THE RONNING CENTRE FORUMS • II

Living Together with Disagreement: Pluralism, the Secular, and the Fair Treatment of Beliefs in Canada Today

A presentation by

Iain T. Benson

with a response by

Alex Fielding

THE CHESTER RONNING CENTRE
FOR THE STUDY OF RELIGION AND PUBLIC LIFE

THE CHESTER RONNING CENTRE FOR THE STUDY OF RELIGION AND PUBLIC LIFE

AUGUSTANA CAMPUS, UNIVERSITY OF ALBERTA

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THE CHESTER RONNING CENTRE

FOR THE STUDY OF RELIGION AND PUBLIC LIFE

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II

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Chester Alvin Ronning, OC, CC (1894–1984),
in whose memory the Centre is named,
Principal of Camrose Lutheran College, 1927–42,
subsequently served Canada
as one of her most eminent diplomats.
He and his family made their home
in Camrose

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Iain T. Benson

*Living Together with Disagreement: Pluralism, the Secular, and the Fair Treatment of Beliefs in Canada Today**

Revised and updated text of a presentation to Ronning Centre forums at the Faith and Life Chapel, University of Alberta, Augustana Campus, Camrose, Alberta on February 17, 2007, and at the Anglican Parish of Christ Church, Calgary, Alberta, on February 18, 2007

PART I: PLURALISM AND THE SECULAR

This paper will examine two key terms in relation to our culture today: "pluralism" and the "secular". It will argue that both terms are generally insufficiently defined in popular contemporary usages, often frustrating rather than furthering the very principles they should represent. After examining these, I'd like to turn to discuss the fair treatment of beliefs in Canada

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* I would like to thank the organizers and, particularly, David Goa, Director of the Chester Ronning Centre, for the invitation to address these few remarks to the Centre's Forum audiences, and also those present for their questions.

today on tfihe basis of what we have seen in relation to the discussion of pluralism and the secular. First, however, it is useful to note that religious beliefs (linked with "conscience" in Section 2(a) of the Canadian Charter of Rights and Freedoms) have public dimensions. That is why our notion of the nature of the public sphere and its relation to beliefs is so critical.

THE PUBLIC NATURE OF THE RIGHTS OF "CONSCIENCE AND RELIGION"

It will be recalled that in the first decision of the Supreme Court of Canada dealing with the definition of the Freedom of Conscience and Religion in Section 2(a) of the Charter, then Chief Justice Dickson stated:

> 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*.[1]

Note that the words employed are active, public words – "declare", "manifest", "practice", "teaching", "dissemination". We would do well to remember those words and their public dimensions at a time when many of the challengers wish to avoid a sharing of the public realm by a privatization of those rights that have a genuinely public dimension. In recent years, some would choose to limit religion by finding it to be a private right only – something for home or church. Or else there is a suggestion, true in one way but which can be over-extended, that religious belief is one thing and religious conduct another.

TWO APPROACHES TO "PLURALISM" UNDER THE CANADIAN CONSTITUTION

It is important to consider the nature of pluralism in Canada. Like so many terms in our public discourse ("values", "the secular", "liberalism", etc.) its common use can mask the fact that it is little analysed. As such, if there are presuppositions in the term, or an ambiguous usage that is not discovered or discussed, we can be misled as to what is actually being said when the term is used. Pluralism can connote a kind of relativistic approach, as in "because we are a pluralistic society, such and such a moral position cannot have any public validity". It does not have to mean this, however, and in Canada our linkage of a language of pluralism with a firm commitment to group rights, for example, points us to a principled, and what might be called structural or shared pluralism, rather than one that is relativistic or, perhaps, totalistic. For this totalistic notion of pluralism views society as moving towards the articulation of only one public policy, and such a view is antagonistic to the notion of plurality and tolerance of diversity. The political condition in Canada respects the "*modus vivendi*", though, as I shall argue with examples drawn from recent legal cases, whether it will continue to do so remains to be seen, as this foundational aspect is now very much under attack.

John D. Whyte has noted that the Constitution of Canada has been framed on the basis not of any individualistic conception of liberalism but, rather, of one that respects and nurtures each person's communities. Moreover, the two kinds of rights protected by the Charter, group rights and individual rights (which, as with "religion", overlap as both personal and communal), derive from different conceptions of the proper role of the state, which are both reflected in the Constitution.

> There are two theoretical models for describing the modern democratic state. One derives from the political philosophy of liberalism, under which society is arranged without a particular conception of the good and in which individuals have claims of right to equal regard and respect. The other might be labelled the organic society, in which the primary focus is not the autonomy of the individual but the importance of nurturing communities or corporate life. Such a society adheres to a conception of the good in the sense that it accepts that the superior condition for individual well-being is not the maximization of personal autonomy but the growth of strong communities formed around common interests. The interest [sic] of individuals are best vindicated not through the recognition of each person's formal equality but through the joining together of those with similar interests to create nurturing, supportive, normative communities. An organic nation is comprised of these various communities each working out a political accommodation which reconciles conflicting interests but which allows as much of the normative role to the particular communities as possible .... The truly effective way to respect life and to achieve a fulfilled life may be through identification with a group and having the assurance that one community or another recognizes one as having distinguishable substantive value.[2]

Consequently, as Professor Whyte observes:

> It is impossible to discern in the constitutional text either the clear direction to promote liberal values as wholeheartedly as possible or the direction to sustain communitarian values to the greatest extent possible.

> The Charter reflects the tension. Of course, it gives impetus to the nation's change to liberalism, but it does not reveal, in any precise way, where the limit should be drawn to protect other political values.[3]

The Canadian model depicted above does not start with the proposition that either form of right is paramount, or will necessarily converge with or has a "trump" over other claims, but instead looks for the proper sphere of operation of each. This is a form of "structural pluralism" which must be respected. Recent commentary in the United States has recognized the principles of structural pluralism. James Skillen has noted that

> a just society is one in which multiple institutions and diverse spheres of responsibility can function together in freedom, under protection of the law[; so] then part of the legal obligation of a just government is to recognize and protect that complex diversity of society. Closely related to this principle, and mutually interdependent with it, is the principle of religious freedom .... government should act in accord with the principles of justice by treating faiths and faith communities with equal public protection. Government cannot do this, however, without respecting the freedom and diversity of those faiths.[4]

Claims that are, therefore, totalistic, and which claim to represent in themselves all of "public policy" where recognition as such effectively delegitimizes other legally contestable perspectives, must be suspected of overreaching. Such totalistic claims for "recognition" by any particular advocacy group ought to concern us if we are moving towards developing a richer respect for structural pluralism that holds together

notions of group as well as individual rights and a plurality of moral perspectives.

I should like now to turn to another key term in contemporary society – the "secular" – because, as with "pluralism", how we use the term "secular" can hide what is actually going on in its use. What do we mean by the term?

THE NATURE OF THE "SECULAR" AND THE ILLUSION OF "NEUTRALITY"

The term "secular" has changed its meaning over the last century and a half. The term in general usage now means, essentially, free *from* religion, as in "we ought to keep religion out of the schools because they are secular". This was not the original meaning, nor is it a meaning which recognizes the *modus vivendi* aspect of pluralism referred to above or the epistemological reality of moral acts in the lives of all citizens. We are, in short, all believers, and, as we shall see, the courts have, recently, come to acknowledge that any pre-emptive exclusion of "religion" from the category of "beliefs" that may operate in society is unfair to and intolerant of those beliefs that emanate from religious convictions, and gives a preferential position to the beliefs or convictions of atheists and agnostics.

This direction is inconsistent with the principles of a free and democratic society. It is not simply a matter of how beliefs are expressed, but of what communities are nurtured and created by the analysis that must be examined.

If we start off with the assumption (building it into our use of the term "secular") that religion has no place in the public sphere, then, of course, we shall tend to diminish the role of the religious in civil society. But this is really to adopt implicit-

ly or explicitly the ideology of atheistically-driven "secularism", since the term "secular", viewed historically, does not require, though it has come to imply, such a removal of the sacred dimension from the aspects of life it describes. The "secular" (which is better and more clearly understood and examined as "the public") is, properly understood, a realm of competing faith/belief claims, not a realm of "non-faith" or "non-belief" claims. Given the current dominance of the atheistic definitions of "secular" and "separation of church and state", it will take some time for them to be redefined so as better to support the right ordering of freedoms in contemporary society.

Note how in contemporary usage "secular schools", "secular government", etc. are widely understood to mean non-religious or not influenced by religion or religious principles. I would like to suggest that this is because we have adopted the atheistic or agnostic definition of "secular" in which the public sphere is pre-emptively stripped of religion and not a richer and more properly inclusive conception. The separation of church and state is, after all, a jurisdictional distinction important to both the church and the state. A valid separation should not preclude an equally valid *co-operation* between church and state. Most religious groups in the West, for example, do not in fact want the state to run the church or vice versa.

The historical shift in the use of "secular" should be recognized. It is tempting to ignore the shift in meaning by acquiescing in the use of the terms "secular" and "religious" as if they described different worlds. But they do not describe different worlds. They describe different functions. What we most often mean by "the secular" is the public or the state, and by

"religion", a set of practices within the state. Therefore the separation of "religion" from something constructed as "the secular" serves, usually implicitly and often unintentionally, an anti-religious goal and is neither accurate nor just.

Where the *Oxford English Dictionary* defines "secular", the uses of the word that suggest that the secular is "non-sacred" in character arise as recently as the mid-nineteenth century.[5] It was coined by George Jacob Holyoake and used by him and those whom he influenced, such as Charles Bradlaugh, who were secularists (atheistic and agnostic in belief). It is from works such as theirs that the current usage is adopted, in which the "secular" is understood to mean "free from religion".

In fact, this more recent use of "secular", which we may justly call the atheistic or agnostic interpretation, is seldom viewed alongside alternative understandings. This is not helpful since an atheistic definition, if used as the meaning for a central term such as "secular", fails to give a proper place to religion in the private and public dimensions of society. The atheistic "secular" becomes, in effect, a blueprint for the naked public square. A more informed historical understanding, built upon a richer epistemological ground, better reflects both the reality of beliefs in society and the principles of freedom that ought to undergird a properly civil society.

THE PARADIGM SHIFT ABOUT THE "SECULAR"

One of the most significant shifts for the future of equality and how we understand accommodation and collisions of rights in law occurred in the Supreme Court of Canada's decision in *Chamberlain* v. *Surrey School District,* and this shift has not

yet been sufficiently noted. The term "strictly secular" in the British Columbia Schools Act had to be defined. Did it mean, as held at trial, that "any influence by religion" nullified the "secular" (better understood as "public") nature of the Trustees' role and decisions? When they took into account the concerns of local parents on the suitability of certain books as "classroom learning resources", and these concerns in turn were based, as some were, on the religious convictions of the parents, did this run afoul of the "strictly secular" aspect of the legislation?

