

**ACCEPTING THE UNACCEPTABLE: TRINITY WESTERN UNIVERSITY, RELIGIOUS  
FREEDOM, AND THE MEANING OF LIBERAL CONSTITUTIONALISM**

ROBERT BOISSONNEAULT

A THESIS SUBMITTED TO THE FACULTY OF GRADUATE STUDIES IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS

GRADUATE PROGRAM IN LAW  
YORK UNIVERSITY  
TORONTO, ONTARIO  
FEBRUARY 2022

**ABSTRACT**

This thesis proposes an answer to the question of when, and under what conditions, a state operating within the framework of liberal constitutionalism may legitimately condition receipt of public benefits on the recipient's conformity with liberal values—a question that is implicitly asked, but never directly answered, by the decision of the Supreme Court of Canada in *Law Society of British Columbia v Trinity Western University*. How this question is answered has significant implications for the law of religious freedom in Canada.

This thesis posits a conceptual distinction between two types of public benefit: public licences and public mandates. This distinction is animated by the principles of 1) tolerance and 2) respect for individual self-actualisation, which together form the core of liberal constitutionalism. This thesis argues that only access to public mandates may be made contingent on conformity with liberal values.

## ACKNOWLEDGEMENTS

I want to acknowledge my parents, Marc and Judy, and my brother, Matthew, who encouraged me to persevere through every obstacle and gave me every reason I needed to keep going.

I want to acknowledge my friends—Alex, Charlie, Daman, Daniel, Isaac, Laurence, Mathias, Max, Michael, Ryan, Steve, Thomas, and Zechariah—who provided valuable feedback and, perhaps more importantly, moral support.

I want to acknowledge the members of my Examining Committee, Profs. Amélie Barras and Bruce Ryder, for their thoughtful engagement with my work.

I want to acknowledge Profs. Dayna Scott, Sonia Lawrence, and Ruth Buchanan, each of whom took a chance on me.

I want to acknowledge my supervisor, Prof. Benjamin Berger, who was and is the best teacher I have ever had, and without whom no part of this would have been possible.

Lastly, I want to acknowledge my ancestors, Jewish and Catholic alike, who kept their faith over countless centuries and who now lie, unknown to me, in unvisited graves the world over. May I come to understand God as well as they did.

AMDG

*Robert Boissonneault*

*February 3, 2022*

## TABLE OF CONTENTS

<b>ABSTRACT</b> .....	II
<b>ACKNOWLEDGEMENTS</b> .....	III
<b>TABLE OF CONTENTS</b> .....	IV
<b>SECTION 1: INTRODUCTION</b> .....	1
<b>SECTION 2: CASE LAW</b> .....	9
Overview .....	9
<i>R v Big M Drug Mart</i> (1985) and <i>R v Edwards Books and Art Ltd</i> (1986) .....	10
<i>Trinity Western University v British Columbia College of Teachers</i> (2001) .....	14
<i>Chamberlain v Surrey School District No 36</i> (2002) .....	16
<i>Syndicat Northcrest v Amselem</i> (2004) .....	17
<i>SL v Commission scolaire des Chênes</i> (2012) .....	19
<i>Loyola High School v Quebec</i> (2015) .....	20
<i>Trinity Western University v The Nova Scotia Barristers' Society</i> (2015) and <i>The Nova Scotia Barristers' Society v Trinity Western University</i> (2016) .....	25
<i>Trinity Western University v The Law Society of Upper Canada</i> (2015) and <i>Trinity Western University v The Law Society of Upper Canada</i> (2016) .....	27
<i>Trinity Western University v The Law Society of British Columbia</i> (2015) and <i>Trinity Western University v The Law Society of British Columbia</i> (2016) .....	31
<i>Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)</i> (2017) .....	33
<i>Law Society of British Columbia v Trinity Western University</i> and <i>Trinity Western University v Law Society of Upper Canada</i> (2018) .....	38
MAJORITY OPINION AND CONCURRENCES .....	38
DISSENT .....	39
Summary .....	42
<b>SECTION 3: SCHOLARLY LITERATURE</b> .....	44
Overview .....	44
Criticising the <i>status quo</i> : The conscience alternative .....	45
Criticising the <i>status quo</i> : The equality alternative .....	48
Defending the <i>status quo</i> : The “proxy” argument .....	52
Defending the <i>status quo</i> : Religion <i>qua</i> religion .....	58
Summary .....	61
<b>SECTION 4: RELIGION AND SELF-ACTUALISATION</b> .....	64
Introduction .....	64
The right to be wrong .....	65
Engaging the incomprehensible .....	71
Section 32 and self-actualisation .....	75
The commitment to self-actualisation .....	84
Direct and indirect protection .....	86
<b>SECTION 5: RELIGION AND TOLERANCE</b> .....	94
Introduction .....	94
Why tolerance? .....	96
Tolerance and value pluralism .....	100
What does it mean for value pluralism to “fail”? .....	104
When does moral disapproval justify withholding toleration? .....	106
<b>SECTION 6: CONCLUSION</b> .....	119
<b>BIBLIOGRAPHY</b> .....	124

## **SECTION 1: INTRODUCTION**

The dispute between Trinity Western University (TWU) and the law societies of Ontario and British Columbia should be understood as a dispute over whether and to what extent the liberal state can make access to public resources contingent on conformity with liberal values. My purpose here is to propose a framework for thinking about this question. I argue for a framework in which the state distinguishes between two types of lawful authority: public licences and public mandates. The TWU dispute reveals the utility of such a distinction, derived from the two commitments that form the core of state liberalism: the commitment to individual self-actualisation and the commitment to tolerance.

While the commitment to self-actualisation, however articulated, still features prominently in legal discourse, the commitment to tolerance is perhaps less prominent than it once was. Indeed, the word “tolerance” is curiously absent from the decision of the Supreme Court of Canada in *Law Society of British Columbia v Trinity Western University* (2018).<sup>1</sup> This omission is especially striking given how closely the concept of tolerance is associated with the concept of religious freedom—an association that can be traced back to the beginning of the modern era.<sup>2</sup>

Religious tolerance requires one to permit activities to which one is morally opposed (although, to be clear, this demand is not unique to religious tolerance; tolerance of sexual diversity may be similarly demanding). The “activity” may simply be the status of holding heretical or, alternatively, irrational beliefs, or it may be a specific practice, such as circumcision, the wearing of gendered religious clothing, or same-sex sexual relations.

John Gray argues that there are, within the liberal tradition, two competing conceptions of tolerance:

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.<sup>3</sup>

---

<sup>1</sup> *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [*Trinity Western*].

<sup>2</sup> See, for example, John Locke, “A Letter Concerning Toleration” in Ian Shapiro, ed, *Two Treatises of Government and A Letter Concerning Toleration* (New Haven, Conn: Yale University Press, 2003) 220.

<sup>3</sup> John Gray, *Two Faces of Liberalism* (New York: The New Press, 2000) at 105 [Gray 2000]. For a discussion of Gray’s work as it relates to religious freedom under the *Canadian Charter of Rights and Freedoms*, see Alex

My own view is closer to the latter than to the former, although it is certainly possible to recognise difference and disagreement as permanent features of human society without welcoming “divergent ways of living.” In other words, I can believe that society would be better off without difference (or with less difference, or without a particular manifestation of difference) while at the same time acknowledging that social difference is the price of social peace. Whether such difference is good or bad is of little practical consequence. It is simply a fact.

Gray’s preferred conception of tolerance—tolerance as a condition of peace—is, to my mind, inclusive of both “acceptance” and “tolerance.” The former captures one’s relationship with those manifestations of difference that one is prepared to affirmatively “welcome” in the way that Gray describes. The latter captures one’s relationship with those manifestations of difference that one does not affirmatively welcome, but whose existence one is nonetheless prepared to “merely” tolerate. For example, one might affirmatively welcome ready access to a multiplicity of cuisines and at the same time merely tolerating certain cultural and religious practices.

It should also be remembered that the word “tolerance” once carried a very different connotation. As Wendy Brown notes, “tolerance” was once widely understood as a “code word for mannered racialism.”<sup>4</sup> While Brown is correct, I would argue that reluctant acquiescence to difference is a necessary part of the spectrum of tolerance. A commitment to liberal tolerance does not require that all manifestations of difference be welcomed. More importantly, it is not the case that tolerance need only be extended to those manifestations of difference that *can* be welcomed and celebrated. If it were, there would be limited room in society for fundamentally irreconcilable, comprehensively metaphysical commitments, and religious minorities in particular would suffer.

In describing religious commitments as “comprehensively metaphysical”, my goal is to capture, or at least gesture towards, that which sets religious commitments apart from secular or otherwise non-religious commitments. Many non-religious people have metaphysical commitments—any form of moral realism would qualify—but those commitments are not

---

Fielding, “When Rights Collide: Liberalism, Pluralism and Religious Freedom in Canada” (2008) 13 Appeal: Rev Current L & L Reform 28.

<sup>4</sup> Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton: Princeton University Press, 2006) at 1 [Brown 2006].

experienced as obligations to a transcendent, unifying source of authority that exists external to and independently of human society. Religious commitments have a relational component that is absent from secular ethical commitments. They are commitments to the transcendent or to the divine, however understood.

I acknowledge that these descriptors are imperfect; they likely owe too much to the Western tradition of classical theism. Indeed, there is likely no set of descriptors neutral enough to capture the full array of religious experience. Still, the distinguishing feature of religious commitment with which the liberal state ought to be concerned is the being- and life-orienting way in which the commitment is experienced—its comprehensive form, rather than its content, whatever that may be. It is this feature that allows me to describe religious commitments as “comprehensively metaphysical” in nature.

One further point must be made: The religious commitments that I describe as “comprehensively metaphysical” are the first-order metaphysical commitments that form the foundation of one’s religious belief system. A Jew’s second-order commitment to, for example, keep a kosher home may be *derived* from comprehensively metaphysical commitments—such as belief in the authority of the Law of Moses—but it cannot itself be characterised as comprehensively metaphysical.

In light of the above, the question that I propose to answer is as follows: What does *Trinity Western* tell us about how the liberal state should engage with religious communities, sustained by comprehensively metaphysical commitments, whose values are in tension with those of liberalism? How should we think about questions of access to public resources by such communities?

I argue that the liberal state’s relations with non-liberal or otherwise “dissident” religious communities should be conducted in accordance with two foundational liberal commitments: the commitment to self-actualisation and the commitment to tolerance. I derive from these commitments a necessary distinction between public mandates and public licences. When awarding public mandates—which should be understood as grants of authority to act on the state’s behalf—the state is entitled to require that the mandate be carried out in accordance with state values (that is to say, liberal values). However, when awarding public licences—which should be understood as grants of permission to engage in a particular activity—the state’s

decision must not be informed by approval or disapproval of the prospective licensee’s values, especially where those values are grounded in religious convictions.<sup>5</sup>

The licence/mandate distinction is, at its core, a framework for thinking about when and to what extent the liberal state should condition access to public resources on conformity with state values. It is also, more narrowly, a way of understanding what the dispute between Trinity Western University and the various law societies was really about. As such, the licence/mandate distinction—and the distinctively liberal commitments from which it is derived—will animate much of the discussion that follows.

I will approach the above question from the perspective of the dispute in *Trinity Western*. TWU is a small, private, evangelical Christian university located in Langley, British Columbia. It is formally affiliated with the Evangelical Free Church of Canada and is accredited in both Canada and the United States. All students are required to adhere to the Community Covenant, a code of conduct that forbids “sexual intimacy that violates the sacredness of marriage between a man and a woman.”

This provision has been widely condemned as homophobic.<sup>6</sup> In 2012, TWU began the process of establishing a law school, which entailed seeking accreditation from the ten provincial law societies. Three of the ten—the Law Society of British Columbia, the Law Society of Upper Canada, and the Nova Scotia Barristers’ Society—ultimately denied accreditation.<sup>7</sup> In each case, the law society (or members of the law society) objected to the accreditation of a law school that was engaged in homophobic discrimination. TWU then applied for judicial review in all three provinces. The matter was ultimately resolved by the Supreme Court in June 2018.

The provision of the TWU Community Covenant to which the law societies objected indisputably has the potential to harm LGBT students, faculty, and staff. The prospect of protecting it, even under the constitutional aegis of religious freedom, offends the liberal, equality-protective conscience in a way that protecting (for example) the freedom of a Sikh

---

<sup>5</sup> To be clear, the state can also empower private actors in other ways. For example, an *ex gratia* payment is neither a mandate or a licence, nor is a long-term funding arrangement. The mandate/licence distinction is intended to capture a particular kind of relationship with the state, wherein an individual or institution plays an ongoing role that it could not play without some kind of state empowerment.

<sup>6</sup> See Elaine Craig, “The Case for the Federation of Law Societies of Canada Rejecting Trinity Western University’s Proposed Law Degree Program” (2013) 25 Can J Women & L 148; see also Jacques Gallant, “Top Court to Weigh In on Accreditation for Christian Law School”, *The Toronto Star* (5 November 2016), online: <[www.thestar.ca](http://www.thestar.ca)>; Douglas Todd, “The Bible Tells Them So: Why Homosexual Behavior is Not Allowed at Trinity Western”, *Vancouver Sun* (3 February 2013), online: <[www.vancouversun.com](http://www.vancouversun.com)>.

<sup>7</sup> The Law Society of Upper Canada became the Law Society of Ontario in May 2018.

student to carry the ceremonial kirpan does not.<sup>8</sup> It is the difference between causing inconvenience to an institution and passing judgment on a core element of individual identity. Tolerance is naturally put to a much greater test in the latter case. Does religious freedom operate as a kind of personal veto, allowing religious individuals to “opt out” of laws of general application? Is it a “weak right” that cannot survive conflict with any other right? Or is there still a reason to protect religion, even when doing so means making non-trivial concessions to religious ways of life?<sup>9</sup>

It is easy enough to protect religion when “religion” is understood as limited to the private sphere (or at least to a discretely religious sphere), where there is little to no possibility of conflict with other enumerated rights, such as the right to equality. This argument features prominently in contemporary critiques of liberal secularism, such as Talal Asad’s:

From the point of view of secularism, religion has the option of confining itself to private belief and worship or of engaging in public talk that makes no demands on life. In either case such religion is seen by secularism to take the form that it properly should have.<sup>10</sup>

I am concerned here with what happens, and what ought to happen, when religion does make demands of society and of the state, and when the consequences of meeting those demands are in tension with the liberal vision of society. My argument has three core components:

1. The liberal state’s relations with dissident religious communities must be conducted in accordance with the liberal commitment to self-actualisation. By “self-actualisation” I mean the experience of living one’s life in accordance with one’s most deeply held commitments. Many individuals, including those whose deeply held commitments are non-liberal, will seek to self-actualise through participation in public life. There must be a recognition that making access to public life (which should be understood as including public resources) contingent on conformity with liberal values will frustrate the self-actualisation of many religious individuals and communities. There must also be a recognition that religious commitments, which I

---

<sup>8</sup> See *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6.

<sup>9</sup> Bruce Ryder expresses a version of this concern, even going so far as to suggest that marriage commissioners who are opposed to same-sex marriage for religious reasons ought to be accommodated, so long as they were appointed before the legalisation of same-sex marriage. See Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship” in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 87 at 100-102 [Ryder 2008].

<sup>10</sup> Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Palo Alto, Calif: Stanford University Press, 2003) at 199.

characterise as “comprehensively metaphysical”, are distinct from non-religious commitments—the key point of divergence being the way in which religious commitments are experienced by the religious adherent.

2. Relations with dissident religious communities must also be conducted in accordance with the liberal commitment to tolerance, which is best understood as the set of social conditions necessary for self-actualisation to occur. I argue, in the tradition of *modus vivendi* or political liberalism, for a presumptively maximalist conception of tolerance, wherein manifestations of difference must not attract legally sanctioned disadvantage unless imposing such disadvantage is reasonably necessary preserve the liberal character of the state and of society.
3. The licence/mandate distinction can be a way of honouring these commitments as we think about access to public benefits, such as accreditation. It ensures that access to public life is not unnecessarily made contingent on conformity with liberal values, which in turn ensures that the self-actualisation of individuals and communities with non-liberal commitments is not unduly frustrated. I conclude by arguing that the authority to operate an accredited law school is best understood as a licence, not as a mandate, and observing that the consequences of accrediting the TWU law school would not have meaningfully threatened or diminished the liberal character of society or of the state.

TWU’s status as a university is also an important factor. In *R v Big M Drug Mart* (1985), the Supreme Court identified the right to teach one’s religion as part of the “essence” of religious freedom.<sup>11</sup> In *Loyola High School v Quebec* (2012), the court recognized that the teaching of religion may depend on the existence of dedicated educational institutions.<sup>12</sup> TWU is not simply a religious institution that happens to have an educational mission; its educational function is not incidental. When a religious educational institution makes a claim under section 2(a), the teaching of religion ought to be treated as a core religious activity. I would argue that the religious practices of educational institutions are therefore entitled to greater protection than are the practices of institutions whose religious character is only incidental.

---

<sup>11</sup> *R v Big M Drug Mart*, [1985] 1 SCR 295 at para 94, 18 DLR (4th) 321 [*Big M*].

<sup>12</sup> *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 132-133 [*Loyola High School*].

The TWU cases are, as I have said, a point of reference, or perhaps a framing device. Benjamin Berger describes the first TWU case, which concerned the decision of the British Columbia College of Teachers to deny accreditation to TWU’s teacher education program, as raising “questions about the relationship of private Christian post-secondary to public life, the conditions precedent for the discharge of a public role in a diverse society committed to equal treatment, [and] the history and purpose of human rights exemptions for religious institutions.”<sup>13</sup> The same is true of the recent TWU cases.

However, my primary goal is not to argue for or against the accreditation of TWU’s law school, although my position is that none of the law societies disclosed a constitutionally adequate reason for denying accreditation. Rather, my goal is to take advantage of the extent to which TWU, the law societies, and now the courts have aligned themselves with different conceptions of religious freedom. I will also take account of the broader religious freedom jurisprudence that the Supreme Court has developed since the enactment of the *Canadian Charter of Rights and Freedoms* in 1982.

The doctrine of *Charter* values played a central role in the TWU cases. While my position on the *Charter* values question will become clear, it is not the focus of this thesis. I do not take issue with the basic proposition that delegated statutory authority must be exercised in a manner consistent with the *Charter*, but there is a need for greater clarity on how statutory decision-makers ought to go about considering the *Charter*. In one account of the process, the decision-maker must simply ensure that every decision “gives effect ... as fully as possible to the *Charter* protections at stake given the [decision-maker’s] particular statutory mandate.”<sup>14</sup> This account, in which “*Charter* protections” can be equated with “*Charter* rights”, is supported by the Supreme Court’s decisions in *Doré v Barreau de Québec* (2012) and *Loyola High School*.

However, there is another account in which “*Charter* protections” include not only the rights set out in the *Charter* but also the values that animate those rights. This account is supported by more recent decisions, including *Trinity Western*.<sup>15</sup> This second approach of the

---

<sup>13</sup> Benjamin Berger, *Law’s Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at 155 [Berger 2015].

<sup>14</sup> *Loyola High School*, *supra* note 12 at para 39.

<sup>15</sup> For example, the majority notes at para 31 that “under the precedent established by this Court in *Doré* and *Loyola*, the preliminary question is whether the administrative decision engages the *Charter* by limiting *Charter* protections—both rights and values (*Loyola*, at para. 39).” However, there is no reference to “values” in paragraph 39 of *Loyola High School*, only to “protections.” In fact, paragraph 39 of *Loyola High School* is principally a recitation of paragraph 57 of *Doré*, which also says nothing at all about “values.” The court has not used consistent

*Charter* values framework, which appears to be the prevailing approach, is more contentious. Two lines of criticism have emerged, and I am sympathetic to both. Firstly, some critics argue that the *Charter* values analysis is less rights-protective than is the standard *Oakes* analysis under section 1 of the *Charter*. As a result, administrative decision-makers have an arguably “freer hand” to breach the *Charter*, in the sense that the *Doré* proportionate balancing analysis is less onerous than the section 1 analysis.

The second line of criticism holds that the *Charter* values framework allows administrative decision-makers to, in effect, circumvent the recognised limits on the *Charter*’s application and compel private actors to conform to state values. While this is, I think, what occurred in the TWU cases, my purpose here is not to resolve the question of how administrative decision-makers should apply the *Charter*. Still, my arguments will occasionally intersect with the *Charter* values question.

In the next section, I will summarise the decisions of the lower courts on the TWU question, as well as all directly relevant decisions of the Supreme Court. I will focus on those decisions that address 1) the law’s understanding of religion, 2) the ability of religious communities and institutions to govern themselves in accordance with their own values, and 3) the ability of the state to impose its own values on private actors. In Section 3, I will survey the current scholarly literature on religious freedom, summarising the various arguments for and against protecting religion. In Section 4, I discuss the liberal state’s commitment to self-actualisation. In Section 5, I discuss the liberal state’s commitment to tolerance. The licence/mandate distinction is informed by both commitments, but is discussed most extensively in Section 5.

---

language, and one could persuasively argue, although not definitively establish, that the explicit inclusion of “*Charter* values” within the scope of “*Charter* protections” is a more recent development. See *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 at para 31; *Loyola High School*, *supra* note 12 at para 39; *Doré v Barreau de Québec*, 2012 SCC 12 at para 57.

## **SECTION 2: CASE LAW**

### **Overview**

This section serves two purposes. One is to summarise and analyse the various TWU decisions from the perspective of the commitments to self-actualisation and tolerance. The other is to summarise and analyse other decisions that speak to 1) the law's understanding of the nature of religion and the meaning and purpose of religious freedom, 2) the ability of religious communities to govern themselves in accordance with their religious commitments, and 3) the ability of the state to require private actors to act in accordance with state values.

The Supreme Court has consistently recognised the state's commitment to self-actualisation, and has further recognised that the experience of living one's life in accordance with one's religious commitments as an important aspect of self-actualisation. In the *Charter* era, this recognition can be traced back to *Big M* and *R v Edwards Books and Art* (1986). However, the court has also consistently struggled with the comprehensive, relational nature of religious adherence. By this I mean that the court's conception of religion is, to a large extent, predicated on two problematic distinctions. One is a distinction between religious belief and religious practice. The other is a distinction, within the life of a given religious individual, between religious and non-religious activities.

Both distinctions are apparent in *Amselem*, but their problematic implications are most clearly evident in *Ktunaxa Nation v British Columbia* (2017), wherein the court tried and, in my view, failed to make sense of indigenous religion within the existing section 2(a) framework. The result was to highlight the cultural contingency of the law's understanding of religion, and the extent to which that cultural contingency still limits the law's ability to recognise religion as a way of life.

The question of religious self-government at the communal level is addressed most directly in *Alberta v Hutterian Brethren of Wilson Colony* (2009), *Loyola High School*, and *Trinity Western*. However, the relevance of *Hutterian Brethren* is more limited than it may appear. The community in *Hutterian Brethren* sought to set itself apart, physically as well as socially, from mainstream society. Unlike the communities in *Loyola High School* and *Trinity Western*, it did not seek to participate in public life. Still, *Hutterian Brethren* is relevant insofar as it gave the court occasion to recognise the communal and institutional aspects of religious life. More thorough recognition followed in *Loyola High School*, where the court acknowledged that

religious self-actualisation may occur through participation in communal and institutional activities, and that religious freedom must therefore be capable of protecting such activities (although the stopped short of recognising religious freedom as a group right).

The question of state values, and the extent to which the state can compel private conformity with state values, is more elusive. While the court has recognised that one of the purposes of public education is to impart a particular set of values, it has been reluctant to acknowledge the non-neutral and, more precisely, liberal character of the values in question. This reluctance is evident in *Chamberlain v Surrey School District No 36* (2002) and *SL v Commission scolaire des Chênes* (2012). The court did concede in *Mouvement laïque québécois v Saguenay* (2015) that the state cannot be perfectly neutral, but this concession is followed in short order by the perplexing claim that an imperfect neutrality “is nevertheless a true neutrality.”<sup>16</sup>

Finally, there is support for something like the licence/mandate distinction in *SL* and *Loyola High School*, both of which concerned the same component of the provincial secondary school curriculum. While the court in *SL* held that the state may use the public education system to teach what are in essence liberal values—including the value of neutrality—the court in *Loyola High School* held the state does not have a free hand to require private religious schools to teach religion and ethics from a “neutral” perspective. The court recognised that the public education system and Loyola High School did not have the same status in relation to the state. I would argue that, while the public education system carries out a public mandate, Loyola High School’s authority to educate is more akin to a public licence. Consequently, the state’s ability to require conformity with state values is more limited where Loyola High School is concerned.

### ***R v Big M Drug Mart* (1985) and *R v Edwards Books and Art Ltd* (1986)**

The Supreme Court of Canada recognized a limited right to religious freedom in 1955, twenty-seven years prior to the enactment of the *Charter*.<sup>17</sup> That year, the court held in *Chaput v Romain* (1959) that the state must treat all religions equally and cannot interfere in religious

---

<sup>16</sup> *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 132 [*Saguenay*].

<sup>17</sup> Beverley McLachlin, “Freedom of Religion and the Rule of Law: A Canadian Perspective” in Douglas Farrow, ed, *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal: McGill-Queen’s University Press, 2004) 12 at 19.

practices without just cause. As a statutory right, the religious freedom recognized in *Chaput* could be overridden by clear statutory language. It bound the executive but not the legislature.<sup>18</sup>

The decision in *Chaput* came two years after *Saumur v Quebec* (1957), in which the Supreme Court held that, under the division of powers set out in the *Constitution Act, 1867*, only Parliament can legislate with respect to religion.<sup>19</sup> As a result, Québec was constitutionally precluded from enacting legislation targeting religious minorities, such as the Jehovah's Witnesses (both *Chaput* and *Saumur* arose from the Duplessis government's campaign against Québec's Jehovah's Witness community). Taken together, *Chaput* and *Saumur* offered some protection to religion, even if there was not yet a free-standing constitutional right to religious freedom.

However, the approach to religious freedom represented by *Chaput* and *Saumur* has been superseded by the *Charter*-based jurisprudence that has developed since 1982, and the division of powers question (whether the provincial legislatures are competent to legislate with respect to religion) has received little to no judicial attention until very recently.<sup>20</sup> The post-1982 jurisprudence is grounded in section 2 of the *Charter*, which gives constitutional force to four "fundamental freedoms" (or groups thereof), including "freedom of conscience and religion."<sup>21</sup>

The court first defined "freedom of religion" in *R v Big M Mart*, decided in 1985. In that case, the defendant had been charged with selling goods on a Sunday, in violation of the Alberta *Lord's Day Act*. The court struck down the *Act*, finding it to be an unconstitutional form of compelled religious practice. However, the court also attempted to answer the broader question of what is, and should be, protected under the heading of "freedom of religion." Chief Justice Dickson, writing for a unanimous court, offers the following:

Freedom can primarily be characterized by the absence of coercion or constraint ...

Freedom means that, subject to such limitations as are necessary to protect public safety,

---

<sup>18</sup> *Chaput v Romain*, [1959] SCR 321 at 864, 1 DLR (2d) 241.

<sup>19</sup> *Saumur v Quebec (City)*, [1953] 2 SCR 299 at 351, [1953] 4 DLR 641.

<sup>20</sup> It has been argued that Québec's *Act respecting the laicity of the state*, which bars public employees from wearing religious clothing, is unconstitutional on division of powers grounds. See *Hak c Procureure générale du Québec*, 2019 QCCS 2989 at paras 62-77. This argument was recently rejected by the Québec Superior Court in *Hak v Procureure générale du Québec*, 2021 QCCS 1466 at para 434.

<sup>21</sup> *Canadian Charter of Rights and Freedoms*, s 2, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982 c 11 [*Charter*].

order, health, or morals or the fundamental rights and freedoms of others, no one is forced to act contrary to his beliefs or his conscience.<sup>22</sup>

While the claim that freedom consists in the absence of coercion or restraint is clear, there is no apparent distinction between freedom of religion and freedom of conscience. Indeed, Chief Justice Dickson later refers to a singular “purpose of freedom of conscience and religion.”<sup>23</sup> This is not a reference to the language of section 2(a); it is, rather, a tacit endorsement of the proposition that freedom of religion can be collapsed into a broader freedom of conscience. Liberal values “demand that every individual be free to hold and to manifest whatever beliefs his or her conscience dictates.”<sup>24</sup> The implication is that religious beliefs are a function of conscience, although this point is absent from the court’s subsequent religious freedom decisions.<sup>25</sup>

However, Chief Justice Dickson does acknowledge that religious beliefs are “historically prototypical”—and thus likely to be met with persecution—as well as “paradigmatic” of the category of deeply held beliefs, the expression of which is protected by the *Charter*. These two points are significant. They suggest that, even if religion *qua* religion (as distinct from religion as an expression of conscience) is not unique and deserving of special protection, there might nonetheless be functional value in recognizing the unique role that religion plays in Western societies.

The fact that religious beliefs are “historically prototypical” is only relevant if one has an interest in protecting nascent, controversial belief systems and in promoting tolerance. The description of religious beliefs as “paradigmatic” suggests that religious beliefs are representative of deeply held beliefs generally. The specific represents the general, and religious beliefs are the manifestations of conscience against which freedom of religion is tested. To be clear, I am not attributing these further claims to the court; they are largely absent from the *Big M* decision. Still, there are seeds.

---

<sup>22</sup> *Big M*, *supra* note 11.

<sup>23</sup> *Ibid* at para 123.

<sup>24</sup> *Ibid*.

<sup>25</sup> And, moreover, the prevailing view among scholars is that freedom of conscience and freedom of religion are distinct rights. For a recent overview of the scholarly consensus, see Brian Bird, “The Call in *Carter* to Interpret Freedom of Conscience” (2019) 85 SCLR 107 at 112-15; see also Howard Kislowicz, Richard Haigh & Adrienne Ng, “Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom” (2011) 48 *Alta L Rev* 679.

The *Lord's Day Act* was unconstitutional because it had the effect of compelling religious observance. The court held, rightly, that the state was not entitled to insist on universal compliance with Christian religious obligations. In so doing, the court set limits on the state's ability to impose its values on society at large, in line with the liberal state's axiomatic commitment to value pluralism and self-actualisation on one's own terms (these commitments, and their relevance to religious freedom, are addressed in greater detail in a subsequent section).

Notably, the court returned to section 2(a) the next year in *R v Edwards Books and Art Ltd.* The majority opinion was again authored by Chief Justice Dickson, who wrote that "the purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a different or higher order of being."<sup>26</sup> Protecting religious beliefs thus ensures, or at least advances, the protection of conscience-based beliefs generally. If Chief Justice Dickson sees value in protecting religious beliefs *qua* religious beliefs, it is not apparent. The divine, and the beliefs and practices associated with the divine, are incidental to the objective of section 2(a).

While the three "pillars" of religious freedom recognised in *Big M*—the right to hold religious beliefs, the right to profess religious beliefs, and the right to manifest religious beliefs, including through teaching—are a useful analytical tool, they do not capture the entirety of religious life.<sup>27</sup> Indeed, Chief Justice Dickson hastens to add that religious freedom "means much more" than those three rights.<sup>28</sup> This crucial addendum has been wrongly overlooked, leading to a judicial understanding of religion that emphasises the personal the expense of the interpersonal, the communal, and the institutional.<sup>29</sup> Religion—and, more specifically, religious life—is not simply an agglomeration of distinctly "religious" beliefs and practices. It is an all-encompassing way of life, organised around comprehensively metaphysical commitments.

---

<sup>26</sup> *R v Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at para 97, 35 DLR (4th) 1 [*Edwards Books*].

<sup>27</sup> Berger 2015, *supra* note 13 at 198; Howard Kislowicz, "Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation" (2013) 39 *Queen's LJ* 176 at 196-98; Charles Taylor, *The Malaise of Modernity* (Concord, Ont: House of Anansi Press, 1991) 2.

<sup>28</sup> *Big M*, *supra* note 11.

<sup>29</sup> John von Heyking, "Civil Religion and Associational Life under Canada's 'Ephemeral Monster': Canada's Multi-Headed Constitution" in Ronald Weed & John von Heyking, eds, *Civil Religion in Political Thought* (Washington, DC: The Catholic University of America Press, 2010) 298 at 313. See also Christopher L Eisgruber & Mariah Zeisberg, "Religious Freedom in Canada and the United States" (2006) 4 *Intl J Constitutional L* 244 at 258-259.

This aspect of religion does not feature prominently in the court's recent religious freedom decisions.<sup>30</sup> Notably, the majority in *Ktunaxa Nation v British Columbia* limited the state's duty under section 2(a) to "[the protection] of everyone's freedom to hold [religious] beliefs and to manifest them in worship and practice or by teaching and dissemination."<sup>31</sup> In effect, the three "pillars" identified in *Big M* are treated as accounting for the whole of religious freedom, even if Chief Justice Dickson intended otherwise (as seems likely). This approach, anchored in a conception of religion as an aggregate of activities, has worrying implications for the communal and institutional dimensions of religious self-actualisation.

### ***Trinity Western University v British Columbia College of Teachers (2001)***

In 1996, the British Columbia College of Teachers withheld accreditation from the TWU teacher training program. Like the law societies, the college objected to the discriminatory practices in which TWU engages (namely the requirement that members of the TWU community refrain from same-sex sexual relations). Unlike the law societies, the college also objected to allowing individuals with homophobic beliefs to become teachers, which would be contrary to the public interest. In sum, the college denied accreditation in order to exclude homophobic individuals from the teaching profession. Notably, the law societies did not attempt to make this argument; their stated objective was never to keep the legal profession free of homophobic individuals.

The Supreme Court ruled against the college in 2001. While the court accepted that discriminatory practices can justify a denial of accreditation, it found that the specific discriminatory practices of TWU were protected by the BC *Human Rights Act*, which permits private religious institutions like TWU to engage in religiously motivated discrimination (up to a point). More importantly, the court ruled that the college was wrong to have considered how graduates of the TWU program would conduct themselves as teachers:

The perception of the public regarding the religious beliefs of TWU graduates and the inference that those beliefs will produce an unhealthy school environment have, in our

---

<sup>30</sup> Jamie Cameron argues compellingly that the court initially approached section 2(a) as "the setting for a conception, not only of religious freedom, but of all the Charter's fundamental freedoms." This framing of section 2(a) has been almost entirely forgotten. See Jamie Cameron, "Big M's Forgotten Legacy of Freedom" 100 SCLR (2d) [forthcoming in 2020] at 4.

<sup>31</sup> *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 71 [*Ktunaxa Nation*].

view, very little to do, if anything, with the particular expertise of the members of the BCCT ... The evidence in this case is speculative, involving consideration of the potential future beliefs and conduct of graduates from a teacher education program taught exclusively at TWU.<sup>32</sup>

The problem, then, was that the college had presented no evidence of discriminatory conduct by TWU graduates. Had any such evidence existed, the college could have fairly called into question TWU's ability to properly train teachers (and, even then, only if the conduct in question could be plausibly attributed to some failure on the part of the college). The college took the position that TWU's discriminatory policies would necessarily result in discriminatory conduct by TWU graduates. The court rejected this argument, noting that "the BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society."<sup>33</sup>

In other words, one is entitled to hold "divergent" and even bigoted beliefs, provided that said beliefs do not translate into unlawful discrimination. Even if one can assume that most TWU graduates hold homophobic beliefs, one cannot assume that they will discriminate on the basis of those beliefs. The beliefs themselves are protected.

