in such a way as to encourage hatred or violence or are translated into action which breaches the applicable human rights law," see Ginn & Kindred, *supra* note 1215 at 5.

[1500] *Same-Sex Marriage*, *supra* note 178 at para 58.

have argued that the case of *Bob Jones University*[1501] in the United States is applicable. It is curious that the SCC did not use BJU in its *TWU* 2018 decisions but the Ontario Court of Appeal did.[1502] For reasons I have argued elsewhere, this analogy fails.

However, to be consistent, the legal revolution would also have to argue that TWU's charitable tax status should be removed because TWU had discriminated against sexual equality by supporting traditional marriage, and such discrimination is contrary to public policy and not a public benefit.[1503]

We may expect further demands from the legal revolutionaries that Parliament repeal those applicable sections of the *Civil Marriage Act* and the *Income Tax Act* which protect religious charities that maintain beliefs and practices on traditional marriage – and/or that the SCC rule those applicable sections as unconstitutional in light of the *TWU* 2018 decisions.

8.7 Final Remarks

The Trinity Western University case has galvanized a significant group of academics and practitioners in the legal profession challenging religion's special status in the law. This study likens this phenomenon to a revolution, using Thomas S. Kuhn's theory of scientific revolutions to analyze this development. Legal revolutions were contrasted from scientific revolutions in their goals, methodology, and perspectives. These differences are based in the varying values and desired outcomes of each discipline.

It is concluded that the legal revolution against religious accommodation is due to the law's inability to answer critics of religion who favour sexual equality rights. There is on display a "rights inflation" phenomenon where the demands of equality rights have come to eclipse the legal norm of religious accommodation even in the private sphere. What was once considered private, such as running religious universities, is now viewed as public because of the state's regulation of such institutions. This is a new phenomenon which threatens every publicly regulated religious enterprise.

The law, like other fields of human endeavour, is swept up in our cultural moment that I have called "The Sexular Age." The Sexular Age concept has been only lightly introduced in this work and is in need of further development. But, at a minimum, it is the result of rampant individualism (associated with identity politics) that has captured the imagination of our time, wherein the individual is free to be whatever, whomever, they so desire. This Sexular Age has meant that religious communities, such as Trinity Western University, are at odds with the culture. There is a demand, arising within the legal fraternity, that the law must no longer grant legal accommodation to religious communities that refuse to accept the Sexular Age. Religion has become, in the minds of the sexularists, an anachronism that must be forced to change by law – so that all may be "free" to pursue their self-identity without any hindrance – even the hindrance of a private religious institution that one can only join voluntarily. Lost are the legal distinctions between private and public, religious and non-religious, the role of religion and the role of state, accommodation of difference and imposition of the majority.

Further, it is contended that the present legal revolution to strip religion of its favored legal status in favour of sexual equality puts liberal democratic ideals and ultimately the free and democratic society in a precarious position.

[1501] *Bob Jones University, supra* note 877.

[1502] The Ontario Court of Appeal accepted the BJU analogy; *TWU* ONCA 2016, *supra* note 701 at para 136-138.

[1503] Templeton, *supra* note 1344.

As traditional legal and moral norms are obscured by non-traditional norms, tension has increased between the conservative and progressive factions of society. This is particularly pronounced around sexual equality claims. Sexual equality advocates are challenging the right of religious institutions, such as universities, to maintain sexual prohibitions, based on their faith, on their campus operations.

It matters not, for these advocates, that the religious institution is privately funded and religious – indeed, "the fact that TWU feels that it is a Christian based institution is irrelevant to the discussion."[1504] The rationale is that the entity is involved in a "public" sphere activity and must abide by public norms or else cease functioning. This radical concept has been around since at least the time of the French Revolution but is one that liberalism ultimately rejected as being too radical and incompatible with a free and democratic society. However, it is now being given new life in the struggle between religion and sexual equality.

It is revolutionary from the current state of the law. This development will alter the very framework of how religious entities operate in Canadian society and will lead to a diminished public role of religious communities in public service enterprises. Transitioning to an era of reduced religious tolerance has an unknown outcome for the democratic project that has historically sought to increase the maximum amount of individual freedom while simultaneously maintaining civil peace.