To hold this would have meant that, in effect, only atheists or agnostics had a right to have their beliefs fully respected in the public sphere. Mackenzie JA for the British Columbia Court of Appeal held, overturning the decision of the trial judge, that the "secular" must include religious beliefs and not be understood to place impediments in the way of religious believers.

Understanding the public sphere in this way constitutes a shift of tremendous importance; it has relevance in various areas, such as, most recently, the question of the personal beliefs of marriage commissioners in relation to same-sex marriage. In a sense the future requires us to realize, in line with the holding on a "religiously inclusive" public sphere in *Chamberlain*, that it is never a question of religion and the public, religion and the civic, or religion and law, but religious belief *within* the public, religious believers and groups *within* the civic, and so forth. The sharp dichotomies of anti-religious secularism should no longer hold sway in our analysis in Canada. This is easy to say, but to do the identification and nuanced analysis required is difficult, since it requires re-thinking our descriptions from first principles, as we shall see in years ahead.

What accommodation means is making the scope for dissent larger, instead of making it smaller by invoking false dualisms to drive religion into the private and out of the public. Overcoming some of the conceptual confusions of the past in relation to such false dichotomies as I've mentioned must also be accompanied by a re-understanding of "secularism", a term that is almost never used in relation to its clearly identifiable anti-religious history. Usually the term is employed with no definition at all or with a definition that elides the history of its origins.

SECULARISM IS ANTI-RELIGIOUS

Secularism, as it is understood in what we may call the English tradition, is a particular ideology. It has a meaning historically. When the term was coined by Holyoake in the mid-nineteenth century, he and those who followed him had an idea of driving religion out of the public sphere. Thus, for the courts to suggest, without analysis or argument on the point, or for academics to suggest, without analysis of the term, that Canada is based upon the principles of "secularism" (as some have done) indicates that they do not realize what they are dealing with.

Equality in relation to all sorts of believers, religious and non-religious, means we have to think more deeply about the key terms we use to describe Canadian society going forwards. If we live, as we do, in a society that has no religious establishment and allows public participation by all citizens (the term "secular" obscures these distinctions), it is one that is necessarily religiously inclusive and it is not one based upon the anti-religious ideology of secularism in which the public sphere is implicitly if not explicitly stripped of religion and religious influence.[6]

The implications of this for our thinking about religious belief in relation to such issues as public education curriculum and sexual orientation claims, or the responsibilities and limits of the role of civic officials such as marriage commissioners, are obvious. We need a new paradigm to deal with religious belief in relation to equality rights. Even if we look to reconciling, instead of "balancing", in certain areas, as Justice Iacobucci suggested in an article some years ago,[7] we still need to overcome the privatized presumptions or the unrealistic expectations that undergird the false dualisms I've referred to already.

Social recognition is not something the law ought to promise to one side of legally contestable social debates. The law ought to be ensuring the open texture of civil society, not bringing its weight to bear on one side of the matter, for to do this risks tilting civil society against the freedoms that the law in general must protect for everyone.

CHAMBERLAIN V. *SURREY SCHOOL DISTRICT:* THE MEANING OF "SECULAR" IN CANADIAN LAW: ENTER THE RELIGIOUSLY INCLUSIVE PUBLIC SPHERE

In the years following the turn of the new millennium the nature of the "secular" was very much at issue in the *Chamberlain* series of decisions out of British Columbia. There, the British Columbia Court of Appeal rejected the newer atheistic use of "secular" and affirmed that the secular is a realm which has, properly, a place for beliefs that emerge from religious commitment. Justice Mackenzie, for himself and his colleagues in a unanimous three-justice panel of British Columbia's highest court, analysed the term "secular" in the following manner:

Can "strictly secular" in s. 76(1) of the *School Act* be interpreted as limited to moral positions devoid of religious influence? Are only those with a non-religiously informed conscience to be permitted to participate in decisions involving moral instruction of children in the public schools? Must those whose moral positions arise from a conscience influenced by religion be required to leave those convictions behind or otherwise be excluded from participation while those who espouse similar positions emanating from a conscience not informed by religious considerations are free to participate without restriction? Simply to pose the questions in such terms can lead to only one answer in a truly free society. Moral positions must be accorded equal access to the public square without regard to religious influence. A religiously informed conscience should not be accorded any privilege, but neither should it be placed under a disability. In a truly free society moral positions advance or retreat in their influence on law and public policy through decisions of public officials who are not required to pass a religious litmus test.

A contrary interpretation is not only insupportable in principle, it would raise immense practical difficulties. How would it be determined that a moral position is advanced from a conscience influenced by religion or not? If the restriction were applied only where the religious conviction was publicly declared it would privilege convictions based on a conscience whose influences were concealed over one openly proclaimed. The alternative would be to require inquiry as to the source of a moral conviction, whether religious or otherwise. Both alternatives are offensive and indefensible.[8]

A leading American scholar on the law relating to religion, Michael W. McConnell, has written:

> The beginning of wisdom in this contentious area of law is to recognize that neutrality and secularism are not the same thing. In the marketplace of ideas, secular viewpoints and ideologies are in competition with religious viewpoints and ideologies. It is no more neutral to favor the secular over the religious than it is to favor the religious over the secular. It is time for a reorientation of constitutional law: *away* back from the false neutrality of the secular state, *toward* a genuine equality of rights.[9]

Consistently with the criticism of the use of the term "secular" presented in this paper, however, observe that while Professor (now Justice) McConnell correctly identifies the "non-neutral" nature of the state, he perpetuates the false bifurcation between "the secular" and "the religious". This, too, must change for there to be a proper delineation of the issues that are at stake in these areas. Still, despite this error, McConnell rightly criticizes the notion that there is a "neutrality" that can be stripped of religious beliefs and claims in such a manner that what is left represents an adequate "consensus" for civil society.

Recent suggestions that, for example, the use of picture books in Kindergarten classrooms to show that same-sex parents are just the same as heterosexual parent couples is "neutral", show that the concept of "neutrality" is incoherent where matters are foundationally contested.

To parents who view respect for persons (as distinct from "recognizing", "welcoming", or "affirming") as all that can reasonably be required of them by civil society, it is rather alarming

to be told in cool and dispassionate tones that neutrality requires that their children be taught that what the parents believe to be wrong is, in fact, right. This is what the case amounts to, and it is, in fact, a question of whether genuine respect is shown for religious adherents. The religious parents do not, after all, require that their "beliefs" be affirmed in the public school classroom.

Keeping in mind the nature of the *modus vivendi* and the danger of a totalizing or convergence liberalism (which assumes that some beliefs will simply slough away over time), it is interesting that the same-sex parenting picture books that were at issue in the Kindergarten to Grade Two curriculum of the Surrey School Board in the *Chamberlain* case were viewed by a recent commentator as simply "to promote mutual respect and understanding".[10] The author shows no indication that such public classroom promotion that implies the complete equivalency of homosexual/lesbian sexuality and heterosexual sexuality (implicit in being "Mom" and "Dad") is anathema to mainstream religious adherents whether they are Sikh, Hindu, Muslim, Catholic, Protestant, or Jewish.[11]

In giving the reasons of the Supreme Court majority in *Chamberlain*, Chief Justice McLachlin said:

> 33. Moreover, although parental involvement is important, it cannot come at the expense of respect of the values and practices of all members of the school community. The requirement of secularism in s. 76 of the *School Act*, the emphasis on tolerance in the Preamble, and the insistence of the curriculum on increasing awareness of a broad array of family types, all show, in my view, that parental concerns must

> be accommodated in a way that respects diversity. *Parental views, however important, cannot override the imperative placed upon the British Columbia public schools to mirror the diversity of the community and teach tolerance and understanding of difference* (emphasis added).

Justice Gonthier, in dissent, though not disagreed with by the majority judges on this point, stated:

> it is a feeble notion of pluralism that transforms "tolerance" into "mandated approval or acceptance". In my view, the inherent dignity of the individual not only survives such moral disapproval, but to insist on the alternative risks treating another person in a manner inconsistent with their human dignity ....[12]

We have seen, above, how some commentators place a requirement of approval on the list of things necessary to respect the dignity of the person, taking a "pick one" approach rather than an "exemption and accommodation" approach. This would be an error since, as I have suggested already, "sexual conduct", like "religious belief", is a matter that should be essentially private, is highly contested, and cannot properly form part of the core notion of civic excellence without driving other conceptions (also perfectly legal to hold) about human sexual conduct into the darkness.

Justice Gonthier added the following trenchant remarks about a kind of "false tolerance":

> I also note that language espousing "tolerance" ought not [sic] be employed as a cloak for the means of obliterating disagreement. Section 15 of the Charter

> protects all persons from discrimination on numerous enumerated and analogous grounds, including the grounds of religion and sexual orientation. *Language appealing to "respect", "tolerance", "recognition" or "dignity", however, must reflect a two-way street in the context of conflicting beliefs, as to do otherwise fails to appreciate and respect the dignity of each person involved in any disagreement, and runs the risk of escaping the collision of dignities by saying "pick one". But this cannot be the answer.* In my view, the relationship between s. 2 and s. 15 of the Charter, in a truly free society, must permit persons who respect the fundamental and inherent dignity of others and who do not discriminate, to still disagree with others and even disapprove of the conduct or beliefs of others. Otherwise, claims for "respect" or "recognition" or "tolerance", where such language becomes a constitutionally mandated proxy for "acceptance", tend to obliterate disagreement.[13]

Two relatively recent decisions, one from the Supreme Court of Canada and another from the Ontario Superior Court, suggest that more nuanced balancing of rights is possible than was seen in the original decision and some of the arguments of the Supreme Court judges in *Chamberlain*.[14] One can only hope that they signal a better approach to future cases raising "*Chamberlain*-type" conflicts.

TRINITY WESTERN UNIVERSITY

Another important decision on the scope of religious rights that, taken out of context, could be used to support a privatization of religion, is *B.C. College of Teachers* v. *Trinity Western*

University et al. (2001) 199 DLR (4th) 1 (SCC). The facts can be briefly stated.

The British Columbia College of Teachers ("BCCT") is the governing body of the teaching profession in B.C. Part of its statutory mandate is to establish standards for the education and competence of its members, "having regard to the public interest". Trinity Western University ("TWU"), a fully accredited private university founded on religious principles, sought (and was denied) full accreditation from the BCCT for its teacher training program.