Justice L'Heureux-Dubé, writing alone in dissent, would have upheld the denial of accreditation. She took the view that, when a student or employee of TWU signs the Community Covenant, that student or employee becomes "complicit in an overt, but not illegal, act of discrimination against homosexual and bisexuals."<sup>34</sup> The BCCT, being responsible for providing the "best possible educational environment for public school students", was entitled to "treat [the TWU students'] public expressions of discrimination as potentially affecting the public school communities in which TWU graduates wish to teach."<sup>35</sup>

Justice L'Heureux-Dubé articulated a conception of "belief" very different from that of the majority. In Justice L'Heureux-Dubé's view, the denial of accreditation interfered not with "freedom of belief" but with "the narrower freedom to act on [one's] beliefs." In other words,

---

<sup>32</sup> *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 19 [*TWU v BCCT*].

<sup>33</sup> *Ibid* at para 36.

<sup>34</sup> *Ibid* at para 72, L'Heureux-Dubé J, dissenting.

<sup>35</sup> *Ibid* at paras 47, 72.

because TWU students remained literally “free” to hold their religious beliefs, there had been no interference with religious freedom.

Justice L’Heureux-Dubé’s understanding of religion (and, by extension, of religious freedom) is predicated on a stark distinction between “belief” and “practice”—a distinction that is, more often than not, exogenous to the religious system in question.<sup>36</sup> It is the *law* that decides where belief ends and practice begins. While L’Heureux-Dubé’s reasoning has never been expressly endorsed by the court as a whole, the same insistence on an externally constructed distinction between religious belief and religious practice is present in subsequent decisions (namely, the majority reasons in *Ktunaxa Nation* and Justice Rowe’s concurrence in the more recent TWU decision).

I should note that the decision in *BCCT v TWU* was never likely to determine the outcome of the recent TWU case. The similarities between the two cases notwithstanding, there are important differences between the mandate of the BCCT and those of the law societies. There are also important differences between the two professions. Finally, the sixteen years since *BCCT v TWU* have seen a dramatic improvement in the social standing of LGBT Canadians. Disapproval of homosexuality is no longer the norm. Increasingly, it is the adherents of the TWU Community Covenant (and the beliefs enumerated therein) who find themselves at the margins of society.

### ***Chamberlain v Surrey School District No 36 (2002)***

In *Chamberlain v Surrey School District No 36*, the court again held that the state does not have a free hand to impose its values on society at large, even in the course of providing public services. The applicant was a primary school teacher in the British Columbia public education system. He sought permission to teach his students about same-sex relationships with reference to three children’s books, each of which featured a family wherein both parents were of the same sex. The school board denied the applicant’s request, prompting him to seek judicial review.<sup>37</sup>

---

<sup>36</sup> Myanathi Fernando makes a similar point in the context of the French *laïcité* tradition. See Myanathi L Fernando, *The Republic Unsettled: Muslim French and the Contradictions of Secularism* (Durham, NC: Duke University Press, 2014) 145-147.

<sup>37</sup> *Chamberlain v Surrey School District No 36*, 2002 SCC 86 at paras 1-3 [*Chamberlain*].

It is important to note that the question before the court in *Chamberlain* was whether the board's decision was reasonable, not whether the *Charter* had been violated. In particular, the court was asked to determine whether the board's decision was reasonable in light of section 76 of the British Columbia *School Act*, which requires school boards to conduct themselves in accordance with "strictly secular and non-sectarian principles."<sup>38</sup>

The court concluded that the board's decision was motivated primarily by religious disapproval of homosexuality, and was therefore incompatible with section 76.<sup>39</sup> While the court rightly held that school boards cannot use their authority to impose the religious values of the majority, it also suggested that tolerance and equality are value-neutral ("Tolerance is always age appropriate"<sup>40</sup>). That is to say, the state can teach tolerance and promote equality without imposing a particular set of values.

I disagree. It would be better to simply acknowledge that, in a liberal state, the public education system is intended to teach children liberal values, such as equality. Indeed, public education is one of the few contexts in which the liberal state *can* impose its values, and the court acknowledged as much.<sup>41</sup> In characterizing the principle of equality as value-neutral, the court set the stage for future decisions, most notably *SL* and *Trinity Western*

### ***Syndicat Northcrest v Amselem (2004)***

The next major religious freedom decision—and the first in many years—was *Syndicat Northcrest v Amselem*, decided in 2004 (the 1990s saw few developments in religious freedom jurisprudence, *Adler v Ontario* being a significant exception). The question before the court in *Amselem* was the proper definition of "religion" within the meaning of the Québec *Charter of Human Rights and Freedoms* (which now also serves as the definition of "religion" within the meaning of section 2(a) of the *Charter*).

In order to establish whether the religious rights of the applicants had been violated, the trial judge heard testimony from two rabbis on the proper application of Halakhic law (the rabbis disagreed on the question at hand). The judge's intention was to determine whether the applicants had correctly interpreted the requirements of their religion. Having heard from the

---

<sup>38</sup> *School Act*, RSBC 1996, c 412, s 76.

<sup>39</sup> *Chamberlain*, *supra* note 37 at para 20.

<sup>40</sup> *Ibid* at para 69.

<sup>41</sup> *Ibid* at para 33.

rabbis, the judge accepted the interpretation that he believed to be correct, asserting that “there is no religious obligation requiring practicing Jews to erect their own sukkahs.”<sup>42</sup>

The Court of Appeal rejected this interpretation of freedom of religion, finding that religious beliefs and practices do not need to be doctrinally correct in order to be protected by section 2(a). The Supreme Court agreed with the Court of Appeal on this point. It also clearly linked religious freedom to the divine:

Freedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religion officials.<sup>43</sup>

By acknowledging the role played by the divine in religious beliefs and practice, the court made possible the separation of freedom of religion from freedom of conscience. The *Amselem* decision appears to recognise, however tacitly, that beliefs and practices associated with the divine are somehow unique (the free practice of religion is described as “integrally linked” to one’s “self-definition”<sup>44</sup>).

*Amselem* was hailed as a victory for religious freedom, and understandably so.<sup>45</sup> The court had opened the door to a wide range of religious freedom claims, including by those whose religious beliefs fell outside the doctrinal mainstream. Moreover, it would be relatively easy to establish that one’s 2(a) rights had been violated.<sup>46</sup> In my view, however, the *Amselem* framework overstates the sense in which religion is a personal endeavour, to the detriment of interpersonal, communal, and institutional manifestations of religion—and not by accident. While the law can make sense of “private religion” without much difficulty, “public religion” is more challenging. The law’s particular, culturally emergent conception of religion—which Berger describes as “law’s religion”—“operates within common assumptions about the

---

<sup>42</sup> *Syndicat Northcrest v Amselem*, 2004 SCC 37 at para 22 [*Amselem*].

<sup>43</sup> *Ibid* at para 46.

<sup>44</sup> *Ibid* at para 42

<sup>45</sup> Ryder 2005, *supra* note 16 at 199.

<sup>46</sup> *Amselem*, *supra* note 42 at para 62.

importance of personal commitment, and within these it presents religion in the most favorable light by defining it in terms of intense experience that can galvanize conduct.”<sup>47</sup>

In other words, law’s religion—that is to say, religion as understood by the law—is rooted in personal experience. This conception of religion, which Berger and others associate with a markedly “protestant” mode of religious belief and practice, allows religious difference to “fit within the unifying enclosure of the state.”<sup>48</sup> However, the law’s understanding of religion may or may not align with “lived religion” (that is to say, “religion is experienced in the real world”). Reducing religion to a discrete set of individual beliefs and practices may aid the law in adjudication of rights claims, but this conceptual simplicity comes at the expense of meaningful engagement with the interpersonal, communal, and institutional aspects of lived religion.

While the court purported to address this problem in *Loyola High School*, subsequent decisions disclose an ongoing reluctance to treat religion as a way of life, not as an aggregate of beliefs and practices that can be assessed independently of one another.<sup>49</sup> This reluctance ultimately informed the court’s decision in *Trinity Western*.

### ***SL v Commission scolaire des Chênes (2012)***

In 2005, the government of Québec began work on a program of “secular” moral instruction for secondary school students. The new program, known as “Ethics and Religious Culture” (ERC), was intended to replace the existing religious education programs (at the time, Québec’s *Education Act* permitted parents to choose between Catholic and Protestant religious education).<sup>50</sup> The ERC program gave rise to two *Charter* challenges. The second—*Loyola High School*—is the better known of the two, but the first—*SL v Commission scolaire des Chênes*—is also significant, especially as it relates to the notion of religious neutrality.<sup>51</sup>

---

<sup>47</sup> Berger 2015, *supra* note 13 at 101-03. Here, Berger quotes from Charles Taylor, *Varieties of Religion Today: William James Revisited* (Cambridge, Mass: Harvard University Press, 2002) at 9.

<sup>48</sup> Kathryn Bromley Chan, “The Duelling Narratives of Religious Freedom: A Comment on *Syndicat Northcrest v Amselem*” (2005) 45 *Alta L Rev* 451 at 458. Chan attributes the concept of the state as a homogenising “enclosure” for competing rights claims to Martha Minow, “Rights and Cultural Difference” in Austin Sarat & Thomas R Kearns, eds, *Identities and Rights* (Ann Arbor, Mich: University of Michigan Press, 1995) 357.

<sup>49</sup> I refer primarily to *Ktunaxa Nation* and *Trinity Western*. However, the same reluctance is evident in *Hutterian Brethren* and *SL*, although perhaps to a lesser extent.

<sup>50</sup> Québec, Ministry of Education and Higher Education, “Background for the ERC Program”, (Québec, QC: Ministère de l’Éducation et de l’Enseignement supérieur, September 2017) at para 1.

<sup>51</sup> Berger 2015, *supra* note 13 at 118; Howard Kislowicz, “The Court and Freedom of Religion” (2017) 78 *SCLR* (2d) 221 at 229 [Kislowicz 2017]; Vanessa MacDonnell, “Developments in Constitutional Law: The 2011-2012 Term” (2012) 59 *SCLR* (2d) 51 at 86-88.

The applicants in *SL* were the parents of children in Québec’s public school system. They argued that the ERC program interfered with their rights as parents to raise their children in the Catholic faith. In brief, the applicants’ claim was that “neutrality” is not, in fact, neutral, because teaching children about religion from a “neutral” perspective is incompatible with teaching children that Catholicism is true (which the parents, as practicing Catholics, sincerely believed). If children hear one thing at school and another at church (or at home), they are liable to be confused. This confusion amounts to interference with the parents’ right to teach and disseminate their religion, which is protected by the *Charter*.

The Supreme Court found against the parents, explicitly denying that “different beliefs [being] presented on an equal footing” interferes with religious freedom.<sup>52</sup> The underlying assumption is that neutrality is necessarily non-coercive, and that all religious belief systems can—or, as a matter of law, must—accept equality with all other religious belief systems. As in *Chamberlain*, the court refused to acknowledge that equal legitimacy (as distinct from legal equality) is a distinctly liberal value with which non-liberal belief systems may struggle. The court later returned to this point in *Loyola High School*.

### ***Loyola High School v Quebec (2015)***

In *Loyola High School*, the Supreme Court upheld the right of a private, Catholic high school to teach Catholicism from a Catholic perspective. The government of Québec had sought to require Loyola High School to teach all religions and ethical systems—including Catholicism—from a “neutral” perspective. The court found that section 2(a) protects the communal and institutional expression of religious belief, with Justice Abella writing that “religious freedom under the *Charter* must [account] for the socially embedded nature of religious belief.”<sup>53</sup> One has a right to propagate one’s beliefs, including to one’s children, within the scope of “teaching and dissemination”—one of the three “pillars” of religious freedom recognised by the court in *Big M*. In many cases, this propagation is achieved communally or institutionally, such as through the operation of religious schools. The effect of *Loyola High*

---

<sup>52</sup> *SL v Commission scolaire des Chênes*, 2012 SCC 7 at para 38.

<sup>53</sup> *Loyola High School*, *supra* note 12 at para 60.

*School* was to protect the teaching of religion—and, specifically, the teaching of one’s own religion—from state interference.<sup>54</sup>

Chief Justice McLachlin and Justice Moldaver, writing separately, would have expressly rejected Québec’s argument that a corporation has no right to religious freedom. Québec relied primarily on *Edwards Books*, in which the court held that “a business corporation cannot possess religious beliefs.”<sup>55</sup> However, Loyola High School is not a business corporation, and the concurring judges were satisfied that a corporation can enjoy protection under section 2(a) so long as 1) “it is constituted primarily for religious purposes” and 2) “its operations accord with these religious purposes.”<sup>56</sup>

The extent to which the door may be open to *other* corporate religious freedom claims is not yet known, and even Chief Justice McLachlin and Justice Moldaver noted that “the precise scope of [the two requirements set out above] may require clarification in future cases which test their boundaries, but is evident that Loyola falls within their ambit.”<sup>57</sup> They then emphasised that Loyola High School “has operated for over a century in accordance with [its] religious educational purpose.”<sup>58</sup> These comments, taken together, indicate that *Loyola High School* should not be read as definitively deciding the issue of corporate religious freedom.

Loyola High School won the right to teach both Catholic doctrine and—perhaps more interestingly—Catholic ethics from a Catholic perspective.<sup>59</sup> The school is therefore free, within the parameters of the Ethics and Religious Culture program, to teach that same-sex sexual relations are immoral.<sup>60</sup> In fact, the language of the TWU Community Covenant would not be

---

<sup>54</sup> However, the court also recognises “participation in communal institutions” as “[essential to] the vitality of a religious community”, suggesting that the scope of protection could be expanded to include activities other than religious instruction. A school at which Catholic doctrine is taught is not necessarily a Catholic school, even if said doctrine is taught from a Catholic perspective. Religious schools are embedded in communities of shared belief and practice; their religious character cannot be reduced to the teaching of a course or even to the activity of teaching. It is appropriate that the court recognise this fact.

<sup>55</sup> *Edwards Books*, *supra* note 26 at 784.

<sup>56</sup> *Loyola High School*, *supra* note 12 at para 100, McLachlin CJC & Moldaver J, concurring [*Loyola High School* Concurrence].

<sup>57</sup> *Ibid* at para 101.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Loyola High School*, *supra* note 12 at para 70.

<sup>60</sup> While it is true that Loyola High School did not win a free hand to teach ethics without government oversight, the court expressly recognized, at para 162, the school’s right to “describe and explain Catholic doctrine and ethical beliefs from a Catholic perspective.” Moreover, the school’s teachers “cannot be required to adopt a neutral position.” Consequently, the remaining restrictions on Loyola High School’s ability to teach Catholic ethics are procedural, not substantive. The school must still present any proposed curricula (or amendments to existing curricula) to the government for approval, but the government is not permitted to *withhold* approval on the basis of opposition to the substantive religious beliefs that the school seeks to teach.

out of place in a Catholic document, differences between Catholic and evangelical moral theology notwithstanding. What, then, would happen if Québec’s education ministry found the teaching of Catholic sexual ethics be discriminatory? Could it revoke the accreditation of Catholic private schools? Could it discipline offending teachers?<sup>61</sup>

As in the earlier *SL* decision, the court grounded its reasoning in the notion of “differently legitimate” belief systems, as if one religious belief system can reasonably be expected to concede the legitimacy of another. The court’s specific concern was that, if Loyola High School were permitted to teach other religions from a Catholic perspective, those religions “would necessarily be seen not as differently legitimate belief systems, but as worth of respect only to the extent that they aligned with the tenets of Catholicism.”<sup>62</sup>

A Catholic institution might characterise that outcome as ideal. After all, the Catholic Church is not neutral on the question of whether Catholicism is true, and truth and falsehood cannot be equally legitimate, even if falsehood is respected and protected. Moreover, we do not know what it means for one religious belief system to recognise another as “legitimate.” If a “legitimate” religion is merely one whose adherents are deserving of toleration and respect, the notion of “[different] legitimacy” is not obviously problematic from a religious perspective. However, if a “legitimate” religion is one whose *ethical and metaphysical claims* are deserving of toleration and respect, “legitimacy” might very well present a problem for many religions.

Charles Taylor and Jocelyn Maclure argue that “peaceful coexistence in a diverse society requires that we learn to find normal a range of identity-related differences.”<sup>63</sup> If embracing “different legitimacy” simply means recognising difference as *normal*, then the concept is much less troubling. To what does the legitimacy in question attach? If it attaches to the mere *existence* in society of a multiplicity of identities (whether religious or otherwise), and the consequence is simply that a wide range of identities is recognised as “normal” in the way that Taylor and Maclure describe, then recognising “different legitimacy” is no more burdensome than the basic, *modus vivendi* form of liberal tolerance.<sup>64</sup>

---

<sup>61</sup> In Québec, the teaching profession is subject to direct government regulation—there is no equivalent of the Ontario College of Teachers. For the regulation of private schools, see *infra* note 255.

<sup>62</sup> *Loyola High School*, *supra* note 12 at para 75.

<sup>63</sup> Charles Taylor & Jocelyn Maclure, *Secularism and Freedom of Conscience* (Cambridge, Mass: Harvard University Press, 2011) 47.

<sup>64</sup> On this point, see Andrée-Anne Cormier, “Must Schools Teach Religions Neutrally? The Loyola Case and the Challenges of Liberal Neutrality in Education” (2018) 45 *Religion & Educ* 308 at 317. “One may strongly believe that there exists a universal truth about religious beliefs (e.g., that they are all false and that the lives of religious

If, however, the legitimacy attaches to the *substantive beliefs* of other religions—as the language used by the majority would suggest—then it may not be possible to reconcile the concept of “different legitimacy” with the exclusive truth claims made by any religions. The concurrence expresses a similar concern:

Requiring a religious school to present the viewpoints of other religions as equally legitimate and equally credible is incompatible with religious freedom. Indeed, presenting fundamentally incompatible religious doctrines as equally legitimate and equally credible could imply that they are both equally false. Surely this cannot be a perspective that a religious school can be compelled to adopt.<sup>65</sup>

Again, Catholics believe that Catholicism is true. They necessarily believe that other religions are false (or, at the very least, meaningfully less true than Catholicism). Insisting on the “different legitimacy” of all religions interferes with the ability of Catholics to teach that their religion alone is true (which can normally be done without actively denigrating the adherents of other religions).

As Janet Epp Buckingham notes, teachers in a Catholic school are “not expected to be neutral in the classroom but rather to inculcate Roman Catholic *truth* and perspectives [emphasis added].”<sup>66</sup> The teaching and dissemination “pillar” of religious freedom must be understood as protecting the right of Catholic schools to make exclusive truth claims, at least by implication. One of the purposes of Catholic religious education is to transmit Catholic knowledge (or Catholic truth) from one generation to the next. Catholic schools must therefore be free not only to present the claims of Catholicism but to advocate for the truth of those claims as well. I refer to Catholics and Catholicism because *Loyola High School* concerned a Catholic institution, but most religions make exclusive truth claims of one kind or another.<sup>67</sup>

---

believers are based on an illusion), while also firmly believing that all religious believers are fully equal members of society who should be respected and accommodated politically. Religious believers may coherently believe the same thing about atheists.” Notably, the latter worldview—in which atheists and adherents of other religions are regarded as equal members of society—can be maintained without conceding the *legitimacy* of any other belief system, religious or otherwise.

<sup>65</sup> *Loyola High School Concurrence*, *supra* note 56 at para 160.

<sup>66</sup> Janet Epp Buckingham, “Catholic Schools Can Be Catholic” (2015) 4 Oxford J L & Religion 308 at 310.

<sup>67</sup> Gavin D’Costa, “The Impossibility of a Pluralist View of Religions” (1996) 32 Religious Stud 223 at 227-28; See also Ron Greaves, “The Borders between Religions: A Challenge to the World Religions Approach to Religious Education” (1998) 21 British J Religious Educ 20. For Christian theological perspectives, see John Hick, “Religious Pluralism and Salvation” (1988) 5 Faith & Phil 365; Alvin Plantinga, “A Defense of Religious Exclusivism” in Thomas D Senior, ed, *The Rationality of Belief and the Plurality of Faith: Essays in Honor of William P Alston* (Ithaca, NY: Cornell University Press, 1995) 191.

The Supreme Court grappled with this element of religious adherence in *Alberta v Hutterian Brethren of Wilson Colony*, acknowledging that religious freedom cases “may often present [an] ‘all or nothing’ dilemma ... Compromising religious beliefs is something adherents may understandably be unwilling to do.”<sup>68</sup> The suggestion is that, in a diverse society, perfect compliance with one’s religious obligations may well be impossible. This is no doubt true. At the same time, there is a difference between limits on the performance of religious obligations “in society” and limits on the ability to govern religious institutions in a religious way, as TWU sought to do.<sup>69</sup>

I should note that the court did acknowledge, in *Mouvement laïque québécois v Saguenay*, that “absolute state neutrality is impossible to attain” (although the court hastened to add that “a neutrality that is non-absolute is nonetheless a true neutrality”).<sup>70</sup> While the court was right to recognise the impossibility of absolute neutrality, it remains reluctant to admit just how many things are *not* value-neutral. In particular, tolerance and equal legitimacy were not neutral as applied to the applicants in *SL*, and equality was not neutral as applied to TWU.<sup>71</sup>

This pretence of state neutrality is, to my mind, a poor substitute for the honest commitment to state tolerance articulated by the court in previous religious freedom decisions.<sup>72</sup> By insisting that liberal values are in some sense value-neutral, the court obscures reality of the liberal state’s relationship with non-liberal value systems. Instead of simply acknowledging that the liberal state will sometimes have a legitimate need to interfere with non-liberal ways of life, we characterise such interference as “neutral” and, in so doing, understate its coercive nature.

---

<sup>68</sup> *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 61 [*Hutterian Brethren*].

<sup>69</sup> In a concurring judgment, Chief Justice McLachlin and Justice Moldaver would have extended constitutional protection to religious institutions that 1) are “constituted primarily for religious purposes” and “[operate in accordance with] these religious purposes” (*Loyola High School*, *supra* note 12 at para 100, McLachlin CJC & Moldaver J, concurring). Chief Justice McLachlin and Justice Moldaver did not share the majority’s reluctance to recognise group rights. In my view, such recognition is unnecessary. It is possible—and, I would argue, preferable—to protect the institutional manifestations of religion while preserving religious freedom as an individual right. In cases like *Loyola High School*, the right protected by section 2(a) is the right to self-actualise through participation in religious life. This is an individual right, even if it cannot be exercised by an isolated individual.

<sup>70</sup> *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 132 [*Saguenay*].

<sup>71</sup> Commenting on *Loyola High School*, Howard Kislowicz argues that, while the state is permitted to act non-neutrally when pursuing the “core national values” of “equality, human rights and democracy”, these values “are not a *carte blanche*; there will be a limit to how much a government can limit religious freedom when it claims to be acting in furtherance of core national values.” See Howard Kislowicz, “Developments in Religious Freedom: What *Saguenay* and *Loyola High School* Tell Us—and Don’t—About the Trinity Western University Law School Cases” (2016) 72 SCLR 2(d) 75 at 94 [Kislowicz 2016].

<sup>72</sup> See, for example, para 36 of *TWU v BCCT*, *supra* note 32: “The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.”

The doctrine of state neutrality purports to anchor the state’s posture vis-à-vis dissident ways of life in something external to the liberal value system—or to any value system, for that matter. The doctrine of state tolerance is, by contrast, explicitly anchored in the axiomatic liberal principle of tolerance. It would have, I think, allowed the courts to more clearly recognise the dispute in *Trinity Western* as arising from a clash of values, rather than from a clash between sectarian discrimination and a neutral, minimally coercive commitment to equality.

***Trinity Western University v The Nova Scotia Barristers’ Society (2015) and The Nova Scotia Barristers’ Society v Trinity Western University (2016)***

In April 2014, the Council of the Nova Scotia Barristers’ Society passed a resolution to the effect that TWU would be denied accreditation unless it either “[exempted] law students from signing the Community Covenant” or “[amended] the Community Covenant ... in a way that ceases to discriminate.”<sup>73</sup> TWU sought judicial review, and Justice Campbell of the Supreme Court of Nova Scotia ruled in January 2015 that the NSBS had exceeded its jurisdiction. He found that the Barristers’ Society did not, under the *Legal Profession Act*, “have the power to require universities or law schools to change their policies.”<sup>74</sup> The Barristers’ Society has the authority to regulate the practice of law, but it does not have the authority to regulate law schools, except insofar as it assesses whether they are competent to train lawyers.

While Justice Campbell acknowledged that the *Act* requires the Barristers’ Society to “uphold and protect the public interest in the practice of law”, he rejected the claim that the society may therefore deny accreditation to law schools with morally objectionable policies. This finding followed from a determination that the discriminatory policy in question—the provision of the Community Covenant relating to extra-marital sexual relations—is not unlawful.<sup>75</sup> Finally, Justice Campbell found that, even if the society had acted *intra vires*, its decision would not satisfy the *Oakes* test.<sup>76</sup>

Subsequent judicial developments notwithstanding, the language used by Justice Campbell in *TWU v NSBS* is notably bold. Having summarised the two competing “moral matrices”, he offers the following:

---

<sup>73</sup> *Trinity Western University v Nova Scotia Barristers’ Society*, 2015 NSSC 25 at para 27 [*TWU v NSBS*].

<sup>74</sup> *Ibid* at para 4.

<sup>75</sup> *Ibid* at para 10.

<sup>76</sup> *Ibid* at paras 219, 270.

Both are moral judgments. It has been said that morality binds groups together. It also blinds. The values of the other are easily seen as merely prejudices ... Unless tolerance engages the incomprehensible, the contemptible or the detestable, it is nothing much more than indifference. It isn't a line. It's a process. And it's one that invites and almost requires a level of discomfort.<sup>77</sup>

Justice Campbell's claim here is that tolerance must be understood as *more* than mere indifference. It is easy enough to "tolerate" those divergences that do not provoke discomfort or offence, but Justice Campbell argues that we should practice a more demanding form of tolerance—one that requires us to tolerate "the incomprehensible, the contemptible or the detestable." However, while Justice Campbell would have us tolerate divergences to which we are *not* indifferent, Berger argues that we could achieve the same objective by adopting a posture of indifference towards a wider array of divergences:

The hope of cultivating indifference lies in the possibility that those cultural manifestations one initially sees as foreign, objectionable, or intolerable might, with some effort and reflection, be understood as untroubling to the law ... Faced with a complex and homologous culture and a claim to religious freedom, the judge critically assesses whether a given religious practice or commitment ought really to matter to the law.<sup>78</sup>

At first glance, Justice Campbell's warning against "mere" indifference might appear to conflict with Berger's appeal for a conception of tolerance anchored in indifference. However, I take Justice Campbell and Berger to be making the same basic point: that some manifestations of difference ought to be understood as lying beyond the reach of the state, even while provoking intense discomfort or offence.<sup>79</sup>

Justice Campbell also stated that "a person has a constitutional right to express religiously based views that ridicule, belittle, or affront the dignity of other people, including sexual or other minorities."<sup>80</sup> Morally, the right is grounded in the fact that religion, like the law,

---

<sup>77</sup> *Ibid* at paras 274-275.

<sup>78</sup> Berger 2015, *supra* note 13 at 178.

<sup>79</sup> The concept of "tolerance as indifference" has a long history, especially in the context of religion. John Locke's argument for a limited form of religious freedom was predicated, in part, on an "indifference towards the salvation of others." See David Alvarez, "Reading Locke after Shaftesbury: Feeling Our Way Towards a Postsecular Genealogy of Religious Tolerance" in Mary Helen McMurrin & Alison Conway, eds, *Mind, Body, Motion, Matter: Eighteenth-Century British and French Literary Perspectives* (Toronto: University of Toronto Press, 2016) 92.

<sup>80</sup> *Ibid* at para 206.

makes comprehensive moral claims.<sup>81</sup> Justice Campbell did not elaborate on this point, but I take the underlying assumption to be that religion is a source of moral authority to a greater extent than are other elements of one’s identity, such as one’s race and sexuality.<sup>82</sup> This claim, in conjunction with the claim that tolerance must “[engage] the incomprehensible” and the irreconcilable, makes *TWU v NSBS* especially relevant to my project here.

The decision of the Nova Scotia Court of Appeal, issued in July 2016, was somewhat less interesting. On the jurisdictional question, the court agreed with Justice Campbell—the Barristers’ Society did not have the authority to pass judgment on TWU’s discriminatory policies, especially given that said policies have never been found to violate the British Columbia *Human Rights Act* (the court determined that the Nova Scotia *Human Rights Act* could not be applied to a university based in another province).<sup>83</sup> However, the court declined to address the question of religious freedom, dismissing the society’s appeal without reference to the *Charter*. The decision is therefore of limited theoretical use.

### ***Trinity Western University v The Law Society of Upper Canada (2015) and Trinity Western University v The Law Society of Upper Canada (2016)***

In April 2014, the benchers of the Law Society of Upper Canada voted 28-21 to deny accreditation to TWU. TWU then sought judicial review. In July 2015, the Ontario Superior Court of Justice unanimously upheld the benchers’ decision, having found that the Law Society had properly balanced the relevant *Charter* right—in this case, freedom of religion—with the objectives of the *Law Society Act*.<sup>84</sup> The court noted that the Law Society, unlike the Nova Scotia

---

<sup>81</sup> *Ibid* at para 211.

<sup>82</sup> Justice Campbell notes that there remains a constitutionally protected right to express religious disapproval of homosexual acts, even if most Canadians understand the debate over the morality of such acts to be “over.” He draws on *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, wherein the Supreme Court refers to “potentially offensive but lawful contributions to the public debate on the morality of homosexuality”—a category that, notably, includes express calls for “homosexuality to be illegal” (para 200). While there is also a right to express non-religious disapproval of homosexual acts, *Whatcott* suggests that moral claims anchored in foundational religious texts and doctrines are perhaps entitled to greater deference (para 197). See also *Owens v Saskatchewan (Human Rights Commission)*, 2006 SKCA 41 at para 78.

<sup>83</sup> *The Nova Scotia Barristers’ Society v Trinity Western University*, 2016 NSCA 59 at para 4 [*NSBS v TWU*].

<sup>84</sup> *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 at para 93. Here, the court applied the *Doré* test, which is used to determine whether an administrative decision-maker has properly applied the *Charter*. See *Doré v Barreau de Québec*, 2012 SCC 12 [*Doré*].

Barristers' Society and the British Columbia College of Teachers, has a statutory mandate to “advance...the cause of justice.”<sup>85</sup> The court interpreted this mandate broadly:

In exercising its mandate to advance the cause of justice, to maintain the rule of law, and to act in the public interest, the respondent was entitled to balance the applicants' rights to freedom of religion with the equality rights of its future members, who include members from two historically disadvantaged minorities (LGBTQ persons and women). It was entitled to consider the impact on those equality rights of accrediting TWU's law school, and thereby appear to give recognition and approval to institutional discrimination against those same minorities.<sup>86</sup>

The court made two further points of note. Firstly, because evangelical Christians are free to attend secular law schools—and have done so for decades—the absence of an evangelical Christian law school from the Canadian legal landscape is not an obstacle to the practice of one's evangelical Christian faith.<sup>87</sup> The court took the position that TWU “can hold and promote its beliefs without acting in a manner that coerces others into forsaking their true beliefs in order to have an equal opportunity to a legal education. It is at this point that the right to freedom of religion must yield.”<sup>88</sup>

Secondly—and relatedly—the court cited an address given by Chief Justice Dickson in 1986. Speaking to the Canadian Bar Association, the Chief Justice argued that “the ethos of the [legal] profession” is determined by the admissions process at law schools, and that those involved in the admissions process therefore have a responsibility to treat all applicants equally and fairly.<sup>89</sup> They must act with due deference to the “important role” that the legal system plays in Canadian society, which includes ensuring that the “best candidates” are admitted.<sup>90</sup>

---

<sup>85</sup> *Ibid* at para 129.

<sup>86</sup> *Ibid* at para 116

<sup>87</sup> This is true, just as it is true that Catholic children are free to attend secular high schools, but the decision in *Loyola High School* did not hinge on whether the existence of a Catholic high schools is a strict prerequisite for the free practice of Catholicism. Rather, the decision extended *Charter* protection to communal and institutional expressions of religious belief, including schools. While the Superior Court discusses *Loyola High School* at length, it is not clear what distinguishes a private, Catholic high school from a private, evangelical Christian university, especially when one accounts for the implied right of the former to impose a Catholic learning environment on all students (*Loyola High School*, *supra* note 12 at para 61). *Loyola High School* alone does not appear to tip the balance in favour of the Law Society.

<sup>88</sup> *TWU v LSUC* (ONSC), *supra* note 84 at para 117.

<sup>89</sup> *Ibid* at para 98.

<sup>90</sup> This argument—which the court appears to accept—is similar to the position taken by the BCCT in *TWU v BCCT*. In that case, the BCCT argued that it was empowered to protect the “ethos” of the teaching profession from what can only be described as moral corruption. The moral standing of the profession would be undermined if

The case proceeded to the Ontario Court of Appeal, where it was heard in June 2016. The decision, written by Justice MacPherson, was issued later that month. The Court of Appeal unanimously upheld the decision of the Superior Court, leaving TWU without accreditation in Ontario (at this point, TWU had been either accredited or accredited pending appeal by the relevant law society in every other province). Before addressing the question of religious freedom, Justice MacPherson attempts to distinguish between the position taken by the BCCT in *TWU v BCCT* and the position taken by the LSUC in the current case. In Justice MacPherson’s view, the difference is as follows:

The [BCCT] denied accreditation on the basis that the Community Covenant might affect TWU graduates’ ability to teach in public schools in a non-discriminatory manner. In contrast, the LSUC accepts that TWU graduates would not be at any more risk of discriminating because of the Community Covenant than graduates of other law schools.<sup>91</sup>

That is indeed a tenable distinction, although it is at odds with the “gatekeeper argument” advanced by Chief Justice Dickson and endorsed by the Superior Court. It is clear enough that, while the discriminatory nature of the Community Covenant is and will remain the central issue in any bid for accreditation by TWU, the future conduct of TWU graduates will continue to be scrutinized. Indeed, Justice MacPherson returns to the gatekeeper argument and develops it further, contending that there are two sets of gatekeepers: 1) the admissions committees at law schools and 2) the provincial law societies, with the latter regulating the former.<sup>92</sup>

On the question of religious freedom, the Court of Appeal adds little to the decision of the Superior Court. Justice MacPherson accepts that the Community Covenant is deeply harmful to the LGBT community (“It hurts”<sup>93</sup>), and he rejects the argument that the benchers failed to

---

homophobes and other bigots were permitted to become teachers. Notably, this argument was rejected by the Supreme Court, and not only because the BCCT had acted *ultra vires* with respect to the British Columbia *Teaching Profession Act*. Rather, the court went on to express deep discomfort with ideological litmus tests, irrespective of statutory considerations (*TWU v BCCT*, *supra* note 32 at para 19).