There is a need among legal practitioners, academics, and the judiciary alike for a deeper appreciation of religion and its role in democracies. This study argues that religion has had a unique role in buffering the state tendency to demand ultimate allegiance at the expense of individual conscience.[1505] Through exploring Trinity Western University's law school proposal and the opposition to it by the legal profession, this study illustrates and demonstrates the practical application of its contention that opposition to religious tolerance on matters of traditional sexuality, within the legal profession, is revolutionary and, if successful, foreshadows significant challenges to democratic values and principles both institutionally and individually. Institutionally, constraint is now possible as other religious institutions will be, in all likelihood, denied government approval to operate in the public sphere for failing to abide by the government's interpretation of the *Charter* and its moral judgements as a "blueprint for moral conformity". Evangelical Christians, as individuals, will face future challenges in other contexts similar to their loss of the freedom to attend a law school within the ambiance of a like-minded Christian setting.[1506]

TWU was forced to defend itself twice over the last two decades when it sought to offer a new degree program. *TWU* 2001 involved the education degree; *TWU* 2018, the law degree.

[1504] Email from Peter Leslie (4 February 2014), in NSBS Submissions, *supra* note 1200 at 142.

[1505] A similar sentiment was echoed by President Trump in his inaugural address: "At the bedrock of our politics will be *a total allegiance to the United States of America*, and through our loyalty to our country, we will rediscover our loyalty to each other" (emphasis added), see "The Inaugural Address" (20 January 2017), online: *The White House* <https://www.whitehouse.gov/briefings-statements/the-inaugural-address/>.

[1506] As Justice Campbell so aptly put it in *TWU* NSSC 2015, *supra* note 775 at para 11:

> People have the right to attend a private religious university that imposes a religiously based code of conduct. That is the case even if the effect of that code is to exclude others or offend others who will not or cannot comply with the code of conduct. Learning in an environment with people who promise to comply with the code is a religious practice and an expression of religious faith. There is nothing illegal or even rogue about that. That is a messy and uncomfortable fact of life in a pluralistic society. Requiring a person to give up that right in order to get his or her professional education recognized is an infringement of religious freedom.

Even though TWU ought to have been protected by the *Charter* (as it was in *TWU* 2001), in *TWU* 2018 its protection was denied because the law societies were given the deference to apply their statutory objectives by means of "*Charter* values." The net effect was a denial of the *Charter* right. As Côté and Brown JJ noted, s. 52 of the *Constitution Act*, 1982, provides for the primacy of the Constitution, meaning "that rights trump statutory objectives and decisions taken thereunder",[1507] not the other way around. Yet neither the *Charter*, nor human rights legislation, nor even a SCC decision (*TWU* 2001) were sufficient to safeguard TWU's religious freedom.

TWU's experience stands as a troubling development going forward for those religious organisations that are involved in government-regulated industries. The SCC has made it abundantly clear that state actors will be given deference in carrying out their statutory mandates while balancing *Charter* rights. However, as noted above, even when state actors do not carry out such balancing, as LSBC admitted, the SCC was willing to do it for them to ensure the "right" decision was made. The ability of these state actors to self-define their "public interest", as did the law societies, will mean a further expansion of government into the private sphere. What was once private has now become public.

It is reasonable to expect state actors in other fields to be emboldened to expand their authority and only provide a cursory glance at the *Charter* rights engaged by their "reasonable" decisions. Even if they were to be predisposed to favour religious accommodation, they will not be able, in all likelihood, to withstand the loud outcry from political activists who would accuse them of "condoning" discrimination. One only has to consider the myriad government actors that must give approval for religious organisations to operate. One of those is the Canada Revenue Agency which is tasked with registering charities to allow them to issue charitable donor receipts. During the *TWU* 2018 hearings the Canadian Bar Association lawyer admitted that government authorities would likely be justified in denying tax exempt status so that they do not condone discrimination.[1508]

TWU 2018 illustrates the paradigm shift that has occurred in the legal profession against the law's accommodation of religious practice. We now await the unfolding consequences of this shift as religious sensibilities are increasingly labelled "degrading and disrespectful" by a Court moved to develop its own "*Charter* values". These diminish *Charter* rights in the guise of diversity that denies the very freedom and pluralism it claims to be implementing.