The root of the dispute between TWU and the BCCT was the content of a statement of community standards which TWU requires that its students pledge to observe (although not necessarily agree with). The statement sets out the responsibilities of the student in contributing towards "an atmosphere that is consistent with [the] profession of [religious] faith". As part of maintaining this atmosphere, one section of the statement requires that students "refrain from practices which are biblically condemned", including "premarital sex, adultery, and homosexual behaviour". Despite a committee recommendation that TWU's teacher training program be approved, the BCCT ultimately denied accreditation on the basis that "the proposed program follows discriminatory practices that are contrary to the public interest and public policy", on the basis of the statement that "homosexual behaviour" is biblically condemned.

The trial judge overturned the Council's decision, and directed the BCCT to approve TWU's application. That decision was upheld by the British Columbia Court of Appeal. Both courts

determined that there was no evidence to connect any particular graduate of TWU with any discriminatory conduct against gay or lesbian students. The BCCT appealed further to the Supreme Court of Canada. An 8–1 majority of the Supreme Court of Canada denied the BCCT's appeal, and ordered it to approve TWU's education program, subject to the conditions set out by the BCCT's practice committee.

> [29] In our opinion, this is a case where any potential conflict should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute ....[14]
>
> [34] Consideration of human rights values in these circumstances encompasses consideration 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. Even though the requirement that students and faculty adopt the Community Standards creates unfavourable differential treatment since it would probably prevent homosexual students and faculty from applying, one must consider the true nature of the undertaking and the context in which this occurs. Many Canadian universities, including St. Francis Xavier University, Queen's University, McGill University and Concordia University College of Alberta, have traditions of religious affiliations. Furthermore, S. 93 of the Constitution Act, 1867 enshrined religious public education

> rights into our Constitution, as part of the historic compromise which made Confederation possible ….[15]

It is important in this case to understand what a proper relationship is between religion and religious communities and those who do not have religious faith and are not members of religious communities. This relationship can easily be mischaracterized by a misuse of key terms such as "the secular" or phrases such as "the separation of church and state".

THE DISTINCTION BETWEEN "BELIEF" AND "CONDUCT": SHARING THE PUBLIC SPHERE WHERE BELIEFS DIFFER

Differing beliefs are bound to conflict; differing patterns of conduct relating to beliefs may conflict even more sharply. How such conflicting positions are balanced is an essential issue in the kind of liberal, diverse, and pluralistic society we have. In *TWU* the Court (majority of eight judges) stated:

> 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.[17]

If diverse views are to be respected, then claims for viewpoint or belief preference that amount to "trump" claims are suspect. Yet it is increasingly just such claims of trumps that are being seen frequently in constitutional litigation. When trump claims – such as the "visibility promotion" of gays and lesbians – are said to amount to "social policy" (this claim was seen in the *Brockie* case in Ontario[18]), it is important to note that a better approach, in accordance with the *modus vivendi* or "pluralistic liberalism" set out earlier in this paper, is to look

more closely as to how to share the sphere rather than "grant" dominance of the sphere to one viewpoint.

Since the *TWU* case has suggested the distinction between "conduct" and "belief" is an operative conception in constitutional analysis, then this distinction must apply to all citizens. That is, the "beliefs" of gays and lesbians must not have superior or trump value as against the "beliefs" of other citizens. While, at the margins, a "belief" and "conduct" distinction may be appropriate (consider anti-Semitism as a religion or, for that matter, cannibalism – both of which can be justifiably restricted), it is also important to realize that the public manifestation, teaching, and dissemination of religion (referred to in the *Big M* decision, above) anticipates a *public dimension* to religious belief that is also public *conduct*. This line will, therefore, have to be worked out on the facts of particular cases but cannot simply be reduced to a stark "you have the right to believe but not to act" formula, the way that is sometimes argued, or that one set of beliefs on contested areas (such as sexual conduct) requires that other beliefs be banished.

It is also important to point out that while religion may be proposed, it ought not to be *imposed*, and that freedom of religion allows in certain respects for the freedom to be free from religion. In this way, and by analogy, the freedom to believe what one wants about certain matters (say religion or sexual practices) must allow the freedom to dissent from or not believe what others do about those religious or sexual practice claims. This means that care must be taken for a kind of tactical retreat at points where the beliefs are irreconcilable. This notion of a "tactical retreat" or reduction of expectations

should be learned by current zealots for certain sexualities who wish to impose their beliefs on others. Perhaps sexualities, like religious practices, ought to have a more private dimension. Certainly the claim to public "recognition", where recognition is shorthand for "acceptance", becomes very like a theocratic claim to public sphere dominance for a particular religious tenet.[19]

If the appropriate place for the development of deeply held beliefs, such as religious beliefs, is the home and the church, then perhaps other deeply held beliefs, such as what is and is not appropriate sexual conduct, should also be reserved for the home?[20] Courts have yet to deal with this approach to sexually contested views the way they have with respect to religiously contested views in earlier days. Now would be a good time to embark on this kind of approach lest the totalistic claims of certain activists (the "new sectarianism" as one writer has called the new movement) lead to a new round of "[quasi-]religious wars".[21]

To return again to the decision of the British Columbia Court of Appeal in *Chamberlain*, we can see that a "trump rights" approach was eschewed by the judges in the manner in which they dealt with religion and other claims. Mackenzie JA, speaking for himself and two others, held, *inter alia,* that:

> (20) Some aspects of human sexuality remain morally controversial including homosexual or "same-sex" relationships. The division of moral conviction on this subject cuts across society and divides religious communities as well as people of no religious persuasion. The moral position of some on all sides of particular issues will be influenced by their religion, others not.

There is no bright line between a religious and a non-religious conscience. Law may be concerned with morality but the sources of morality in consciences are outside of the law's range and should be acknowledged from a respectful distance ....

(31) Today, adherents of non-Christian religions and persons of no religious conviction are much more visible in the public square than a century ago and any truly free society must recognize and respect this diversity in its public schools. "Strictly secular and non-sectarian" must be interpreted in a manner that respects this reality. That respect precludes any religious establishment or indoctrination associated with any particular religion in the public schools but it cannot make religious unbelief a condition of participation in the setting of the moral agenda. Such a disqualification would be contrary to the fundamental freedom of conscience and religion set forth in s. 2 of the Charter, and the right to equality in s. 15. It would negate the right of all citizens to participate democratically in the education of their children in a truly free society ....

(33) In my opinion, "strictly secular" in the *School Act* can only mean pluralist in the sense that moral positions are to be accorded standing in the public square irrespective of whether the position flows out of a conscience that is religiously informed or not. That meaning of strictly secular is thus pluralist or inclusive in the widest sense. This interpretation accords with *Big M,* where the fatal flaw in the *Lord's Day Act* was its link to exclusively Christian doctrine rather than morality. It also accords with the distinction between morality and dogma or creed in s. 76(2) [of the School Act].

> (34) No society can be said to be truly free where only those whose morals are uninfluenced by religion are entitled to participate in deliberations related to moral issues of education in public schools. In my respectful view "strictly secular" so interpreted could not survive scrutiny in the light of the freedom of conscience and religion guaranteed by s. 2 of the Charter and the equality rights guaranteed by s. 15.[22]

PART II: THE FAIR TREATMENT OF DIFFERING BELIEFS

TWO KINDS OF LIBERALISM AND THE THREAT OF A KIND OF LIBERAL FUNDAMENTALISM: THE NATURE OF LIBERALISM AND DIVERSITY: *MODUS VIVENDI* OR CONVERGENCE?

It is beyond the scope of this paper to treat this next area in an extended way. This area is, nonetheless, extremely important. There are several different theories going under the banner of "liberal" or "liberalism" and some recent writings warn us that one set of these conceptions actually poses a threat to religions and to properly plural, liberal society itself. What are these different sorts of liberalism and what sort should be fostered in a pluralist democracy? Some assistance on these questions may be found in the thought of two political scientists in particular: John Gray and William Galston.

In *Two Faces of Liberalism,*[23] John Gray suggests that there are two basic approaches to liberalism. In the first, disagreements are assumed to be way stations on the road to eventual agreement and it is thought that emerging social consensus will eventually lead to a coalescence of viewpoints. This may

be called "convergence liberalism", but Professor Gray calls it "rational consensus". In the second, disagreements and different beliefs are viewed as necessary accompaniments to living in a world of incommensurate (and incommensurable) beliefs and values. Here the search is not for eventual convergence but for ways of co-existence or, as Gray calls it, the search for a *modus vivendi* or ways of living together.

Gray's work has provided a sustained analysis of the dangers to genuine freedom posed by the idea that there is only one form (monistic) of *liberalism itself*. Gray suggests that the principles key to genuine liberalism must avoid "one size fits all" (monistic) approaches that foresee a common end point in society that can and should be driven to by law and politics. Genuine tolerance and genuine diversity must beware of counterfeits as they move towards the *modus vivendi*.

Gray writes that liberal thought

> rarely addresses the deeper diversity that comes when there are different ways of life in the same society and even in the lives of the same individual. Yet it is the latter sort of pluralism that should set the agenda of thought for about ethics and government today.[24]

Gray also says:

> Liberalism contains two philosophies. In one, toleration is justified as a means to truth. In this view toleration is an instrument of rational consensus, and a diversity of ways of life is endured in the faith that it is destined to disappear. In the other, toleration is valued as a condition of peace, and divergent ways of living are welcomed as marks of diversity in the good life. The

> first conception supports an ideal of ultimate convergence on values, the latter an ideal of *modus vivendi*. Liberalism's future lies in turning its face away from the ideal of rational consensus and looking instead to *modus vivendi*.
>
> The predominant liberal view of toleration sees it as a means to a universal civilization. If we give up this view, and welcome a world that contains many ways of life and regimes, we will have to think afresh about human rights and democratic government. We will refashion these inheritances to serve a different liberal philosophy.
>
> We will come to think of human rights as convenient articles of peace, whereby individuals and communities with conflicting values and interests may consent to coexist.[25]

Gray cautions against a kind of illiberal "fundamentalism" that can hide all too easily in what looks like a liberal approach to tolerance and diversity but is not.

> It is a mark of an illiberal regime that conflicts of value are viewed as signs of error. Yet liberal regimes which claim that one set of liberties – their own – is universally legitimate adopt precisely that view. They treat conflicts among liberties as symptoms of error, not dilemmas to which different solutions can be reasonable. Liberalism of this kind is a species of fundamentalism, not a remedy for it.[26]

The second contemporary scholar whose work is particularly helpful in helping us see divergences within the liberal tradition is William A. Galston, former policy adviser under the Clinton administration in the United States. Professor Galston

approaches Gray's concerns from a slightly different angle and argues that autonomy and diversity are competing theoretical conceptions within liberalism.