<sup>91</sup> *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518 at para 68 [*TWU v LSUC* (ONCA)].

<sup>92</sup> *Ibid* at para 130.

<sup>93</sup> *Ibid* at para 119.

give due consideration to TWU’s rights under section 2(a) of the *Charter*.<sup>94</sup> The *Doré* test was therefore correctly applied.<sup>95</sup>

Finally, and almost parenthetically, the court cites *Bob Jones University v United States*, a 1983 decision of the Supreme Court of the United States. In that case, the Internal Revenue Service had withdrawn tax-exempt status from Bob Jones University, a private, evangelical Christian university located in Greenville, South Carolina. Until 1971, BJU had denied admission to Black applicants. After 1971, only married Black applicants could be admitted, and interracial relationships were forbidden.<sup>96</sup> BJU challenged the constitutionality of the relevant IRS policy, which denied tax-exempt status to colleges and universities with discriminatory admissions policies.

The Supreme Court ruled against BJU, finding that the IRS could legitimately deny the “public benefit” of tax-exempt status to colleges and universities that violate applicable anti-discrimination policies. More generally, the court agreed with the IRS that tax-exempt status could not be granted “neutrally”—to exempt an institution from taxation is to endorse the activities in which the institution engages, even if only tacitly. Justice MacPherson equates TWU to BJU, and the LSUC to the IRS. In both cases, a regulatory agency denied a public benefit to a private, religious university that was engaged in discrimination. In both cases, the agency had the statutory and the constitutional authority to do so.<sup>97</sup>

Justice MacPherson observes that the Community Covenant “discriminates against the LGBTQ community on the basis of sexual orientation contrary to s. 15 of the *Charter*.”<sup>98</sup> The Supreme Court held in *Egan v Canada* that the *Charter* prohibits discrimination on the basis of sexual orientation, but the *Charter* has never been held to apply to a purely private actor such as

---

<sup>94</sup> *Ibid* at paras 129, 142.

<sup>95</sup> Administrative decision-makers must exercise their statutory discretion in a manner consistent with the values animating the *Charter*. The decision in *Doré v Barreau de Québec*, 2012 SCC 12, provides guidance to both administrative decision-makers and reviewing courts. An administrative decision-maker must “balance” *Charter* values and statutory objectives by determining “how the *Charter* value at issue will best be protected in view of the statutory objectives” (para 55-56). On judicial review, the question before the reviewing court is whether “in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play” (para 57). If the administrative decision-maker has “properly balance the relevant *Charter* value with the statutory objectives”, the decision will be found to be reasonable and will therefore be upheld (para 58).

<sup>96</sup> These discriminatory policies were animated by the religious beliefs of the Jones family, which has controlled BJU since the university’s founding in 1927. Unlike TWU, BJU is not associated with a church—the incumbent head of the Jones family is the highest religious authority.

<sup>97</sup> *TWU v LSUC (ONCA)*, *supra* note 91 at para 138.

<sup>98</sup> *Ibid* at para 115.

TWU.<sup>99</sup> I therefore take Justice MacPherson to mean that the Community Covenant *would* violate section 15 if TWU were subject to the *Charter*. Still, even this claim has problematic implications. The *Doré* test required the Court of Appeal to determine whether the LSUC had properly balanced the objectives of the *Law Society Act* and the relevant *Charter* values, but it is not at all clear how Justice MacPherson’s reasoning—which appears to be informed, at least in part, by consideration of a counterfactual scenario in which TWU is subject to the *Charter*—can be reconciled with the non-application of the *Charter* to private actors.

***Trinity Western University v The Law Society of British Columbia (2015) and Trinity Western University v The Law Society of British Columbia (2016)***

In Ontario and Nova Scotia, the decision to deny accreditation to TWU was clearly made by the governing body of the provincial law society. In British Columbia, the decision-making process was considerably more complicated. In October 2014, the Law Society of British Columbia held a referendum on the question of whether to accredit TWU. The benchers regarded the referendum as binding, and so voted 25-1 to withdraw accreditation.<sup>100</sup> TWU then sought judicial review.

In December 2015, Chief Justice Hinkson of the Supreme Court of British Columbia found that the referendum had been invalid, and that TWU’s accreditation should therefore be restored.<sup>101</sup> However, Chief Justice Hinkson also found that the benchers had properly applied the *Doré* test. Had they simply *voted* to withdraw accreditation—and not unlawfully delegated their decision-making authority to the membership as a whole—their decision would have been upheld.<sup>102</sup>

On the matter of freedom of religion, Chief Justice Hinkson was largely silent. Fortunately for the purposes of this thesis, the Court of Appeal (which ruled in November 2016)

---

<sup>99</sup> *Egan v Canada*, [1995] 2 SCR 513 at 528, 124 DLR (4th) 609 [*Egan*]; *RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573 at 33-35, 33 DLR (4th) 174.

<sup>100</sup> TWU had technically been accredited in British Columbia since December 2013, when it received preliminary accreditation from the Federation of Law Societies of Canada. Under the provincial *Law Society Rules*, any law school accredited by the FLSC is automatically accredited in the province, unless the benchers pass a resolution to the contrary.

<sup>101</sup> In April 2014, the benchers voted on a motion to withdraw accreditation. The motion was defeated, and Chief Justice Hinkson determined that all subsequent votes—including the vote to withdraw accreditation held after the referendum—were invalid. See *Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326 at paras 35-37, 156 [*TWU v LSBC (BCSC)*].

<sup>102</sup> I refer to the so-called “April Motion”, which would have been valid had it passed (*ibid* at para 146).

was anything but. In a direct rebuttal of Justice MacPherson and the Ontario Court of Appeal, the court denies that accreditation is a public benefit equivalent to tax-exempt status:

Accreditation is not a “benefit” granted in the exercise of the largesse of the state; it is a regulatory requirement to conduct a lawful “business” which TWU would otherwise be free to conduct in the absence of regulation ... [We do not see] *Bob Jones University* as supporting a general principle that discretionary decision-makers should deny public benefits to private applicants.<sup>103</sup>

The court then proceeds to reject the argument that agents of the state cannot be seen to be endorsing discrimination:

In a diverse and pluralistic society, this argument must be treated with considerable caution. If regulatory approval is to be denied based on the state’s fear of being seen to endorse the beliefs of the institution or the individual seeking a licence, permit or accreditation, no religious faculty of any kind could be approved. Licencing of religious care facilities and hospitals would fall into question.<sup>104</sup>

Finally—and most interestingly—the court suggests that the principle of state neutrality actually *requires* agents of the state to tolerate and extend formal recognition to certain discriminatory practices. Otherwise, secular liberalism will become a prerequisite for recognition by the state.<sup>105</sup> The most directly relevant paragraph is reproduced here:

State neutrality is essential in a secular, pluralistic society. Canadian society is made up of diverse communities with disparate beliefs that cannot and need not be reconciled. While the state must adopt laws on some matters of social policy with which religious and other communities and individuals may disagree (such as enacting legislation recognizing same-sex marriage), it does so in the context of making room for diverse communities to hold and act on their beliefs.<sup>106</sup>

---

<sup>103</sup> *Trinity Western University v Law Society of British Columbia*, 2016 BCCA 423 at para 182 [*TWU v LSBC* (BCCA)].

<sup>104</sup> *Ibid* at para 184.

<sup>105</sup> I refer to *liberal* secularism because it is a mistake to assume that religion alone would struggle for recognition under a narrowly liberal regulatory regime. It is easy to imagine any number of non-liberal but entirely non-religious belief systems that agents of the state might hesitate to “endorse.”

<sup>106</sup> *TWU v LSBC* (BCCA), *supra* note 103 at para 185.

Of the seven TWU decisions, the decision of the BC Court of Appeal is the one that is most alive to the importance of the licence/mandate distinction, and most sensitive to the implications of conditioning access to public benefits on conformity with state values.

***Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations) (2017)***

While the *Amselem* test is still good law, the Supreme Court has recently shown a willingness to judge the internal operations of religious belief systems. In *Ktunaxa*, the court upheld British Columbia’s decision to approve the construction of a ski resort on a site that is of great religious importance to the Ktunaxa Nation. The Ktunaxa believe that the land in question, known as Qat’muk, is home to the Grizzly Bear Spirit, “a principal spirit within Ktunaxa religious beliefs.”<sup>107</sup> Building the ski resort, the Ktunaxa argued, would drive the Grizzly Bear Spirit from Qat’muk, severing or at least impairing the relationship between the spirit and the Ktunaxa people. They sought judicial review of the government’s decision, alleging a violation of section 2(a).

The Ktunaxa lost at trial, on appeal, and at the Supreme Court. The court noted that it had, in *Amselem*, “[chosen] to protect *any* sincerely held belief rather than examining the specific merits of religious beliefs.”<sup>108</sup> Moreover, it had held that “[inquiring] into profoundly personal beliefs would be inconsistent with the principles underlying religious freedom.”<sup>109</sup>

However, the court in *Ktunaxa* drew a distinction between religious beliefs and the *objects* of religious beliefs. Section 2(a) protects the right to hold and manifest religious beliefs; it does not protect objects or places of religious significance. Thus, there was no violation of s 2(a), despite the fact that the loss of the Grizzly Bear Spirit would, in practice, do real damage to the integrity of the Ktunaxa belief system.<sup>110</sup>

The *Ktunaxa* decision highlighted the practical difficulties of the *Amselem* test, which presumes a hard distinction between the spiritual and the physical. We “hold” religious beliefs in our minds, and we “manifest” those beliefs by acting on or doing things in the physical world. The notion that the physical world can act on our religious beliefs is a novel one, and the court was not prepared to accommodate it.

---

<sup>107</sup> *Ktunaxa Nation*, *supra* note 31 at para 5.

<sup>108</sup> *Ibid* at paras 71-72.

<sup>109</sup> *Ibid*.

<sup>110</sup> *Ibid*, Factum of Appellant at para 68.

It is not clear what will happen to the Grizzly Bear Spirit should it be “driven out” of Qat’muk, but it *is* clear that the Ktunaxa will no longer be able to engage with the spirit as they currently do.<sup>111</sup> Even if “deicide” is not the correct term, it is counterintuitive to maintain that the diminution, if not destruction, of one’s belief system simply does not engage section 2(a). *Ktunaxa* is arguably a move away from the court’s prior position of deference to religious belief systems.<sup>112</sup> Instead of accepting the Ktunaxa’s claim at face value, the court appealed to the distinction between religion *proper* and the objects of religion—a distinction that is clearly not tenable as applied to the Ktunaxa religion.<sup>113</sup>

Justices Moldaver, joined by Justice Côté, had the same concern. Writing separately, Justice Moldaver would have found a breach of the *Charter* (albeit one saved by section 1). They warned that, because there is an “inextricable link between spirituality and land in Indigenous religious traditions”, the majority’s approach risked “excluding Indigenous religious freedom claims involving land from the scope of s. 2(a) protection” and limiting *Charter* protection to “empty rituals and hollow gestures.”<sup>114</sup>

There are important differences between *Ktunaxa Nation* and *Trinity Western*, but there also important similarities. In both cases, the claimant sought accommodation of a worldview that diverges, in a non-trivial way, from the moral and cosmological “mainstream”. The Ktunaxa claim did not relate to “values” *per se*, but it *did* relate to the need for private spaces organised

---

<sup>111</sup> *Ktunaxa Nation*, *supra* note 31 at para 171, Moldaver J, concurring [*Ktunaxa Nation* Concurrence].

<sup>112</sup> Howard Kislowicz and Senwung Luk argue that *Ktunaxa Nation* represents the imposition of “new limits on religious freedom”, the burden of which will be “experienced disproportionately by Indigenous groups.” However, as Kislowicz and Luk make clear, the impact will not be limited to indigenous religion. They give the example of the Eucharist, which is arguably a “focal point of worship” in Catholicism but not in Protestantism. If such focal points are indeed excluded from the scope of protection under section 2(a), then the Eucharist would be protected for Catholics but not for Protestants. Kislowicz and Luk describe this state of affairs as “paradoxical”, and rightly so. See Howard Kislowicz & Senwung Luk, “Recontextualizing *Ktunaxa Nation v British Columbia*: Crown Land, History and Indigenous Religious Freedom” (2019) 88 SCLR (2d) 205 at 226-227.

<sup>113</sup> The court expressed concern that the “extension” of section 2(a) protection proposed by the Ktunaxa would “put deeply held personal beliefs under judicial scrutiny. Adjudicating how exactly a spirit is to be protected would require the state and its courts to assess the content and merits of religious beliefs”, which would be contrary to the central holding in *Amselem* (*Ktunaxa Nation*, *supra* note 31 at para 72).

<sup>114</sup> *Ktunaxa Nation* Concurrence, *supra* note 31 at paras 130-131. James Hickling argues that, while the concurring reasons of Justices Moldaver and Côté were consistent with the court’s religious freedom jurisprudence, the majority reasons departed from precedent with a view to excluding property rights from the scope of *Charter* protection. In Hickling’s view, the majority cannot, on the one hand, declare the Ktunaxa to “stand in the same position as non-Aboriginal litigants” and then, on the other, make new law that is adverse to the interests of the Ktunaxa. See James Hickling, *Ktunaxa Nation v British Columbia: Sacred Sites and Saving Graces*” (2020) 9 Oxford JL & Religion 193 at 199-200.

around one's distinctive worldview. For the evangelical Christians at TWU, the space is the university itself. For the Ktunaxa, the space is Qat'muk. Both claims were denied.

More generally, *Ktunaxa Nation* and *Trinity Western* are evidence of the court's ongoing struggle to account for the communal aspect of religious freedom.<sup>115</sup> While there is good reason to be wary of free-standing communal rights, there is also a need to recognise that religious life is a communal project, which cannot be broken down into discrete, analytically convenient "beliefs" and "practices."<sup>116</sup> To say that the Ktunaxa are free to practice their religion even without access to the Grizzly Bear Spirit is to misunderstand the nature of religion. In a literal sense, the desecration of Qat'muk would change nothing. There is no activity or set of activities in which the Ktunaxa would no longer be able to engage, and they would still be "free" to believe in the Grizzly Bear Spirit. However, this kind of analysis fails to capture the nature of the harm suffered by the Ktunaxa people.<sup>117</sup>

Desecrating Qat'muk would undermine the integrity of the Ktunaxa way of life. Insofar as that way of life is anchored in religion, it is deserving of constitutional protection. Moreover, there *is* an individualized harm, even if there is no interference with negative liberty. Individual Ktunaxa self-actualise through participation in the communal project of Ktunaxa life. The right to self-actualise in accordance with one's own metaphysical commitments lies at the core of religious freedom. Without Qat'muk, the rituals, practices, and even beliefs that constitute the Ktunaxa way of life would be stripped of meaning. Importantly, this harm to the Ktunaxa way of life is distinct from any harm that may or may not be suffered by the Grizzly Bear Spirit itself.

The consequences of amending the Community Covenant would not be so severe. While the metaphysical integrity of evangelical Christianity *as a whole* does not turn on whether TWU is permitted to operate a law school, there is a real sense in which the integrity of the Ktunaxa

---

<sup>115</sup> Benjamin L Berger, "Assessing *Adler*: The Weight of Constitutional History and the Future of Religious Freedom" (2019) 39 NJCL 35 at 58-59 [Berger 2019].

<sup>116</sup> For a discussion of the theoretical risks associated with recognising group rights, see K Anthony Appiah, "Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction" in Charles Taylor et al, *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 149.

<sup>117</sup> Some scholarly commentary on *Ktunaxa Nation* has focused on the court's failure to account for developments in foreign and international law, including developments—such as the adoption of the United Nations Declaration on the Rights of Indigenous Peoples—that would favour acknowledgment and protection of the unique features of indigenous religion. See, for example Kent Williams, "How the *Charter* Can Protect Indigenous Spirituality; or, the Supreme Court's Missed Opportunity in *Ktunaxa Nation*" (2019) 77 UT Fac L Rev 1.

religion *does* turn on whether Qat'muk is desecrated.<sup>118</sup> Still, the difference between the two is of degree, not of kind. In both *Ktunaxa Nation* and *Trinity Western*, the court conceived of “religion” as an aggregate of clearly identifiable beliefs and practices, not as a comprehensive way of life.

Benjamin Berger notes that, while the majority in *Trinity Western* acknowledged the need to account for communal and institutional manifestations of religious belief, this acknowledgement ultimately “did little work informing the [majority’s] analysis.” Instead, the majority framed the religious practice in question—the maintenance of an educational institution governed in accordance with Christian values—in “essentially individualistic terms.” This framing, Berger argues, “cleared the way for the majority not only to find that the [Law Society’s] decision was reasonable, but (even more notably) that the effect of the decision on religious freedom was ‘of minor significance’ and ‘not a serious limitation’.”<sup>119</sup>

Berger rightly faults the majority for not “[drawing] out the communal and group dimensions of [TWU’s] claim”, just as the majority in *Ktunaxa Nation* rejected any suggestion that the communal aspect of religious life might “extend the s. 2(a)’s protection beyond the freedom to have beliefs and the freedom to manifest them.”<sup>120</sup> Berger also observes that the promise of *Loyola High School*, which opened the door to stronger protection for communal and institutional manifestations of religion, has not yet been realized.<sup>121</sup> I share Berger’s concern, although I propose that we can do justice to the group dimensions of a religious freedom claim without recognizing group *rights*. The right being asserted by the Ktunaxa should be understood as the right to self-actualise through maintenance of and participation in a religious way of life. The right still attaches to the individual, not to the community or to the object of religious devotion. In my view, the court erred in concluding that it could not find for the Ktunaxa without extending *Charter* protection to the Ktunaxa as a group or to the Grizzly Bear Spirit itself.<sup>122</sup>

---

<sup>118</sup> Benjamin Berger notes that indigenous religion is uniquely vulnerable to this kind of harm. See Benjamin L. Berger, “Religious Freedom in Canada: A Crucible for Constitutionalism” (2018) 1 *Quaderni di Diritto e Politica Ecclesiastica* 111 at 120.

<sup>119</sup> Berger 2019, *supra* note 115 at 57.

<sup>120</sup> *Ibid* at 56.

<sup>121</sup> *Ibid* at 54.

<sup>122</sup> Although, to be clear, the court’s aversion to recognising group rights was not the only barrier to the Ktunaxa’s claim. Richard Moon argues that court’s primary concern was ensuring that *Charter* protections do not extend to property. He argues that the court’s “exclusion of ‘the object of worship’ from the protection of s. 2(a) appears to be a crude device to relieve the court from having to decide whether spiritual practice should be accommodated.” In Moon’s view, the court ought to have recognised that “the state, as steward of public lands, carries a variety of

A full investigation into whether religious freedom—or any other *Charter* right—ought to attach to groups as well as to individuals would be beyond the scope of this thesis. My claim here is simply that religious ways of life can be protected to a constitutionally sufficient degree even if religious freedom is not treated as a group right. However, I acknowledge that there is a further question of whether religion and religious ways of life would be protected in a different way, or even in a better way, by a more robustly group-based approach to religious freedom.

In a way, *Ktunaxa Nation* and *Trinity Western* are evidence of the limits of the *Amselem* framework described above. In emphasising the *personal* nature of religious belief and practice, *Amselem* obscures the sense in which religion is *more* than personal. When religious freedom is framed as protecting a personal right to establish a connection with the divine, one can understand how the interpersonal, communal, and institutional aspects of religious life might appear less important. Moreover, the concept of “religious life” does not fit the *Amselem* framework especially well. The language of *Amselem* (“subjectively engendering a personal connection with the divine”<sup>123</sup>) suggests a direct, unmediated relationship between the believer and the object of his or her belief—a relationship confined to the believer’s mind. This emphasis on individual belief and practice overlooks the substance of religious life.

I do not wish to overstate the similarities between *Ktunaxa Nation* and *Trinity Western*. In *Trinity Western*, the Law Society’s decision was grounded in moral disapproval of the Community Covenant. In *Ktunaxa Nation*, the government neither approved nor disapproved of the Ktunaxa’s religious practices. However, there are still important similarities between the two decisions. In both, the court paid relatively little attention to the “way of life” in which religious beliefs and practices find meaning, and to how the integrity of that way of life can be threatened by state action.

---

obligations so that its control over a particular area of land may be subject to different limits.” See Richard Moon, “*Ktunaxa* and the Shape of Religious Freedom” (1 January 2020), *Social Science Research Network*, online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3502988](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3502988)>.

<sup>123</sup> *Amselem*, *supra* note 42 at para 62.

***Law Society of British Columbia v Trinity Western University and Trinity Western University v Law Society of Upper Canada (2018)***

MAJORITY OPINION AND CONCURRENCES

The Supreme Court heard the two TWU cases together in December 2017 and rendered judgment in June 2018. The majority found that the law societies' decision to deny accreditation represented a "proportionate balancing" of the TWU's *Charter* rights and the law societies own statutory objectives.<sup>124</sup> The Chief Justice McLachlin concurred in the outcome, as did Justice Rowe. Justices Côté and Brown dissented.

Drawing on the Supreme Court's earlier decision in *Green v The Law Society of Manitoba*, the majority determined the law societies are entitled to deference in determining what is and is not in the public interest.<sup>125</sup> In the case of TWU's bid for accreditation, the law societies were entitled to conclude 1) that accreditation would limit access to the legal profession for LGBT people and 2) that a more diverse legal profession is in the public interest.

On the former point, the majority agreed with the law societies that "limiting access to membership in the legal profession on the basis of personal characteristics, unrelated to merit, is inherently inimical to the integrity of the legal profession."<sup>126</sup> More importantly, the majority also reaffirmed that the state *always* has a legitimate interest in promoting and protecting "shared values", including equality, human rights and democracy.<sup>127</sup>

On the question of whether there had been a violation of TWU's religious freedom, the majority concluded that, because the law societies had not forbidden TWU from operating a Christian law school in the abstract, there had been no "significant" interference with religious freedom.<sup>128</sup> TWU was still in theory free to operate a Christian law school, but not with the mandatory Community Covenant.

Without questioning the sincerity of TWU's religious beliefs, the majority held that a *mandatory* code of conduct is not required to ensure the Christian character of the law school.<sup>129</sup> Finally, the majority dismissed TWU's argument that there is a tenable distinction between

---

<sup>124</sup> *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 at para 105 [*Trinity Western*].

<sup>125</sup> *Ibid* at para 35.

<sup>126</sup> *Ibid* at para 41.

<sup>127</sup> *Ibid*.

<sup>128</sup> *Ibid* at para 85.

<sup>129</sup> *Ibid* at para 87.

sexual orientation and sexual practice. The Supreme Court had previously rejected the possibility of such a distinction in *Saskatchewan (Human Rights Commission) v Whatcott*.<sup>130</sup>

Chief Justice McLachlin’s concurrence was somewhat more deferential to religion; Justice Rowe’s concurrence was markedly less so. In particular, the Chief Justice disagreed with the majority’s characterisation of the violation as of “minor significance.” The Chief Justice criticised the majority for “failing to acknowledge the significance that all members abiding by the same code of conduct has for a religious community.”<sup>131</sup> More generally, she suggested that the majority opinion was at odds with Canada’s long history of religious schools, which have developed into an integral part of religious life.

The Chief Justice also took issue with the majority’s reliance on *Charter* values—the supposedly “shared” values that the state can always legitimately promote. Very briefly, *Charter* rights enjoy constitutional protection, while *Charter* values are an interpretive tool that guides administrative decision-makers as they carry out their statutory mandates. They can also guide the development of the common law.<sup>132</sup>

For his part, Justice Rowe denied that religious freedom can ever protect the right of believers to compel non-believers. In his words, “religious communities may adopt their own rules and membership requirements, [but] the foundation of the community remains the voluntary choice of individual believers.”<sup>133</sup> Justice Rowe did not go so far as to say that religious freedom can never protect the activities of religious institutions, but he did deny that TWU as an institution has a *Charter* claim against the law societies. He made a point of specifying that “claimants” refers not to TWU but to individual members of the TWU community (along with Brayden Volkenant, a prospective law student who joined TWU’s claim).<sup>134</sup>

## DISSENT

The dissent disagreed with the majority on a number of points, most notably 1) the proper characterisation of religious observance and 2) the extent to which private actors can be bound

---

<sup>130</sup> *Ibid* at para 97.

<sup>131</sup> *Ibid* at para 131, McLachlin CJC, concurring [*Trinity Western Concurrence* (McLachlin CJC)].

<sup>132</sup> *Ibid* at para 115.

<sup>133</sup> *Ibid* at para 219, Rowe J, concurring [*Trinity Western Concurrence* (Rowe J)].

<sup>134</sup> *Ibid*.

by *Charter* values. Justices Côté and Brown rejected the argument that, because there is no direct interference in the religious lives of members of the TWU committee, there is necessarily no violation of religious freedom. Following Justice Sachs of the Supreme Court of South Africa, they contended that “religion is not just a question of belief or doctrine. It is part of a way of life.”<sup>135</sup>

On the question of *Charter* values—and the value of equality in particular—Justices Côté and Brown took the position that private institutions like TWU have no obligation to ensure equal access to anything.<sup>136</sup> They were “troubled” by “the majority’s continued reliance on ‘values’ protected by the *Charter* as equivalent to ‘rights.’” In their words:

*Charter* “values”—unlike *Charter* rights, which are the product of constitutional settlement—are unsourced. They are, therefore, entirely the product the idiosyncrasies of the judicial mind that pronounces them to be do ... Canadians are permitted to hold different sets of values. One person’s values may be another person’s anathema. We see nothing troubling in this, so long as each person agrees to the other’s right to hold and act upon those values in a manner consistent with the limits of core minimal civil commitments which are necessary to secure civic order ... What *is* troubling, however, is the imposition of judicially preferred “values” to limit constitutionally protected rights, including the right to hold other values.<sup>137</sup>

The dissent’s last point, to do with the imposition of values on private actors, is of particular interest to me. I share the dissent’s concern that the outcome of the court’s decision, in which a private actor is made to conform to an external value system, fails to account for the sense in which religious freedom demands deference to and accommodation of religious value systems. I also share the dissent’s fear that the *Charter* is being used not to restrain the state but to legitimise the use of state power to suppress “deviant” value systems.

With respect to the Ontario case, Justices Côté and Brown took issue with the Court of Appeal’s claim that the Community Covenant discriminates “contrary to s. 15 of the *Charter*.” Given that the *Charter* plainly does not apply to private actors, the dissent characterises this claim as a “serious error.”<sup>138</sup>

---

<sup>135</sup> *Ibid* at para 263, Côté & Brown JJ, dissenting [*Trinity Western Dissent*].

<sup>136</sup> *Ibid* at para 261.

<sup>137</sup> *Ibid* at para 308.

<sup>138</sup> *Ibid* at para 299.

Of course, the Court of Appeal did not (and presumably would not) truly suggest that the *Charter* applies to private actors. Instead, the Court of Appeal invoked the *Charter* in the course of analysing the proportionality of the Law Society’s decision. As noted by Justices Côté and Brown, the *Doré* balancing framework called on the Law Society to “proportionately balance” its statutory objectives and TWU’s *Charter* rights. However, the Court of Appeal appeared to seek a balance of TWU’s religious rights and the equality rights of prospective LGBT students. The result is a strange grey area between application and non-application of the *Charter*. The *Charter* does not apply to private actors, but the Court of Appeal nonetheless gave *some* standing to *Charter* rights that are not obviously engaged.

The dissent’s concern is understandable. While there are competing accounts of how the *Charter* values analysis is to be conducted, there is at least one account in which administrative decision-makers are permitted to require private conformity with state values. Justice Rowe had a similar concern, despite concurring with the majority in the outcome. He noted that the concept of “*Charter* values” was developed as a tool for reinterpreting the common law in light of the *Charter*, and specifically in contexts where the *Charter* has no direct application. *Charter* values, he writes, “have no independent function in the administrative context.”<sup>139</sup>

The majority’s response to these concerns is, in essence, that equality is a shared social value as well as a *Charter* right, so it is appropriate for courts, tribunals, and administrative decision-makers to consider equality even where section 15 does not apply. In the majority’s view, “it should be beyond dispute that administrative bodies other than human rights tribunals may consider fundamental shared values, such as equality, when making decisions within their sphere of authority.”<sup>140</sup> I am less sure that equality is, in fact, a shared value in the way that the majority imagines it to be—and, even if it were a shared value, the state does not have a free hand to impose values on private actors just because the values in question are “shared.” I am similarly doubtful that shared values are legally cognizable, except to the extent that they are expressly enshrined in law. I will return to both points in a later section.

---

<sup>139</sup> *Trinity Western* Concurrence (Rowe J), *supra* note 133 at paras 167-168.

<sup>140</sup> *Ibid.*, note 65 at para 46.

## Summary

An analysis of the court’s religious freedom decisions reveals two trends with implications for the state’s commitments to self-actualisation and tolerance. The first trend—represented by *Hutterian Brethren*, *Ktunaxa Nation*, and *Trinity Western*—is the court’s reluctance to deviate from the conception of religion articulated in *Big M*, which posits distinctions between “belief” and “practice” and between religious and non-religious activities. These distinctions obscure the fact that religion is, more often than not, experienced not as an activity or set of activities but as a comprehensive way of life. The result is an approach to religious freedom that may not adequately protect non-mainstream or “dissident” forms of religious self-actualisation—because of the unique way in which comprehensively metaphysical commitments are experienced has not been properly accounted for.

While there is a sense in which mainstream religious communities have acclimated to the law’s conception of religion—which is, it has been argued, best suited to the Protestant culture from which it emerged—other religious communities continue to struggle. In this respect, the “religion” protected by section 2(a) may differ significantly from “lived religion” as experienced by religious individuals. This misalignment can and frequently does frustrate religious self-actualisation in a non-trivial way.<sup>141</sup>

While it is true that the court in *Amselem* and, to a lesser extent, the court in *Loyola High School* demonstrated a greater willingness to engage with the reality of lived religion, I would argue that these decisions are outliers. Indeed, I would argue that one way of reading the court’s more recent religious freedom decisions is as a gradual retreat from *Amselem*. At the very least, *Amselem*’s promise of engagement with the highly personalised nature of lived religion and the distinctiveness of religious self-actualisation has not been realised.

The second trend—represented by *Chamberlain*, *SL*, and *Saguenay*—is the court’s preference for the doctrine of state neutrality over the doctrine of state tolerance, which takes the

---

<sup>141</sup> There is an extensive literature on the disjunction between religion as understood by the law and religion as experienced by individual religious adherents. Some scholars, such as Winnifred Fallers Sullivan, are of the view that such disjunction is inevitable. Others are more optimistic. See Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005); see also Nicholas Shrubsole, *What Has No Place, Remains: The Challenges for Indigenous Religious Freedom in Canada Today* (Toronto: University of Toronto Press, 2019); Berger 2015, *supra* note 13.

form of an insistence that state's liberal values are, in some sense, value-neutral.<sup>142</sup> This insistence can prevent the law from engaging, in an honest and respectful way, with what is occurring when the state impose liberal values on private actors. There is also, I think, reason to believe that a state that is cognizant of its own substantive commitments will be psychologically inclined to adopt a more deferential posture with respect to the substantive commitments of others. There is a humility that comes from awareness and active acknowledgement of one's own non-neutrality, and the extent to which one is a partisan actor. The resulting deference is the core of tolerance, which is a necessary precondition for individual self-actualisation.

The decision in *Trinity Western* is in line with both trends, in the sense that the majority reasons both 1) understate the extent to which religious self-actualisation can be frustrated when the state makes access to public life and public resources contingent on conformity with state values and 2) understate the non-neutral, liberal character of the commitment to equality.

---

<sup>142</sup> This trend has been observed by, among others, Kislowicz 2017, *supra* note 51 at 223-225; see also Mark A Witten "Tracking Secularism: Freedom of Religion, Education, and the Trinity Western University Law School Dispute" (2015) 79 Sask L Rev 215.

### **SECTION 3: SCHOLARLY LITERATURE**

#### **Overview**

This section is divided into four parts. The first two parts are dedicated to critiques of the current constitutional arrangement, wherein religious freedom is recognised as a free-standing right. In the first part, I explore the argument that there is no need for “religious freedom” as traditionally understood, because the activities that presently fall within the scope of religious freedom would be adequately protected by a more expansive right to freedom of conscience. In the second part, I explore the argument that meaningful religious freedom is ultimately impossible, and that we would be better off protecting religious ways of life under the heading of equality.

The second two parts are dedicated to *defences* of the current arrangement. In the third part, I engage with the most common “proxy-based” arguments for religious freedom—that is to say, arguments that the law should protect religion because protecting religion achieves some other end. Religion is thus, to one extent or another, a proxy for some other thing of value. Finally, in the fourth part, I engage with arguments for the protection of “religion *qua* religion”, meaning arguments that the law should protect religion because the constitutive elements of religious life have some unique or special value. However, the analytical utility of the distinction between proxy-based arguments and “*qua* religion” arguments should not be overstated, as will become clear. It is a helpful starting point, but many arguments do not fit neatly into one category or the other.

My arguments fall into this fourth category. The argument from self-actualisation contends that the law should protect religion because religious commitments, being comprehensively metaphysical in nature, play a special role in individual self-actualisation. The argument from tolerance contends that the law should protect religion because the practice of tolerating religion plays a special role in developing a norm of deference towards difference, which results in a more tolerant society generally.

I conclude the section by tying these four categories of argument—arguments for a conscience-based alternative to religious freedom, arguments for an equality-based alternative to religious freedom, arguments for the protection of religion as a proxy for something else, and arguments for the protection of religion *qua* religion—back to the questions raised at the beginning of this thesis.

### Criticising the *status quo*: The conscience alternative

My position is that religion is unique, and thus deserving of freestanding constitutional protection. However, there are scholars who take opposing views.<sup>143</sup> Some argue that religious belief is adequately protected by other rights, such as freedom of conscience or freedom of expression. As a result, there is no need to carve out religious freedom as a distinct right. Others argue that religious beliefs and practices should not be protected at all.

The former view is represented here by Christopher Eisgruber and Lawrence Sager, who argue—in the American context—that a general guarantee of “equal liberty” is sufficient to protect the rights of religious believers.<sup>144</sup> “Equal liberty” is composed of freedom of expression, freedom of association, property rights, and general personal autonomy. Eisgruber and Sager also argue that no one should be “devalued” on account of their religious beliefs.<sup>145</sup>

Jeremy Webber is critical of the Eisgruber-Sager thesis, which Webber characterises as seeking a “religion-free” conception of religious freedom. Webber argues, *contra* Eisgruber and Sager, that “we would be wise to follow our progenitors’ leads and accept that freedom of religion is founded on the special importance of religious belief.”<sup>146</sup> When Webber describes religious beliefs as “special”, he means two things. Firstly, he means that religious beliefs are often especially deeply held, such that people will react strongly (and sometimes violently) if they perceive their religious lives to be under threat. Secondly, Webber means that there is something “inexhaustible” about the “mystery” of religious beliefs. He argues, rightly, that religious freedom requires us to “continually confront the fact that we will never completely understand, much less accept” the religion or non-religion of others.<sup>147</sup>

In my view, Webber’s reasoning supports something like the maximalist claim that I make in this thesis—that is, the claim that we ought to be compelled to tolerate, up to a point,

---

<sup>143</sup> In this section, I distinguish between scholars who defend the *status quo* and those who oppose it. “Status quo” means the prevailing constitutional arrangement, in which religion is singled out for some kind of special legal protection (as in the *Canadian Charter of Rights and Freedoms*, the American *Bill of Rights*, and the European *Charter of Fundamental Rights*). Naturally, not everyone who defends the *status quo* does so for the same reason, and the same is true on the other side of the debate.