TWU's concession to remove the mandatory code of conduct was an unforeseen development after it had fought so long to maintain its right to have a mandatory Community Covenant. There is much to consider about that development. It raises questions about the extent to which society will want to sanction the state's use of power to force a religious community into compliance with state dictates even when the religious community has done nothing unlawful. However, that is a discussion that other scholars will want to broach in the near future.

Nevertheless, TWU's move to change ought to be seen as a good faith move that should reassure the legal profession that though it is a Christian law school it is not inherently dogmatic nor unreasonable. Rather, it is pragmatic and respectful of the law, seeking to do all

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[1507] *LSBC v TWU* 2018, *supra* note 14, para 305.

[1508] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 and *Trinity Western University v. The Law Society of Upper Canada*, 2018 SCC 33 (Transcript of oral hearing, SCC vol 2, 1 December 2017, at 282-283).

that it can to reach a compromise that keeps its faith intact while, at the same time, meeting the equality concerns raised by the *TWU 2018* litigation.

For its part, the legal profession must now take leadership and recognize that under its expanded "public interest" mandate, religious minorities must also be protected, even if they have beliefs and practices that no longer comply with changing sexual mores. They are still due the respect and dignity that the *Charter* gives them. Despite disagreements, we must seek to get along. Fundamental human life issues such as marriage, abortion, and end of life will forever be part of the bubbling caldron of public debate. That should not deter us from living together in and with our differences, respecting the right of others to peaceably hold and practice a different way of life.

If TWU applies again for a law school, it would appear that the revolutionary spirit within the profession would continue and seek to expunge religious accommodation from the law. However, it is open for the profession to consider, upon further reflection on the anti-religious sentiment exhibited by its members, whether there is still any role for it to protect and promote a plural, multicultural society that tolerates difference – including the ability of a Christian university to have a Christian law school – all in the "public interest".

What can we expect in the future?

If my analysis of the legal revolution against the place of religion is correct, that is to say, that it follows similar developments to what Kuhn noted in the scientific community, then the revolutionaries, being in charge of legal education, will ensure that all budding lawyers will see the law of religious accommodation in the same way as the revolutionaries do. Kuhn noted that in the scientific revolution the revolutionaries "are in an excellent position to make certain that future members of their community will see past history in the same way."[1509] The repudiation of a past paradigm means that it is no longer "a fit subject for professional scrutiny" and all previous works based on that paradigm are of no use.[1510] This "drastic distortion in the scientist's perception of his discipline's past" makes the member of the scientific community a "victim of a history rewritten by the powers that be."[1511]

The powers that be in the legal profession have reinterpreted the law of religious accommodation to mean that any private religious organization, regulated by government, that does not accommodate sexual identity will not be accommodated by the state. The main justifications for this new paradigm, as adopted by the SCC, are: a) that government must not be seen to condone a religious belief and/or practice that violates the cardinal rule of our Sexular Age – the individual is free to do or be whatever "they" want; b) the government must not be part of limiting the ability of the public to access any of its regulated programs, even those operated by religious communities.

The legal academy has the power to ensure that all new lawyers will be taught, not the old paradigm of religious accommodation based on the intellectual, political, religious, and philosophical history of liberal democratic society, but on the new understandings of the Sexular Age that emphasises identity politics.

The legal profession has now obtained from the SCC the increased authorization to re-define their public interest mandate in accordance with the internal political realities of the profession. The irony is that the "public interest" is, in the circumstance, more aligned with the internal interests of the professional members than it is aligned with the public – that is, the average Canadian citizen who is not a lawyer.

[1509] Kuhn, *Revolutions, supra* note 1 at 166.
[1510] *Ibid* at 167.
[1511] *Ibid*.