> The accommodation of diversity within a determinate but limited conception of liberal public purposes is a better foundation for liberal philosophy than is the promotion of rational reflection or personal autonomy – however attractive these values may be to important professions and social classes within liberal societies.[27]

As Galston puts it:

> pluralist politics is a politics of recognition rather than construction. It respects the diverse spheres of human activity; it does not understand itself as creating or constituting those activities. Families are shaped by public law, but that does not mean that they are "socially constructed."[28]

What provides ways of agreement and civic discourse if not our conceptions of the good and the "civic glue" to keep us together more powerfully than religious beliefs and formation? Galston rejects "a strategy for justifying the liberal state that seeks to dispense with all specific conceptions of the good" as one that "cannot succeed".[29] He says that a justification of the liberal order must contain, at a minimum, the following elements:

> 1) social peace; 2) rule of law; 3) recognition of diversity; 4) tendency towards inclusiveness; 5) minimum decency; 6) affluence; 7) scope for development; 8) approximate justice; 9) openness to truth; 10) respect for privacy.[30]

Many things could be said of this list and the more detailed descriptions Galston gives. For our purposes however, Galston notes in relation to the last principle, that of privacy: "Liberal polities recognize that not everything of importance to human beings occurs in the public sphere or can be regulated by public decisions."[31]

Galston elsewhere in his book has stated the importance of religion to liberal politics:

> In some measure, religion and liberal policies need each other. Religion can undergird key liberal values and practices; liberal politics can protect – and substantially accommodate – the free exercise of religion. But this relationship of mutual support dissolves if the respective proponents lose touch with what unites them. Pushed to the limit, the juridical principles and practices of a liberal society tend inevitably to corrode moralities that rest either on traditional forms of social organization or on the stern requirements of revealed religion .... liberal theorists (and activists) who deny the very existence of legitimate public involvement in matters such as family stability, moral education, and religion are unwittingly undermining the values and institutions they seek to support.[32]

Galston discussed "liberal purposes" in relation to civic education. While the state has a right to ensure that "core civic commitments and competences" that undergird a well ordered liberal polity are effectively disseminated directly (public education) or indirectly (private education), it must be careful not to overreach.

> [The state] must not throw its weight behind ideals of personal excellence outside the shared understanding of civic excellence, and it must not give pride of place to understandings of personal freedom outside the shared understanding of civic freedom. For if it does so, the liberal state will prescribe – as valid for, and binding on, all – a single debatable conception of how human beings should lead their lives. In the name of liberalism, it will betray its own deepest and most defensible principles.[33]

It is difficult to read this passage and not think of the manner in which, in the original *Chamberlain* decision, parental concerns about legally contestable matters and any attempt at conceptualizing a shared public sphere were avoided.[34] This decision tended towards doing precisely what Galston says is impermissible – making "valid for, and binding on, all" "a single debatable conception of how human beings should lead their lives". While the books portraying same-sex parenting seem innocuous enough, and did not, in the end, get into the classroom (once the matter was referred back to the Trustees), the principles behind the decision could, as they no doubt eventually will, be taken much further – to suggesting that portrayals of the acceptability of same-sex sexual conduct are necessary in public education as a counter to "heteronormativity". Sooner or later greater attention will have to be paid to *modus vivendi* in this context if living together with disagreement is to become a reality.

RESPECT FOR DIGNITY AND DISAGREEMENT ABOUT BELIEFS, RELIGIOUS OR SEXUAL

You can respect my dignity as a religious believer even if you reject my religious beliefs, so why cannot I respect your dignity as a homosexual or a lesbian even as I reject the validity of your beliefs regarding sexual conduct? Dignity ought not to be reduced to "forced agreement" about matters other than a general respect for the person. This is another aspect of the threat to liberty occasioned when the personal and private is dissolved into the public. We can live with each other in peace, in some respects, only because we do not have to force all our beliefs to arm wrestle for supremacy in public.

The manner in which religious doctrinal requirements were recognized in *Trinity Western University* by reliance on ordering principles – rather than by the invocation of a "trump rights" approach (the removal of any "codes of conduct" outside of one universally acceptable one) – ought to be the kind of model that is used going forward.[35] Galston's conclusion about a more limited role for the government (and, by implication, law itself) is shared by Oxford's Joseph Raz in the following formulation:

> . . . a government dedicated to pluralism and autonomy cannot make people good. To be autonomous they have to choose their own lives for themselves. Governments and other people generally, can help people flourish, but only by creating the conditions for autonomous life, primarily by guaranteeing that an adequate range of diverse and valuable options shall be available to all. Beyond that they must leave individuals free to make of their lives what they will.[36]

Conflicts among basic liberties are always going to be present in law and politics. John Gray lists some examples of these and they will be familiar to most of us. These include: freedom of speech versus freedom from racist abuse; privacy for public figures versus freedom of expression for journalists; freedom of association and conscience in Catholic and Muslim schools (or more generally in relation to religious projects) versus freedom from discrimination in employment on grounds of religion or sexual orientation; freedom to proselytize versus the freedom to practise one's religion without fear of persecution. To this we might add the right of associations to have their own internal rules (with or without public funding) and the right of citizens to obtain employment without discrimination.[37]

Both Galston and Gray caution against illiberalism and warn that the search for grounds of co-operative non-agreement may all too easily be viewed as something else in which differing conceptions must be overcome by an overarching imperative.

Charles Taylor, as well, has noted an important point in relation to politics, that touches on the kinds of conflicts we shall see more of as we constitutionalize norms that, in their nature (same sex marriage), will not be accepted by, and legally need not be accepted by, large numbers of citizens. Too often the claims are framed in terms that focus on the "disadvantage" of one group to the exclusion of what the claimed advantaging will produce for everyone as opposed to the group itself. This, as Charles Taylor has written forcefully, is not good for politics or democracy:[38]

> The kind of politics that tends to emerge out of this sense of exclusion, whether grounded in reality or

> philosophically projected (and it is often a mixture of both), is one that eschews the building of coalitions around some conception of the general good. *Its attempt is rather to mobilize behind the group's demands on a narrow agenda, regardless of the overall picture and impact on the community at large. Any invocation of the community good as grounds for restraint tends to be viewed with suspicion. This is political fragmentation,* the breaking up of the potential constituencies for majority coalitions behind multifaceted programs, designed to address the major problems of the society as a whole, into a congeries of campaigns for narrow objectives, each mobilizing a constituency determined to defend its turf at all costs.[39]

THE JURISDICTION OF LAW AND THE STATE

Law is not and must not be everything in a free and democratic society. It is important for liberty that there be limits on the power of the state and the reach of law. Not everything should or can properly be the subject of law. This point needs to be worked through in much greater detail.

WHAT IS THE RELATIONSHIP BETWEEN LAW AND RELIGION?

A signal exchange took place some years ago, when Chief Justice Beverley McLachlin, at a conference co-sponsored by the Centre for Cultural Renewal and the McGill University Department of Religious Studies entitled *Pluralism, Public Policy and Religion,* presented a paper on the importance of conscience and religion. In the course of her remarks, the Chief Justice indicated her thinking at that time with respect to the relationship between law and the "religious citizen".

Here is how she formulated the relationship:

> The modern religious citizen is caught between two *all-encompassing sets of commitments*. The law faces the seemingly paradoxical task of asserting its own ultimate authority while *carving out a space within itself* in which individuals and communities can manifest alternative, and often competing, sets of ultimate commitments.[40]

Note the terms "all-encompassing" and "ultimate" here in relation to the law, as well as the fact that it is the law that carves out within itself places for what may be "competing sets of ultimate commitments". In this conception law is "bigger" than religion. The Chief Justice then developed this idea as follows:

> 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? … It is the courts that are most often faced with this clash and charged with managing this dialectic.[41]

Law here is viewed, frankly and openly, as a "comprehensive worldview" capable of competing with and even encompassing religion. Moreover, law is deemed capable of determining not only what is just but what is "good" and "true". It is able to lay claim "to the whole of human experience". Whatever else one can say of this, it elevates law to the status of transcendent determinations and therefore judges to the role of de facto clerics. It is starkly at variance with earlier decisions of the court that spoke of its inability to deal with "metaphysical" or "philosophical" matters[42] and with the common law tradition in which liberty, not law, is the primary condition.

As Francis Lyall has noted with respect to liberty and law:

> As a general statement drawn from the common law, liberty is the basic position in law in Britain. Liberty is not conferred by a legal instrument: it is the normal condition, and infringements on that liberty can exist only as allowed by legislation or case law. Interference with the manifestation of traditional religious belief is therefore something which has to be justified in terms of public order or public good.[43]

On the other hand, and with respect, the Chief Justice's formulation tends towards a monistic or totalistic conception and is quite contrary to that kind of political pluralism referred to by other scholars, such as William Galston, in which there is a vision of "social space" and "spheres of autonomy" that must resile from claims to be a comprehensive good. On this reading, the Chief Justice's conception of law asks too much when it views itself as larger than the religious and other conceptions *alongside of which* it must operate as but one of several order-

ing frameworks within a constitutional democracy recognizing ordered and interlocking liberties.[44]

This limitation on the role of law was recognized in her response to the Chief Justice's address by the University of Chicago's Jean Bethke Elshtain, who replied:

> Surely, 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.[45]

With respect, the way forward for constitutional adjudication in certain cases is to abandon entirely, or significantly narrow, the notion of the law's role in aid of forcing the approval of certain contested social conceptions with the implicit or explicit idea that we shall, sooner or later, come to agreement.

Interestingly, it may be that the Chief Justice herself had not finally settled on the relationship between law and religion, as she has since expressed a better understanding of this relationship than that articulated in her 2002 speech.

In one of the Supreme Court's more recent decisions touching on religious liberty, *Amselem,* the Chief Justice noted that both the state and the law should be reticent to delve into personal matters related to the nature of religious belief, because

> the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts

> should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", precept, "commandment", custom or ritual. *Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion*.[46]

There is a considerable difference between law "carving out within itself" a place for religion (as in the 2002 lecture) and law not wishing to "entangle itself in the affairs of religion" (as in *Amselem*).