<sup>144</sup> Christopher L Eisgruber & Lawrence G Sager, *Religious Freedom and the Constitution* (Cambridge: Harvard University Press, 2007) 52-53.

<sup>145</sup> *Ibid* at 4.

<sup>146</sup> Jeremy Webber, “Understanding the Religion in Freedom of Religion” in Peter Crane, Carolyn Evans & Zoë Robinson, eds, *Law and Religion in Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2008) 23 at 42 [Webber 2008].

<sup>147</sup> *Ibid*.

that which we are least inclined to tolerate. The practice of tolerating “inexhaustibly mysterious” systems of belief (including associated practices) gives rise, over time, to a deferential instinct—a kind of reflexively tolerant posture vis-à-vis the foreign and the unknown—that results in a more tolerant society generally. Webber describes this deferential instinct in the following way:

The categories of religion are never closed. If the same concerns engaged, protection should extend. And how do we know if the concerns are engaged? We reflect back, continually and self-critically, on what seems to us to be most characteristic of religious belief and religious practice; on why people hold so tenaciously to those beliefs—so tenaciously than it seems that the beliefs hold them, not vice versa; and on why we want to preserve a space for such inexplicable and unanswerable mysteries.<sup>148</sup>

In a similar vein to Eisgruber and Sager, Michael Perry argues that religious freedom should be reimagined as religious and *moral* freedom, meaning the right to live according to one’s personal to moral code, irrespective of whether that code is grounded in religious or spiritual beliefs.<sup>149</sup> Perry regards religious autonomy (the ability to manifest religious beliefs and engage in religious practices) as a kind of moral autonomy (the ability to live one’s life in a subjectively “moral” way). Perry aims to develop a “global political morality” based on “axiomatic” principle of universal human dignity.<sup>150</sup>

However, his argument for expanding religious freedom to include moral freedom is ultimately a pragmatic one. It is not possible, he argues, for society to address moral questions without also addressing religious questions, even if only indirectly. Thus, it makes sense to combine religious freedom with moral freedom, and to protect the two in the same way.<sup>151</sup> Importantly, Perry treats religious thinking as a kind of moral thinking. The implication is that there is no substantive difference between moral beliefs and religious beliefs, and that the impact of limiting one’s moral freedom is the same as the impact of limiting one’s religious freedom.

Outright opposition to religious freedom is rare—at least among academics—but it does exist. In this context, opposition to religious freedom entails opposition to explicit legal

---

<sup>148</sup> *Ibid* at 43.

<sup>149</sup> Michael J Perry, *A Global Political Morality: Human Rights, Democracy, and Constitutionalism* (Cambridge: Cambridge University Press, 2017) at 69.

<sup>150</sup> *Ibid* at 35.

<sup>151</sup> *Ibid* at 66-67.

protections for religion. It does not entail support for state-sponsored suppression of religion or for active discrimination against religious adherents.

In recent years, this position—which, again, has little support among scholars of religion and the law of religious freedom—has been associated with Brian Leiter.<sup>152</sup> Leiter argues that special legal treatment for religion would be defensible only if there were a “moral reason why states should carve out special protections that encourage individuals to structure their lives around categorical demands that are insulated from the standards of evidence and reasoning we everywhere else expect to constitute restraints on judgement and action.”<sup>153</sup> By “moral reason” Leiter means a “positive correlation between beliefs that are culpably without epistemic warrant and valuable outcomes.”

A belief is “without epistemic warrant” if the believer has no reason, or at least not enough reason, to accept it as true. Epistemic warrant is distinct from truth, and a belief can be epistemically warranted but also false. The determining factor is whether the belief is reasonable given the information available to the believer in question.<sup>154</sup> However, Leiter’s position is that all religious beliefs are intrinsically without epistemic warrant, so there is no need to assess the information available to each believer.

There is no consensus on what can constitute epistemic warrant, nor is there consensus on whether religious beliefs are or can be epistemically warranted.<sup>155</sup> Leiter does not claim to offer a comprehensive account of epistemic warrant, but he does seem to presuppose that religious beliefs are epistemically unwarranted. Leiter’s argument is, in essence, that legal protection for epistemically unwarranted beliefs would only be defensible if the beliefs in question were socially beneficial. Given that, in Leiter’s view, religious beliefs are not socially beneficial, legal protection for religion cannot be justified.

---

<sup>152</sup> While the scholarly response to Leiter’s argument has been overwhelmingly negative, arguments like Leiter’s (that is to say, arguments expressly premised on a negative valuation of religion) play a role in shaping society’s understanding of religious freedom. As Leiter is perhaps the only scholarly representative of his position, it is appropriate that he be included here. At the same time, I do not mean to understate the harshness of the scholarly criticism that Leiter has received. Andrew Koppelman, for one, describes Leiter as “blind to reality” and argues that “even many philosophers who look down on religion are humbler than [Leiter].” See Andrew Koppelman, “How Shall I Praise Thee – Brian Leiter on Respect for Religion” (2010) 47 San Diego L Rev 961 and 986.

<sup>153</sup> Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013) at 63 [Leiter 2013].

<sup>154</sup> Brian Leiter, “Foundations of Religious Liberty: Toleration or Respect?” (2010) 47 San Diego L Rev 935 at 957.

<sup>155</sup> Robert Audi, *Epistemology: A Contemporary Introduction to the Theory of Knowledge*, 3rd ed (New York: Routledge, 2011) 190; 319.

In response, Andrew Koppelman accuses Leiter of relying on a “radically impoverished conception of what religion is and what it does.”<sup>156</sup> Noting that Leiter is keen to defend freedom of conscience, Koppelman suggests that Leiter’s opposition to religious freedom is really just opposition to religious exemptions from laws of general application.

Leiter characterises religion as consisting of “categorical” demands that, from the perspective of the believer, operate very much like laws.<sup>157</sup> As a result, religious believers are able to articulate conscience-based objections to complying with the law. In many cases, the state grants an exemption. Leiter dislikes this arrangement, citing the Canadian example of *Multani*. In that case, the Supreme Court of Canada allowed a Sikh boy to wear his ceremonial dagger—the *kirpan*—to school.<sup>158</sup> If Koppelman is correct, Leiter believes that the *only* legally significant function of religious freedom is to permit these exemptions. Koppelman argues that religious freedom actually protects a much wider range of activities, which cannot be subsumed under the heading of “conscience” as Leiter proposes.

### **Criticising the *status quo*: The equality alternative**

Another critique of the *status quo* worth noting is the so-called “impossibility argument”, which is associated with Winnifred Fallers Sullivan. While Sullivan is by no means “opposed” to religious freedom, she does argue that there is a sense in which true religious freedom is impossible.<sup>159</sup> In her book, *The Impossibility of Religious Freedom*, Sullivan writes that “the modern religio-political arrangement has been largely, although not exclusively, indebted, theological and phenomenologically”<sup>160</sup> to the American Protestant tradition:

Religion ... came to be understood as being private, voluntary, individual, textual, and believed. Public, coercive, communal, oral, and enacted religion, on the other hand, was

---

<sup>156</sup> Andrew Koppelman, “No Respect: Brian Leiter on Religion” (2010) Northwestern Pritzker School of Law, Working Paper No 31.

<sup>157</sup> *Ibid.*

<sup>158</sup> Leiter 2013, *supra* note 153 at 25; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 53 [*Multani*].

<sup>159</sup> In Canada, the impossibility argument has featured prominently in commentary on the *Ktunaxa Nation* decision. See Benjamin L Berger, “Liberal Constitutionalism and the Unsettling of the Secular” in Rex Adhar, ed, *Research Handbook on Law and Religion* (Cheltenham, UK: Edward Elgar Publishing, 2018) 198; Nicholas Shrubsole, *What Has No Place, Remains: The Challenges for Indigenous Religious Freedom in Canada Today* (Toronto: University of Toronto Press, 2019) at 18 [Shrubsole 2019].

<sup>160</sup> Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005) at 7 [Sullivan 2005].

seen to be “false.” The second kind of religion, iconically represented historically in the United States, for the most part by the Roman Catholic Church (and by Islam today), was, and perhaps still is, the religion of most of the world.<sup>161</sup>

In essence, Sullivan argues that freedom of religion, as it exists in the United States, applies only to the Protestant way of “doing religion.”<sup>162</sup> Sullivan structures her argument around *Warner v Boca Raton*, in which the United States Court of Appeals for the Eleventh Circuit upheld a municipal regulation banning “vertical grave decorations” from the public cemetery.<sup>163</sup> Sullivan served as an expert witness for the unsuccessful applicants, who challenged the regulation on religious freedom grounds (Sullivan notes that most of the applicants were Catholic, a fact that she describes as “not incidental”).<sup>164</sup>

In brief, Sullivan uses the *Warner* case to argue that most manifestations of religious adherence fall outside of what the law understands “religion” to be. Indeed, Sullivan argues that “‘religion’ is not a useful term for United States law today, because there is no longer any generally accepted referent that is relevant for defensible political reasons.”<sup>165</sup> When religion in the United States was thought to be essentially coextensive with Protestantism, everyone understood to what the word “religion” referred. That is no longer the case. The “public” nature of what the applicants in *Warner* sought to do (in most cases, to adorn a loved one’s grave with some kind of object) collided with the “private” institutional nature of religion as imagined by the legal system.<sup>166</sup> In other words, the right to freedom of religion is best understood as a right enjoyed by religious institutions. What the applicants in *Warner* sought was a right “to live outside the state”, at least to some extent. Sullivan concludes by suggesting that “such a right may not be best realized through laws guaranteeing religious freedom but by laws guaranteeing equality”, including religious equality.<sup>167</sup>

---

<sup>161</sup> *Ibid* at 8.

<sup>162</sup> Sullivan distinguishes between 1) Protestantism and 2) the Protestant approach to religious observance. Importantly, this “Protestant way” is not unique to Protestantism, and Sullivan notes that Catholics (for example) can be “Protestant” in their approach to religion.

<sup>163</sup> *Warner v Boca Raton (City)*, 267 F Supp (3d) 1223 (11th Cir 2001); *Warner v Boca Raton (City)*, 64 F Supp (2d) 1272 (SD Fla 1999).

<sup>164</sup> Sullivan 2005, *supra* note 160 at 8.

<sup>165</sup> Winnifred Fallers Sullivan, *Prison Religion: Faith-Based Reform and the Constitution* (Princeton: Princeton University Press, 2009).

<sup>166</sup> *Ibid* at 138.

<sup>167</sup> *Ibid* at 159.

When Sullivan argues that religious freedom is “impossible”, she means that the state will, in the course of setting aside space for religion, necessarily define “religion” as including some manifestations of religious adherence while excluding others. The process of defining religion will, by necessity, define religion down. There is no legally manageable definition of religion that can capture every aspect of religious life. If the state were to define religion as including every religiously motivated practice or activity—that is to say, any practice or activity that religious individuals experiences as in some way “religious”—the rule of law would be undermined. However, when the state adopts a definition of religion that is in any way exclusionary, the consequent conception of religious freedom will always fail to protect some aspect of religious life:

If the definition of religion is expanded for the purposes of the free exercise clause to include all self-described “religiously motivated” behavior, are not the fear mongers right? To do this would be to give every American the power to determine whether a particular law comports with their religion, as they define it. And it privileges these persons over those who would not so describe their motivation.<sup>168</sup>

Sullivan’s argument is provocative and challenging. I agree that religious freedom does not—and, at least in a liberal society committed to the rule of law and a norm of legal equality, cannot—protect every aspect of religious life. It cannot create an individual, communal, or institutional right to “opt out” of any law that is in tension with one’s religion. As a result, there is a sense in which *full* religious freedom really is “impossible” in the way that Sullivan describes. “Religion” will always to some extent elude legal definition; there will always be some manifestations of religious adherence that the law does not (and, again, cannot) protect.

At the same time, legal protection of religion need not entail *absolute* religious freedom. We do not generally understand “freedom” to mean “the complete absence of constraint.” The fact that the law does not protect certain expressive activities—some of which are not only not protected, but prohibited—does not mean that there can be no meaningful legal protection of expressive freedom. Similarly, there are manifestations of religion that the law does not protect, or prohibits outright. The result is a form of religious freedom that is, while limited, still capable of providing meaningful protection to religious life.

---

<sup>168</sup> *Ibid* at 148.

With respect to the licence/mandate distinction, religious freedom does not entail a right to exercise public authority—that is, a right to hold a public mandate. Indeed, religious freedom *requires* that public authority be exercised in a manner consistent with the state’s liberal commitments. This requirement may, in some sense, limit the religious freedom of those religious individuals or groups who wish to exercise state-like authority over non-adherents, but such limits are necessary to preserve the liberal character of the state.

Similarly, religious freedom does not entail a general right to opt out of any law that runs counter to one’s religious commitments. Like the requirement that public authority be exercised in a manner consistent with the state’s liberal commitments, the absence of a general right of religious non-compliance may limit the religious freedom of certain individuals and groups (religious freedom may sometimes require religious exemptions from laws of general application, but there is no *general* right to such exemptions). These limits are real and non-trivial and should be acknowledged as such, but they do not make religious freedom “impossible”, at least if religious freedom is understood as a means of carving out space for religion in liberal society while preserving the liberal character of the state and society. Sullivan’s criticism is well-taken, but the very real difficulties that she highlights do not, to my mind, justify Sullivan’s preference for a more thoroughgoing commitment to equality over stand-alone protection for religious freedom.<sup>169</sup>

However, criticism of religious freedom is not limited to the academic criticism of Sullivan, Leiter, and others. Martha Nussbaum argues that the real threat to religious freedom is popular pushback against minority religions, especially Islam.<sup>170</sup> She describes a “new religious intolerance” taking root in the United States (in the form of opposition to the so-called “Ground Zero mosque”<sup>171</sup>) and in Europe (in the form of bans on the niqab).<sup>172</sup> The opponents of the

---

<sup>169</sup> Sullivan’s most widely cited work, *The Impossibility of Religious Freedom*, is not expressly prescriptive, and there are other interpretations of her argument. My interpretations find support at Sullivan 2005, *supra* note 104 at 149, 174.

<sup>170</sup> Martha Nussbaum, *The New Religious Intolerance* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2012) at 4 [Nussbaum 2012].

<sup>171</sup> In 2010, a New York zoning commission approved the construction of a Muslim community centre in downtown Manhattan, two blocks away from where the World Trade Center once stood. The so-called “Ground Zero mosque” was neither a mosque nor located at Ground Zero. Many prominent conservatives expressed opposition to the community centre, especially in the run-up to the 2010 congressional elections.

<sup>172</sup> Nussbaum 2012, *supra* note 170 at 132-38, 216-24.

Ground Zero mosque were hostile to Islam in particular, not to religion in general, and the same can be said of those who support banning the niqab.<sup>173</sup>

The point is that secularism—as envisioned by proponents of *laïcité*—is not the only alternative to religious freedom.<sup>174</sup> In fact, the more likely alternative is the establishment of the majority religion, practically if not legally. Religious freedom stands in opposition to both establishment, in which the state protects only one religion, and state atheism, in which the state declines to protect (and may actively seek to suppress) religious beliefs and practices.<sup>175</sup> Few, if any, mainstream scholars take the view that there should be a single established religion, and, even in the handful of liberal democracies that *do* have a state religion—such as England, Denmark, and Norway—the special privileges extended to that religion are no more than ceremonial or symbolic.

Still, there is a sectarian argument against religious freedom, and that argument should be accounted for, as it serves to highlight what religious freedom is *for* (the word “sectarian”, in this context, captures both religious and secular forms of sectarianism). The purpose of religious freedom is to ensure that no social group can use the power of the state to impose its beliefs and values on the wider society. In the past, the social group most restrained by religious freedom was the dominant religious group. The fact that the dominant “religious group” may now, in some cases, be liberal secularism does not change the underlying logic of religious freedom.

### **Defending the *status quo*: The “proxy” argument**

Support for some version of the *status quo*—in which religious beliefs and practices enjoy special legal protection—is likely the majority view, at least in Canada and the United States. There are, in effect, two arguments for protecting religious freedom, one anchored in the value of religion *qua* religion, and the other anchored in the value of religion as a proxy for

---

<sup>173</sup> However, there is also a secularist argument for banning the niqab. This argument, associated with the French *laïcité* tradition, presents the niqab as a threat to the “secular” nature of the public sphere.

<sup>174</sup> For analysis of contemporary *laïcité*, see Amélie Barras, *Refashioning Secularisms in France and Turkey: The Case of the Headscarf Ban* (London: Routledge, 2014); see also Stéphanie Hennette-Vauchez, “Is French *Laïcité* Still Liberal? The Republican Project under Pressure (2004-15)” (2017) 17 Human Rights L Rev 285. For a recent Canadian perspective, see Mario Polèse, “Quebec’s Bill 21: Is There Room for More Than One View of Religion in Canada?”, *Policy Options Politiques* (4 August 2021), online: <[www.policyoptions.irpp.org](http://www.policyoptions.irpp.org)>.

<sup>175</sup> The term “state atheism” will be controversial, but it seems clear that, if a state declines to protect religious beliefs and practices in any way, it necessarily favours non-religion over religion. I accept that not all forms of atheism are actively hostile to religion, but “atheism” should still be taken to include both passive non-religion and active hostility to religion.

something else, such as individual autonomy—which can be understood as inclusive of conscience rights—or the principle of limited government.<sup>176</sup>

In the most common version of the proxy argument, the category of “religion” is a stand-in for a wide range of activities deemed essential to personal identity and autonomy. Even if “religion” as understood by the law fails to capture the fullness of religious life, it still captures something worth protecting. Benjamin Berger describes the resulting constitutional arrangement as the “conceptual individualization of religious experience”, in which religion is “assimilated into the analytic structure of constitutionalism.”<sup>177</sup>

Avigail Eisenberg regards “religion” as a proxy for personal identity, as distinct from personal autonomy:

Whereas religion was once treated as a matter crucial to individual freedom to choose one’s mostly deeply held beliefs and to follow one’s conscience, it is now increasingly viewed as an un-chosen identity similar to culture or ethnicity, which must be accommodated in order to treat people fairly.<sup>178</sup>

Once, the law regarded religious freedom as a matter of personal *autonomy*, analogous to freedom of expression and freedom of association.<sup>179</sup> Now, the law understands religious freedom to be a matter of personal *identity*, more properly analogous to the right to equality before the law.<sup>180</sup> Eisenberg attributes this distinction to Richard Moon, although Moon—unlike Eisenberg—does not regard the identity paradigm as clearly superior to the autonomy paradigm, instead arguing that both are needed.<sup>181</sup>

In Eisenberg’s view, the autonomy paradigm wrongly presupposes that one *chooses* one’s religious beliefs. Even if there is a sense in which religious beliefs are chosen, most religious believers do not understand themselves to have made a choice. Religious belief is experienced as

---

<sup>176</sup> Although, to be clear, an argument need not be one or the other, and some combine elements of both.

<sup>177</sup> Benjamin L Berger, “Law’s Religion: Rendering Culture” in Richard Moon ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 267-68.

<sup>178</sup> Avigail Eisenberg, “Religion as Identity” (2016) 10 L & Ethics Human Rights 295 [Eisenberg 2016]. For a related critique of the autonomy argument for religious freedom, see Farrah Ahmed, “The Autonomy Rationale for Religious Freedom” (2017) 80 Modern L Rev 238.

<sup>179</sup> Many scholars still take this view.

<sup>180</sup> Eisenberg 2016, *supra* note 178 at 296.

<sup>181</sup> *Ibid.* Moon distinguishes between the “choice approach” and the “identity approach; Eisenberg prefers to distinguish between “liberty approach” and “egalitarian approach.” However, the substance of the distinction is the same. See Richard Moon, “Religious Commitment and Identity: *Syndicat Northcrest v Amselem*” (2005) 29 SCLR (2d) 201 at 213.

a component of personal identity, analogous to race, gender, and sexual orientation.<sup>182</sup>

Meanwhile, the autonomy paradigm perpetuates the “myth that individuals are free to choose their religious commitments and should be liable for the consequences of their choices.”<sup>183</sup>

This myth serves to justify severe restrictions on religious freedom, such as prohibitions on the public display of religious symbols. The niqab, Eisenberg argues, should be understood not as a *choice* that the wearer makes, but as a representation of the wearer’s identity. The category of “religion” captures such representations, even if the underlying identity eludes legal categorisation. Thus, “religion” can be said to act as a proxy for personal identity.<sup>184</sup>

While I am not persuaded that the *law* has come to understand religious freedom as a matter of personal identity in the way the Eisenberg describes, there is something to the argument that *society* may be moving in that direction. For example, Andrew Koppelman observes that religious disapproval of same-sex sexual relations is often equated with racism, and religious interests are often equated with the interests of LGBT people, the implicit claim being that religion and sexual orientation (and race, for that matter) are the same *kind of thing*. When a religious group seeks an exemption from a law of general application (typically an anti-discrimination law), they are accused of “using” their identity to undermine the law’s guarantee of equality.<sup>185</sup> In 2016, the United States Commission on Civil Rights described requests for religious exemptions as “pretextual attempts to justify naked animus against lesbian, gay, bisexual, and transgender people.”<sup>186</sup> Similarly, the Colorado Civil Rights Commission accused the owners of Masterpiece Cakeshop of “using their religion to hurt others.”<sup>187</sup>

Koppelman observes, correctly, that religious people do not “use” their religion. Religion is not experienced—and should not be thought of—as a tool to be used. As Koppelman notes, “one uses a tool, and is not used by it.”<sup>188</sup> The claim made by the federal commission—that requests for religious exemptions are grounded not in sincere religious belief but in free-standing bigotry of no clear origin—is premised on a radical misunderstanding of the nature of religious

---

<sup>182</sup> *Ibid* at 305.

<sup>183</sup> *Ibid* at 317.

<sup>184</sup> It is worth noting that Eisenberg’s conception of religion is very similar to Leiter’s. She, like Leiter, sees religion as a personal characteristic that demands accommodation. The only major difference is that Eisenberg is inclined to accommodate, while Leiter is not.

<sup>185</sup> Andrew Koppelman, “Gay Rights, Religious Liberty, and the Misleading Racism Analogy” (2020) 45 BYUL Rev 1 at 9 [Koppelman 2020].

<sup>186</sup> *Ibid*.

<sup>187</sup> *Ibid*.

<sup>188</sup> *Ibid*.

adherence. Understanding religion as a matter of identity, just as race and sexual orientation are matters of identity, tends to obscure the reality of how religious people think, feel, and participate in society.

Consequently, the commission's error implicates both Eisenberg's proposal—that religion be thought of as a matter of identity—and, in a less direct way, Sullivan's argument that a properly expansive guarantee of equality might be preferable to religious freedom. When religion is equated with identity—and further equated with *other personal characteristics* that are constitutive of identity—we lose sight of the sense in which religion is more of a way of living than a way of being. Moreover, the law tends to, as a practical matter, protect and promote equality by identifying personal characteristics that cannot serve as bases for differential treatment. There is therefore limited room, within the framework of equality, to draw distinctions in kind *between* personal characteristics. Conceiving of religion as a matter of personal autonomy is, I think, the superior approach, as it maintains the law's focus on what religious people actually think, feel, and do. There is a sensitivity to the epistemic experience of religious life that is, to a greater or lesser degree, absent from the identity-based, equality-centric paradigm.

Another proponent of the proxy argument, Michael McConnell, takes a very different view. McConnell, a former federal judge, is a movement conservative with close ties to the Republican Party.<sup>189</sup> He has criticised the prevailing interpretation of the United States Constitution's Establishment Clause (“Congress shall make no law respecting an establishment of religion<sup>190</sup>”), which is generally read as a secularising provision. In McConnell's view, the Establishment Clause was intended to “prevent the government from exercising control over religion, which was seen as a particular important and valuable institution for the formation of public character and opinion in the republic.”<sup>191</sup> In other words, the Constitution does not require the complete separation of church and state.

McConnell regards “religion” as a proxy for personal autonomy, and for the principle of limited government (although, to be clear, he is also deeply committed to the value of religion

---

<sup>189</sup> Jamshid Ghazi Askar, “Scholar Michael W McConnell Mixes Law, Religion”, *Deseret News* (9 January 2011), online: <[www.deseretnews.com](http://www.deseretnews.com)>.

<sup>190</sup> US Const amend I.

<sup>191</sup> Michael W McConnell, “Religion and Its Relation to Limited Government”, (2010) 33:3 *Harv JL & Pub Pol'y* 943 [McConnell 2010].

*qua* religion). The constitutional function of religious freedom was, and is, to set limits on state authority. “The basic idea of separation of church and state”, McConnell writes, “is thus to figure out what the government should be doing, figure out what the church should be doing, and distinguish between them.”<sup>192</sup> What we now call the “private sphere” was once the domain of religion, and it included “education, charity, the arts, the economy, and so forth.”<sup>193</sup>

McConnell conceives of early modern society as divided into is “the state” and something that is not the state. That second thing—that which exists beyond the reach of the state—is anchored in religion and religious life. Today, there are many things that are not the state, and many of those things enjoy constitutional protection. However, the very idea of life outside the state rests, in McConnell’s account, on a fundamentally religious foundation. Thus, religion can be said to be a proxy for the principle of limited government. It makes a kind of soft sovereignty claim on behalf of “private life” as a concept. When we protect religious freedom, we protect freedom in general.<sup>194</sup>

McConnell takes an expansive view of religious freedom, and his openness to closer ties between religious institutions and the state sets him apart from many liberals, myself included. However, the deeper problem with McConnell’s argument is that, if religion is understood as a proxy for private affairs generally, it may be more difficult to argue that the category of “religion” has any fixed content. For example, McConnell notes that education (whether primary, secondary, or tertiary) was once provided more or less exclusively by private religious institutions. However, this is clearly no longer the case. If the sphere of religion has already shrunk in the way that McConnell describes, there is no guarantee that it will not shrink further.

Society now regards as *public* many things that were once thought of as a *private*. Consequently, the state has a much longer reach than it once did. McConnell would cast religion as a sort of social bulwark against state interference in properly private affairs, but McConnell’s approach could also see “private” defined as “Everything over which the state does not exercise authority—yet.” This is, to my mind, the primary shortcoming of proxy-based arguments for

---

<sup>192</sup> *Ibid* at 948.

<sup>193</sup> McConnell 2010, *supra* note 191 at 949.

<sup>194</sup> McConnell observes that “once the limited state gives way to the modern omni-potent regulatory hegemon, the wall of separation that kept the government within a narrow sphere no operates” (McConnell 2010, *supra* note 98 at 949). He suggests that religious freedom is somehow at odds with the modern administrative state, the implication being that religious freedom could actually be used to push the state *back*. I will not address this argument here, although it serves to highlight the extent to which McConnell’s theory of religious freedom is linked to his other philosophical commitments.

religious freedom. When one argues we should protect religion with a view to protecting *some other valuable thing*, the effect is to tie religion to that other thing, with a consequent reduction in focus on the constitutive elements of religious life. Proxy arguments are not *wrong*—religious freedom may very well protect other things that we regard as valuable—but the protection of religion ought to be anchored in the protection of the beliefs and practices of actual religious individuals, communities, and institutions.

We see the same shortcoming—to the extent that a failure to protect the constitutive elements of religious life is acknowledged as a shortcoming—in the work Mark Tushnet. In Tushnet’s view, religion and religious institutions play an important role in promoting civic virtue and preparing individuals for participation in public life. Religious institutions are “intermediate institutions”, which, Tushnet argues, “can provide the experience of acting for the common good. With that experience, members can enter the political arena knowing that they should pursue not only the private interests, but the public interest as well.”<sup>195</sup> However, the category of “intermediate institutions” also includes non-religious institutions, and Tushnet does not claim that religion plays a *necessary* role in promoting civic virtue.<sup>196</sup> For Tushnet, religious freedom serves a purpose, but that purpose is not—or at least is not primarily—the protection of religious beliefs and practices.<sup>197</sup>

I agree that religious institutions can play a role in promoting civic virtue. That aspect of Tushnet’s argument is persuasive. However, if religious freedom is tied to the promotion of civic virtue, there is no reason to protect those manifestations of religious adherence that do *not* promote civic virtue. If participation in religious life is only valuable to the extent that it prepares one to participate in *civic* life, there is no obvious basis on which to carve out space for “dissident” value systems.

Of course, if one does not regard religion as having any inherent or unique value, this instrumentalisation of religious belief and practice will not be cause for concern. My position, though, is that there is value in religion that cannot be found elsewhere. The capacity of religious

---

<sup>195</sup> Mark Tushnet, “The Constitution of Religion” (1986) 18 Conn L Rev 701 at 736.

<sup>196</sup> The category of “intermediate institutions” has also included “baronies of feudalism that bound people together by ritualistically created personal ties of reciprocal duty, the guilds that protected local markets against erosion, and the feudal attachments that tied workers to their neighborhoods” (*Ibid* at 730).

<sup>197</sup> It should come as no surprise that Tushnet takes a narrow view of the accommodations—that is to say, exemptions from laws of general application—to which religion may be entitled. See Mark Tushnet, “*Accommodation of Religion Thirty Years On*” (2015) 38 Harv Women’s LJ 1.

institutions to promote civic virtue is a compelling reason to protect religion, but it cannot serve as the sole or primary basis for religious freedom. Locating the value of religious freedom in something other than religion itself will always, to a greater or lesser extent, draw the law's attention away from the reality of religious experience. This is the difficulty with all proxy arguments.

### **Defending the *status quo*: Religion *qua* religion**

The “religion *qua* religion” argument is more ambitious, and closer to my own position. By “religion *qua* religion” I mean “religion as a unique phenomenon.” In other words, we protect religion because we want to protect religion, not because protecting religion achieves some other end. Importantly, it is possible to protect religion without conceding that religion is, in some sense, a good thing. William Galston suggests that we are *all* in the business of protecting religion, whether we realise it or not:

Jeremy Bentham famously declared that “[n]atural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense,—nonsense upon stilts.” He might well be right. But that is not what the Framers thought, and it is their thought that governs us, unless and until we the people decide to discard or emend it.<sup>198</sup>

In the Anglo-American philosophical tradition, human rights are understood to be anchored somewhere beyond the reach of the state—sovereign moral territory that no civil authority can touch. The effect of a bill of rights is to entrench that sovereignty in law. If Galston is correct, it matters a great deal that the Framers of the American constitution did not understand themselves to be creating rights that would not otherwise exist. Rather, they understood themselves to be recognising rights that had always existed, either as a function of natural law or as the result of some action by God.

The takeaway for Galston is that the modern human rights tradition (including beyond the United States) is descended, ultimately, from the religious and spiritual commitments of Locke, Jefferson, Madison, and many others.<sup>199</sup> When we talk about human rights, we are talking about a philosophical system organised around certain metaphysical commitments, be they deistic, theistic, pantheistic or more conventionally religious. Guaranteeing freedom of religion centres

---

<sup>198</sup> William A Galston, “Religion, Conscience, and the Case for Accommodation” (2014) 51 San Diego L Rev 1045 at 1052 [Galston 2014].

<sup>199</sup> *Ibid* at 1053.

those commitments in a way that, for example, guaranteeing freedom of conscience would not.<sup>200</sup> Galston worries that replacing “religion” with “conscience” would be unworkable in practice, because the domain of “conscience” is not limited to metaphysical matters in the way that religion is.<sup>201</sup>

The problem with Galston’s argument is that, even if human rights really are legitimised with reference to religion, what follows is the protection of a kind of religious thinking, not the protection of the things that religious people actually *do*. Galston’s argument for protecting *that* aspect of religious life is, in effect, that we cannot protect conscience without protecting religion.<sup>202</sup> While Galston very clearly wants to protect religious beliefs and practices, he stops short of arguing that religion is good for society. Fortunately, Timothy Macklem is willing to go further.

Macklem suggests that “the moral foundation of freedom of religion is to be found in the value that faith, understood as a mode of belief distinct from reason, is capable of contributing to human well-being.”<sup>203</sup> He concludes that “there are secular reasons to regard faith as valuable.”<sup>204</sup> I should note that the distinction between “faith” and “reason” is highly contentious; many philosophers—religious and otherwise—are deeply committed to the compatibility of reason with religious belief.<sup>205</sup>

However, Macklem’s argument is tenable even if “faith” and “reason” are mutually exclusive. In brief, his thesis is that faith “enables us to make commitments of a certain kind, and to act upon those commitments, in the absence of a full reason to do so, and thus facilitates the realization of whatever value those commitments are capable of yielding.”<sup>206</sup> The capacity for faith, as Macklem understands it, is thus a precondition for the adoption of normative guiding principles.

---

<sup>200</sup> *Ibid.*

<sup>201</sup> Galston writes that “there is an epistemological continuum between the Resurrection and environmentalism, not a stark choice” (*supra* note 198 at 1053). His point is that religious beliefs are those beliefs that concern religious matters; they do not directly require particular policy outcomes. This distinction is crucial. Without it, the law would have no way of distinguishing between religious beliefs and political preferences.

<sup>202</sup> Galston makes the further point that “religion offers conscience a matter of public objectification.” When the Quakers say that they cannot go to war, we take them seriously because their objection is rooted in religion. As a result, we are more inclined to take the same objection seriously when it comes from a non-religious source.

<sup>203</sup> Timothy Macklem, “Faith as a Secular Value” (2000) 45:1 McGill LJ 1 [Macklem 2000].

<sup>204</sup> *Ibid.*

<sup>205</sup> Richard Swinburne, *The Coherence of Theism* (Oxford: Clarendon Press, 1977), 2-3; Alvin Plantinga, *Warranted Christian Belief* (Oxford: Oxford University Press, 2000), 29-30.

<sup>206</sup> Macklem 2000, *supra* note 203 at 39.