In the end, the SCC in its *TWU* 2018 decisions has created a large echo chamber wherein the legal profession has entered a world apart from the Canadian public. It is the interests of the lawyers, the legal governing bodies, and the judiciary that have now adopted a new paradigm. The law of religious accommodation has been fundamentally altered. The respect for religion, the granting of special status to religion, has been taken away. As we move forward it is my prediction, based upon my study in this field, and the assistance of Kuhn's work, that all legal vestiges that held religion as "special" will be systematically removed. However, this study has also revealed that history is clear: religion has a remarkable ability to revive and become a societal force that has to be reckoned with. Perhaps *TWU* 2018 is the low point of the accommodation of religion in Canadian law; perhaps it is not, and there is less accommodation on the horizon. What is for certain is that the debate about religion being special is far from over. Professor Frank S. Ravitch rightly bemoans the fact that the struggle between religion and sexual equality is taking a dark turn. As both sides dig in their heels there are, he observes, two authoritarian groups – one on each side of the debate that attempts "to silence and shame those who do not agree with them – or those who simply seek open discourse."[1512] "It is easy," he notes, "to destroy bridges and much harder to build them."[1513] Well said.

We are, it would seem, at a place described by Churchill: "Now this is not the end. It is not even the beginning of the end. But it is, perhaps, the end of the beginning."[1514]

[1512] Frank S. Ravitch, *Freedom's Edge: Religious Freedom, Sexual Freedom, and the Future of America*, (Cambridge: Cambridge University Press, 2016), 203.
[1513] *Ibid* at 204.
[1514] Winston Churchill, "The End of the Beginning," The Lord Mayor's Luncheon, Mansion House (10 November 1942), online: *The Churchill Society, London* <http://www.churchill-society-london.org.uk/EndoBegn.html>.

SUMMARY

The Legal Revolution Against the Acccommodation of Religion:
The Secular Age v. The Sexular Age

The blast of cannons, the slice of the guillotine, the march of rebel soldiers: these are the popular images of revolution. Yet revolts may occur just as decisively in the pages of an academic journal, or in the comments of a courthouse or law faculty.

Recognizing the parallels between politics and science, Thomas S. Kuhn asserts that paradigmatic shifts within scientific studies are as disruptive as the violent overthrow of one political regime by another. His work, *The Structure of Scientific Revolutions* (1970), examines the transition from one established paradigm to another through the accumulation of anomalies which build to a crisis. Eventually, the inadequacy of the old paradigm is revealed and resolved through a "Eureka" moment which offers an entirely new way of understanding and interpreting the world. The revolution is complete with the repudiation of the old and the consolidation of a new worldview.

Applying Kuhn's model to the legal profession presents a unique and original analysis of the relationship between religion and the law – a special relationship which now appears to be verging on crisis.

Freedom to practice religion has long been part of the legal paradigm in liberal democracies. However, historic accommodations are threatened by the new "Sexular Age," in which asymmetrical equality claims seek to vanquish all other human rights that would occupy similar public space. Moreover, they assault the private domain which liberal democracies have traditionally given to the practice of religion. The tensions between the old paradigm and the anomalous demands of equality rights are effectively illustrated in the Trinity Western University (TWU) Law School case: a seeming crisis point in the revolution.

Chapter one of this dissertation asks what is required of the law if religious tolerance is indeed at the "very foundation of our democracy" (see *Multani v. Commission scolaire Marguerite-Bourgeoy,* 2006*)*. Should liberal democracies continue to insist that religion be given special constitutional treatment in the current context? If so, why? And finally, what would be the possible consequences should the legal revolution succeed in overthrowing religion's special status?

After an analysis of Kuhn's model of revolutions in chapter two, chapters three and four delve into the meaning or function of religion (with reference to scholars as diverse as Haidt, Leiter, Nehushtan, Norenzayan, or Dworkin), and into the historical and philosophical rationale for protecting religious freedom in the West. Chapter five then turns to an analysis of the rise of secularism and the concurrent repudiation of religious traditions, particularly regarding sexuality. The advance of equality claims based on sexual orientation and the redefinition of marriage call into question the place of religious influence on law and public policy.