In the West today no religions can or do claim priority over plural politics, yet in these earlier formulations of the Chief Justice (in her McGill address and the judgement in *Chamberlain*), and in the writings of certain academic commentators, law (often spoken of as "equality claims" or "human rights" from one particular perspective) can all too easily claim a comprehensiveness that places it culturally in a position superior to the role of religions. In her judgement in *Amselem*, the Chief Justice subscribed to a better formulation of the relationship.[47]

There is another reason why law should not be elevated into a particular kind of religion or "community". In the first place, law and human rights are for *all* citizens, religious and non-religious, so the framework of both law and human rights ought not to be set up as a de facto replacement religion in some supposed "non-religious secular", however tempting it may be for some to view them in this way. In the second place, as both the B.C. Appeal Court and the Supreme Court of Canada decisions in *Chamberlain* noted, religions are fully *within* the public sphere.

We must not accept any longer the idea of a secular that is, ipso facto, stripped of religious influence and religious believers. The "separation of church and state" should be recognized as relating to a structural separation between the jurisdictions of the state (law and politics) and religions but it ought not to be understood as an exclusion of *co-operation* between state and religions. We must be careful to keep an institutional and a personal analysis separate. Thus, to hear, as one does frequently in politics, that a particular politician must keep his or her religious views out of their work as a politician is a category error. Beliefs of whatever sort necessarily frame the work of all human beings in one way or another, and atheist and agnostic politicians have no special privilege in this respect. Of course the manner in which arguments are made based on beliefs has to be thought through carefully so that, in one's public role, they make sense to a wide variety of citizens. The personal beliefs of many important politicians, who may have been strong theists, owed their galvanizing power not to, say, "gospel" pronouncements better left to the pulpit but to the ability to speak persuasively about the common goods affecting all citizens.[48]

THE NATURE OF "DIGNITY" AND ASKING TOO MUCH IN THE NAME OF TOLERATION; RELIGIOUS VERSUS SEXUAL DOGMA

One can accept the dignity of another person without having to accept their beliefs. In fact, to demand that one person accept the beliefs of another in order to accord dignity is an overreach that, again, asks too much from society out of the barrels of the law.

There are beliefs that we cannot rightly force others to share with us. Dogma, in this sense the deepest beliefs a person

might have, has been bracketed out of public education as being inappropriate for non-denominational settings. Are there analogies to religious dogma with respect to other contested beliefs today? I believe there are. There is such a thing as "sexual dogma". Like religion, we allow citizens to hold differing beliefs about what constitutes valid sexual conduct and many other areas that are publicly debated. Citizens are free to believe what they want about them and, in respectful ways, say as much.

Understood this way, we can see that an issue such as "same-sex marriage", therefore, lends itself to treatment as *sexual dogma* akin to a *religious dogma* unsuitable for forced public school (or public sphere) affirmation, thus mirroring the wider social position of Canadian culture. The question of how to inculcate respect for citizens whether gay or straight, religious or non-religious must be dealt with in non-dogmatic ways whether that dogma is religious or sexual.

THE BELIEF AND CONDUCT DISTINCTION

In *B. (R.)*[49] and again in *Trinity Western* the court said that the right to hold a belief is one thing, the right to act on it in public another. This needs to be applied more consistently between religion and sexual orientation. As with the insistence that a person accept the beliefs of another in order to accord dignity, the idea that my conduct needs to be shown publicly and "affirmed" in a quest for "social recognition" asks too much of society, unduly pressures the scope of individual and group freedom, gives unrealistic expectations to certain other citizens, places unrealistic burdens upon the public sphere, and warps the proper role of the law.

The scope of this discussion, however, is being approached rather strangely at the moment. It is sometimes said that the failure to accept same-sex conduct or the "pro-choice" position on abortion, and to hold a view that same-sex sex or abortion are wrong, is an "ism" akin to racism. Why should this be? We do not say that the rejection of the views of a person as to religious conduct are akin to an "ism", so why should this be the case with sexual conduct or other legally contestable issues? At the moment the rise of new zealotry seems able to dominate public discourse because, at least in part, the conceptual categories needed to analyse the debates properly are badly confused.

CONCLUSION

The Supreme Court of Canada's decision in *Chamberlain*, referred to above, in how it handled the definition of "secular" and pluralism as requiring the inclusion of religion and religious viewpoints, is a model for the law and the first serious consideration of a non-atheistic/agnostic (or secularistic) "secular" in Canada. It, and the *TWU* decision, provide the beginning outlines of an approach to both pluralism and the secular that will be superior to the preemptively non-religious and atheistic/agnostic understandings that preceded them. The decision also correctly describes the nature of pluralism as one that encourages a diversity of beliefs and that resists the co-option of "secular" society by totalistic conceptions of liberalism that exclude diversity.

These decisions ought to lead to a reconsideration of how we view law and policies in relation to all public aspects of society, including public education. Pluralism can be and needs to be re-conceptualized within existing legal norms and the Canadian

historical tradition, so as to foster a richer conception of diversity and genuine tolerance with an appropriately communitarian focus. For pluralism to be pluralism, however, it is important to rescue it from a pseudo liberalism that hides its totalistic claims.[50]

The move to recognize two central versions of liberalism, one that is consistent with community and freedom (*modus vivendi* or "pluralistic liberalism") and one that eventually attacks genuine diversity ("convergence liberalism") is a helpful tool when dealing with claims that hide their "trump right" aspects under the language of diversity and equality, when they in fact attack genuine diversity and the equality of all citizens. It could be that decisions such as *TWU*, *Chamberlain* (the appeal decisions), and *Brockie* (the appeal decision) signal the somewhat tentative and in some ways inconsistent beginnings of a new era in Charter jurisprudence in Canada. Time, other decisions, and a more nuanced public and academic debate in these areas, will tell.

NOTES

1 *R.* v. *Big M Drug Mart Ltd.* [1985] 1 SCR 295 at 336.

2 John D. Whyte, "Is the Private Sector Affected by the Charter?", in *Righting the Balance: Canada's New Equality Rights*, Lynn Smith, ed. (Saskatoon: The Canadian Human Rights Reporter Inc., 1986) 145 at 174–175.

3 Ibid. 177–178.

4 James Skillen, "The Theoretical Roots of Equal Treatment", in *Equal Treatment of Religion in a Pluralistic Society,* Stephen V. Monsma and J. Christopher Soper, eds. (Grand Rapids: Eerdmans, 1998) 55 at 72.

5 The *Oxford English Dictionary,* 2nd ed., s.v. "secular", "secularism", and "secularity". All uses suggesting a meaning of "secular" that denote an absence of connection with religion postdate G.J. Holyoake, *The Principles of Secularism Briefly Explained* (London: Holyoake & Co., 1859).

6 The trial judgment of Madam Justice Saunders in *Chamberlain,* in which "strictly secular" was interpreted to mean not based upon or influenced by religion, is a good example of a secularistic understanding of the meaning of "secular principles". See *Chamberlain* (1998), 60 BCLR (3d) 311 (SC). For a detailed analysis of this decision in relation to the Court of Appeal judgment which overturned it, see Iain T. Benson and Brad Miller, "Court Corrects Erroneous Understanding of the Secular and Respects Parental Rights", *Lex View* No. 40.0 (2000): <http://www.culturalrenewal.ca/qry/page.taf?id=64>.

7 Justice Frank Iacobucci, "Reconciling Rights: The Supreme Court of Canada's Approach to Competing Charter Rights" (2003) 20 Sup Ct L Rev (2d) 137–167. The argument here is that "reconciling" has advantages over "balancing" as an analytical and practical tool in certain types of cases. The article reviews where reconciliation might be the best approach to what could, at first blush, appear to be a clash or conflict of rights.

8 *Chamberlain* v. *Surrey School District* (2000) 80 BCLR (3d) 181 (CA) reversing (1998) 60 BCLR (3d) 311 (SC), paras. 28–29. See note 6 above.

9 Michael W. McConnell, "Equal Treatment and Religious Discrimination", in Monsma and Soper, *Equal Treatment* 30 at 33.

10 John Russell, "How to be Fair to Religious and Secular Ideals within the Liberal State", *The Advocate* 60/3 (May 2002) 345 at 352.

11 It is, of course, the case that there is divergence within religions as to the acceptability of homosexual and lesbian sexual conduct. This, however, says nothing about the respect that should be owed to com-

munities that define themselves around one side of divergent beliefs. All belief systems have divergence, and the fact that both feminists and civil libertarians disagree is not an argument against the valid claims for respect that should be owed to feminists or civil libertarians.

12 *Chamberlain* [2002] 4 SCR 710.

13 Ibid. at para. 134 (emphasis added).

14 *B.C. College of Teachers* v. *Trinity Western University et al.* (2001) 199 DLR (4th) 1 (SCC) 30 at para. 29.

15 Ibid. 32 at para. 34.

16 *Multani* v. *Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, 2006 SCC 6 (wearing of Kirpan in public school allowed, on the basis of freedom of religion; absolute ban overturned); for a comment on this decision see Peter Lauwers and Iain Benson, "Accommodating Kirpans in Public Schools", Lex View No. 57.0: <http://www.culturalrenewal.ca/qry/page.taf?id=119>; and *R.* v. *Khawaja* [2006] OJ No. 4245 Ontario Superior Court of Justice (October 24, 2006) (striking down section of Criminal Code requiring religious or political connection for terrorism charge to be laid creates an unacceptable "chill" on religious liberty); for a comment on this decision see Kevin Boonstra and Iain Benson, "Terrorism and the Law: Balancing Security with the Chill on Fundamental Freedoms", Lex View No. 60.0: <http://www.culturalrenewal.ca/qry/page.taf?id=141> [both Lex View sites last accessed 4 April 2007].

17 *Trinity Western University* v. *College of Teachers* [2001] 1 SCR 772 at 812.

18 *Ontario Human Rights Commission* v. *Scott Brockie*, Ontario Superior Court of Justice, Divisional Court [2002] OJ No. 2375, June 17, 2002. For a detailed review of this decision see T. Peter Pound and Iain T. Benson, "Court Overturns Key Aspect of Human Rights Board of Inquiry Decision: Religious Freedom Respected, but Narrowly", *Lex View* No. 51: <http://www.culturalrenewal.ca/qry/page.taf?id

=53>. Here the claim, by a gay rights group and the Ontario Human Rights Commission and Tribunal Counsel on appeal, that the advancement of gay and lesbian "visibility" was a formal government policy and that, in light of this policy, Mr Brockie (the religious appellant) could have his views but only at home and in his church, was rejected by the Ontario court. The Court held that Brockie (a printer) could not be required "to print [materials] of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious beliefs or creed" (at para. 58). He could refuse to do so in the public world of his printing business in downtown Toronto. As such, the Board's order was overbroad and conflicted with Brockie's rights to the freedom of conscience and religion. The attempt here by a governmental statutory agency to limit religion to the "private" realm was chilling. Fortunately the Court struck down this attempt at administrative overreaching and, in so doing, an attempt to use trump-rights "liberalism" to enforce a secularist conception of the secular. For a case comment on the Tribunal decision in the Brockie case see Bradley Miller, "*Brillinger* v. *Brockie:* Case Comment" (2000) 33 UBC L Rev 829, which shows how the Ontario Inquiry Panel failed to give any real weight to Brockie's religious beliefs. The present author, with Phil McMullin, acted as counsel for Brockie on the appeal to the Ontario Divisional Court but took no part in the cost appeal aspects that followed it.