Finally, Jeremy Webber offers a “two-level” argument for religious freedom, although each “level” operates independently of the other. Firstly, Webber argues that religious freedom is essential to the maintenance of a *modus vivendi* tolerable to all (or at least most) of society.<sup>207</sup> We respect religious freedom because the alternative is discord and very probably violence (and, notably, Webber observes that “religious reasons for acting are so pervasive that they cannot be banished from political life”<sup>208</sup>). Drawing on the Indian legal tradition, Webber argues that anything more ambitious than a *modus vivendi* is possible only under conditions of general religious harmony, which notably do not obtain in India. Ensuring conviviality is thus a kind of fallback defence of religious freedom, and Webber implies that, when faced with genuine religious discord, it is the only defence that counts.<sup>209</sup>

Webber’s second argument is that, when one recognises religious freedom, “one opens oneself, potentially, to insights held by those who profess religious beliefs. This is a source of intellectual growth for individuals and the society as a whole.”<sup>210</sup> Here, Webber challenges the Rawlsian contention that religious beliefs should be excluded from the scope of public reason. Ultimately, Webber’s position is that dialogue between belief systems is good, and that religious beliefs system should not be excluded from that dialogue simply because they are religious.<sup>211</sup> He also notes that religious perspectives are often unique, giving the example of indigenous religious beliefs with respect to the natural world (with which the Supreme Court of Canada struggled in *Ktunaxa Nation*).<sup>212</sup>

In a similar vein, Indian society has been and continues to be shaped by the interaction between religions—principally Hinduism and Islam, but also Buddhism, Christianity, Sikhism and several others. In China, the analogous interaction is between Buddhism, Confucianism, and Taoism, and Chinese folk religion. Webber regards these interactions as essentially positive, and valuable to non-believers as well, even if the religious beliefs are fundamentally different from the beliefs of non-believers.<sup>213</sup>

---

<sup>207</sup> Jeremy Webber, “A Two-Level Justification for Religious Toleration” (2012) 4:2 J Indian L & Society 25 at 34 [Webber 2012].

<sup>208</sup> *Ibid* at 31.

<sup>209</sup> *Ibid* at 35.

<sup>210</sup> *Ibid* at 37.

<sup>211</sup> *Ibid* at 38.

<sup>212</sup> *Ibid* at 38-39.

<sup>213</sup> *Ibid* at 44.

It could be argued that Webber's argument is, in fact, a proxy argument. After all, each of the two "levels" ties the value of religion to some other thing, be it the preservation of a *modus vivendi* or the possibility of intellectual growth. Still, I do not take Webber to be making a proxy argument. Webber's *modus vivendi* argument is premised on an acknowledgment that religious disagreements are uniquely, or at least especially, irresolvable. He notes elsewhere that the need for some measure of religious freedom arose, historically, from the "sheer destructive power of religious conflict given the tenacity with which people held to religious beliefs."<sup>214</sup> In other words, there is something *about religion* that makes religious disagreements uniquely or especially difficult to resolve. This difficulty is what gives rise to the need for *modus vivendi* tolerance.

In a similar vein, Webber's second argument contends that religious commitments—including, notably, religious commitments other than one's own—contribute to intellectual growth and play a special role in self-actualisation. Webber argues persuasively that "the mystery of other's beliefs" is "inexhaustible", and that exposure to this unique mystery promotes—and, indeed, requires—intellectual growth.

I acknowledge that the distinction between "religion *qua* religion" and "religion as a proxy" is very fine. The ultimate question is whether one regards the constitutive elements of religious life—that is, the beliefs and practices of actual religious people—as having some kind of unique or special value. The answer need not be a definitive "yes" or "no", but, while I suspect that Tushnet's answer would be something like a "no", I am reasonably confident that Webber's answer would be something like a "yes" (indeed, Webber expressly argues for an "affirmative valuing of religion"). For that reason, Webber's argument should not be understood as a proxy argument.

## Summary

I conclude with Webber because the two "levels" of Webber's argument for religious freedom map onto the two liberal commitments (meaning, in this context, commitments of the liberal state) that animate the distinction between licences and mandates as it relates to religion. The first "level" aligns with the commitment to tolerance, while the second "level" has a nexus with the commitment to self-actualisation. These commitments precede, and exist independently

---

<sup>214</sup> Webber 2008, *supra* note 146 at 31.

of, any particular understanding of the purpose of religious freedom. In my view, it is Webber's understanding of the purpose of religious freedom that proceeds most naturally from the state's pre-existing commitments.

The various proxy arguments fall short in that the resulting legal protection attaches not to religious life but to the "social accidents" of religious life (such as Tushnet's civic-mindedness, or McConnell's night-watchman state). There is a failure to recognise the value of being free to self-actualise in accordance with one's religious commitments, even where such self-actualisation does not promote some other social good. Similarly, the conscience argument—that the activities currently protected by religious freedom could be adequately protected by freedom of conscience—does not account for the comprehensively metaphysical nature of religious commitments.

Finally, the equality paradigm tends to homogenise axes of difference that are, themselves, markedly different from one another. Race is not the same kind of thing as gender, which is not the same kind of thing as religion. Achieving racial equality might very well mean that the category of "race", as traditionally understood, ceases to exist. Could the same be said of religious equality? I suspect that the answer is no. We are, I think, better off treating each axis of difference as a free-standing basis for self-actualisation, without presuming that any one axis can be usefully analogised to another. This approach is more consistent with the state's commitment to self-actualisation. It is also more consistent with the state's commitment to tolerance. The equality paradigm might, in the end, leave us with only one way of confronting difference. Our approach to tolerating racial difference may be ill-suited to religious difference, and vice versa. The practice of tolerance ought to be attentive to both the particular and the general, where the former is the *instance* of difference (such as adherence to Islam in a traditionally Christian society) and the latter is the *axis* of difference (in this case, religion).

While I am sympathetic to Sullivan's version of the equality argument (which, of course, arises from her impossibility argument), I am ultimately not persuaded that religious life would be better protected by an enhanced right to equality.<sup>215</sup> It is true that some aspects of religious life fall outside the scope of religious freedom, and this non-inclusion imposes meaningful limits on the religious freedom of those affected.

---

<sup>215</sup> See Sullivan 2005, *supra* note 160 at 149, 174.

Still, I believe that many of these limits are found, in the final analysis, not at the boundaries of religious freedom but at the boundaries of what is possible within the parameters of the liberal state and its laws. In other words, true religious freedom—especially for adherents of the “outlaw religion” for which Sullivan has sympathy—would continue to be impossible even if the equality alternative were implemented.

## **SECTION 4: RELIGION AND SELF-ACTUALISATION**

### **Introduction**

The purpose of this section is to explore the relationship between religious freedom and the liberal state's commitment to free self-actualisation. The basic freedom to live one's life in accordance with one's most deeply held commitments has long been recognised as a distinguishing feature—and, I would argue, *the* distinguishing feature of liberal society. Indeed, many liberals argue that the primary function of the liberal state is to secure this basic freedom for all citizens.<sup>216</sup> Religious citizens may seek to self-actualise in a distinctly religious way. Some will seek to self-actualise through individual or community-based withdrawal from mainstream society; others will seek to self-actualise through participation in public life, alongside their non-religious or differently religious peers. Consequently, if the state is to protect the freedom to self-actualise, it must ensure that the requisite access to public life (including access to public resources) is presumptively made available in a value-neutral way. To the extent that access is made contingent on conformity with liberal values, the degree of conformity demanded must closely track the legitimate state interest being pursued. The licence/mandate distinction is one possible response to this requirement.

Religious commitments are metaphysical in content and comprehensive in form. They are experienced as part of a relationship with, or an obligation to, something whose existence is not purely physical. I do not seek to describe this “something” with any great precision; the “something” to which Jews, Christians, and Muslims owe obligations and the “something” to which adherents of indigenous religions relate are very different. The Supreme Court took essentially the same approach in *Amselem*, repeatedly referring to “the divine” but never spelling out what, exactly, is captured by the concept of divinity. This is the correct approach. We can recognise the distinctiveness of religious obligations, which arise from one's relationship with the divine, while at the same time recognising that the concept of the “divine” has different meanings in different cultures, and even within a single culture.

---

<sup>216</sup> This argument can be traced back at least to Kant and, before him, to Locke. More recent proponents include Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986). I am sympathetic to the neo-republican variant, which conceives of the state as a mechanism through which to free individuals from conditions of domination. See, for example, Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012).

The liberal state's protection of the freedom to self-actualise must account for the differences between religious self-actualisation and other forms of self-actualisation. These differences are a function of the distinct way in which religious obligations are experienced. They are also a function of the sense in which religion is not a discrete set of distinctly "religious" beliefs and practices, but a comprehensive way of life. The implication is that religious self-actualisation is best protected by a free-standing right to religious freedom.

### **The right to be wrong**

Above, I described the TWU cases as a "framing device", meaning that the issues at play invite a critical examination of why, exactly, we protect religion. The scope (as distinct from the content) of religious freedom was delineated by the Supreme Court in *Big M, Amselem*, and *Saguenay*, and *Trinity Western* was decided on the basis of those decisions. In other words, *TWU* might very well have offered an opportunity to engage in a normative analysis of religious freedom, but the court was under no obligation to take up that opportunity.

Moreover, it was always entirely possible that the administrative law aspect of the case would take precedence over the religious freedom dimension. For that reason, whether TWU prevailed in its bid for an accredited law school mattered less than one might think. After all, there is no serious argument that maintaining a law school is of fundamental importance to the continued existence of evangelical Christianity.<sup>217</sup> What was at stake in *Trinity Western* was the TWU community's ability to participate in public life in a manner consistent with its religious obligations. We can, and should, recognise the importance of this freedom while at the same time acknowledging that evangelical Christianity could continue without it. The "core" of evangelical Christianity, to the extent that it makes sense to speak of such a thing, would likely not include the operation of a law school.

Still, it is important to distinguish between what was immediately at stake (whether TWU is permitted to operate a law school) and what loomed in the background (why we value religious freedom, and perhaps whether we value it at all). Mark Witten argued that a ruling

---

<sup>217</sup> This is perhaps the rare claim that is less contentious when taken literally. TWU certainly stressed the importance of the educational aspect of religious freedom, arguing that a private evangelical educational institution ought to be free to "attract evangelical students and faculty that share its beliefs, and provide Christian education with a spiritual formation component (see *Trinity Western*, *supra* note 1 (Factum of the Appellants at para 69)). However, there is nothing in TWU's submissions to suggest that the operation of a law school is a core religious obligation or otherwise central to the practice of evangelical Christianity

against TWU would “represent a marked shift in the direction of a harder and more assertive conception of secularism.”<sup>218</sup> Webber argued that “[freedom] of religion is about the protection of truth. It is about the protection of what, to those in government, is often error.”<sup>219</sup>

Of course, there is not and has never been a literal “right to be wrong.” Rather, there is a right to hold, express, and engage in a range of beliefs and practices, including beliefs and practices that society generally regards as wrong or even evil. There is no right to be wrong, but there is a right to hold and express beliefs and engage in practices that happen to be wrong in some sense.

Wrongness itself does not attract protection, but nor is it clear that the state can legitimately withhold public licences on the basis of the prospective licensee’s wrong, evil, or unpopular beliefs. I address the concept of a public licence, and how it differs from a public mandate, in greater detail in the next section, but the core of my claim is that the state is presumptively entitled to consider the applicant’s values—and require conformity with the state’s values—when conferring public mandates but not, in the absence of some intolerable harm, when conferring public licences.<sup>220</sup>

In the Introduction, I outlined two arguments for the legal protection of religious freedom. The former—the self-actualisation argument—relates directly to this right to be wrong. Again, by “right to be wrong” I do not mean an actual right to hold false beliefs (although liberalism clearly recognises a right to hold beliefs that happen to be false). The point is not that religious beliefs are false and thus in need of protection, as we might want to “protect” a child’s comforting belief in Santa Claus or the Tooth Fairy.

The truth value of a religious belief—whether it is true, false, or neither—has no bearing on whether the belief and any associated practices should be protected. Indeed, protecting religious freedom necessarily entails protecting false beliefs, either because only one religion is true or, alternatively, because atheism is true. There is no scenario in which *all* beliefs captured by religious freedom are true, and that is by design.<sup>221</sup>

---

<sup>218</sup> Mark A Witten, “Tracking Secularism: Freedom of Religion, Education, and the Trinity Western University Law School Dispute” (2015) 79 Sask L Rev 215 at 217 [Witten 2015].

<sup>219</sup> Webber 2012, *supra* note 207 at 26.

<sup>220</sup> In brief, a public licence is the state’s permission to engage in a particular activity or set of activities, while a public mandate is an appointment to perform a function or set of functions on the state’s behalf. The holder of a public mandate is an agent of the state while the holder of a public licence is not necessarily.

<sup>221</sup> It is true that the decision *Trinity Western* ultimately turned not on TWU’s *beliefs* but on the religiously motivated discriminatory *practices* in which TWU engaged. At the same time, it is not possible to separate the

Above, I linked religion and religious freedom to self-actualisation. By “self-actualisation” I mean the meaningful realisation of one’s most deeply held and comprehensively metaphysical commitments. However, there are other forms of self-actualisation. I distinguish between self-actualisation on the basis of comprehensively metaphysical commitments, self-actualisation on the basis of other deeply held commitments (including moral and political commitments, which may or may not have a metaphysical aspect), and self-actualisation on the basis of identity—meaning one’s race, sexuality, or other personal characteristic.<sup>222</sup>

The difference is that, even if religion is treated as a personal characteristic, it is still the only personal characteristic that makes demands *experienced as* anchored in a transcendent morality, or in the structure of the universe itself. The “demands” made by one’s race, for example, are anchored in human society and understood as such. A Black woman is required to navigate society in a particular way, and that way is particular to her being Black and a woman. In many cases, the cause is racism or sexism or, in all likelihood, a combination of the two. Still, there is no feature of the universe or free-standing moral principle that makes this unique experience unavoidable.

A Muslim woman is also required to navigate society in a particular way, and that way is, again, particular to her being a Muslim and a woman. But there is a difference. She heeds the call to prayer not simply because her society requires her to—although it may—but because, in doing so, she honours her obligations to the divine. Those obligations, which I describe as comprehensively metaphysical, are experienced in a unique way.

I use “comprehensively metaphysical” to capture the sense in which religious obligations differ from societal obligations and even from basic physical obligations.<sup>223</sup> The apple’s obligation to fall is the latter—as basic physical obligation. The apple does not choose to fall, but

---

requirements of the Community Covenant from TWU’s sincerely held belief that same-sex sexual relations are wrong. Religious practices do not exist independently of religious beliefs; the former proceed from the latter, in the sense that one believes X and consequently does Y. To take the position that *Trinity Western* was “about beliefs, not practices” is to rely on a distinction that is exogenous to the lived religion in which members of the TWU community participate. Religious freedom cases are almost never about belief *alone*.

<sup>222</sup> Again, “comprehensively metaphysical” is intended to capture the unique way in which metaphysical commitments of a religious nature are experienced. They are “metaphysical” in that they have a nexus with something whose existence is, in some sense, external to human society, and they are “comprehensive” in that they are experienced as being- or life-orienting.

<sup>223</sup> The Supreme Court uses similarly expansive language in *Amselem*, describing religious beliefs and practices as those that “have a nexus with religion” and enable the believer to “connect with the divine.”

the Muslim woman does choose to pray.<sup>224</sup> The similarity is thus a limited one, but the obligation in both cases is grounded in something external to human society. For some, obligations to the divine are simply a given.

To be clear, my claim is that religious obligations are experienced as obligations to something external to human society. The law need not—and should not—concern itself with whether a given religious obligation is in fact anchored in something external to human society. It is, of course, true that religious obligations are not static, and there may be disagreement within a religious community as to the content or even existence of a particular obligation, as was the case in *Amselem*. However, what ought to matter to the law is how the obligation is experienced in the present moment, because it is this experience that serves as a basis for religious self-actualisation.

Not all religious beliefs are primarily “metaphysical” in nature, but religious belief systems generally rest on metaphysical truth claims, even if the claim is simply—for example—that there exists a supreme being or divine force that deserves veneration and commands moral obedience (and, to be clear, many religious belief systems do not include belief in a supreme being). I propose that self-actualisation on the basis of one’s comprehensively metaphysical commitments is worthy of state protection and contributes to the normative basis for protecting religious freedom.

Importantly, self-actualisation on the basis of comprehensively metaphysical commitments need not take precedence over forms of self-actualisation. Rather, my argument is that no other form of self-actualisation can capture the unique way in which religious commitments, whether comprehensively metaphysical or otherwise, are experienced: as commitments to something whose existence transcends human society and the physical world.<sup>225</sup>

---

<sup>224</sup> I am willing to concede that this argument is only tenable if religion is understood as a choice, rather than as a feature of personal identity. Most philosophers of religion take this view, either because religious beliefs can be sustained by reason, or because religious beliefs are “properly basic” (a properly basic belief is a belief that is self-evident in the most literal sense, such as the belief that one is currently awake, or a belief with respect to one’s current physical location; this argument is associated primarily with Alvin Plantinga).

<sup>225</sup> My use of “physical” in this context is intended to correspond to the literal meaning of “metaphysical” (that is, “beyond the physical” or “beyond nature”). No two deities are understood to exist in exactly the same way, and there are important differences—for example—how the God of Abraham is understood to exist and how the Grizzly Bear Spirit of the Ktunaxa people is understood to exist. Still, it seems apparent that the Grizzly Bear Spirit has an existence that is not *purely* physical, even if some aspect of the Grizzly Bear Spirit is inextricably bound up with the physical world. The words used by the Supreme Court in relation to religion, such as “divine” and “spiritual”, point in the same ultimate direction: towards engagement with some transcendent thing or force whose existence is not limited to the physical, material world.

In this respect, religious obligations differ from other obligations, and religious self-actualisation differs from other forms of self-actualisation.

There can be no doubt that liberalism recognises the value of self-actualisation. In the dominant liberal tradition, the state is a collective enterprise that recognises the individual as the foundational unit of human society. There are other traditions within liberalism that give greater weight to collective interests, but they do not concern me here. Recent developments aside, there is a strong argument that the Canadian constitutional order remains grounded in the older, fundamentally individualistic iteration of liberalism. Here, Benjamin Berger clearly summarises the “core set of concerns” shared by all strains of liberal thought:

First, liberalism is closely associated with the high valuation of reason. Liberalism is understood to be founded upon and facilitative of reason. Ethics grounded in “irrational” conceptual soil is excluded from the politics of a liberal state. Second, liberalism is centrally interested in questions of individual freedom. Liberal theories tend to focus upon the needs and priorities of the individual and seek to limit the state’s interference with individual autonomy. Finally, liberalism understands law as the tool with which to limit the state’s interference in the lives of the individual.<sup>226</sup>

The emphasis on “reason” is of particular note, as is the insistence that “irrational” politics be excluded from the liberal *state*, as distinct from liberal *society*. There is no comprehensive account of what makes a political program “irrational”, but the basic (and basically Rawlsian) principle is this: There can be no exercise of state authority whose public rationale is not readily intelligible to, if not accepted by, every member of society.<sup>227</sup>

This formulation arguably presupposes that every member of society is *already* a kind of liberal, but, even setting aside the “intelligibility” criterion, religiously motivated exercises of state authority are not compatible with the liberal commitments articulated above. However, I am not concerned here with religiously motivated exercises of state authority, and the requirement that the state not adopt explicitly religious laws is not in tension with religious freedom (in fact, it *follows* from religious freedom). My concern is liberal society, not the liberal state.

---

<sup>226</sup> Benjamin Berger, “The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State” (2002) 17 CJLS 39 at 42 [Berger 2002].

<sup>227</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005) 12. Christopher Eberle argues that “the clarion call of justificatory liberalism is the public justification of coercion.” See Christopher Eberle, *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002) 54.

A liberal society is a society governed by a liberal state, meaning a state organised around and bound by liberal principles. Witten observes that the Canadian constitutional order is “not neutral” but rather “has a political culture that is birthed out of...the contemporary political culture of liberalism.”<sup>228</sup> I agree. I also do not see an alternative. No state, anywhere, is truly “neutral” on questions of morality, although many profess to be.<sup>229</sup> Iain Benson argues that states cannot even be neutral on questions of metaphysics:

The term “secular” has come to mean a realm that is neutral or, more precisely, “religion-free.” Implicit in this religion free neutrality is the notion that the secular is a realm of facts distinct from the realm of faith. This understanding, however, is in error. Parse historically the word “secular” and one finds that secular means something like non-sectarian or focused on this world, not “non-faith.” States cannot be neutral toward metaphysical claims. Their very inaction towards certain claims operates as an affirmation of others.”<sup>230</sup>

Even secular states make metaphysical claims. For example, the fundamental architecture of the Canadian human rights regime—from the text of the *Charter* to the underlying principle of human dignity identified by the Supreme Court<sup>231</sup>—is predicated on the claim that all humans have natural, equal, and inviolable value (that is, the *Charter* gives constitutional weight to fundamental rights that have always existed, morally if not legally).

None of this is a problem. The liberal state is animated by liberal principles, which are themselves animated by “liberal” metaphysical claims (or, at the very least, by metaphysical claims that seem conducive to liberal outcomes). The problem is what happens *outside* the liberal state. Sullivan suggests that the essence of religious freedom is a right “to live outside the state.”<sup>232</sup> Webber goes further, arguing that religious freedom consists in the affirmative protection of error—in other words, a right to be wrong.<sup>233</sup>

---

<sup>228</sup> Witten 2015, *supra* note 218.

<sup>229</sup> For example, see the *Constitution of the Republic of Albania* (2007 Rev Ed), art 10(2) (“The state is neutral on questions of belief and conscience and guarantees the freedom of their expression in public life”).

<sup>230</sup> Iain T Benson, “Notes towards a (Re)Definition of the Secular” (2000) 33:3 UBC L Rev 519 at 520.

<sup>231</sup> *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 214, Bastarache J, concurring.

<sup>232</sup> Sullivan 2005, *supra* note 160 at 159.

<sup>233</sup> Webber 2012, *supra* note 207 at 26.

Both are correct. The liberal state is permitted and, in many cases, required to act in accordance with liberal principles. Whether that requirement can be extended to the wider society is an open question. I propose that the answer is “no.”

### **Engaging the incomprehensible**

If we accept the premise that the Canadian state is a liberal one—and we should—we also accept that the Canadian constitutional order is “centrally interested in questions of individual freedom”<sup>234</sup> (although individual freedom need not prevail in every case). However, “individual freedom” has libertarian connotations that are, in this context, unhelpful. I am concerned not with individual freedom *simpliciter*—meaning mere freedom from constraint—but with self-actualisation on one’s own terms, even if those terms are decidedly non-liberal.

In *TWU v NSBS*, Justice Campbell observed that “tolerance” requires engagement with “the incomprehensible, the contemptible or the detestable.” Otherwise, “tolerance” is little more than “indifference.”<sup>235</sup> In effect, the law should be taken to recognise a right to live one’s life in a manner that is profoundly inconsistent with the state’s liberal commitments. The alternative is a “more progressive society” that would not “permit any incursions by religion into public life or would at least limit those incursions to those by religions that have belief systems and practices that are more consonant with mainstream morality.”<sup>236</sup>

This alternative strikes me as deeply illiberal. The organising principles of the liberal state would, in many cases, produce illiberal outcomes if applied beyond the state. Sullivan’s formulation of a “right to live outside the state” in some respects brings to mind images of isolated religious communes and self-removal from the infrastructure of modern society. I do not take Sullivan to be endorsing that outcome, but the right that she proposes should instead be characterised as a “right to live outside of liberalism.” Liberalism can—and, I think, should—be understood to recognise such a right.<sup>237</sup>

---

<sup>234</sup> Berger 2002, *supra* note 128.

<sup>235</sup> *TWU v NSBS*, *supra* note 73 at para 275.

<sup>236</sup> *Ibid* at para 271.

<sup>237</sup> Galston and Gray would likely endorse this claim as well. Galston argues persuasively that liberal societies ought to be more tolerant of non-liberal ways of life, and can do so “without ceasing to be liberal.” For his part, Gray argues that liberals should not expect, let alone seek to bring about, a “convergence on a universal liberal culture.” He urges liberals to adopt a more humble posture vis-à-vis non-liberal ways of life, acknowledging the possibility that “at least some nonliberal regimes and cultural forms possess genuine virtues and harbor authentic excellences that are weak, or lacking, in liberal regimes.” See William A Galston, *Two Concepts of Liberalism* (1995) 105 *Ethics* 516 at 521-22; John Gray, “Agonistic Liberalism” (1995) 12 *Soc Phil & Pol’y* 111 at 134-35.

Liberal constitutionalism is attractive because it offers a less coercive but still morally grounded alternative to the confessional state. In a confessional state, everyone is required to conform to explicitly sectarian principles, and to accept and to live in accordance with the state's particular conception of the good life. The point of the liberal alternative is precisely that it contains no such requirement.<sup>238</sup> The range of permissible life options is broader than the range of options available to the state, although talk of "breadth" is somewhat misleading. The state is bound by liberal doctrine, but nonetheless permits its citizens to adhere, within certain limits, to other doctrines, including doctrines that run counter to everything that liberalism holds dear. In summary, even if the liberal state is not neutral between competing conceptions of the good life (as is evident in most areas of public policy), citizens of the liberal state still have considerable freedom to self-actualise in accordance with non-liberal commitments.

At issue in *TWU* is the liberal principle of equality, which has constitutional force by virtue of the section 15 of the *Charter*. The TWU Community Covenant clearly discriminates against LGBT people, along with anyone else who might be inclined to engage in extra-marital sexual relations. The discrimination is the result of TWU's deeply held belief that extra-marital sexual relations, including all sexual relations between people of the same sex, are morally wrong. There is thus a clear violation of the principle of equality, which has evolved to prohibit discrimination on the basis of sexual orientation.

The state has been bound by this principle since 1995, when the Supreme Court held in *Egan* that sexual orientation is analogous to the prohibited grounds of discrimination listed in the section 15.<sup>239</sup> Most private actors are similarly bound, in the provision of goods and services and certain other activities, by virtue of federal or provincial human rights legislation. However, TWU enjoys a partial exemption from the British Columbia *Human Rights Code*, which protects the university's right "to accept only students who subscribe to its adopted religious views."<sup>240</sup> The legal consequence of this exemption is that, as a general rule, the religiously motivated discriminatory practices in which TWU engages cannot constitute violations of the *Code*. It does

---

<sup>238</sup> Jonathan Quong endorses this characterization of liberalism, arguing that liberalism "presents liberal rights and institutions as something that can appeal to everyone who is willing to cooperate on fair terms, regardless of one's views as to what constitutes a virtuous or flourishing life." I share Quong's view that *this* conception of liberalism—and likely *only* this conception of liberalism—can be accepted even by those who "believe that the good life requires strict adherence to inherited cultural or religious traditions." See Jonathan Quong, *Liberalism without Perfection* (Oxford: Oxford University Press, 2011) 4.

<sup>239</sup> *Egan*, *supra* note 99.

<sup>240</sup> *TWU v LSBC (BCCA)*, *supra* note 103 at para 115.

not necessarily follow that TWU's discriminatory conduct cannot have other legal consequences, such as loss of access to certain public benefits that would otherwise be available.

As for the *Charter*, it applies only to exercises of state authority.<sup>241</sup> The non-discrimination obligations of *private* actors are rooted in statute, and TWU is partly exempt from the statute that would ordinarily bar it from discriminating on the basis of sexual orientation. The result is a decidedly non-liberal state of affairs: A private actor is permitted to discriminate, in violation of the liberal principle of equality. The law societies of Ontario and British Columbia propose to correct this state of affairs by using their statutory authority to, in effect, compel a liberal outcome.

At the Ontario Court of Appeal, Justice MacPherson observed that the Community Covenant is “contrary to” section 15 of the *Charter*.<sup>242</sup> His claim, taken literally, seems to be that the Community Covenant is *currently* contrary to the *Charter*, not that it *would be* contrary to the *Charter* if the *Charter* applied to TWU. In effect, an administrative decision-maker can, in the course of carrying out its mandate, compel a limited form of *Charter* compliance even where there is no suggestion that the *Charter* actually applies. This is a consequence of the prevailing interpretation of the *Doré* framework.

I do not mean to suggest that the law societies are not bound by the *Charter*—they clearly are. The law societies are “government” within the meaning of section 32 and, consequently, cannot discriminate in a manner contrary to section 15. What I take issue with is the claim that permitting discrimination by a private actor is itself discriminatory as a matter of constitutional law. The *Charter* should not be understood as requiring the state to bring about a society—as opposed to the state itself—that is free of discrimination.

The state itself cannot discriminate, and, while the state has the authority to forbid discrimination by private actors in some circumstances, the exercise of this authority is limited by the constitutional protection that attaches to certain discriminatory practices. I acknowledge, of course, that this conception of the state's non-discrimination obligations is in tension with the dominant interpretation of the Supreme Court's decision in *Doré*. My concern is that the *Doré*

---

<sup>241</sup> This reading of section 32 of the *Charter* was endorsed by the Supreme Court in *Dolphin Delivery*, *supra* note 59.

<sup>242</sup> *TWU v LSUC* (ONCA), *supra* note 91 at para 115.

framework will, over time, facilitate the erosion of the right to live outside liberalism, to the detriment of the freedom to self-actualise in accordance with non-liberal commitments.

There was no section 15 claim in *Trinity Western*, but the underlying *Charter* value that animates section 15—the principle of equality—is what stood between TWU and accreditation. This dynamic, in which an administrative decision-maker seeks to compel a private actor to comply with the *Charter*, is bolstered by the fact that anti-discrimination obligations attach to public and private actors alike. As a result, anti-discrimination rules look more like a common standard and less like a special set of rules governing the exercise of public authority (as opposed to rules promoting free expression, which are not extended by statute to cover private actors).

We do not generally require private actors to respect freedom of expression, nor is there a free-standing duty to provide for the security of the person of one's fellow citizen. When it comes to section 15, however, we make an exception. Equality is a fundamental organising principle of the liberal state, and we tend to be comfortable extending it society as a whole. Still, imposing the state's non-discrimination obligations under the *Charter* to a society as a whole would, for a non-trivial number of people, greatly frustrate the freedom to self-actualise in accordance with one's deeply held, comprehensively metaphysical commitments.

A private actor is, in the absence of statutory constraints, entitled to prefer one state of affairs over another, and to bring about that state of affairs by way of discrimination. Most of the time, the necessary discrimination is trivial and has nothing to do with race or gender or sexual orientation—but sometimes it does. As a general rule, human rights legislation operates to prevent discrimination in the provision of goods, services, and other commercially available resources.<sup>243</sup>

However, it does not—and ought not to—prevent discrimination in the context of interpersonal relations and private manifestations of preference. We may regard this kind of discrimination as morally wrong, deserving of vociferous condemnation, and perhaps socially harmful, but we do not seek to remedy it through state action. The takeaway is that we do, in the course of respecting personal autonomy, permit a wide range of discriminatory practices and behaviours, contemptible though they may be.

---

<sup>243</sup> *Canadian Human Rights Act*, RSC 1985, c H-6, ss 5-11; *Human Rights Code*, RSO 1990, c H.19, s 1; *Charter of Human Rights and Freedoms*, CQLR, c C-12, s 15.

Of course, TWU *does* discriminate in the provision of goods and services and would run afoul of the provincial *Human Rights Code* if it, and institutions like it, were not expressly exempt (although, again, TWU’s partial exemption from the *Code* is immediately relevant only to the application of *Code*).<sup>244</sup> The fact that we tolerate private discrimination does not save TWU on its own, but it does highlight the sense in which the freedom to discriminate—whether the discrimination be trivial or pernicious—is an important part of personal autonomy.

While I address the relationship between religious freedom and the principle of non-discrimination is discussed in greater detail in the next section, my own view is that the state should, when conferring public licences, refrain from considering the values of prospective licensees.

### **Section 32 and self-actualisation**

I referred above to section 32 of the *Charter*, which sets out when the *Charter* does and does not apply. I noted that the *Charter* only applies to agents of the state. For reference, section 32 reads as follows:

32. (1) This Charter applies
- a) to the Parliament of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
  - b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
- (2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

In my view, section 32 should be read as entrenching the liberal—as opposed to more broadly “progressive”—character of both the *Charter* and the Canadian state as a whole. Section 32 makes it clear that *Charter* is intended to bind the state and the state alone. This reading is in line with the liberal commitment to self-actualisation. The liberal state leaves space for self-actualisation on the basis of one’s own commitments, which need not be the liberal commitments of the state. In many cases, the two align. Most Canadians, myself included, now believe that

---

<sup>244</sup> *Human Rights Code*, RSBC 1996, c 210, s 41(1).

discrimination on the basis of sexual orientation is wrong. It is also prohibited by law in most commercial contexts, and rightly so.

Most Canadians—again, myself included—also do not share TWU’s moral opposition to same-sex sexual relations. The state’s position is that discrimination on the basis of sexual orientation is wrong, and the courts would presumably and rightly view statutory restrictions on same-sex sexual activity as unconstitutional. In particular, they would be unconstitutional interference with the self-actualisation of LGBT people.

But TWU is not the state, and section 32 limits *Charter* liberalism to the state and its agents. The result is a kind of minimalist liberalism. We have a set of liberal principles that bind the state, but section 32 stands between those principles and the creation of a state that would, in effect, be a confessional state whose “confession” is liberalism.<sup>245</sup> The alternative to the liberal state might be a kind of liberal confessionalism, in which the freedom to self-actualise is subordinate to compliance with liberal values. In a liberal confessional state, the civil authorities would be relieved of their duty tolerate illiberal practices, including discriminatory practices that are currently permitted.

I do not believe that we have a liberal confessional state, and we should not desire one. The chief value of the liberal state is that it is compatible with non-liberal forms of self-actualisation. It permits individuals to make and live in accordance with truth claims that are deeply offensive to others and even to the state. Self-actualisation on the basis of *metaphysical* truth claims is of particular and unique importance, because those claims act on the believer in a way that other truth claims—and other bases for self-actualisation—do not.

The claim here is ultimately that metaphysical truth claims engage the conscience in a unique way. There is a difference in kind between the relational metaphysical commitments of a religious person and the non-relational metaphysical commitments of a non-religious person. There is a similar difference between religious and non-religious moral commitments. In both

---

<sup>245</sup> Some scholars are of the view that liberal confessionalism has already taken hold. While I am sympathetic to the argument that the *Charter* values framework poses a threat to the public/private distinction that stands at the core of section 32, claims that the state now has a free or nearly free hand to impose liberal values on private actors are, in my view, overstated and not supported by recent jurisprudence. For the more nuanced (and pre-*Doré*) version of this argument, see Mark S Harding & Rainer Knopff, “Constitutionalizing Everything: The Role of ‘Charter Values’” (2013) 18 Rev Const Stud 141 [Harding & Knopff 2013]. For the somewhat polemical version, see Leonid Sirota, “Unholy Trinity: The Failure of Administrative Constitutionalism in Canada” (2020) 2 J Commonwealth L 1.

cases, the religious person is honouring an overriding commitment to the divine, whose existence is understood as transcending human society and the physical world.

To be clear, religious convictions are not a trump card, and religious freedom does not serve to justify discrimination in every case. There can be a tenable distinction between discrimination on the basis of sexual orientation (which tends to be rooted in moral disapproval of particular acts) and discrimination on the basis of race (which is rarely grounded in metaphysical commitments).<sup>246</sup> Richard Moon suggests that TWU’s claim may resonate “only because as a community ... we still cannot quite let go of the idea that a ban on same-sex intimacy is a restriction on behaviour (that an individual can refrain from engaging in) rather than an act of discrimination against gays and lesbians.”<sup>247</sup>

Moon’s dismissal of conservative evangelical sexual morality is striking. Social recognition of sexual orientation as a source of identity is a relatively recent development. Many, if not most, religious communities still regard same-sex sexual relations as a behaviour. The conservative evangelical position—that one can love the sinner but hate the sin—should be taken at face value.<sup>248</sup> Moral disapproval of same-sex sexual relations can be distinguished from, for example, white nationalism. While the former is, in my view, at least theoretically compatible with respect for the dignity of LGBT individuals, the latter expressly denies the dignity of non-white individuals. It is a mistake to use the liberal conception of personal identity as a “yardstick” against which to measure non-liberal conceptions of identity.