This is evident in the opposition to TWU's law school proposal, examined in chapters six and seven. Objections, which would deny TWU's right to rely upon the current legal paradigm regarding religion, represent a "Eureka" moment for many in the legal profession. These critics have concluded that the law's accommodation of religion no longer fits their understanding of how the law should operate when religious and sexual minorities come into conflict.

The revolt over the TWU case has created a heightened sense of incompatibility between the legal system and religion. Going forward, how should the law balance religious and secular interests? And how should society respond to a voluntary community of members with internal rules of conduct? Given the importance of religion in our diverse and plural

society, will religious communities continue to have space in which to operate without fear of state reprisal?

The conclusion considers several possibilities for the future (including a skeptical response to William Eskridge's prediction that religious groups will gradually align with secular society on matters of sexuality), before positing seven suggestions that accept dissonance as strength, not failure. These include the assertion that religion matters, and that religion is not the nemesis of equality rights. When an institution such as TWU is private, peaceable, non-commercial, and there is no evidence of abuse of private power, then the law ought to maintain its indifference.

The ramifications go well beyond the accreditation of the TWU law school. To remove religious accommodations is to destroy what the SCC in *Mouvement laïque québécois v. Saguenay (City)*, 2015, termed "the pursuit of an ideal: a free and democratic society. This pursuit requires the state to encourage everyone to participate freely in public life regardless of their beliefs." Historically, liberal democratic societies have achieved unprecedented peace and stability leading to expansive personal freedoms. Denying those freedoms would not merely restrict a particular institution or community, but would limit our very capacity to maintain civil peace and liberty.

SAMENVATTING (DUTCH SUMMARY)

De juridische revolutie tegen de accommodatie van godsdienst: de seculiere tijd versus de seksuliere tijd

De rook van kanonnen, de slag van de guillotine, marcherende rebellenstrijders: dit zijn de beelden die revolutie oproept. Revoltes kunnen echter evenzo daadkrachtig plaatsvinden in de pagina's van een academisch blad of in de commentaren van een rechtbank of rechtenfaculteit.

Zich terdege bewust van de paralellen tussen de politiek en de wetenschap stelt Thomas S. Kuhn dat paradigmatische verschuivingen binnen wetenschappelijke studies net zo ontwrichtend zijn als de gewelddadige afzetting van het ene politieke regime door het andere. Zijn werk *De structuur van wetenschappelijke revoluties* (1970) verkent de overgang van een gevestigd naar een nieuw paradigma door middel van de opstapeling van anomalieën die tot een crisis leiden. Uiteindelijk komen de tekortkomingen van het oude paradigma aan het licht en worden ze verholpen door een eurekamoment: een geheel nieuwe manier om de wereld te begrijpen en interpreteren. De revolutie is compleet met de verwerping van het oude wereldbeeld en de consolidatie van een nieuwe zienswijze.

Het toepassen van Kuhn's model resulteert in een unieke en originele analyse van de relatie tussen godsdienst en de wet; een bijzondere relatie die nu in een crisis lijkt te geraken.

De vrijheid om een geloof te belijden maakt sinds jaar en dag deel uit van het juridisch paradigma in liberale democratieën. Historische accommodaties worden echter bedreigd door de nieuwe "Seksuliere Tijd," waarin asymmetrische gelijkheidsclaims tot doel hebben alle andere mensenrechten die vergelijkbare publieke ruimte innemen, weg te vagen. Bovendien vallen ze het private domein aan dat liberale democratieën traditioneel hebben gegeven aan het praktiseren van godsdienst. De spanningen tussen het oude paradigma en de anomale eisen van gelijkheidsrechten zijn goed geïllustreerd in de zaak van de beoogde rechtenfaculteit van Trinity Western University (TWU): naar alle waarschijnlijkheid een crisispunt in de revolutie.