19 See Elshtain, *Democracy on Trial,* above, on the importance of maintaining a private/public distinction

20 Of course religious schools, which are voluntarily chosen by parents, present a specific and principled distinction here. There it is not only appropriate but essential that particular religious teaching be provided.

21 Graham Good, *Humanism Betrayed: Theory, Ideology and Culture in the Contemporary University* (Montreal: McGill-Queens University Press, 2001), chapter 2, "The New Sectarianism: Gender, Race, Sexual Orientation" 22-38.

22 *Chamberlain* v. *Surrey School District No. 36* [2002] 4 SCR 710 (emphasis added).

23 John Gray, *Two Faces of Liberalism* (New York: New Press, 2000). The work of Peter Lauwers (now Justice Lauwers of the Ontario Superior Court) in relation to John Gray's thought has been an inspiration over many years. Recently, he has commented insightfully on Gray's writings in a manner consistent with the themes in this paper: see "Religion and the Ambiguities of Liberal Pluralism: A Canadian Perspective" (2007) 17 SCLR (2d) 1–45 at 12 ff.

24 Ibid. 12.

25 Ibid. 105.

26 Ibid. 20–21.

27 William Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Cambridge: Cambridge University Press, 1991) 301.

28 William Galston, "Religion and Limits", in *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy,* Douglas Farrow, ed. (Montreal: McGill–Queen's University Press, 2004) 41 at 47.

29 Galston, *Liberal Purposes* 154.

30 Ibid. 301–304.

31 Ibid. 304. An interesting aspect of the current debates about the public place of "sexual orientation" debates is the shift from private sexual moralities to public demands for public recognition. Canada has gone from a privacy justification for legalizing same-sex conduct ("the state has no place in the bedrooms of the nation", as Prime Minister Trudeau said in relation to changing the Criminal Code so as to allow same-sex conduct) to requiring local officials to proclaim "gay pride" days. See *Hudler v. London (City)* [1997] OHRBID

No. 23, October 7, 1997: <http://www.qrd.org/qrd/world/legal/ontario.human.rights.commission.pride.day-10.29.97> (last accessed December 1, 2009). For a longer historical overview written from the same-sex activist position, see Alex Spence, "Perceptions: the first Twenty-Two Years, 1982–1994: <http://library2.usask.ca/srsd/perceptions/965.html> (last accessed December 1, 2009). This shift, and the danger it poses to genuine civil rights, has been commented upon by Jean Bethke Elshtain; see her *Democracy on Trial* (New York: Basic Books, 1995) where she writes that

> the complete collapse of a distinction between public and private is anathema to democratic thinking, which holds that differences between public and private identities, commitment, and activities are of vital importance. Historically it has been the antidemocrats who have insisted that political life must be cut from one piece of cloth; they have demanded overweening and unified loyalty to the monarch or the state, unclouded by other passions, commitments, and interests .... a politics of displacement is a dynamic that connects and interweaves public and private imperatives in a way that is dangerous to the integrity of both. (Pp. 38, 40.)

Elshtain gives two examples of this displacement politics: the ideology of women's victimization and identity politics, particularly in relation to "gay liberation". She concludes her insightful analysis by noting that "the demand for public validation of sexual preferences, by ignoring the distinction between the personal and the political, threatens to erode authentic civil rights, including the right to privacy" (ibid. 57).

32 Ibid. 279.

33 Ibid. 256.

34 In *Chamberlain* v. *Surrey School District No. 36* [2002] 4 SCR 710.

35 *Trinity Western University* v. *British Columbia College of Teachers* [2001] 1 SCR 772. (At issue was the constitutionality of a Code of Conduct for a Christian university that banned premarital or homosexual sex, amongst other things. Conduct code upheld, no evidence of discrimination.) For a detailed analysis of this decision see Iain T. Benson and Brad Miller, "Pluralism and the Respect for Religion", Lex View No. 46: <http://www.culturalrenewal.ca/qrypage.taf?id=58> [last accessed 1 February 2007]; see also David Brown, "Reconciling Equality and Other Rights: Paradigm Lost?" (2003) 15 National J Constitutional Law 1.

36 Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994) 120.

37 Gray, *Two Faces* 76–77.

38 See Charles Taylor, "The Public Sphere", in his *Philosophical Arguments* (Cambridge, MA: Harvard University Press, 1995) 257 at 281.

39 Ibid. 281–282 (emphasis added).

40 Beverley McLachlin, "Freedom of Religion and the Rule of Law: A Canadian Perspective", in Farrow, ed., *Recognizing Religion* 12 at 16 (emphasis added).

41 Ibid., 21–22 (emphasis added).

42 *Tremblay* v. *Daigle* (1989) 62 DLR (4th) 634 (SCC) at 650, [1989] 2 SCR 530. The case dealt with whether the Quebec Charter provision saying "every human being has a right to life" provided protection for a third trimester infant *en ventre sa mère*. Near the beginning of its unanimous (and unattributed) Reasons, the Supreme Court of Canada stated:

> The Court is not required to enter the philosophical and theological debates about whether or not a foetus is a person, but, rather, to answer the legal question of whether

> the Quebec legislature has accorded the foetus personhood. Metaphysical arguments may be relevant but they are not the primary focus of inquiry. Nor are scientific arguments about the biological status of a foetus determinative in our inquiry. The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties – a matter which falls outside the concerns of scientific classification. In short, this Court's task is a legal one. *Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature*. (Emphasis added.)

It is interesting to compare this conception of the role of law with that set out by Chief Justice McLachlin in her McGill address some years later (discussed elsewhere in this paper). Clearly the role and nature of law as it is discussed and applied in Canada in the contemporary period is a very fluid set of concepts that can, at periods of time not so very far apart, be construed in radically different ways. One might be excused for asking whether, in light of the evidence, law's tiller isn't accurately described at the moment as being at least partly set to "full drift ahead"?

43 Francis Lyall, "Religious Law and its Application by Civil and Religious Jurisdictions in Great Britain", in *Religion in Comparative Law at the Dawn of the 21st Century,* Ernest Caparros and Louis-Léon Christians, eds. (Brussels: Bruylant, 2000) 251 at 253.

44 In a recent essay, in the same volume as that containing the article of the Chief Justice discussed in this paper, Galston succinctly sets out a history of the development of the notion of political pluralism from Aristotle through Hobbes to Rousseau and Rawls, showing the tensions between religious communities and the developed principles of political pluralism; see Galston, "Religion and Limits" 41–50. He states: "the common good of a pluralist society is not merely the

aggregate of individual or group interests, but it is not and must not be a comprehensive good either" (p. 48, emphasis in original).

45 Jean Bethke Elshtain, "A Response to Chief Justice McLachlin", in Farrow, ed., *Recognizing Religion* 35 at 36.

46 *Syndicat Northcrest* v. *Amselem* 2004 SCC 47 [2004] 2 SCR 551 at para. 50 (emphasis added).

47 In a recent article, I have been critical of attempts to suggest that law constitutes a "community" as suggested by some commentators (most notably Benjamin Berger). Law as one of the ordering systems of the state must be available equally to all and must not be understood to be the special province of some citizens but not others; see Iain T. Benson, "The Case for Religious Inclusivism and the Judicial Recognition of Associational Rights: A Reply to Lenta" (2008) 1 Constitutional Court Rev 297 at 309 n. 30.

48 See Jonathan Chaplin, "Beyond Liberal Restraint: Defending Religiously-Based Arguments in Law and Public Policy" (2000) Special Issue: Law, Morality and Religion, 33 UBC L Rev 617. Chaplin gives a useful review of the arguments of John Rawls and Robert Audi in terms of the discussion around what can constitute a properly "public" argument. Discussing the difference between public offices such as judges or ministers and so on, or between documents for use in church or by the state, Chaplin writes that "both categories of actors (as Rawls rightly implies) share a duty to articulate their views in terms of the requirements of the 'public interest.' Yet, the difference of 'office' ... does impose different demands on the kinds of reasons they may publicly invoke .... Those [religious] believers who cannot resists [sic] invoking their comprehensive doctrines at every turn need not be regarded as irrational dogmatists but, rather, as political apprentices in need of guidance towards more focused and pertinent modes of political speech" (p. 643). Consistently with the argument in this paper, I would add to Chaplin's helpful insights that the same must be said of those (religious or non-religious believers) whose

articulations, for example, quite often start out with erroneous dichotomies in relation to religion/religious belief and the civic, the public, or the "secular".

49 *B. (R.)* v. *Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315 was a case involving the compulsory administration of a blood transfusion to a child against the parents' wishes.

50 Such totalistic claims can be exceedingly subtle. For example, the claim that "justificatory neutrality" is what is required in the public realm can amount to little more than that all beliefs are valid in public as long as they can make sense to non-religious people! This is hardly neutrality. See Russell, "How to be Fair". In his exceedingly clear and helpful article, Russell fails to deal with the historic shift(ing) of the term "secular" in an anti-religious direction, and in the title of his article bifurcates religion from the secular in a manner that I have argued elsewhere is both historically and philosophically suspect. Though he cites my article on the "secular" and describes it as erroneous, he does not, in fact, deal with its central arguments. See Iain T. Benson, "Notes Towards a (Re) Definition of the 'Secular' " (2000) 33 UBC L Rev 519.

Alex Fielding

Liberalism Unbound: Towards a More Inclusive Public Sphere

A Response to Iain T. Benson, "Living Together with Disagreement: Pluralism, the Secular and the Fair Treatment of Beliefs in Canada Today"

☼

I would like to begin by thanking David Goa and Dittmar Mündel of the Chester Ronning Centre for organizing the excellent lecture by Iain T. Benson held on 17 February 2007 at the Augustana Campus, University of Alberta.

In a time where the influx of immigrants with diverse religions can create conflict with the laws of the majority, this question of how to live together in disagreement goes to the heart of pluralism, the 'common good' and the modern liberal exercise in Canada. The recent debates over *sharia* tribunals, faith-based education, same-sex marriage, and the accommodation of religious marriage commissioners illustrate the difficulties in balancing the religious and "secular" in the public sphere.