---

<sup>246</sup> But see *R (E) v Governing Body of JFS*, [2009] UKSC 15, in which the Supreme Court of the United Kingdom held that a private Jewish school could not refuse admission to students who were not of matrilineal Jewish descent (and who were therefore not “Jewish” within the meaning of Orthodox Judaism). The court equated discrimination on the basis of ancestry with discrimination on the basis of race. In my view, even if one accepts that the school’s admissions policy amounted to race discrimination, religious groups ought to be able to determine their own membership, even if membership is determined in part by blood. Finally, it should also be noted that the mother of the appellant in *JFS* had undergone a Conservative conversion to Judaism, not an Orthodox conversion. Had she undergone an Orthodox conversion, the appellant’s non-Jewish heritage would not have been held against him.

<sup>247</sup> Richard Moon, “*The Law Society of British Columbia v Trinity Western University*: Complicated Answers to a Simple Question” (2019) 94 SCLR (2d) 335 at 356 [Moon 2019].

<sup>248</sup> I make this claim for three reasons. Firstly, *Amselem* stands for the proposition that religious truth claims ought to be taken at face value, except where there is evidence of insincerity. This is the correct approach for the law to take. It is also, secondly, the approach most consistent with the respect for difference that is central to liberal pluralism. Even if some manifestations cannot be tolerated, there is no harm in assuming that people with whom we disagree mean what they say. This assumption is a matter of respect that can be conceded freely, at no cost to the integrity of the liberal value system. Finally, even if the law (rightly) recognises that discrimination can occur in the absence of bigotry some other kind of discriminatory animus, it is still useful to have language for distinguishing between discriminatory practices that are motivated by bigotry and those that are motivated by something else.

However, we should hesitate to conclude that religious freedom can only justify certain kinds of discrimination. Religious institutions are currently permitted to discriminate on the basis of sex and gender, and one can imagine other kinds of religiously motivated discrimination that the law might be obligated to protect.<sup>249</sup>

The point is not that there can be no self-actualisation without unfettered religious freedom. Indeed, self-actualisation itself cannot be unfettered. The point, rather, is that the religious outcome (or the outcome in which religious freedom prevails) should not be disfavoured just because it is not the *liberal* outcome, or the outcome that the *Charter* would require if section 32 were more expansive.<sup>250</sup> It is also vitally important that the limits set by section 32 be respected. If the *Charter* does not apply, it should not be applied. It should not tip the balance in favour of a more “*Charter*-friendly” outcome.

There is an extensive literature on the role of the *Charter* in administrative decision-making. In *Doré*, the Supreme Court held that administrative decision-makers must exercise their discretionary authority in a manner consistent with the values underlying the *Charter*.<sup>251</sup> Decision-makers are expected to strike an appropriate balance between their statutory objectives and the relevant *Charter* values. The outcome of this balancing exercise is subject to reasonableness review, not to the more stringent section 1 analysis.<sup>252</sup>

The concept of “*Charter* values” is controversial, for two reasons. Firstly, it appears to expand the scope of the *Charter*, adding a constitutional dimension to cases where the *Charter* would otherwise not apply. The result is an erosion of the distinction between public and private. Secondly, it is not clear why administrative-decision makers should be entitled to deference on the interpretation and application of *Charter* rights, especially given that the democratic branch

---

<sup>249</sup> The Catholic Church believes that it does not have the authority to ordain women as priests, because it is metaphysically impossible for a woman to receive the sacrament of Holy Orders. It is not controversial to suggest that the church should, with respect to ordination, be permitted to discriminate on the basis of gender. However, the Church of Jesus Christ of Latter-day Saints (the Mormon Church) reserved its priesthood not just to men but to *white* men until 1978. That was clearly discrimination on the basis of race, but it is the kind of racial discrimination that religious freedom would likely justify (as opposed to the Bob Jones University case, in which the university did not give a clearly doctrinal or even religious reason for discriminating against Black students).

<sup>250</sup> Indeed, Peter Danchin argues that the entire concept of “human rights” is predicated on liberal value claims. See Peter G Danchin, “Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law” (2008) 33 *Yale J Intl L* 1 at 58.

<sup>251</sup> *Doré*, *supra* note 84 at para 24.

<sup>252</sup> *Ibid* at para 35; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 57.

of government is held to a much *less* deferential standard.<sup>253</sup> Notably, the dissent in *Trinity Western* warned that *Charter* values could become “mere rhetorical devices by which courts can give priority to particular moral judgements.”<sup>254</sup>

I am sympathetic to both lines of criticism, but the former concern—that appeals to *Charter* values endanger the constitutionally entrenched distinction between public and private actors—is of particular relevance here. If the public/private distinction is not upheld, there will be much less room for individual self-actualisation, to the detriment of those who seek to live their lives in accordance with non-liberal value systems.

Finally, religious self-actualisation forms part of the normative basis for religious freedom, but the two are not coextensive. The law protects the latter, not the former. There is no free-standing, justiciable right to self-actualisation, just as there is no free-standing right to dignity or quality of life.<sup>255</sup> Religious freedom entails 1) the right to hold and express one’s religious beliefs, 2) the right to engage in the practices required by one’s religious beliefs, and 3) the right to give communal expression to one’s religious commitments through participation in group religious activities and the maintenance of religious institutions.<sup>256</sup> There is a legally necessary but ultimately contrived distinction between religious and non-religious practices. If one is deeply religious, there is a very real sense in which *everything* has a “nexus with religion.”<sup>257</sup>

Still, it is appropriate to limit the content of religious freedom to the three “pillars” enumerated above. A robust conception of religious freedom, rooted in a commitment to freedom of self-actualisation, will not generally be a barrier to liberal policy outcomes. In particular, religious freedom does not entail a general right to “opt out” of anti-discrimination legislation.<sup>258</sup>

---

<sup>253</sup> Harding & Knopff 2013, *supra* note 246 at 157; Matthew Horner, “Charter Values: The Uncanny Valley of Canadian Constitutionalism” (2014) 67 SCLR (2d) 361 at 365.

<sup>254</sup> *Trinity Western* Dissent, *supra* note 135 at para 309.

<sup>255</sup> *Gosselin* Concurrence (Bastarache J), *supra* note 231.

<sup>256</sup> *Big M*, *supra* note 11; *Loyola High School*, *supra* note 12 at para 60.

<sup>257</sup> *Amselem*, *supra* note 42. In a similar vein, Nicholas Shrubsole observes that the term “religion” refers to “pragmatic sets of generalities instead of fixed elements of a single universal phenomenon. In other words, religion exists as a system of classification and not as a tangible object of study” (Shrubsole 2019, *supra* note 159 at 31).

<sup>258</sup> In summary, the state should be constitutionally barred from exercising its authority in a discriminatory way, including on the basis of sexual orientation. However, the state should *not* be constitutionally barred from *permitting* discrimination by private actors. Moreover, some discriminatory practices should themselves be constitutionally protected. I acknowledge that this approach would be inconsistent with *Vriend v Alberta* (1998), in which the Supreme Court held that the state is constitutionally *required* to prevent private discrimination on the basis of sexual

Kathryn Chan notes that, while the Supreme Court of the United States has been keen to extend constitutional protection to religious institutions, the Supreme Court of Canada has not yet taken a clear position on the matter.<sup>259</sup> Chan distinguishes between two approaches to recognising an institution’s religious nature. The *mission-operation approach* “posits that a corporation may have both moral agency and a conscience or religion that is expressed in its mission and operational structure”, while the *moral-association approach* “ascribes conscience to a group of [individuals]’, and recognizes the institution as the *vehicle* or ‘*means* by which [those] individuals express their moral convictions.”<sup>260</sup> The mission-operation approach is the more formal of the two, looking primarily to the institution’s corporate objects. The moral-association approach, by contrast, is more functional, looking primarily to the institution’s relationship with a given religious community.

In my view, the moral-association approach is better-suited to the task of protecting religious self-actualisation. Institutional activities ought to attract *Charter* protection only insofar as they closely connected to religious life. This is consistent with my conception with religious freedom as an individual right with group, communal, or institutional manifestations, rather than as a free-standing collective right. There is a difference between discriminating in the course of maintaining a religious community or institution and discriminating in the course of providing goods or services to the public at large. While the former *may* attract constitutional protection, the latter will typically not. Finally, the moral-association approach invites closer scrutiny of the claimant institution’s activities, such that courts would not be required to take the institution’s corporate objects at face value.<sup>261</sup>

For example, a conservative evangelical Christian who operates a gas station does not have a right to refuse service to a same-sex couple. The operation of a gas station is not primarily a religious activity—although it may have a nexus with religion—and the operator is not being asked to endorse anything that his customers do or do not do. Moreover, one must carefully distinguish between those institutions that can plausibly claim a religious character and those that

---

orientation, at least to the extent that it prevents other forms of discrimination. See *Vriend v Alberta*, [1998] 1 SCR 493 at para 63, 156 DLR (4th) 385.

<sup>259</sup> Kathryn Chan, “Identifying the Institutional Religious Freedom Claimant” (2017) 95 Can B Rev 707 at 710 [Chan 2017]. The majority in *Loyola High School* concluded that it was “not necessary ... to decide whether corporations enjoy religious freedom in their own right under s. 2(a) of the *Charter*” (*Loyola High School*, *supra* note 12 at para 33).

<sup>260</sup> *Ibid* at 713, quoting Elizabeth Sepper, “Taking Conscience Seriously” (2012) 98 Va L Rev 1501 at 1541.

<sup>261</sup> *Ibid* at 714.

cannot. The teaching of religious beliefs is a core element of religious life, so educational institutions like Loyola High School and Trinity Western University ought to have some access to *Charter* protection.<sup>262</sup> Educational institutions can have a religious function; businesses generally cannot.

However, not all businesses are alike. A gas station operator can sell gas to a same-sex couple without endorsing or expressing approval of homosexuality, but the same is not true of a baker asked to design a cake for a same-sex wedding.<sup>263</sup> Creative activities, in which the merchant's talents are used for an expressive purpose, are distinct from mere transactions, and from the general operation of a business.<sup>264</sup> The appropriateness of a religious exemption is highly context-dependent, but the purpose of religious exemptions is to protect religious self-actualisation and related activities, not to allow religious individuals and institutions to pick and choose which laws apply to them. Moreover, in the case of the baker and the same-sex wedding, it is the baker's religious freedom that is engaged, not the bakery's. A bakery's activities are not closely connected to religious life.

So, while it is possible to imagine a business whose religious character attracts *Charter* protection, it is equally possible to imagine a business whose religious character is only incidental, and whose non-religious character is so overwhelming as to preclude *Charter* protection. In other words, a business can be more or less religious, and we can extend *Charter* protection to some businesses but not others. Andrew Koppelman argues persuasively that “principles are a distraction”, and that we can, in fact, carve out narrow exemptions for religious businesses without undermining the law's commitment to equality:

Many compromises are possible: an exemption for very small businesses, or for religiously oriented businesses, or expressive enterprises such as photographers. The specifics would have to be negotiated, and the negotiations would be different in different places ... A few dissenters, whom one can easily avoid ever meeting, are unlikely to undermine the equality of gay people.<sup>265</sup>

---

<sup>262</sup> *Big M*, *supra* note 11.

<sup>263</sup> This example is taken from *Masterpiece Cakeshop*, a recent decision of the Supreme Court of the United States. However, the court ultimately withheld judgment on the religious freedom question and referred the matter back to the Colorado Civil Rights Commission for redetermination. See *Masterpiece Cakeshop v Colorado Civil Rights Commission*, 584 US \_\_\_ (2018).

<sup>264</sup> The Supreme Court of the United States came to the opposite conclusion in *Hobby Lobby*, holding that any closely held business can claim a religious identity. See *Burwell v Hobby Lobby Stores, Inc.*, 573 US 682 (2014).

<sup>265</sup> Koppelman 2020, *supra* note 185 at 2.

Koppelman’s concluding claim—that permitting “a few dissenters” to discriminate in accordance with their religious commitments—brings to mind Berger’s hope that “those cultural manifestations one initially sees as foreign, objectionable, or intolerable might, with some effort and reflection, be understood as untroubling to the law.”<sup>266</sup> However, Koppelman’s claim is somewhat more provocative.

I take Koppelman to be arguing that the law’s tolerance for a given practice ought to depend, in part, on the societal prevalence of the practice. Berger’s conception of “tolerance as indifference” is certainly, I think, *compatible* with Koppelman’s proposal, but I do not understand Berger to be arguing that a practice may be more or less “troubling” to the law depending on how widespread the practice is. Still, religiously motivated discrimination by a trivial number of small, creatively oriented businesses strikes me as the kind of thing that ought not to trouble the law, so long as the scope of the permitted discrimination is clearly and narrowly defined.

Religion is a way of life, but it does not follow that every choice made by a religious person engages section 2(a) of the *Charter*. Religious freedom cannot protect the entirety of one’s existence, even if there is a sense in which one’s entire existence is religious, or at least informed by religious convictions. For example, religious freedom should not, as a rule, include a right to engage in political activities for religious reasons.<sup>267</sup> A political activity, like a business, can be more or less religious, but, in most cases, any religious character will be functionally overwhelmed by the activity’s political character. I draw this line as, in part, a concession to practicality. There comes a point at which a given activity’s religious character is too remote, or too bound up with non-religious commitments and interests, for constitutional protection to attach.<sup>268</sup>

There is a right to maintain a private moral universe, either on one’s own or in community with others, without being substantially hindered by the state. Hindrance need not take the form of active persecution; the withholding of public benefits that would otherwise be

---

<sup>266</sup> Berger 2015, *supra* note 13 at 178.

<sup>267</sup> Various groups have argued that anti-abortion advocacy should be regarded as a religious activity for the purposes of anti-discrimination legislation. Thus far, the courts have declined to rule on these claims. See *Grant v Ryerson Students’ Union*, 2016 ONSC 5519; *BC Civil Liberties Association v University of Victoria*, 2015 BCSC 39.

<sup>268</sup> Although this may, for some, be the precise point at which the weight of religious obligations is most intensely felt. In such cases, the state’s only option is to explain that “religion” as understood by the law cannot, as a practical matter, capture everything that a given individual experiences as in some way “religious.”

available is also a form of hindrance. I propose that the most attractive feature of the liberal state is its willingness to recognise and protect normative ecosystems very different from its own. In the tradition of public reason liberalism (as distinct from perfectionist liberalism), it is by virtue of this willingness to yield that our constitutional order demands obedience.<sup>269</sup>

It is a mistake to ask whether the TWU community “needs” an accredited law school in order to carry on—it does not, and evangelical Christians would be able to maintain their moral universe even if TWU did not exist. The better question is whether it is *right* for the state to withhold public benefits from persons of whose values it disapproves. The strict necessity of the benefit in question should not be determinative.

Moreover, public benefits facilitate participation in public life. Consequently, religious participation in public life may be significantly diminished by the denial of public benefits to religious institutions. This seriousness of this harm should not be understated. While there is no positive right to participate in public life, it is not appropriate for the state to favour non-religious participation over religious participation, or to make religious participation contingent on conformity with the state’s values. As Richard Moon notes, “the complete removal of religion from the public sphere may be experienced by religious adherents as the exclusion of their worldview and the affirmation [by the state] of a non-religious or secular perspective.”<sup>270</sup> The systematic exclusion of divergent worldview from the public sphere would be inconsistent with value pluralism.

The TWU community inhabits a normative world that falls outside of the Canadian mainstream. Regardless of whether TWU is entitled to deference in this case, the liberal commitment to value pluralism requires a degree of deference to communities like TWU—and, indeed, to TWU itself—in most cases. The right to a private moral universe, one animated by comprehensively metaphysical commitments and in which axiomatic liberal values do not prevail, is fundamental to the liberal legal tradition. The point of liberal constitutions and bills of rights is to set aside space for meaningful autonomy and self-actualisation.

This space allows for a wide range of lifestyles and personal preferences, not just those lifestyles and preferences that are in harmony with the state’s own values, or with the prevailing

---

<sup>269</sup> Charles Larmore, *The Autonomy of Morality* (Cambridge: Cambridge University Press, 2008) 86.

<sup>270</sup> Richard Moon, “Christianity, Multiculturalism, and National Identity: A Canadian Comment on *Lautsi and Others v. Italy*” in Jeroen Temperman, ed, *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden: Martinus Nijhoff Publishers, 2012) 242 at 250.

cultural values. The TWU community is the kind of thing that liberalism does and should protect, not the kind of thing that should be devalued or disfavoured by the liberal state.

### **The commitment to self-actualisation**

At the outset, I asked, “What principles, or commitments, should govern the liberal state’s relations with “dissident” religious communities, whose distinctly religious beliefs and practices are in tension with the state’s liberal values?” I have argued that one such commitment is the commitment to self-actualisation, including self-actualisation on the basis of deeply held, comprehensively metaphysical commitments. In exploring this commitment, one discovers distinguishing features of religious adherence that, in my view, set religion apart from other aspects of personal identity (the most important such feature being the unique, relational way in which religious obligations are experienced). These features tell us something about *why* we single out religion for stand-alone constitutional protection. Religion is a vitally important basis for self-actualisation, and there is reason to worry that the freedom to self-actualise on the basis of one’s religious commitments would not be adequately protected if religious freedom were not established as a free-standing right.

I have repeatedly described religious commitments as “comprehensively metaphysical.” This is, again, a claim about the way that religious commitments are experienced. They are “metaphysical” in that they entail the perception of engagement with something that 1) is believed to be in some sense external to human society and 2) has an existence that is not purely physical. There is no single word or term that fully captures the sense in which religious beliefs are unique, but “comprehensively metaphysical” is close enough. Even the fullest possible commitment to a non-religious belief system—secular socialism, for example—is still lacks the relational aspect that sets religious commitments apart. We rightly describe socialism as a political ideology; it is an approach to politics and to political relations between persons. There is no equivalent, discrete sphere of human life to which religion can be confined. Religion is, or can be, comprehensive and omnipresent. It bleeds into everything.

I choose to attribute this unique omnipresence to the metaphysical claims that religion makes; others might prefer a different explanation. In any case, the point is that something about religious beliefs causes them to be experienced in a unique way—a way that makes tolerance of

religion especially demanding, and makes religious self-actualisation meaningfully different from political or ideological self-actualisation.<sup>271</sup>

I should note here that religion can be “unique” even if the elements of religion are not unique to religion. The wearing of a niqab signals allegiance to Islam, just as the wearing of a red poppy on Remembrance Day signals allegiance to a belief system in which the nation’s war dead are deserving of honour and veneration. The wearing of a white poppy signals allegiance to a belief system that, while similar to the red-poppy belief system, places a greater emphasis on the preservation of peace. The outward display of one’s beliefs and convictions is not unique to religion, but such displays take on a special significance when grounded in religious adherence.

What we call “religion” is a unique composite of beliefs and practices.<sup>272</sup> The composite is “unique” insofar as it includes a set of metaphysical commitments. These commitments in turn include a belief in the divine, however understood, and a sense of oneself as having a relationship with the divine (a relationship that typically, but not necessarily includes personal obligations to the divine). For this reason, ethical vegetarianism would likely not attract constitutional protection under the heading of religious freedom, while vegetarianism as practiced by observant Hindus can and does (whether ethical vegetarianism may attract constitutional protection under the heading of freedom of conscience is beyond the scope of this thesis).

When certain beliefs and practices (including the aforementioned beliefs regarding the divine) come together under the heading of “religion”, the resulting composite is unique enough to deserve constitutional protection, even if the beliefs and practices in question would not be protected in other contexts. Non-religious composites of belief and practice—which do not include a belief in the divine—may also be deserving of protection, but not in the same way, and perhaps not to the same extent.

---

<sup>271</sup> Although political self-actualisation is also vitally important, and is protected in the Canadian context by freedom of expression, freedom of association, and the various democratic rights.

<sup>272</sup> There is an expansive literature on the meaning of “religion.” Jonathan Smith argues persuasively that “religion is solely the creation of the scholar’s study. It is created for the scholar’s analytic purposes by his imaginative acts of comparison and generalization. Religion has no existence apart from the academy.” A thorough engagement with Smith’s argument would be beyond the scope of this thesis, but I am inclined to say that, even if Smith is correct, the category of “religion” may still be a way of identifying a certain kind of human activity. Moreover, Nicholas Shrubsole makes the point that religious people have, over the centuries, come to understand themselves as “doing religion”, at least in Western societies. In that sense, religion has “become real.” See Shrubsole 2019, *supra* note 159 at 25; Jonathan Z Smith, *On Teaching Religion: Essays by Jonathan Z. Smith*, ed by Christopher Lehrich (Oxford: Oxford University Press, 2013) 80.

The niqab and the poppy are both significant, but they are differently significant. Whether one is more significant than the other is a further question, but not a crucial one, as the unique significance of the niqab (grounded in the wearer's connection to the divine) is sufficient to warrant protection. However, my position is that, from the perspective of the wearer's subjective self-actualisation, the niqab is more significant than the poppy. Non-religious ritual observances, no matter how significant, are not grounded in one's relationship with the divine. The desire to wear a poppy may arise from intense personal experiences of death, loss, and grief, but even these experiences are not analogous to the obligations experienced by religious individuals.

Non-religious individuals do not have epistemic access to the mental state associated with religious observance (and vice versa), so there is a sense in which we simply cannot know whether religious obligations are, in fact, more demanding than other belief- or value-based obligations. Neither the *niqab*-wearer nor the poppy-wearer knows how the other feels (although *niqab*-wearers can, of course, also be poppy-wearers). On this point, it is enough to say that there is a *prima facie* distinction in form, if not in intensity, between self-imposed or socially imposed obligations and obligations to an external source of metaphysical authority.

However, even if one does not accept that religion is *more* significant, one can accept that it is *uniquely* significant. This alone is sufficient to justify direct protection of religion, as distinct from indirect protection under the heading of a broad right or freedom that might be read as including religion.

### **Direct and indirect protection**

It is appropriate, at this juncture, to engage with the most frequently proposed alternative to religious freedom: freedom of conscience. I have, in this thesis, advocated for the continued existence of religious freedom as a free-standing right. The liberal state is committed to setting aside space for individual self-actualisation, including self-actualisation in accordance with one's religious commitments. The free-standing constitutional protection of religion honours this commitment, but it has been argued that a stand-alone freedom of conscience, or even a broader protection for equal liberty, would have the same effect.

I disagree. While freedom of conscience is capable of protecting some aspects of religious life, it cannot capture religious life as a whole. It is ill-suited to protecting the

communal and institutional manifestations of religious adherence, which the Supreme Court rightly recognised in *Loyola High School*. Moreover, a stand-alone freedom of conscience would tend to homogenise deeply held commitments of different kinds, without accounting for the comprehensively metaphysical nature of religious commitments.<sup>273</sup>

There is a difference between protecting religion *directly* and protecting religion *indirectly*, in the course of protecting other things. For example, freedom of expression protects religious speech, freedom of association protects religious institutions, and “liberty” protects all manner of religious activities. The *Charter* also protects freedom of conscience, although the Supreme Court has not discussed the meaning of “conscience” at any great length since the *Morgentaler* decision in 1988.<sup>274</sup> In *Carter v Canada (Attorney General)*, the court expressly declined to “direct the legislature to provide robust protection” for physicians who do not wish to participate in medically assisted dying, holding instead that “what follows is in the hands of the physicians’ colleges.”<sup>275</sup>

However, the fact that the courts have yet to “breathe life” into freedom of conscience is not, on its face, an argument against protecting religion under the broader heading of “conscience.” Removing the word “religion” from the *Charter* would not completely remove the constitutional protections that religion currently enjoys. It seems clear that a general guarantee of freedom of conscience, combined with a guarantee of freedom of expression, would protect many of the fundamental components of religious life.

Still, there are important differences between freedom of religion, on the one hand, and the incidental protection of religion at the nexus of other freedoms, on the other. The concern is that, even if other freedoms could protect *parts* of religious life, they would fail to protect the things that make religion unique. Freedom of expression protects religious speech, including evangelisation, but it does not demand any particular deference to the value system *behind* the religious speech.

---

<sup>273</sup> To be clear, my claim is here is that religious freedom and freedom of conscience protect different things, not that one is more protective than the other. There are things that are well-protected by freedom of conscience that would be poorly protected (or not protected at all) by religious freedom. The inverse is also true. A free-standing freedom of conscience is no less necessary than a free-standing religious freedom. The fact that the two freedoms are equivalently protected by the *Charter* is not a problem for my argument.

<sup>274</sup> Richard A Haigh, *A Burl on the Living Tree: Freedom of Conscience in Section 2(a) of the Canadian Charter of Rights and Freedoms* (SJD Thesis, University of Toronto Faculty of Law, 2012) [unpublished] [Haigh 2012].

<sup>275</sup> *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 130-132.

Freedom of conscience might protect deeply held beliefs of various kinds, but conscience-based objections are highly individualised and, unlike religious objections, lack a connection to a comprehensively metaphysical belief system, and typically lack a connection to a comprehensive way of life that one shares with others. I assert that *my* conscience prevents *me* from taking some kind of action, or from complying with a law of general application. My objection need not be anchored in a comprehensive belief system. Moreover, the exercise of conscience rights does not depend on particular communal and institutional arrangements, and those arrangements might lose protection under a “conscience-only” regime.<sup>276</sup>

Freedom of conscience is well-suited to protecting idiosyncratic personal beliefs. In *Morgentaler*, Justice Wilson suggests that the function of freedom of conscience is to secure democracy by safeguarding “the ability of each citizen to make free and informed decisions.” It requires the state to respect the moral and political autonomy of its subjects, but it does not seem to preclude anything in particular. Notably, the court in *Morgentaler* could derive from freedom of conscience only one concrete barrier to state action:

For the present case it is sufficient in my opinion to say that whatever else freedom of conscience and religion may mean, it must at the very least mean this: government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose.<sup>277</sup>

This is far from a definitive formulation of freedom of conscience, but it *could* be read as equating freedom of conscience with freedom from religion, such that “freedom of conscience and religion” simply means “freedom of and from religion” (although this would, if nothing else, be in tension with the court’s earlier decision in *Big M*). In any case, defining freedom of conscience is beyond the scope of this thesis. For my purposes, it is sufficient to say that the content of freedom of conscience is unclear.

Traditional civil liberties, including freedom of conscience, operate by carving out areas of human life that are free of state coercion. In the case of freedom of conscience, the coercion-free area is each person’s own mind. To the extent that freedom of conscience creates a right to

---

<sup>276</sup> In *Maurice v Canada (Attorney General)*, 2002 FCT 69, the Federal Court held that freedom of conscience protects ethical vegetarianism, just as freedom of religion protects religious vegetarianism. However, even if religious vegetarianism is the kind of individualized obligation that *could* be protected by freedom of conscience, I am doubtful that freedom of conscience could meaningfully protect the broader moral framework in which religious vegetarianism is practiced.

<sup>277</sup> *R v Morgentaler*, [1988] 1 SCR 30 at 177, 44 DLR (4th) 385.

action, it does so in a limited and typically negative way, by creating a right *not* to take some kind of action. Freedom of religion is different. It maintains one's sovereignty over one's mind, but it also limits state interference in the relationships between one's mind, the material world, and the divine. Freedom of conscience protects one's ability to form and hold religious beliefs; freedom of expression protects one's ability to express and otherwise manifest those beliefs. Only freedom of religion protects one's ability to carve out a space (often a physical space) in which those beliefs are of fundamental importance, even if they do not reign supreme.

Unlike freedom of conscience or ordinary political freedom, religious freedom requires the state to defer to external value systems, organised in a public way. It pushes the state to make a more comprehensive commitment to self-actualisation, one that accommodates conspicuous and even offensive forms of self-actualisation. It pushes the law to acknowledge the extent to which it is culturally emergent and, in a very real sense, culturally contingent even today. Berger warns that, if the law fails to adequately acknowledge this cultural contingency, those with cultural commitments in tension with the law's own—especially religious commitments—may be excluded from public life:

The special alienation suffered by the religious freedom claimant lies in the fact that, by hiding the cultural nature of the rule of law, the conventional account [of the rule of law, in which the law is understood to be culturally neutral] denies a salient reason for [legal defeat]. As a religious claimant, I lost not because the law has cultural commitments that are at odds with mine—a result that might lead me to politically engage and contest the partisan legal culture. Instead, neither my culture nor that of the law was [acknowledged as] a factor in the legal result.<sup>278</sup>

A robust commitment to religious freedom will push the law to acknowledge and, where appropriate, correct for its own cultural contingency—typically by setting aside space for minority or “dissident” ways of life. These ways of life may be visible in the public square. Their adherents may engage politically and, as Berger describes, “contest the partisan legal culture.” Freedom of conscience is less demanding.

The typical freedom of conscience claimant is an individual seeking a personal exemption from a law or rule of general application. The liberal state can generally grant such an exemption without being forced to, in effect, share the public square or access to public

---

<sup>278</sup> Berger 2015, *supra* note 13 at 157-58.

resources with adherents of non-liberal value systems. Concessions to personal conscience can be hidden from view in a way that most concessions to religion cannot be, especially where the concession engages the communal and institutional manifestations of religion. Religious freedom draws attention to the liberal state's relationship with non-liberal value systems in a way that is public, politically challenging, and highly provocative. This provocation should be welcomed.

If the *Charter* protected freedom of conscience but not freedom of religion, the Supreme Court might have come to a different conclusion in *Loyola High School*. The central holding—that protecting religious freedom means protecting the institutions “through which [religious] individuals express their religious practices and through which they transmit their faith”—could likely not be sustained by freedom of conscience *alone*. Richard Haigh comes to a similar conclusion, arguing that the constitutional role of religious freedom is to protect religion's communal and institutional manifestations, while individual religious belief is (or ought to be) protected under the heading of freedom of conscience:

By re-thinking religion and religious freedom as matters of communal sacrament that are important in their own right, we can keep distinct the two aspects of “conscience” and “religion” without doing damage to either. Put differently, religious faiths – even those as strange as the Church of Holy Shoelaces – could be protected by a strong form of institutional religious freedom. The individual practices of individual adherents, however, may be better framed, in some cases, as freedoms of conscience.<sup>279</sup>

If freedom of religion should be preserved for the purpose of protecting “matters of communal sacrament”, it follows that freedom of conscience would not offer the necessary protection. I agree with Haigh on this point, although I hesitate to accept such a clear distinction between the individual and communal manifestations of religion.

As the Supreme Court has acknowledged, religion is a way of life.<sup>280</sup> Richard Moon's description of religious life, notably endorsed by the Supreme Court in *Loyola High School*, is especially apt:

Religious belief lies at the core of the individual's worldview. It orients the individual in the world, shapes his or her perception of the social and natural orders, and provides a

---

<sup>279</sup> Haigh 2012, *supra* note 275 at 13.

<sup>280</sup> *Loyola High School*, *supra* note 12 at para 44; *Hutterian Brethren*, *supra* note 68 at para 182, Abella & LeBel JJ, dissenting.

moral framework for his or her actions. Moreover, religious belief ties the individual to a community of believers and is often the central or defining association of his or her life. The individual believer participates in a shared system of practices and values that may, in some cases, be described as a “way of life.”<sup>281</sup>

If religion is truly as all-encompassing as Moon imagines it to be, then the individual and communal activities that are constitutive of religious life cannot be performed in isolation. Doing so would undermine the integrity of the religious way of life. Religion should be understood as a gestalt—more than the sum of its parts. We cannot protect the right to hold and profess Catholic beliefs but not the right to celebrate mass. We cannot protect the right to hold and profess Jewish beliefs but not the right to form a *minyan*. Religion does not lend itself that kind of separation. Protecting only individual religious activities would not protect “religion” as it experienced by most religious adherents.

One might ask whether we can protect the right to hold and profess evangelical Christian beliefs but not the right to operate an accredited law school in a manner that is consistent with conservative evangelical Christian morality. The question is legitimate. It is, I think, clear that the operation of an accredited law school is not analogous to prayer. However, there is also the matter of participation in public life and access to public resources. While some religious individuals seek to separate themselves from liberal society, most have some desire to participate in public life. Indeed, some religious individuals participate in public life *through* participation in religious life.

If the liberal state is committed to setting aside space for individual self-actualisation, it must recognise the extent to which many individuals self-actualise through participation in public life. The operation of an accredited law school is not a core religious practice, but there is a sense in which the denial of accreditation to the TWU law school limited the ability of conservative evangelical Christians to participate in public life. The message communicated by the law societies was: “You must choose between your religion and public life.”

To be clear, I do not mean to suggest that conservative evangelical Christians are now excluded from participation in public life. Even those directly associated with the TWU community and the Evangelical Free Church of Canada still have ready, albeit diminished,

---

<sup>281</sup> Richard Moon, “Freedom of Religion under the *Charter of Rights*: The Limits of State Neutrality” (2005) 45 UBC L Rev 497 at 507.

access to public life. Still, we should be attentive to the cumulative cultural effect that decisions like those of the law societies may have.

The licence/mandate distinction is intended to guide the state in discerning whether, and to what extent, it is appropriate to make access to a given aspect of public life—such as public authority or a public resource—contingent on conformity with the state’s values. It may also, by maintaining an explicit focus on the liberal state’s relationship with non-liberal value systems, be sensitive to the cumulative effect of exclusionary decisions in a way that a narrower focus on individual conscience might not be.

To be clear, I understand that Haigh does not seek to replace freedom of religion with freedom of conscience. Rather, he seeks to expand the scope of freedom of conscience to include certain interests that have, thus far, fallen within the scope of religious freedom. In other words, Haigh’s goal is not to weaken the constitutional protections currently enjoyed by religion. Still, the premise of his proposal—that religious activities can be divided into the individual and the communal—is in tension with the reality of religious life. If we accept that religion is a way of life, the only way to protect religion is to protect religion. Otherwise, we run the risk of dismembering religious life. The protection of religion should not be dependent on external conceptual distinctions.

It should be remembered that moral liberty follows naturally from liberty in general, meaning the basic liberty—the presumption of individual freedom—that underpins the liberal democratic framework. Individuals are, by default, free to do as they please, and the onus is on the state to justify any deprivation of freedom. This presumption applies universally, even if some deprivations of freedom are so obviously *justifiable* that the state has never been called on to justify them (such as, for example, the general prohibition on killing other humans). The underlying principle has been articulated in a variety of ways. In the common law tradition, the preferred formulation is: “Everything which is not forbidden is allowed.”<sup>282</sup> In a similar vein, Montesquieu observed that “liberty is a right of doing whatever the law permits.”<sup>283</sup>

Specifying “moral” liberty or liberty of “conscience” does not meaningfully enhance this general guarantee of liberty. Rather, it simply restates a basic principle of liberalism: that people

---

<sup>282</sup> Sir John Laws, “The Rule of Law: The Presumption of Liberty and Justice” (2017) 22 *Judicial Review* 365 at 368.