In het eerste hoofdstuk van deze dissertatie wordt gevraagd wat er wettelijk nodig is als verdraagzaamheid voor godsdienst inderdaad aan het "fundament van onze democratie" ligt (zie *Multani v. Commission scolaire Marguerite Bourgeoy,* 2006). Moeten liberale democratieën erop blijven staan dat godsdienst speciale constitutionele behandeling krijgt in de huidige context? Zo ja: waarom? En wat zijn de mogelijke implicaties als de juridische revolutie erin slaagt om de speciale status van godsdienst omver te werpen?

Na een analyse van Kuhn's model van revoluties in hoofdstuk twee gaan hoofdstukken drie en vier in op de betekenis of functie van godsdienst (verwijzend naar een keur aan geleerden, van Haidt, Leiter en Nehushtan tot Norenzayan en Dworkin) en op de historische en filosofische onderbouwing voor het beschermen van godsdienstvrijheid in het Westen. Hoofdstuk vijf richt zich vervolgens op een analyse van de opkomst van het secularisme en de gelijktijdige verwerping van religieuze tradities, deels met betrekking tot seksualiteit. De opmars van gelijkheidsclaims gebaseerd op seksuele geaardheid en de herdefiniëring van het huwelijk trekken de plaats van religieuze invloed op de wet en overheidsbeleid in twijfel.

Dit is evident in het verzet tegen het voorstel voor een rechtenfaculteit van TWU hetgeen besproken wordt in hoofdstukken zes en zeven. De gemaakte bezwaren, die TWU het recht ontzeggen om zich te verlaten op het huidige juridische paradigma ten aanzien van godsdienst, zijn een eurekamoment voor velen in de juridische wereld. Deze critici hebben geconcludeerd dat de accommodatie die de wet biedt aan godsdienst niet langer voldoet aan

hun begrip van hoe de wet zou moeten functioneren wanneer religieuze en seksuele minderheden met elkaar in conflict komen.

De opstand in de TWU-zaak heeft een versterkt gevoel van onverenigbaarheid tussen het rechtssysteem en religie bewerkstelligd. Hoe moet de wet religieuze en seculiere belangen in de toekomst in balans houden? En hoe zou de maatschappij moeten reageren op een vrijwillige gemeenschap die interne gedragsregels hanteert? Zullen religieuze gemeenschappen, gezien het belang van godsdienst in onze diverse en pluralistische samenleving, ook in de toekomst ruimte hebben om te bestaan zonder bang te hoeven zijn voor staatsrepresailles?

De conclusie neemt verschillende mogelijkheden voor de toekomst onder de loep (waaronder een sceptisch antwoord op de voorspelling van William Eskridge dat religieuze groeperingen zich langzaam zullen aanpassen aan de seculiere samenleving als het gaat om seksualiteitskwesties), waarna het zeven suggesties doet die dissonantie voorstellen als kracht, niet als defect. Deze bevatten de stelling dat religieuze kwesties en godsdienst geen vijanden zijn van gelijkheidsrechten. Als een instituut zoals TWU privaat, vredig en niet-commercieel is - en als er geen bewijs is van misbruik van private macht - zou de wet haar onverschilligheid moeten bewaren.

De gevolgen strekken veel verder dan de accreditatie van de rechtenfaculteit van TWU. Het afschaffen van religieuze accommodaties is het vernietigen van wat het Canadese Hooggerechtshof, in de zaak *Mouvement laïque québécois v. Saguenay (City)* uit 2015, omschreef als '…het nastreven van een ideaal: een vrije en democratische samenleving. Dit vereist dat de staat iedereen aanmoedigt om vrijelijk in het publieke leven deel te nemen, ongeacht hun geloof." Historisch gezien hebben liberale democratieën ongekende vrede en stabiliteit bewerkstelligd wat tot ruime persoonlijke vrijheden heeft geleid. Het ontnemen van deze vrijheden zou niet alleen een bepaald instituut of een bepaalde gemeenschap beperken; het zou ons allen beperken in het bewaren van de maatschappelijke vrede en vrijheid.

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