This response will be divided into three segments. First, it will respond to Benson's analysis of pluralism, liberalism, and the "secular". Second, it will advocate for a return to John Stuart Mill's harm principle as a better way of reconciling competing claims when equality rights and religious freedoms collide.

Third, it will apply the harm principle to the contemporary issues of same-sex marriage and the religious objections of marriage commissioners. The central idea is that by moving away from the vague, all-encompassing language of "Charter values" to the harm principle, we create a more pluralistic public sphere that gives reasons for religious and ethnic minorities to reciprocate such tolerance and participate actively in civil society.

UNDERSTANDING PLURALISM AND THE "SECULAR"

Using historical analysis and recent jurisprudence of freedom of religion, Benson elucidates four important principles for Canada's judiciary, public leaders, and society at large. First, he exposes the public dimension of conscience and religion, as was affirmed by the Supreme Court in *Big M Drug Mart* in protecting religious freedom to "declare", "manifest", "practise", teach", and "disseminate".[1] Second, he examines the nature of pluralism in Canada, favouring a structural or shared pluralism, where group rights are affirmed along *modus vivendi* principles[2] over relativistic or totalistic pluralism, where the language of individual rights and recognition invalidates moral positions in the public sphere. Third, he explains the religiously inclusive nature of the "secular", both historically and in the recent *Chamberlain* decision, over the "atheistic secular" which he views as an ideology of anti-religious *secularism* under the illusion of neutrality. Fourth, he contrasts the liberalism of convergence, where disagreements are assumed to be "way stations on the road to eventual agreement", with a more favourable *modus vivendi* liberalism, in which a more deferential Supreme Court respects dignity and disagreement through a pluralistic public sphere.

Religion cannot simply be confined to home and church, or protect belief but not conduct. To the devout adherent, religious belief infuses all aspects of being. As Benjamin Berger has noted, it flows from a divine authority and at the same time "asserts the complete pervasiveness of this transcendent principle".[3] Liberalism's fundamental flaw is that while it tolerates different worldviews, it ultimately asserts its superiority over them. It fails to recognize that adherence to a faith community, whether it be religious or non-religious, is more than an individual choice in the rational liberal exercise; it is another valid way of experiencing reality. It is deeply tempting for all of us who view the world through a liberal lens to see religion, like every other decision in life, as a matter of individual choice.

However, this approach is blind to the deeper issues at play. When we measure an irrational, divine source of authority against objective reason in the form of the rule of law, the decision is an easy one. This flawed assumption means that the terms of the dispute are already decided before religious groups even get to court. This is why Benson's analysis is so important – by failing to understand the concepts underlying the constitutional rule of law and liberalism itself, the debate is skewed before it even begins.

THE HARM PRINCIPLE AS A MEANS OF RECONCILING COMPETING RIGHTS CLAIMS

After his thorough analysis of pluralism, the "secular" and the religiously inclusive nature of the Canadian state, Constitution and historical antecedents, Benson leaves a critical question unanswered – what happens when rights do in fact collide? While Benson's paradigm seeks to reconcile, rather than to

"balance", divergent claims in the public sphere, how are we to mediate pluralism when religious marriage commissioners are faced with same-sex equality claims?

To avoid the problems that arise with an unmitigated pluralism based in group rights or a "convergence liberalism"[4] in the vague language of Charter values, I have argued for a return to John Stuart Mill's harm principle. Variations of the harm principle have been affirmed by the Supreme Court of Canada in *Big M Drug Mart, R v. Labaye*[5] and *Ross v. New Brunswick School District No. 15*.[6] In *Ross,* the Court stated that an individual's freedom to express one's religious beliefs "is restricted by the right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others."[7] Without elevating certain civic or Charter values above all others (be they religious or not), it allows for a more clearly defined and modest balancing of competing rights in the public sphere.

For example, viewing the same-sex marriage debate in the light of the harm principle would go a long way to pre-empt the valid criticisms of the courts imposing a rational consensus in the name of Charter values. It would be very difficult to demonstrate the tangible harm inflicted on heterosexual couples (past, present, and future) by extending civil marriage to same-sex couples. This is especially true considering the exemption in the Civil Marriage Act for religious marriage, which allows officials of religious groups to refuse to perform same-sex marriages. Indeed, despite the dire predictions, the advent of same-sex civil marriage has not torn apart the social fabric of Canadian society, an outcome much like that of the controversy surrounding the death penalty.

While Mill's harm principle remains a useful analytical device, it needs to be updated in order to avoid falling into the same trap of overbroad, all-encompassing Charter values.[8] Our conceptions of *harm*, like any other justification for law, will be heavily influenced and limited by its cultural context. Many would argue that the harm principle is simply one step removed from the normative assumptions that underlie the Charter values approach. Indeed, abstract notions of harm have the potential to justify a paternalistic state, overzealous judiciary and distinctly illiberal approach of legislating morality.

However, by looking at harm through the lens of our contemporary, rights-based democracy, we begin to see rights as the deliberative markers of harm. When rights collide, they should be limited by their degree of infringement on the rights of others. While rooted in the harm principle, this mechanism of reconciling competing rights claims will only legally prohibit harm if tangible infringement can be established, with the onus on the plaintiff or person seeking to limit a Charter right. Rights infringement should not be interpreted too broadly, in the symbolic "public celebration" sense, but rather along the principles of *modus vivendi*. By doing so, it limits the scope of the harm principle and avoids its overbroad application with respect to indirect or abstract harm. Of course, the effectiveness of the harm principle in mediating competing rights claims is subject to judicial interpretation. That said, with a proper understanding of pluralism, the "secular" and *modus vivendi*, what emerges is a more accommodating, inclusive and ethically rich public sphere.

Liberalism needs to be reclaimed. By elevating certain rights as Charter or civic "values" like equality, autonomy and dignity, it imposes a "one size fits all" societal consensus on a divided public. Furthermore, it flies in the face of liberalism's *raison d'être* and the *modus vivendi* principles that should guide a pluralistic society. Borrowing heavily from Kant, Hannah Arendt offers guidance with her theory of judgement based on an "enlarged mentality".[9] She maintains that judgement is distinct from provable truth claims because it involves the act of reflecting on a matter from the perspective of others. Since judgement is seen as inherently subjective, it cannot compel others in the same way as an objective truth.

Far from being universal, liberalism's exclusive focus on the individual is a relatively recent phenomenon that is grounded in the unique circumstances of the West. The ultimate supremacy of the individual and "secular reason" is deeply problematic for Aboriginals, ethnic groups in an increasingly multicultural landscape, and the millions of Canadians who cannot simply relegate their faith to the private sphere. But even the most pluralistic, accommodating liberalism is not a panacea. Since the courts and the state reason from a liberal paradigm with its faith in rationalism, scepticism, individualism and objectivity, liberalism is not seen as an ideology or cultural system in itself, but rather *the* impartial arbiter of ideological or cultural encounters in the public sphere. When rights collide, religion must ultimately "listen to reason."[10]

Applying Charter values should not mean relegating "dissenters" to their own private realms. Human dignity and religious accommodation are not mutually exclusive. The impact of

litigating these polarizing positions in a "winner take all" courtroom is felt by more than just some irate fundamentalists. By stripping away religion from the public sphere, diversity is subtly transformed into fragmentation. When ethnic and religious groups are alienated in an a-religious and a-cultural public sphere (ironically, in the name of greater integration), such groups withdraw into their own ghettoized communities. If there is no space in the public sphere for moderate religion, the result will be retreat into greater extremism, stereotyping, and lack of understanding.

To take a recent example from Quebec, if Muslim girls aren't allowed to play soccer while wearing the hijab for so-called safety reasons, they will simply stop (or be forced to stop) playing the game entirely.[11] If elements of *sharia* law aren't allowed to co-exist in family law arbitrations and tribunals, such disputes will disappear into the dark corridors of the private sphere, far from the scrutiny, accountability and civic value of the public sphere.[12] If children of deeply religious families are faced with a public school system that doesn't accommodate certain views on early childhood education, the proliferation of home schooling and private, religious education could be close behind. This would have disastrous consequences for the public school system, not just financially, but in terms of the fundamental civic lessons of understanding, compromise, debate and respect for difference.

Accommodation of difference lies at the very core of civil society, defined by Elshtain as "the many networks, institution and relationships that lie, to a great extent, beyond the purview of the state's writ in a pluralistic, constitutional order."[13] In a diverse, multicultural polity like Canada, civil society creates and maintains a shared social fabric. This is

the realm in which citizens grapple with divergent views, conflicting rights and the pragmatic realities of a *modus vivendi* on a daily basis. Structurally speaking, civil society appears to be better equipped to sort out differences than the adversarial, winner-take-all litigation system. By developing civic skills of compromise, stewardship, understanding and debate, civil society can play an educative role that our legal system is unwilling, and often unable, to play. Of course, our courts should continue to intervene when harm is inflicted or rights are infringed in the civil society setting. However, the legal system should take a more modest approach when it reaches its inherent limits as to dialogue, compromise, and cross-cultural understanding.

This hybrid space incorporating both public and private spheres is fragile and could be seriously threatened if we impose the rigid separation of church and state rather than call for their co-operation. Too often we create false dichotomies between the rule of law and the supremacy of God as opposed to looking at the vast areas of commonality between Charter values of dignity, equality, security and autonomy and religious values like grace, humility, forgiveness, and charity.

When these worldviews do in fact collide, the debate is better served in the public sphere or in civil society than in the adversarial courtroom. The courts should adjudicate as a last resort where civil society has failed and harm is being inflicted on an individual. Whether it be compelling marriage commissioners to officiate at same-sex marriages, ordering printing companies to print the materials of gay advocacy groups or refusing to accredit education programs at private universities who disagree with homosexuality, preemptively legislating or ruling in the abstract leads us down the road to Gray's rational

consensus liberalism. Let the balancing take place when rights actually collide, not at the proactive, symbolic rights affirmation stage.

Joseph, Cardinal Bernardin[14] posited three ways in which religion plays a vital public role: in contributing to civil society through religiously based institutions in education, health care, and family services; in direct outreach to the poorest members of society; and in the realm of civic and moral formation as religion teaches service to one's neighbours and a sense of civic stewardship.[15] The contribution of religious groups to public life is impossible to measure and well beyond the scope of this paper. However, the civilizational antecedents and moral compass that have infused our laws, policies and institutions for hundreds of years are rooted in the Judeo-Christian moral tradition. Charities, non-governmental organizations, volunteer associations and community groups are heavily populated by religious individuals and groups. Principles such as grace, forgiveness, charity, and redemption that have infused our common ethos are profoundly rooted in and, many would argue, maintained by religion. We should be aware and unashamed of that by accepting and fostering religious freedoms, subject only to their infringement of the rights of others.