<sup>283</sup> Pierre Manent, *An Intellectual History of Liberalism* (Princeton: Princeton University Press, 1995) at 60.

are, within the bounds of certain liberal organising principles, free to set their own moral priorities and to act on those priorities.<sup>284</sup>

Freedom of religion, on the other hand, points to something *beyond* liberalism. It gives status, if not rights, to non-liberal value systems. It gives *rights* to individuals, who are free to actualise their values in an institutional setting.<sup>285</sup> Not all non-liberal value systems are religious in nature, and it is possible that other intentional communities could claim protection under the heading of religious freedom, even if their value systems have no direct connection to the divine or the metaphysical.

In this limited sense, “religion” might be a kind of proxy after all: We protect religion directly in the name of value pluralism, and the result is a more robust commitment to values-based self-actualisation. More people are free to self-actualise, and on the basis of a wide range of value systems, when religious freedom is protected.

Protecting religion indirectly, through a combination of other rights, does not truly protect lived religion; it just protects certain activities that have a nexus with religious adherence—the accidents of religious belief. The direct commitment to 1) self-actualisation on the basis of one’s metaphysical commitments, anchored in value pluralism, and 2) public, institutional forms of self-actualisation is what makes religious freedom unique and valuable.

---

<sup>284</sup> By this I mean that the state does not normally take an interest in what motivates private actors. Notable exceptions include criminal trials and claims under section 2(a), where the claimant’s subjective beliefs are directly relevant.

<sup>285</sup> Religious freedom is not a group right, even if it looks like one in some cases. The Supreme Court treated Loyola High School as the “collective manifestation” of the religious beliefs of individual Catholics; it did not grant rights to Catholics as a group or to Catholicism as a religion (*Loyola High School*, *supra* note 12 at paras 60-61).

## **SECTION 5: RELIGION AND TOLERANCE**

### **Introduction**

The purpose of this section is to explain how the licence/mandate distinction honours the liberal state's commitment to tolerance. Again, the licence/mandate distinction is, I argue, the approach to the conferring of public benefits that best honours the liberal state's two foundational commitments. The first such commitment—to self-actualisation—is the focus of the previous section. The focus of this section is the second such commitment: the commitment to tolerance.

While the licence/mandate distinction honours both commitments, it relates more directly to the commitment to tolerance. It is therefore appropriate that the most sustained explication of the licence/mandate distinction be located in close proximity to my engagement with the concept of tolerance. Crucially, while the commitment to self-actualisation relates primarily to the individual, the commitment to tolerance is more social in nature. When the liberal state commits to self-actualisation, it commits to setting aside for each individual space in which to self-direct and live one's life as one sees fit, including in accordance with one's deeply held commitments. When the liberal state commits to tolerance, it commits to maintaining the set of social conditions needed to sustain self-actualisation.

Tolerance is a concept with a long history, and, as I noted in the Introduction, there are competing conceptions of tolerance even today.<sup>286</sup> My conception of tolerance, and of the relationship between the various conceptions of tolerance, is closest to that of John Gray, who argues that there are two conceptions of tolerance. In one, tolerance 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 life are welcomed as marks of diversity.”<sup>287</sup>

I agree with Gray in two key respects. Firstly, I agree that the purpose of tolerance is to achieve and sustain social peace. Secondly, I agree that liberal perfectionist conceptions of

---

<sup>286</sup> Gray 2000, *supra* note 3 at 105.

<sup>287</sup> Rainer Forst argues that there are four conceptions of tolerance, typically identified as the “permission” conception, the “coexistence” conception, the “respect” conception, and the “esteem” conception. The former two align with Gray's *modus vivendi* conception of tolerance, while the latter two align with the conception of tolerance that Gray attributes (correctly, in my view) to perfectionist liberalism. See Rainer Forst, *Toleration in Conflict: Past and Present* (Cambridge: Cambridge University Press, 2013) at 26-32.

tolerance are insufficiently deferential to non-liberal ways of life.<sup>288</sup> However, I disagree with Gray's contention that non-liberal ways of life must be affirmatively "welcomed." My concern here may ultimately be semantic in nature, but I would argue that one can *tolerate* difference without positively *welcoming* (that is, recognising as good) every instance of difference that is so tolerated.

Indeed, I would argue that tolerance *must* be conceived of as something less than positive valuation. If "tolerance" only extends to those manifestations of difference that can be recognised as *good*, the scope of tolerance will, to a worrying extent, be coextensive with the scope of liberalism. To the extent that it guides the exercise of state authority, this less demanding conception of tolerance would unduly frustrate the self-actualisation of those who seek to live their lives in accordance with deeply held non-liberal commitments, religious or otherwise.

In his account of liberal constitutionalism, James Tully argues persuasively that, even if there is some sense in which tolerance is a "mere" peacekeeping measure, the state's commitment to tolerance arises from a commitment to restraint, which itself arises from a position of humility vis-à-vis non-liberal ways of life and conceptions of the good:

The philosophy and practice of contemporary constitutionalism offers a mediated peace. In both theory and practice this is seen as second best relative to a just peace. A just peace is a constitutional settlement in accordance with the comprehensive theory of justice ... This is the most destructive illusion of our age. The just peace of the theorists and dogmatists is neither justice nor peace. It is always a limited and partial description of justice which, when imposed, galls the necks of others and leads to discord. On the contrary, a mediated peace *is* a just peace.<sup>289</sup>

When I refer to "tolerance", I refer to the framework within which the liberal state relates to those manifestations of difference that are not or cannot be welcomed—including the discriminatory practices in which some religious communities and institutions (such as TWU) engage. Simply put, tolerance does not require the tolerator to *approve of* or *value* the tolerated.

---

<sup>288</sup> The liberal perfectionist argument holds that the *modus vivendi* tolerance of Gray and others places an untenable emphasis on restraint and deference vis-à-vis non-liberal value systems, to the detriment of the liberal state's ability to promote human flourishing. For examples, see Steven Wall, "Public Reason and Moral Authoritarianism" (2013) 63 Phil 160; Joseph Chan, "Legitimacy, Unanimity, and Perfectionism" (2000) 29 Phil & Public Affairs 5.

<sup>289</sup> James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 2012) 211.

The tolerator's attitude towards the tolerated might be characterised as one of acquiescence or indifference (as Berger proposes), and the relationship between the two might be governed by the rules of "mere civility" (as Teresa Bejan proposes).<sup>290</sup> Tolerance, so conceived, operates to protect manifestations of difference—again, religious or otherwise—that fall far enough outside the liberal mainstream to attract strong disapproval and even condemnation.

Finally, this conception of tolerance evades, to an extent, the critique of liberal tolerance advanced by Wendy Brown and others: that tolerance as practiced by liberal society is condescending vis-à-vis the tolerated; that it operates to exclude and ultimately domesticate difference without ever extending true recognition or equality of status.<sup>291</sup> This is a critique with a long history. Indeed, Goethe argued that tolerance "should be a temporary attitude only: it must lead to recognition. To tolerate means to insult."<sup>292</sup>

*Modus vivendi* tolerance is perhaps less vulnerable to this line of criticism, in that—unlike the more aggressive forms of liberal perfectionism—it is not directed at doing away with difference or excluding difference from public life. Still, I acknowledge that the status accorded to difference by liberal tolerance, no matter how conceived, may fall short of the status accorded to difference by the alternative paradigms advocated by Brown, Axel Honneth, and others.<sup>293</sup> As a thorough engagement with these alternatives is outside the scope of this thesis, it is sufficient to say that many, if not most, of the alternatives in question are external to—and critical of—the tradition of liberal constitutionalism in which this thesis is grounded.<sup>294</sup>

## Why tolerance?

I turn now to the second argument outlined in the Introduction—that the principle of religious freedom is, for lack of a better word, the vanguard of the more general principle of

---

<sup>290</sup> Teresa M Bejan, *Mere Civility: Disagreement and the Limits of Toleration* (Cambridge, Mass: Harvard University Press, 2017) 153.

<sup>291</sup> Brown 2006, *supra* note 4 at 1. See also Lori G Beaman, *Deep Equality in an Era of Religious Diversity* (Oxford: Oxford University Press, 2017).

<sup>292</sup> Rainer Forst, "'To Tolerate Means to Insult': Toleration, Recognition, and Emancipation" in Bert van den Brink & David Owen, eds, *Recognition and Power: Axel Honneth and the Tradition of Critical Social Theory* (Cambridge: Cambridge University Press, 2009) 215 at 216.

<sup>293</sup> Wendy Brown & Rainer Forst, *The Power of Tolerance: A Debate*, ed by Luca Di Blasi & Christoph F E Holzhey (New York: Columbia University Press, 2014) 17-18; see also Axel Honneth, "Recognition as Ideology" in Bert van den Brink & David Owen, eds, *Recognition and Power: Axel Honneth and the Tradition of Critical Social Theory* (Cambridge: Cambridge University Press, 2009) 323.

<sup>294</sup> Ronald Dworkin, "Liberal Community" (1989) 77 Calif L Rev 479 at 484-85.

tolerance. A “vanguard” is literally the forwardmost component of an advancing military force, but the word also refers more generally to “something that holds ground for something else.” In this case, religious freedom holds ground for other kinds of freedom, and for the principle that differences (even deep, irreconcilable differences) should be tolerated. To use another metaphor, religious freedom is the proverbial canary in the coal mine, in the sense that a society’s respect for—and willingness to protect—religious freedom is an instructive measure of that society’s commitment to tolerance.

The word “tolerance”, like the word “vanguard”, has a very particular meaning. In ordinary use, we *tolerate* things that we do not like but are, for whatever reason, inclined to permit. Simple *tolerance* is a far cry from multiculturalism or any kind of celebration of difference. Here, the language that we use when discussing multiculturalism is illuminating. We use “multiculturalism” to refer to both 1) the peaceful coexistence of distinct cultural groups and 2) the belief that the presence of multiple, distinct cultural groups is a good thing.

Multiculturalism-as-peaceful-coexistence is grounded in the value of tolerance; multiculturalism-as-celebration-of-difference is grounded in the positive valuation of difference and diversity. However, the latter is built on the foundation of the former, so the tolerance for which religious freedom acts as vanguard is not something that we left behind generations ago. It is still relevant, conceptually and politically.

There is a range of liberal views on multiculturalism. The most prominent liberal proponent of multiculturalism is Will Kymlicka, who regards multiculturalism as a set of social conditions in which one is free to self-actualise in accordance with one’s cultural identity.<sup>295</sup> Kymlicka’s understanding of culture is similar to the understanding of religion that animates the Supreme Court’s reasons in *Loyola High School*. Culture, like religion, is an element of personal identity that can be fully realised only through participation in group-based activities (although Kymlicka expressly endorses group rights, while the court stopped short of doing so).

There are two liberal critiques of multiculturalism. Perfectionists, such as Brian Barry, argue that multiculturalism limits the state’s ability to promote individual autonomy, including by forcibly emancipating individuals from the oppressive cultural conditions into which they

---

<sup>295</sup> Will Kymlicka, *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995) 89.

happen to have been born.<sup>296</sup> This argument is especially concerned (rightly, I think) with the status of women and LGBT people.<sup>297</sup> A second—and, in my view, more persuasive—line of criticism holds that multiculturalism is a departure from the liberal state’s proper attitude towards difference, which is one of tolerance (alternatively characterised as indifference). Proponents of this critique, such as Chandran Kukathas, argue forcefully that an attitude of tolerance strikes the correct balance between promoting assimilation and perpetuating difference:

Given the complexity of assimilation not only as a sociological but also as a moral phenomenon, it should be unsurprising that the liberal attitude towards it is one of indifference—or toleration—rather than favour. To come down in favour of assimilation would require some account of the desirable account of assimilation, which would be morally hazardous. But to come down against assimilation would be no less problematic, since that would involve recommending that obstacles—whether in the forms of incentives or disincentives—be put in the way of those who do wish to assimilate.<sup>298</sup>

Most proponents of multiculturalism do not regard religion as meaningfully distinct from culture. Indeed, one could argue that multiculturalism is only tenable if one does not distinguish between religious and non-religious forms of culture (that is to say, if each person’s experience of his or her culture is understood to be essentially the same). However, Kukathas’ argument is correct even if one does not take the view (as I do) that religion is experienced in a unique way. The liberal state should tolerate difference. It should not seek to negate difference, but nor should it seek to perpetuate difference by discouraging assimilation as Kukathas describes, because any position other than one of effective neutrality may, given how much power is at the state’s disposal, frustrate individual self-actualisation in impermissible ways. It follows from the commitment to tolerance that the liberal state should tolerate non-liberal ways of life; it follows

---

<sup>296</sup> Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Mass: Harvard University Press, 2001) 143.

<sup>297</sup> See Susan Moeller Okin, “Is Multiculturalism Bad for Women?” in Joshua Cohen, Matthew Howard & Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999) 7; see also Avigail Eisenberg, “Identity and Liberal Politics: The Problem of Minorities within Minorities” in Avigail Eisenberg & Jeff Spinner-Halev, eds, *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge: Cambridge University Press, 2005) 249.

<sup>298</sup> Chandran Kukathas, *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press, 2003) 154. For a similar argument against multiculturalism as practiced in Canada, see Ramesh Thakur, “From the Mosaic to the Melting Pot: Cross-National Reflections on Multiculturalism” in Chandran Kukathas, ed, *Multicultural Citizens: The Philosophy and Politics of Identity* (St Leonards, NSW: Centre for Independent Studies) 105 at 131.

from the commitment to self-actualisation that the liberal state should be essentially neutral on whether a given individual ought to secede from the community into which he or she was born (indeed, such secession may sometimes be necessary for self-actualisation.<sup>299</sup> Tolerance is the correct approach to honouring both commitments, because it is the approach that leaves the most room for individual self-actualisation.

We should tolerate things that we do not like. In particular, we should tolerate beliefs and expressions of belief for which we have contempt. The alternative is social discord, unrest, and potentially even violence—the kind of violence that is, from the vantage point of a secular liberal democracy, totally incomprehensible. This is the essence of Locke’s argument for what we now call religious freedom—we can tolerate our neighbours’ heresies, or we can go to war:

[No] private person has any right in any manner to prejudice another person in his civil enjoyments because he is of another church or religion. All the rights and franchises that belong to him as a man, or as a denizen, are inviolably to be preserved to him. These are not the business of religion. No violence nor injury is to be offered to him, whether he be Christian or pagan.<sup>300</sup>

In Locke’s view, the primary function of religious tolerance is to keep the peace between religious groups (which is not to say that religious tolerance, and tolerance in general, do not *also* serve more altruistic functions). It matters that Locke’s appeal for tolerance came in response to decades of particularly *religious* violence. There was something about religion that demanded tolerance, and even a measure of social accommodation.

Needless to say, religion was not the only cleavage in Locke’s England, and it is not as if the state (such as it was) normally insisted on perfect homogeneity. Still, religious differences were understood, at least by Locke, as fundamentally unlike other points of divergence, at least to the extent that they and they alone cried out to be defended in the form of a treatise. Put simply, people cannot be expected to “get over” religious disagreements, in large part because the “right answer” is epistemically inaccessible.

---

<sup>299</sup> I have deliberately avoided speaking in terms of “choice”, because many of the commitments that animate personal identity, including religious commitments, are not necessarily experienced as chosen. The “decision” to stay in one’s community may not be experienced as a choice, but the decision to leave typically will be. As a result, we should not ask whether a member of a non-liberal community has freely chosen to live his or her life in accordance with the community’s values. That is the wrong question. We should instead ask whether a member of said community who wishes to leave has been affirmatively encouraged to do so or discouraged from doing so by the state. The answer to this question should be “no.”

<sup>300</sup> Locke 2003, *supra* note 2 at 224.

The Anglo-American liberal doctrine of human rights developed in response to Locke's defence of religious freedom, especially in the United States.<sup>301</sup> Unlike Michael McConnell, I do not believe that religious freedom is the foundational liberal freedom, upon which all other freedoms depend.<sup>302</sup> That might have been the case in the past, but we no longer rely on religion to justify freedom of expression, freedom of association, equality before the law, and so on. However, I do agree with McConnell that religious freedom played a unique, guiding role in the development of the notion that the state should respect personal autonomy. The argument is, in essence, that religious freedom came first, and not by accident.<sup>303</sup>

### **Tolerance and value pluralism**

In the previous section, I discussed the relationship between value pluralism and self-actualisation. I argued that value pluralism entails diversity in the realm of self-actualisation, such that the state is required to accommodate radically inconsistent conceptions of self-actualisation. Alan Patten describes this requirement as the principle of "neutrality of treatment", which the state violates wherever "its policies are more accommodating, or less accommodating, or some conceptions of the good than they are of others." The point of neutrality of treatment is to ensure that all persons have fair access to the same range of choices, irrespective of their religious commitments.<sup>304</sup>

Accommodation of metaphysically anchored modes of self-actualisation, under the heading of religious freedom, is the highest and most demanding form of value pluralism. Tolerance is something else, however. Religious freedom serves one function as it relates to value pluralism, and another function as it relates to tolerance.

From the perspective of social organisation, tolerance is less demanding than value pluralism. Value pluralism recognises the positive value of moral and metaphysical, cosmological diversity.<sup>305</sup> It recognises that the existence of multiple value systems is a good thing. However, I reject the claim that value pluralism is synonymous with or a kind of

---

<sup>301</sup> Walter Russell Mead, *God and Gold: Britain, America, and the Making of the Modern World* (New York: Vintage Books, 2008) 239; Alan Ryan, *On Politics: A History of Political Thought from Herodotus to the Present*, vol 1 (New York: Liveright, 2012) at 580-81.

<sup>302</sup> McConnell 2010, *supra* note 191 at 944.

<sup>303</sup> Avihay Dorfman, "Freedom of Religion" (2008) 21 Can JL & Juris 279.

<sup>304</sup> Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1994) 24.

<sup>305</sup> George Crowder, "Value Pluralism and Monotheism" (2014) 7 Politics & Religion 818 at 836-837.

neutrality. The point of value pluralism is not that the state is neutral on questions of morality and cosmology. Rather, the point is that the state, despite *not* being neutral, makes room for and even protects moral-cosmological systems other than its own.

Bruce Ryder reaches a similar conclusion, at least with respect to the non-neutrality of the liberal state:

Religious neutrality does not mean that the state must refuse to take positions on policy disputes that have a religious dimension. Many if not most legislative policies will accord with some religious beliefs and violate others. Critics who say that the state cannot act in a religiously neutral manner in this sense have a compelling point. Secularism, for example, is not neutral. There is no such thing as a view from nowhere. Secular constitutional documents like the Charter are political expressions of a particular philosophy about religion and life.<sup>306</sup>

We rightly identify that “particular philosophy” with liberalism, and with a deep commitment to tolerance and value pluralism. Again, value pluralism does not depend on a neutral state, and pretending that the state is or can be neutral may actually *undermine* value pluralism. In order for value pluralism to succeed, the liberal state must understand itself to be leaving space for non-liberal self-actualisation. In other words, the liberal state must be conscious of its own liberal character.

Value pluralism is a substantive ideological commitment, and so too is tolerance. *Modus vivendi* tolerance is a peace-keeping (and, importantly, peace-making) measure for a divided society in which the state chooses not to demand conformity. The colloquial use of the verb “tolerate” is instructive here. For example, it is no longer appropriate to say that one is “tolerant” of racial and ethnic minorities. The implication of “tolerant”, whether intended or not, is that the minorities in question are an unavoidable fact of life. They are something to be endured not celebrated. The same is true of “tolerating” religions other than one’s own. In this context especially, tolerance can fall well short of genuine acceptance. However, acceptance is not an *alternative* to tolerance. A minority group can be tolerated but not accepted, or it can be both tolerated and accepted. The underlying idea is simply that the legal framework of tolerance should not be taken as evidence of meaningful acceptance and integration.

---

<sup>306</sup> Bruce Ryder, “State Neutrality and Freedom of Conscience and Religion” (2005) 29 SCLR (2d) 169 at 173-174 [Ryder 2005].

By way of example, the United States has always practiced religious tolerance, but genuine acceptance of minority religions has not been forthcoming. The mid-nineteenth century saw the rise of a national political party animated primarily by anti-Catholicism, and antisemitism remained socially acceptable until the 1960s, if not later.<sup>307</sup> Today, the Republican Party falls just short of incorporating open Islamophobia into its platform.<sup>308</sup> None of this is, on its face, incompatible with basic religious tolerance. American Jews were never compelled to abandon their religious beliefs and practices, even as Harvard University denied admission to Jewish students because “Jews cheat.”<sup>309</sup>

None of this should be surprising. Religious tolerance was originally a response to violence. The *Toleration Act* of 1689 was a political compromise aimed at winning the loyalty of non-conforming Protestants; no one expected the Anglicans and the non-conformists to realise the value of religious diversity.<sup>310</sup> The basic, political logic of religious tolerance would persist for some time. Religious minorities were tolerated because tolerance was the path of least resistance, and because there was no overriding political need to do otherwise. Notably, the early Locke advocated rights for Jews and Muslims but *not* for Catholics and non-conformists. His reasoning was that, while the latter posed a threat to the stability of the restored monarchy, the former did not.<sup>311</sup>

The logic of tolerance remains relevant and necessary, even if there is a sense in which it has been superseded by logic of value pluralism. It is troubling that the concept of tolerance is entirely absent from the majority reasons in *Trinity Western*.<sup>312</sup> As I noted above, religious freedom was the first individual right to be codified. The oldest formal guarantee of free expression is the 1789 *Declaration of the Rights of Man and the Citizen*, but formal religious

---

<sup>307</sup> Kevin M Schultz, “Religion as Identity in Postwar America: The Last Serious Attempt to Put a Question on Religion in the United States Census” (2006) 93:2 *J American History* 359 at 361-62.

<sup>308</sup> Nazita Lajevardi & Kassra A R Oskooii, “Old-Fashioned Racism, Contemporary Islamophobia, and the Isolation of Muslim Americans in the Age of Trump” (2018) 3:1 *J Race Ethnicity & Pol* 112 at 120.

<sup>309</sup> Barry A Farber & Arielle Poleg, “Campus Diversity, Jewishness, and Antisemitism” (2019) 45 *J Clinical Psychology* 1 at 4-5.

<sup>310</sup> Noah Feldman, “Morality, Self-Interest, and the Politics of Toleration” (2008) 48 *Nomos* 392 and 396.

<sup>311</sup> Nabil Matar, “John Locke and the Jews” (1993) 44:1 *J Ecclesiastical Hist* 45 at 47.

<sup>312</sup> The dissent, by contrast, cites with approval Berger’s framework of “tolerance as indifference”, wherein there is recognition that a given religious belief or practice “simply does not offend the culture of Canadian constitutionalism” and the “culturally forceful hand of the law” is accordingly stayed (*Trinity Western Dissent*, *supra* note 135 at para 264).

freedom dates to the 1558 Edict of Torda, if not earlier.<sup>313</sup> There was a reason for this. Religious differences, unlike political differences, are fundamentally irreconcilable, and potentially incommensurable as well.<sup>314</sup> Even today, the purpose of interreligious dialogue is to foster mutual understanding, not to conclusively resolve theological differences. For example, no one seriously expects Catholic-Orthodox dialogue to settle theological disagreements that have persisted since the eleventh century. That is not the point of the exercise.

Commenting on the *Trinity Western* decision, Richard Moon faults the court for seeking to “balance” religious and non-religious interests. He argues that religious accommodation claims cannot be resolved by way of a balancing exercise, because “a court has no way to attach value or weight to a religious belief/practice ... a religious belief/practice has no necessary or recognizable value.”<sup>315</sup> In other words, adherents of different religions (including those who adhere to no religion) have no way of making sense of each other’s respective truth claims. As a result, there is no possibility of reaching a mutually acceptable “middle ground”, let alone a definitive resolution. In other words, the differences in question are irreconcilable.

In a democratic society, people can expect to have their political beliefs challenged, and they can reasonably be asked to defend those beliefs in a public setting. Politicians are all but required to do so on a regular basis. Some beliefs are religious as well as political, but purely religious beliefs generally go unchallenged. The existence of God is not something that is debated as part of the political process. Religious people are rarely asked, outside of theological debates, *why* they believe what they believe. In public life, the religious beliefs of state officials are almost never challenged directly. Indeed, the Supreme Court’s decision in *Big M* precludes the use of state authority for religious purposes, although religious *motivations* are arguably still permissible.<sup>316</sup>

---

<sup>313</sup> The Edict of Torda brought limited religious freedom to Transylvania, including for non-Trinitarian Christians. In the English-speaking world, the English *Toleration Act* of 1689 was preceded in 1649 by the Maryland *Toleration Act*, which extended religious freedom to all Trinitarian Christians, including Catholics.

<sup>314</sup> Some religious differences may be incommensurable, but others are simply irreconcilable. For example, Catholicism and Eastern Orthodoxy are similar enough that they can be said to be “having the same conversation”, as it were. The term “incommensurable” suggests a degree of mutual incomprehension that is not always present. Indeed, some religions comprehend each other quite well, agreeing on the questions while differing on the answers.

<sup>315</sup> Moon 2019, *supra* note 248 at 352.

<sup>316</sup> In *Chamberlain*, the Supreme Court noted that the secularism requirement set out in the *School Act* “does not prevent religious concerns from being among those matters of local and parental concern that influence educational policy” (*Chamberlain*, *supra* note 37 at para 3). In other words, elected officials are not required to “forget” their religious convictions completely when making decisions. In my view, the same is true of appointed officials, including judges. If a judge presiding over a criminal trial is motivated by a sense of compassion to impose a lenient

This pervasive silence on religious questions, wherein religious commitments are taken at face value and rarely challenged, is a product of tolerance. It is, in effect, an agreement to disagree. Koppelman observes that:

...it was once widely agreed that there was only one truth path to salvation, and that other people's beliefs were leading them to Hell. Toleration became the rule not because people no longer believed this, but because they became persuaded that the coercive use of state power wouldn't help; state religion is likely to be corrupted religion. Religious liberty is fundamentally about tolerating ideas we regard as odious.<sup>317</sup>

We tolerate religious disagreements because we cannot resolve them, and for good reason. Even if we have moved past mere "tolerance" of religious difference—which is debatable—the logic of religious tolerance speaks to why religious freedom is valuable. It is good that there are things that we are prepared to merely tolerate—things that we do not feel obligated to understand or to recognise as good. Of course, tolerance does not preclude engagement. Interreligious engagement is still possible and, I think, desirable. The point is that such engagement is not necessary, and, where it does occur, it typically does not involve the state. When value pluralism fails, we still have tolerance, and being in the habit of tolerating things—the things that we find most difficult to accept—is good for society.

### **What does it mean for value pluralism to "fail"?**

The basic premise of value pluralism is that there is more than one fundamental value—more than one thing good that is worth pursuing.<sup>318</sup> The alternative to value pluralism is value monism, wherein there is only one fundamental value. Normally, that value is truth, and whether something is good turns on whether it is true, or aligns with the truth.<sup>319</sup> From a value-monist perspective, there is no reason to accommodate beliefs that are not true. A value-pluralist perspective, on the other hand, favours accommodation, because it accounts for values other than

---

sentence, it makes no difference whether the compassion is of religious or secular origin. All personal decisions are informed, to one extent or another, by the values of the decision-maker.

<sup>317</sup> Koppelman 2020, *supra* note 185 at 31.

<sup>318</sup> Isaiah Berlin, "The Pursuit of the Ideal" in Henry Hardy, ed, *The Proper Study of Mankind: An Anthology of Essays* (New York: Farrar, Straus and Giroux, 1998) 1 at 14-16 [Berlin 1998]; Isaiah Berlin & Bernard Williams, "Pluralism and Liberalism: A Reply" (1994) 41 *Political Studies* 306.

<sup>319</sup> Although the distinction can easily collapse. A value-monist could, for example, conclude that a social diversity and a wide range of life options are objectively good, thus reconciling pluralism with value-monism's fundamental concern with "truth." However, the intricacies of the pluralism/monism debate are beyond the scope of this thesis.

truth. The most important practical consequence of value pluralism is that diversity, including diversity of value systems, is good.

Importantly, diversity can be good even if liberalism is “correct”; there is no tension between value pluralism and moral realism. However, we can acknowledge that diversity is good and still set outer limits on what is socially and legally permissible. Some versions of value pluralism are more permissive than others, but the guiding principle is that majority disapproval *alone* is not enough to justify suppressing a practice.<sup>320</sup>

Most of time, the state allows private actors to make illiberal choices, and private actors allow other private actors to make choices that they themselves would not make. There is a recognition that a diversity of lifestyles is the necessary consequence of a diversity of life choices. In other words, we do not object when our neighbours live their lives differently than we do. Or, even if we “object” in some moral and social sense, we do not seriously believe that the state should intervene.

But there are limits. Some life choices are so offensive—so inconsistent with our values—that we *do* want the state to intervene. This impulse is often illiberal. For example, many people regard abortion as so immoral as it cannot be allowed, although those who take this view are in the minority.<sup>321</sup> In a similar vein, many people see TWU’s Community Covenant as so immoral that *it* cannot be allowed. Of course, “not allowed” does not always mean “legally forbidden.” It can also mean “strongly discouraged” or “punished indirectly.” There are many ways of discouraging abortion—and, in effect, punishing women who choose to have abortions—that fall short of outright bans. Similarly, there are many ways of censuring and disadvantaging divergent value systems that fall short of outright suppression.

In these cases, and in many others, value pluralism, when understood as something deeper than tolerance, can be said to have *failed*—not in the sense that the system of value pluralism is no longer effective, but in the sense that liberal society has been forced to confront a manifestation of difference that it is not prepared to celebrate or welcome, even as a transitional measure. Recognition of the value of diversity has been subordinated to profound moral disapproval. Still, legal prohibition does not automatically follow from moral disapproval. There

---

<sup>320</sup> Berlin 1998, *supra* note 319 at 15.

<sup>321</sup> Monique Scotti, “Support for Abortion Rights Strong in Canada, but Ipsos Poll Shows We Are ‘Middle of the Pack’ Globally”, *Global News* (6 March 2017), online: <[www.globalnews.ca](http://www.globalnews.ca)>.

is space between the two, occupied by things that are only grudgingly tolerated. We do not see these things as making a positive contribution to a diverse society, but we tolerate them regardless. My argument is that this presumption of tolerance is a good thing for a free and democratic society—and it is a presumption that is bolstered by strong protections for religious freedom. It is *good* that society is in the habit of tolerating things that it does not like, and tolerating religion *reinforces* that habit in a way that other forms of tolerance do not.

### **When does moral disapproval justify withholding toleration?**

The law societies disapproved of the TWU Community Covenant, but there was no suggestion that the Community Covenant was unlawful, or that private religious institutions should not be free to maintain codes of personal conduct in accordance with applicable religious doctrine. Rather, the dispute in *Trinity Western* turned on the extent to which public authorities like the law societies can rely on moral disapproval in exercising their statutory mandates. Sometimes, moral disapproval is enough, but it is often not.

Few would argue that the liberal state can legitimately withhold benefits from all persons with whom it disagrees. When one is granted a driver's licence, it is understood that the state neither approves nor disapproves of how one intends to use the licence. The benefit of charitable status is available to many entities whose missions the state cannot endorse, including religious institutions. The Holy Blossom Temple in Toronto—Canada's largest synagogue—has been granted the public benefit of charitable status, but no one would suggest that the state has, in granting that benefit, endorsed the substantive content of Holy Blossom's mission (in this case, Reform Judaism).

This analogy requires some explanation. There are, of course, important differences between charitable status, a driver's licence, and the accreditation of a law school, but each of the three is ultimately a set of legal permissions to engage in activities that would otherwise be legally proscribed. The same is true of legal personhood generally. The state decides which non-natural persons may come to possess the rights of legal persons—but, as the Supreme Court has acknowledged, the fact that a non-natural person “has been given the legal attributes of a natural

person” by the state does not create an agency relationship between the resulting legal person and the state, whether for the purposes of *Charter* application or for any other purpose.<sup>322</sup>

In other words, the state can confer a set of legal permissions (such as the rights that attach to legal personhood) while maintaining a position of neutrality vis-à-vis the use of those permissions. The state has conferred upon the Holy Blossom Temple the legal permissions that follow from charitable status (namely, the permission to issue donation receipts). Consequently, the synagogue can engage in activities that would otherwise be prohibited by law. I do not mean to overstate the similarities between the legal permissions granted to the Holy Blossom Temple, the legal permissions granted to the holder of a driver’s licence, and the legal permissions sought by TWU. My point is simply that the state can legally empower private actors to engage in otherwise proscribed activities without expressing meaningful approval of the activities in question.

The differences between the British Columbia *Legal Profession Act* and the provisions of the *Income Tax Act* that relate to charities, while legally consequential, do not detract from this point. Even if the *Income Tax Act* were to require the Canada Revenue Agency to confer charitable status non-neutrally (and deny charitable status to those entities whose value are in tension with those of the state), we could still ask whether charitable status is the *kind of legal permission* to which access ought to be limited in that way. The purpose of the governing statute is not determinative; we can—and, indeed, must—also look to the nature of the legal permission. My position is that there should be a strong presumption of value-neutral access to legal permissions, except where the permissions in question amount to state authority and, when conferred, create an agency relationship between the recipient and the state.

TWU took the position that accreditation is, under the *Legal Profession Act*, the kind of legal permission that can, and ought to be, be conferred neutrally. It argued that accreditation would not cause the substantive content of the Community Covenant to be attributable to the law societies.<sup>323</sup> It further argued that “regulatory approval cannot mean approval of the beliefs of a private group.” Otherwise, “regulation could be used as a tool by government to silence minority

---

<sup>322</sup> *McKinney v University of Guelph*, [1990] 3 SCR 229 at 265-66; 76 DLR (4th) 545. Prior to the Supreme Court’s decision in *Wall*, *infra* note 342, certain decision-makers were subject to judicial review but not to the *Charter*. Now, the availability of judicial review and the application of the *Charter* are much more closely aligned, even if it is still possible to imagine points of divergence.

<sup>323</sup> *Trinity Western*, *supra* note 1 (Reply Factum of the Appellants at paras 26-27).

beliefs.” TWU expressly endorsed William Galston’s principle of maximum feasible accommodation, according to which the state can “intervene in the internal affairs of civil associations” only to preserve the “core requirements of individual security and civic unity.”<sup>324</sup>

It should be remembered that law schools are not the only educational institutions required to seek accreditation. Private secondary schools are similarly regulated, and it is not clear why, if TWU can be denied accreditation on account of the Community Covenant, Loyola High School could not be denied accreditation on account of its own religiously informed policies. Richard Moon notes with approval that “a religious school may dismiss a teacher who enters into a same-sex relationship contrary to church doctrine ... [because] the school is understood to be a private religious organization.”<sup>325</sup>

However, this state of affairs is only possible because religious schools have access to some kind of accreditation.<sup>326</sup> A religious school without the authority to confer secondary school diplomas could not provide a meaningful alternative to the secular public education system. Could accreditation be made contingent on state approval of the school’s internal policies? How could this outcome be reconciled with *Charter* protection for institutional teaching and dissemination? I propose that it could not be. Construing all public benefits as substantive state endorsements would significantly impede participation in public life, frustrating individual self-actualization (religious and otherwise).