WHEN RIGHTS COLLIDE: SAME-SEX MARRIAGE AND CIVIL MARRIAGE COMMISSIONERS

Viewing the same-sex marriage debate in the light of the harm principle would go a long way to pre-empt the valid criticisms of the courts imposing a rational consensus in the name of Charter values. It would be much more difficult to demonstrate the tangible harm inflicted on heterosexual couples by extending civil marriage to same-sex couples, especially con-

sidering the exemption in the Civil Marriage Act for religious marriage, which allows officials of religious groups to refuse to perform same-sex marriages.

Consider the issue of compelling marriage commissioners to officiate at same-sex marriages. Solemnization is a provincial responsibility and different provinces have reacted to the Civil Marriage Act in different ways (the Act itself leaves open the door as to ways of accommodating religious objections to performing same-sex marriages). For many same-sex activists, the dignity requirement of section 15 requires symbolic, public affirmation in compelling marriage commissioners to officiate at same-sex marriages irrespective of their religious beliefs. According to Bruce MacDougall, accommodating the religious beliefs of marriage commissioners would create a "religious veto" over the availability of a public service and run contrary to legal authority that protects equality based on sexual orientation.[16]

As Benson correctly notes, pluralism can connote a kind of relativistic approach as in "because we are a pluralistic society, such and such a moral position cannot have any public validity." To put in the context of compelling marriage commissioners to perform same-sex marriages against their religious views, the new pluralism/tolerance requires public officials like marriage commissioners to leave their unfavourable moral positions at home, or at church. This offers a false simplicity – our taxpayer dollars fund their salary and as a result they must do their job according to the dominant understanding of "tolerance" or individual rights. However, as with so many of these "conflicting rights" and the false dualism of law versus religion, there is a middle ground which can offer a way of respectfully living together in disagreement better than the

"one size fits all" approach. The issue here isn't as simple as whether gay and lesbian Canadians should be afforded their Charter rights or not. The question is whether public affirmation and celebration of same-sex marriage, in the form of proactively compelling marriage commissioners, is necessary to satisfy the dignity requirement of section 15.

First, this conflict between same-sex couples and marriage commissioners would likely occur only in a fraction of cases as same-sex couples wouldn't want to be married by someone who fundamentally disagrees with their way of life, especially considering the places where such religious objections would be most prevalent. Second, in those select cases where this conflict would occur, a more accommodating administrative solution exists. The provincial government would have an obligation to find a marriage commissioner who would be willing to officiate. This step could very well be done subtly and proactively on an administrative level to avoid the situation where marriage commissioners who have religious objections would be asked to perform such a marriage. Third, all future marriage commissioners would be compelled to officiate at same-sex marriages, thus 'grandfathering' the existing marriage officials. Fourth, if this administrative solution fails and a Charter challenge arises, then the SCC would balance the dignity of the same-sex couple under section 15 with the religious freedom of the marriage commissioner under section 2(a) in a contextual, fact-specific analysis. However, by legislating in the abstract to solve a problem that will rarely, if ever, arise, we unnecessarily antagonize both groups. In doing so, "tolerance" becomes a vehicle for convergence which defeats its very purpose, namely, the accommodation of a diversity of worldviews.

The tendency to cast the debate in black and white terms as being either anti-religious or anti-gay alienates both and corrodes the social fabric of civil society. In the name of liberal "tolerance", "dignity", and "Charter values", there is the potential of oversimplifying the "clash of all-encompassing normative commitments" (to use the language of Chief Justice McLachlin)[17] leading to a stripping away of the genuine tolerance and pluralism that liberalism was originally conceived to protect. What is at stake here is the alienation not of some fundamentalist sects, but an array of religious adherents who play a critical role in civil society groups across the country.

Indeed, a far more honest and effective means of confronting perceived intolerance is not to hide it away in the private realm of churches, religious schools and homes, as the disciples of secularism are attempting to do, but to confront it, debate it and try and understand it under the scrutiny of public schools, civil society institutions and political debate. Simply relegating divergent views to the private sphere in the name of a societal consensus will, in addition to stifling important debates on questions of the day, further fragment the civic fabric of Canadian society. Scattered islands of faith communities (whether they be religious, non-religious, or cultural as they all share a sincerely-held *faith* in something) do not constitute a pluralistic public sphere, but rather a way to live *apart* in disagreement, leaving all sectors of society impoverished.

The realm of civil society is precisely where Arendt's "enlarged mentality" can flourish. When we reflect on this matter from the perspective of others, aware of the profoundly cross-cultural encounter saddled with all of its normative assumptions, the debate is transformed from a rigid, rational

consensus to a culture of genuine tolerance and diversity. In affirming the complexity of identity and embracing the value of difference, we give reasons for minority groups and divergent religious faiths to reciprocate such tolerance and participate actively in civil society. History has shown that both the religious and non-religious have been, and can be, guilty of a "diminished mentality". The best setting in which to combat such intolerance, whether it be religious fundamentalism, radical secularism, or other extremist views, is in an enlarged public sphere. Our *modus vivendi*, or how we live together in disagreement, will be the central challenge for Canada's ever-changing, multicultural society.

NOTES

1 *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 421.

2 For more on *modus vivendi* liberalism, see John Gray, *Two Faces of Liberalism* (New York: The New Press, 2000).

3 Benjamin Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State" (2002) 17 Can JL & Soc 39 at 46.

4 This term was first used by Iain T. Benson, "The Context for Diversity and Accommodation in the Democratic State: The Need for a Re-evaluation of Current Approaches in Canada" (August 2006), online: Centre for Cultural Renewal <http://www.culturalrenewal.ca/downloads/sb_culturalrenewal/BENSONPaperPresentedatCBA.pdf> at 12, as presented at the Canadian Bar Association National Conference in St. John's, Newfoundland, 13–15 August 2006.

5 *R. v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728. For commentary on *Labaye* and the harm principle, see Peter Lauwers and Iain

T. Benson, "Swingers Clubs", *R. v. Labaye*, Lex View No. 56 (2005), <http://www.culturalrenewal.ca/qry/page.taf?id=114>.

6 *Ross v. New Brunswick School District No. 15* (1996) 133 D.L.R. (4th) 1 (S.C.C.) [*Ross*].

7 Ibid. at para 72.

8 Note that Mill always considered harm to be a necessary, but not sufficient condition for legal enforcement, allowing for a more nuanced, contextual approach to the mediation of competing rights claims.

9 Hannah Arendt, *Lectures on Kant's Political Philosophy,* Ronald Beiner, ed. (Chicago: University of Chicago Press, 1982).

10 Paul Horwitz, "Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54 U Toronto Fac L Rev 2 at 24.

11 See "Muslim Liberals Decry Charest's Stand on Soccer Hijab", CBC News (27 February 2007), online: <http://www.cbc.ca/canada/montreal/story/2007/02/27/qcsoccerhijab20070227.html>.

12 See Marion Boyd, "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion" (20 December 2004), online: Ontario Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/>.

13 Jean Bethke Elshtain, "A Response to Chief Justice McLachlin", in *Recognizing Religion in a Secular Society: Essays in Pluralism Religion, and Public Policy,* Douglas Farrow, ed. (Montreal: McGill-Queens University Press, 2004) 35–40 at 38.

14 Cardinal Bernardin was an American prelate of the Roman Catholic Church who served as Archbishop of Chicago from 1982 until his death in 1996.

15 In Farrow, ed., *Recognizing Religion* 38.

16 Bruce MacDougall, "Refusing to Officiate at Same-Sex Civil Marriages" (2006) 69 Sask L Rev 351 at 361.

17 The Right Honourable Beverley McLachlin has been the Chief Justice of the Supreme Court of Canada since 1998. In a debate with Jean Bethke Elshtain in October 2002 at the "Pluralism, Religion and Public Policy" conference at McGill University, she described the rule of law as making "total claims upon the self" in a "dialectic of normative commitments" between religion and the rule of law; "Freedom of Religion and the Rule of Law: A Canadian Perspective", in Farrow, ed., *Recognizing Religion* 12–34 at 16.

1R. *v. Big M Drug Mart*, [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 421.
2For more on *modus vivendi* liberalism, see John Gray, *Two Faces of Liberalism* (New York: The New Press, 2000).
3Benjamin Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State" (2002), 17 Can. J.L. & Soc. 39, at 46.
4This term was first used by Iain T. Benson, "The Context for Diversity and Accommodation in the Democratic State: The Need for a Re-evaluation of Current Approaches in Canada" (August 2006), online: Centre for Cultural Renewal<http://www.culturalrenewal.ca/downloads/sb_culturalrenewal/BENSONPaperPresentedatCBA.pdf> at 12, as presented at the Canadian Bar Association National Conference in St. John's, Newfoundland, 13-15 August, 2006.
5R *v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728. For commentary on *Labaye* and the harm principle, see Peter Lauwers and Iain T. Benson, "Swingers Clubs" *R v. Labaye*, LEX VIEW, No. 56 (2005), http://www.culturalrenewal.ca/qry/page.taf?id=114.
6*Ross v. New Brunswick School District No. 15* (1996), 133 D.L.R. (4th) 1 S.C.C. [*Ross*].
7*Ibid.* at para 72.
8Note that Mill always considered harm to be a necessary, but not sufficient condition for legal enforcement, allowing for a more nuanced, contextual approach to the mediation of competing rights claims.
9Ronald Beiner, ed., *Hannah Arendt, Lectures on Kant's Political Philosophy* (Chicago: University of Chicago Press, 1982).
10Paul Horwitz, "Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54 U. Toronto Fac. L. Rev. 2 at 24.
11See "Muslim Liberals Decry Charest's Stand on Soccer Hijab", *CBC News* (27 February 2007), online: <http://www.cbc.ca/canada/montreal/story/2007/02/27/qc-soccerhijab20070227.html>.
12See Marion Boyd, "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion" (20 December 2004), online: Ontario Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/>.
13Jean Bethke Elshtain, "A Response to Chief Justice McLachlin", in Douglas Farrow ed., *Recognizing Religion in a Secular Society: Essays in Pluralism Religion, and Public Policy* (Montreal: McGill-Queens University Press, 2004), at 38.
14 Cardinal Joseph Bernardin was an American prelate of the Roman Catholic Church who served as Archbishop of Chicago from 1982 until his death in 1996.
15*Supra,* note 13, at 38.
16Bruce MacDougall, "Refusing to Officiate at Same-Sex Civil Marriages" (2006) 69 Sask. L. Rev. 351 at 361.
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