The Supreme Court correctly noted in *Saguenay* that “a neutral public space does not mean the homogenization of private players in that space.”<sup>327</sup> Rather, the state facilitates individual self-actualisation by providing equal access to public space. “Space” can refer to physical space, but it can also refer to state resources, such as public benefits (and, in particular, public licences). If the state were to start from the position that access to public space—literal or otherwise—must be contingent on conformity with liberal values, there would be significantly

---

<sup>324</sup> *Ibid.*

<sup>325</sup> Moon 2019, *supra* note 248 at 353.

<sup>326</sup> Most private schools are subject to state oversight, although the nature of the oversight varies between provinces. In Ontario, the Ministry of Education maintains that it does not “regulate, licence, accredit, or otherwise oversee the operation of private schools.” However, it does 1) impose a number of “ongoing operational requirements” and 2) assess the “standard of instruction” at private schools seeking to confer the Ontario Secondary School Diploma. How this differs from “regulation” is not clear to me. In any case, I am primarily interested in whether a more robust regulatory regime could offend the *Charter*. Whether such a regime currently exists is a secondary concern. See Ontario, Ministry of Education, “Private Elementary and Secondary Schools”, (Toronto: Ministry of Education, May 2020).

<sup>327</sup> *Saguenay*, *supra* note 16 at para 74.

fewer opportunities for self-actualisation in the public sphere. There must instead be a strong presumption of neutral access to public space and public resources, including legal permissions.

For this reason, the distinction between a *mandate* and a *licence* is crucial. When the state confers a mandate, it is understood that the mandated individual or institution will carry out certain functions on the state's behalf. However, when the state confers a licence, it is understood that the licenced individual or institution will continue to act independently of the state. The licensee acts with the state's permission, and with the various rights and responsibilities that follow from that permission. Still, the licensee is not an agent of the state.<sup>328</sup>

If this conceptual distinction is not properly maintained, administrative decision-makers may conclude—wrongly—that the state cannot grant licences in a neutral way. In an effort to avoid being seen to endorse religious beliefs and practices, decision-makers may contort the principle of religious neutrality into an “irreligious or anti-religious policy default.”<sup>329</sup> As Bruce Ryder notes, “Canadian jurisprudence does not impose on the state a duty of neutrality *about* religion.”<sup>330</sup> Consequently, there must be away for the state to confer most public benefits (and, in particular, public licences) on a religious institution without endorsing that institution's beliefs and practices. Otherwise, religious neutrality would be indistinguishable from state atheism, and the state would find itself facilitating non-religious activities to the exclusion, or at least to the detriment, of religious activities.<sup>331</sup>

In the *Saskatchewan Marriage Commissioners Reference*, the Saskatchewan Court of Appeal considered whether the Saskatchewan legislature could allow marriage commissioners to “opt out” of solemnising same-sex marriages. Parliament had recently passed the *Civil Marriage Act*, which legalised same-sex marriage throughout Canada. Under Saskatchewan's proposed regime, same-sex marriage would be legal in the province, but even publicly appointed marriage

---

<sup>328</sup> Galston proposes a similar distinction, between “permission” and “encouragement.” However, Galston takes the position that “the state does not have to confer benefits on civil associations that violate important public principles. From this standpoint, the [Supreme Court of the United States] decided *Bob Jones University* correctly by denying tax-exempt status to a discriminatory school.” While I agree that there must be *some* limits on the granting of licences, discrimination is precisely the kind of thing that the state might be required to tolerate in the interest of “maximum feasible accommodation.” See William A Galston, “Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory” (1999) 40 *Wm & Mary L Rev* 869 at 896 [Galston 1999].

<sup>329</sup> Derek B M Ross & Ian N Sinke, “Advancing Religion in a ‘Neutral’ State: Understanding Religion as a Constitutional Good” in Barry W Bussey, ed, *The Status of Religion and the Public Benefit in Charity Law* (London: Anthem Press, 2020) 129 at 148.

<sup>330</sup> Ryder 2005, *supra* note 307 at 174

<sup>331</sup> *Trinity Western Dissent*, *supra* note 135 at para 324.

commissioners would not be required to solemnise same-sex marriages. Saskatchewan's rationale was that, because marriage is a "moral" issue, public officials should not be required to act contrary to their personal religious beliefs.<sup>332</sup>

The court found against the province, reasoning that, because marriage commissioners are appointed by the state and act on the state's behalf, permitting them to withhold services on the basis of their personal religious beliefs would be incompatible with the *Charter's* guarantee of equality:

Marriage commissioners do not act as private citizens when they discharge their official duties. Rather, they serve as agents of the Province and act on its behalf and its behalf only. Accordingly, a system that would make marriage services available according to personal religious beliefs of commissioners is highly problematic.<sup>333</sup>

When one is appointed as a marriage commissioner, one receives a mandate from the state to solemnise marriages on the state's behalf. It is possible to imagine a system in which marriage commissioners are licenced rather than mandated, but such a system does not currently exist in Canada. Importantly, the state has a complete monopoly on the legal recognition of marriage. A marriage commissioner's authority is necessarily delegated by the state. Were it not for this delegation of authority, the marriage commissioner would likely not be in the solemnisation business at all.

There are, I think, important and constitutionally relevant differences between a marriage commissioner and a law school. While the state has a complete legal monopoly on the legal recognition of marriage, it does not have an equivalent monopoly on the practice of law. The state does not practice law, and lawyers do not practice law on the state's behalf (with the exception, of course, of those lawyers who represent the Crown). If lawyers were necessarily state employees, and every lawyer (or even most lawyers) were understood to be carrying out the state's wishes, the state would have a more legitimate interest in limiting who is able to provide legal education.

The practice of law is best understood as a private activity in which one cannot engage without a public licence, not as a public activity that is intrinsically bound up with the exercise of

---

<sup>332</sup> *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 at para 48, 327 DLR 4th (699).

<sup>333</sup> *Ibid* at para 98.

state authority. Legal education is a similarly private activity, in the sense that law schools (whether public or private) do not act on the state's behalf. It is true that the state provides law schools with various forms of support, but a support relationship is not an agency relationship.<sup>334</sup> The state has support relationships with many private actors.

However, as I argued above, the nature of the legal relationship between the state and a prospective recipient of legal permissions does not answer the normative question, even if it does (or can) answer the legal question. For example, the state does not currently have a monopoly on the practice of medicine. By this I mean that physicians do not practice medicine on the state's behalf, even if many physicians are compensated by the state. Still, it is possible to imagine a health care system in which all physicians are state employees and practice medicine on the state's behalf. In such a system, the authority to practice medicine could be characterised as a mandate as a matter of law, but there would still be a further question as to whether the relevant legal permissions *should* be constituted as a mandate. In my view, one implication of the presumption of neutral access described above is that the state should not create a mandate relationship where a licence relationship would adequately further the state's legitimate interests.

In my view, the court in the *Saskatchewan Marriage Commissioner Reference* reached the correct conclusion: When the state confers a mandate, it may legitimately require the mandated individual or institution to act in conformity with the state's values. Accordingly, it may also *withhold* a mandate from any individual or institution who is unwilling or unable to do this.

The Supreme Court addressed the distinction between a mandate and a licence more directly in *Highwood Congregation of Jehovah's Witnesses v Wall*. The applicant, Randy Wall, was a member of a Jehovah's Witness community in Alberta. He was expelled (or "disfellowshipped") for violating the community's code of conduct. Wall then sought judicial review of the congregation's decision.<sup>335</sup> While both Wall and the congregation invoked religious freedom, the court ultimately held that the expulsion decision was not subject to judicial review. As a result, there was no basis on which to consider the parties' religious freedom arguments.

---

<sup>334</sup> There is no judicial consensus on whether, and under what conditions, universities can be said to exercise state authority.

<sup>335</sup> *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 at para 1, [2018] 1 SCR 750 [Wall].

The court held that, because the Highwood Congregation is a fully private entity, its decisions are not subject to judicial review.<sup>336</sup> The court expressly rejected the argument that all decisions of sufficient public importance can be subject to judicial review, even where the decision-maker is fully private. Commenting on a line of cases in which lower courts allowed judicial review of private decisions, Justice Rowe observed that:

...[these] cases fail to distinguish between “public” in a generic sense and “public” in the public law sense. In my view, a decision will be considered public where it involves questions about the rule of law and the limits of an administrative decision maker’s exercise of power. Simply because a decision impacts a broad segment of the public does not mean that it is public in the administrative law sense of the term. Simply put, judicial review is about the legality of state decision making.<sup>337</sup>

Justice Rowe’s distinction between “public” and “private” in the public law context maps onto my distinction between a mandate and a licence. A *mandated* individual or institution exercises public authority in the public law sense; a *licenced* individual or institution does not. While the Highwood Congregation was not incorporated, the court noted that private corporations do not exercise public authority simply by virtue of being incorporated, even where the corporation is established by statute.<sup>338</sup> For example, the United Church of Canada was established by a private Act of Parliament in 1925, but its decisions are not subject to judicial review (Trinity Western University was similarly established by the British Columbia legislature in 1967).

As it happened, the decision in *Wall* did not turn on the congregation’s religious question argument. Wall’s expulsion was non-reviewable because it was a private decision, not because it was a religious decision. Still, Justice Rowe made a point of noting—correctly—that courts “lack the legitimacy and institutional capacity” to determine whether the congregation’s disciplinary process complied with scripture (as Jehovah’s Witness doctrine requires).<sup>339</sup>

As a rule, the state should be permitted to choose agents whose values align with the state’s own (or, failing that, agents who are willing to conduct themselves in accordance with the state’s values). In the context of conferring public mandates, it is appropriate for the state to

---

<sup>336</sup> *Ibid* at para 21.

<sup>337</sup> *Ibid* at para 17.

<sup>338</sup> *Ibid* at para 18.

<sup>339</sup> *Ibid* at para 38.

withhold toleration on the basis of moral disapproval. Above, I explained that religious freedom is necessary to preserve the possibility of moral life outside the state. It protects the right to maintain and inhabit a moral universe distinct from the state's own, and to self-actualise in accordance with deeply held, comprehensively metaphysical commitments that run counter to the constitutive commitments of liberalism.

There is a sense in which self-actualisation depends, or may depend, on a measure of access to public life, public space, and public resources. When the state makes such access contingent on conformity with liberal values, it frustrates the self-actualisation of those who cannot conform in good conscience. However, the state's agents operate within the state's moral universe. There can be no right to a moral life outside the state in the course of exercising state authority. To be clear, requiring state agents to act in conformity with state values may *also* frustrate the self-actualisation of certain individuals. I do not mean to suggest otherwise. This, however, is the kind of barrier to self-actualisation that is necessary to sustain the liberal character of the state.

Different rules should apply to the conferring of public licences, for two reasons. Firstly, licensees do not exercise state authority—there has been no act of delegation. By way of example, the state does not provide legal services to the public at large. It licences individuals to do so, but those individuals are not providing legal services on the state's behalf. In contrast, the state *does* solemnise marriages, and marriage commissioners *do* perform this function on the state's behalf.

Secondly, the state can confer a licence without endorsing the purpose for which the licence will be used. All private corporations are, in effect, "licenced" by either the federal government or a provincial government, even where the state (or the government of the day) disapproves of the corporation's activities. It is simply understood that the state can confer the benefits of legal personhood while neither approving nor disapproving of the corporation's objects.

In the context of TWU's bid for accreditation, the law societies were "the state." While the law societies are mandated by the legislature to regulate the legal profession, they do not themselves confer mandates. Rather, the law societies confer licences. Individual lawyers are licenced by the relevant law society to practice law, but they do not practice law on the law

society's behalf. Similarly, law schools are accredited by the law societies, but they do not educate law students on the law societies' behalf.

Unlike the solemnisation of marriage, legal education is not a delegated function. Institutions that provide legal education are not agents of the state, and they should be required to align with the state's values in exchange for accreditation. The conferring of licences on "dissident" individuals and institutions, including those whose values and resultant practices offend those of the state and the public at large, falls within the scope of the tolerance "buffer." That is to say, we tolerate it despite our disapproval, because doing so reinforces the social presumption of tolerance.

Whether one can be required to align with the state's values in other contexts, outside of the granting of licences, is beyond the scope of this thesis. No right is absolute, and religious freedom cannot sustain a right to "opt out" of *any* law that offends one's religious convictions, nor can it compel the state to tolerate *any* practice grounded in religion, no matter how harmful. My claim here relates only to the conferring of licences, as opposed to the conferring of mandates. While laws of general application, including anti-discrimination statutes, may run afoul of religious freedom in some cases, such violations fall outside of the licence/mandate paradigm. In other words, there is no *quid pro quo*: the state is not making receipt of a licence contingent on violating, abandoning, or renouncing one's religious convictions.

As I noted above, TWU's discriminatory practices cannot be found to constitute discrimination under the British Columbia *Human Rights Code*, at least insofar as those practices are grounded in TWU's religious identity. In my view, exemptions of this kind are constitutionally required, but not because religious freedom includes a constitutional right to discriminate wherever one's religious commitments demand it—it does not. Rather, there is a difference between discriminating in the course of maintaining a private religious institution (which should be protected) and discriminating in the course of providing services to the public at large (which should not be).

Religious freedom is instrumentally valuable in that it promotes pluralism by reinforcing the presumption of toleration. Consequently, the state cannot withhold public licences on the basis of moral disapproval *alone*, especially where the disapproval attaches to a religious belief or practice. Religion plays a unique and important role in individual self-actualisation, so it is appropriate that religious beliefs and practices be constitutionally protected. Religion is also

distinguished by its communal character. A religious educational institution and an educational institution governed by a non-metaphysical moral code simply do not play the same social role.<sup>340</sup> Indeed, the Supreme Court of British Columbia acknowledged as much when it accepted that TWU “was founded to be, and remains, an educational arm of the Evangelical Christian Church.”<sup>341</sup>

Value pluralism entails, among other things, respect for a plurality of belief systems and attendant moral codes, so the availability of public licences cannot simply track the state’s own values. Making public licences available on a value-neutral basis—without regard to the moral content of a given licensee’s religious beliefs and practices—preserves and reinforces the pluralist presumption of tolerance.<sup>342</sup> However, the value-neutral conferring of public licences is not an absolute rule. It is a rebuttable presumption, but only in the sense that all constitutional rights are rebuttable presumptions. In other words, one can imagine a religious practice so harmful that the state could rightly withholding a licence.<sup>343</sup> The goal is to prevent the state from resorting by default to a certain kind of value-sensitive analysis, not to guarantee that religious individuals (and, where applicable, religious institutions) are *never* disadvantaged on account of their particular beliefs and practices.

In determining whether, and to what extent, a non-liberal belief or practice ought to attract legally imposed disadvantage, we should begin by asking whether “staying the hand of the law” and declining to impose disadvantage would, in a fundamentally diminish the liberal character of society or of the state.<sup>344</sup> The commitment to equality and non-discrimination is axiomatic to liberalism. The liberal state has a duty to refrain from discrimination and, I would

---

<sup>340</sup> This distinction is especially relevant in the context of educational institutions, which play a central role in religious life.

<sup>341</sup> *TWU v LSBC* (BCSC), *supra* note 101 at para 2. However, Kathryn Chan notes that the Ontario Court of Appeal declined to accept this characterisation, stating simply that TWU is “said to be an arm of the Evangelical Free Church of Canada” (Chan 2017, *supra* note 260 at 719).

<sup>342</sup> Of course, this commitment to value-neutrality in the conferring of public licences is *itself* a non-neutral, liberal exercise in maintaining and promoting pluralism.

<sup>343</sup> In *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825, 133 DLR (4th) 1, the Supreme Court upheld the effective termination of a teacher who had made antisemitic statements. The teacher’s antisemitic beliefs were at least partly religious in nature. However, public school teachers educate children on the state’s behalf, and it is appropriate for the state to withhold this particular public mandate from those who express or have expressed bigoted beliefs. Whether the state can also withhold teaching licences from such individuals is a further question. I am inclined to say that it can, but only where the conduct of the teacher in question can be shown to be harmful (bearing in mind that primary and secondary school students are the mercy of the education system in a way that university students are not).

<sup>344</sup> Berger 2015, *supra* note 13 at 181.

argue, a further normative duty to prevent private discrimination in some contexts—including discrimination on the basis of sexual orientation. The state could have fulfilled these duties while allowing TWU to operate an accredited law school. TWU is a small, relatively insular community whose values are increasingly at odds with the Canadian mainstream. Declining to impose disadvantage on that community would not have diminished the state’s liberal character, nor it would it have threatened LGBT rights or the social standing of LGBT people. To the extent that the Community Covenant causes harm to LGBT students who choose to attend TWU, that is the kind of harm that the liberal state can and should tolerate. Koppelman comes to the same conclusion with respect to LGBT rights:

The notions that gay people are obligated to lifelong celibacy, or that marriage is inherently heterosexual, are grave moral errors ... But that does not mean that state power must unrelentingly be used to eradicate these ideas ... I would very much like to banish to the margins of society the notion that homosexual sex is inferior to heterosexual sex. I want gay people to suffer no disadvantage or humiliation whatsoever because there are other people who believe that nonsense. But I also believe that the margins of society should be a safe place, where those do not conform to majoritarian norms, and whose views I regard as disastrously misguided, can live their lives in peace and security.<sup>345</sup>

The law societies concluded that they simply *could not* accredit the TWU’s law school without signalling approval of the Community Covenant or causing some further harm to individual LGBT law students. Perhaps they believed themselves to be *obligated*, morally if not legally, to use their power in a non-neutral way and impose disadvantage on TWU. These, too, are errors. The question is not whether discrimination on the basis of sexual orientation is wrong, or non-liberal, or deserving of condemnation. It is all three. The question, rather, is whether there is in the instant case a way for the state to exercise restraint while still honouring its most fundamental commitments, including not only equality but also autonomy, self-actualisation, and tolerance.

Can the liberal state live with—not celebrate or welcome or approve of, but *live with*—the consequences of exercising restraint? I believe that, in the case of TWU, it could have. We should not take an unduly deontological approach to the law’s tolerance of discrimination. The law is not, as a consequence of tolerating discrimination at the margins of society, bound to

---

<sup>345</sup> Koppelman 2020, *supra* note 191 at 31-32.

tolerate discrimination in any other context. The fact that we tolerate discrimination *here* does not mean that we must tolerate discrimination *there*. The slope is not as slippery as it may appear. The floodgates remain closed.

In a recent decision—*Servatius v Alberni School District No 70*—the Supreme Court of British Columbia took note of the distinction between permission and substantive endorsement. In *Servatius*, the applicant’s children had attended an indigenous smudging ceremony organised by their school. The applicant, an evangelical Christian, brought a *Charter* claim against the school, arguing that the imposition of an indigenous religious practice on her children violated section 2(a).<sup>346</sup> The court found for the school, concluding that schools can “showcase” religious practices without violating their duty of neutrality, so long as participation in such practices is not encouraged or required. To illustrate this distinction, the court posited that:

If a Catholic priest came to school with altar candles and a censer containing incense to acquaint students with the sights and scents of Church rights, this would seem to be well within the bounds of what the [*SL v Commission scolaire des Chênes*] case stands for: religious freedom is not compromised when students are taught about other beliefs. If, however, the children underwent a baptism, this would be far over the line.<sup>347</sup>

Here, we see that is possible for a public institution—in this case, a school—to provide resources to religion without being taken to endorse religion. The school’s role in the smudging ceremony was largely passive. It invited a Nuu-chah-nulth elder to lead the ceremony and gave her space in which to do so, but the students in attendance were free to draw their own conclusions. Importantly, the elder was not given a mandate to speak or to act on the school’s behalf. Rather, she simply had permission to conduct a ceremony. The petitioner regarded even this limited permission as tacit endorsement of indigenous religious beliefs and practices, to the detriment of the petitioner’s own Christian beliefs. This framing was correctly rejected by the court.

In summary, we tolerate religion because tolerance is good, and, outside a framework in which tolerance is regarded as valuable, there would be little reason to tolerate religious differences at all. As a result, tolerating religion reinforces tolerance generally. If society is, by custom, inclined to tolerate even those beliefs and practices that the majority regards as either 1)

---

<sup>346</sup> *Servatius v Alberni School District No 70*, 2020 BCSC 15 at para 2.

<sup>347</sup> *Ibid* at para 107.

heretical or 2) fundamentally divorced from rational thought, the principle of pluralism will be more entrenched than it would be under a less ambitious or “minimalist” conception of tolerance.

For this reason, the state must carefully distinguish between public licences and public mandates. Requiring mere licensees to conform with the state’s values in all cases would undermine the presumption of tolerance, which lies at the core of religious freedom. TWU is a private religious institution that sought, and may again seek, a licence to provide legal education in the context of an evangelical Christian community. The law societies’ approval or disapproval of evangelical Christianity as practiced by TWU should not have factored into its decisions.

## **SECTION 6: CONCLUSION**

Ultimately, the Supreme Court’s decision in *Trinity Western* is a source of few answers and many questions. The immediate question—whether the law societies’ denial of accreditation to TWU was contrary to the *Charter*—was resolved in the law societies’ favour. However, it is not at all clear that the TWU saga is over. Shortly after the Supreme Court rendered its decision, TWU elected to modify the Community Covenant. Now, the most contentious rule—the ban on extra-marital sexual relations—will apply only to faculty and administrative staff. Students will be exempt.<sup>348</sup>

At present, TWU does not intend to renew its application for accreditation. However, if TWU were to seek accreditation once again, would the change to the Community Covenant matter? Do the law societies have the authority to, in effect, regulate the workplace policies of institutions that provide legal education? If the law societies were to deny TWU’s application even in light of the amended Community Covenant, it would be difficult to deny that the law societies were motivated by disapproval of TWU’s values, irrespective of whether law students are required to adhere to those values.

In other words, the big questions—the questions considered in this thesis—have yet to be answered. We still do not know why we protect religious freedom, nor do we have a better understanding of how religious freedom, as a justiciable constitutional right, interacts with established social norms. Canadian society has become markedly less religious, both in the sense that religious institutions are less integrated into public life and in the more basic sense that fewer Canadians identify as religious. As a result, the value of religious freedom is less apparent than it once was.<sup>349</sup> In a society where almost one-quarter of the population is non-religious, is it really necessary to single out religion for stand-alone constitutional protection? Or does “religious freedom” simply operate to shield those who engage in discriminatory behaviour from social and legal consequences?

My answer to the former question is “yes.” There is, even today, a compelling case for extending constitutional to protection to religion specifically, as distinct from the incidental

---

<sup>348</sup> Wendy Stueck & Sunny Dhillon, “B.C.’s Trinity Western University Drops Mandatory Covenant Forbidding Sex outside Heterosexual Marriage”, *The Globe and Mail* (14 August 2018), online: <[www.theglobeandmail.com](http://www.theglobeandmail.com)> [Stueck & Dhillon 2018].

<sup>349</sup> Statistics Canada, “2011 National Household Survey: Immigration, Place of Birth, Citizenship, Ethnic Origin, Visible Minorities, Language and Religion” (Ottawa: Statistics Canada, May 2013).

protection that may be offered by other constitutional rights, such as freedom of expression and freedom of association. This argument emanates from two of the liberal state's foundational commitments.

The first foundational liberal commitment is the commitment to self-actualisation, which concerns the relationship between “private” values—such as those of religious individuals and institutions—and the values of the liberal state. All states are committed to a particular value system, and liberal states are no exception. However, liberal states are distinguished by their unique commitment to value pluralism. When attributed to a state, value pluralism is best understood as a willingness to welcome and regard as good the concurrent existence of multiple value systems, which may be in conflict with each other. Importantly, one or more of these value systems may be in conflict in liberalism itself.

As a result of this commitment to value pluralism, liberal states allow individuals to self-actualise on their own terms. They give individuals the freedom to live their lives in accordance with their own values. This freedom includes the freedom to form communities with like-minded individuals. To the greatest extent possible, liberal states do not seek to suppress non-liberal ways of life, even where the values animating those ways of life are deeply offensive to liberalism. In other words, value pluralism means leaving space for non-liberal forms of self-actualisation, even to the extent of tolerating beliefs and practices that would have no place in a fully liberal society.

Religious belief systems are a distinct subset of non-liberal belief systems, and as such are entitled to special deference (although, to be clear, not all religious belief systems are in tension with liberalism). Unlike political creeds and broad-based “lifestyle philosophies”, religions are comprehensive statements of metaphysical fact, informing every part of their adherents' lives. When an individual acts in accordance with his or her religious beliefs, he or she is participating in a relationship with the divine, whose existence is understood to transcend human society and the physical world. No other set of commitments operates in this comprehensively metaphysical way. Obligations to the divine are experienced differently from “ordinary” moral and political commitments. They play a different role in the life of the obligation-holder. The fact that this distinction is fundamentally a question of lived experience does not mean that it should be overlooked.

There is no doubt that the form of evangelical Christianity practiced by the TWU community is in tension with liberalism, at least with respect to sexual morality. Most Canadians accept both extra-marital sexual relations and same-sex sexual relations; TWU accepts neither. A non-liberal, “progressive confessional” state might seek to suppress the TWU community’s way of life, but Canada is a liberal state. Consequently, there must be space for conservative evangelical Christians to self-actualise on their own terms. The liberal state and its agents cannot make the receipt of public benefits contingent on adherence to liberal values. The price of self-actualisation cannot be diminished access to public life, except where diminution is reasonably necessary to preserve the liberal character of the state or of society.

Richard Moon argues, rightly, that *Trinity Western* was a missed opportunity. In his view, the *Charter* obligates the state to “make space for religious practice”, and the court’s task in adjudicating section 2(a) claims is to “mark out a protected space for religious communities or ways of life.”<sup>350</sup> In order to give full effect to the *Charter*’s guarantee of religious freedom, the court must recognise that “the key issue in accommodation cases is not the just or appropriate balance between competing religious and public interests, but is instead the boundary between the civic and spiritual spheres of life.”<sup>351</sup> Moon’s analysis is correct, as is his proposed solution. The purpose of religious freedom is to protect the right to self-actualise outside the state. Treating religious and non-religious interests as the same *kind of thing* is inconsistent with this purpose. It presumes, wrongly, that state- or state-adjacent activities can be held to the same standard or assessed in the same way.

Moreover, section 32 of the *Charter* ought to be interpreted as preventing the state and its values from dominating the private lives of individual Canadians. Indeed, I have argued that the prevailing approach to the *Charter* values framework is in tension with the purpose of section 32. This distinction is a necessary feature of the liberal constitutional order, in that private action is not held to the same standard as state action.<sup>352</sup> The rights set out in the *Charter* reflect the values of the state. They may also, in practice, reflect the values of most Canadians, but the two need not align in every case. It is inconsistent with the liberal state’s commitments to self-actualisation and tolerance to, in effect, circumvent section 32 by considering whether private

---

<sup>350</sup> Moon 2019, *supra* note 248 at 339.

<sup>351</sup> *Ibid* at 358.

<sup>352</sup> Whether state action is held to a *higher* standard or simply to a *different* standard is ultimately of little consequence.

action *would* violate the *Charter* if it were not private action. Where a codified *Charter* right (such as freedom of religion) conflicts with an uncoded *Charter* value (such as equality), the former should prevail in all but the most extreme cases.<sup>353</sup>

The second foundational liberal commitment is the commitment component to tolerance, which concerns the tolerance-promoting effects of giving wide latitude to religious beliefs and practices, and the preservation of the social conditions in which self-actualisation is possible. Unlike the argument from self-actualisation, the argument from tolerance is not focused on religion *qua* religion. Rather, it is focused on what happens to society, and to the freedom to self-actualise in accordance with one's most deeply held commitments, when religion is accorded special deference. In brief, the argument posits that, because individuals are not ordinarily inclined to tolerate beliefs and practices that they regard as heretical or irrational, tolerating religion builds the habit of tolerating difference more generally. In so doing, it reinforces and deepens the social commitment to self-actualisation.

There are stronger and weaker forms of tolerance. The tolerance promoted by the protection of religious freedom is the stronger form. The weaker form, by contrast, would entail tolerating only those value systems that do not run directly counter to mainstream liberal values—value systems that are, while somewhat out of the ordinary, not fundamentally incompatible with liberalism. Strong tolerance is more demanding. It means recognising that the state's values stop at the state's borders, and ensuring that individuals and communities are not penalised for holding and acting upon their own private values.

Together, these two commitments—the commitment from self-actualisation and the argument from tolerance—support a distinction between public mandates and public licences. A public mandate is a grant of authority to act on the state's behalf, while a public license is a grant of permission to do a particular thing. Requiring public mandates to be carried out in conformity with the state's values is appropriate, even in a pluralist society. However, given that public

---

<sup>353</sup> While I accept that the state can, in theory, promote equality at the expense of religious freedom, I do not accept that it can do so by “balancing” the two as if both were *Charter* rights. Promoting a value—which has no clear constitutional status—by limiting a constitutional right is not an exercise in “balancing.” Rather, promoting the value is the state's *justification* for limiting the right. This justification should be subject to section 1 (or, at the very least, correctness review). Bruce Ryder makes a similar point, noting with approval the Supreme Court's holding that “otherwise neutral rules may impose coercive burdens on religious freedoms that will be unconstitutional unless the state can demonstrably justify them as reasonable limits on religious rights.” Of course, the burden imposed by the law societies on TWU's religious freedom cannot be characterized as a “neutral rule.” Rather, the “rule” is anchored in specific disapproval of TWU's religious practices. This is, in my view, a further reason to apply a non-deferential standard of review (Ryder 2008, *supra* note 9 at 91).

licences to do not grant permission to act on the state's behalf, there is no reason to make receipt of a public licence contingent on adherence to state values.

TWU sought permission to operate a law school. As law schools are not operated on the state's behalf, the permission sought is best characterised as a public licence, not as a public mandate. Therefore, the law societies were not entitled to penalise TWU for governing itself in accordance with non-liberal values.<sup>354</sup> The TWU community has a right to self-actualise in accordance with its own comprehensively metaphysical commitments, and without being hindered by the state. More specifically, TWU's eligibility for public licences should not be determined by the state's approval or disapproval of the TWU community's values. Finally, tolerating institutions like TWU—whose practices are repugnant to liberal equality—results in a society that is accustomed to tolerating divergent beliefs and practices. This society is fundamentally more liberal—and more free—than the confessional alternative.

In a previous section, I suggested that tolerance entails a “right to be wrong.” While wrongness should not attract constitutional protection, the right to live one's life in accordance with one's comprehensively metaphysical commitments—including beliefs that happen to be wrong—absolutely must. Religious differences are uniquely irreconcilable, in the sense that the “right answer” both 1) exists and 2) is necessarily beyond our reach. In a liberal society, one should be free to supply one's *own* answer, and to have that answer respected by the state. This principle, grounded in a kind of epistemic humility, is the core of the case for protecting religious freedom. We cannot know who is right, so we protect the right to be wrong, and the right to make and act upon metaphysical commitments without state approval. Freedom of religion is the freedom to maintain one's own private value system, beyond the reach of the state.

---

<sup>354</sup> As Kathryn Chan notes, European courts have (to my mind, rightly) recognised that “religious associations have a right of structural internal autonomy, which includes a right to organize in such a way as to stifle dissident movements that might pose a threat to their cohesion, image, or unity” (Chan 2017, *supra* note 260 at 728-729). I would argue that the category of “dissident movements” need not be limited to *theological* dissidents. Non-conformity with the association's moral code is another form of dissent.

## **BIBLIOGRAPHY**

### **LEGISLATION**

*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

*Canadian Human Rights Act*, RSC 1985, c H-6.

*Charter of Human Rights and Freedoms*, CQLR, c C-12.

*Human Rights Code*, RSBC 1996, c 210.

*Human Rights Code*, RSO 1990, c H.19.

*School Act*, RSBC 1996, c 412.

Constitution of the Republic of Albania.

Constitution of the United States of America.

### **JURISPRUDENCE**

*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37.

*BC Civil Liberties Association v University of Victoria*, 2015 BCSC 39.

*BC Civil Liberties Association v University of Victoria*, 2016 BCCA 162.

*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

*Carter v Canada (Attorney General)*, 2015 SCC 5.

*Chamberlain v Surrey School District No 36*, 2002 SCC 86.

*Chaput v Romain*, [1955] SCR 834, 1 DLR (2d) 241.

*Doré v Barreau de Québec*, 2012 SCC 12.

*Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609.

*Gosselin v Quebec (Attorney General)*, 2002 SCC 84.

*Grant v Ryerson Students' Union*, 2016 ONSC 5519.

*Hak v Procureure générale du Québec*, 2019 QCCS 2989.

*Hak v Procureure générale du Québec*, 2021 QCCS 1466.

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

*Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54.

*Law Society of British Columbia v Trinity Western University*, 2018 SCC 32.

*Loyola High School v Quebec (Attorney General)*, 2015 SCC 12.

*Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3.

*Maurice v Canada (Attorney General)*, 2002 FCT 69.

*McKinney v University of Guelph*, [1990] 3 SCR 229; 76 DLR (4th) 545.

*Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16.

*The Nova Scotia Barristers' Society v Trinity Western University*, 2016 NSCA 59.

*Owens v Saskatchewan (Human Rights Commission)*, 2006 SKCA 41.

*R v Big M Drug Mart*, [1985] 1 SCR 295, 18 DLR (4th) 321.

*R v Edwards Books and Art Ltd*, [1986] 2 SCR 713, 35 DLR (4th) 1.

*R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385.

*Ross v New Brunswick School District No 15*, [1996] 1 SCR 825, 133 DLR (4th) 1.

*RWDSU v Dolphin Delivery Ltd*, [1986] 2 SCR 573, 33 DLR (4th) 174.

*Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11.

*Saumur v Quebec (City)*, [1953] 2 SCR 299, [1953] 4 DLR 461.

*Servatius v Alberni School District No 70*, 2020 BCSC 15.

*SL v Commission scolaire des Chênes*, 2012 SCC 7.

*Syndicat Northcrest v Amselem*, 2004 SCC 47.

*Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31.

*Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326.

*Trinity Western University v The Law Society of British Columbia*, 2016 BCCA 423.

*Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250.

*Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518.

*Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25.

*R (E) v Governing Body of JFS*, [2009] UKSC 15.

*Burwell v Hobby Lobby Stores, Inc*, 573 US 682 (2014).

*Masterpiece Cakeshop v Colorado Civil Rights Commission*, 584 US \_\_\_\_ (2018).

*Warner v Boca Raton (City)*, 64 F Supp (2d) 1272 (SD Fla 1999).

*Warner v Boca Raton (City)*, 267 F Supp (3d) 1223 (11th Cir 2001).

## SECONDARY MATERIAL: ARTICLES

- Ahmed, Farrah. "The Autonomy Rationale for Religious Freedom" (2017) 80 *Modern L Rev* 238.
- Ahmed, Rumea. "Ordinary Justice: A Theology of Islamic Law as a Social Construct" in Abbas Poya, ed, *Sharia and Justice: An Ethical, Legal, Political, and Cross-Cultural Approach* (Berlin: De Gruyter, 2018) 1.
- Alvarez, David. "Reading Locke after Shaftesbury: Feeling Our Way towards a Postsecular Genealogy of Religious Tolerance" in Mary Helen McMurrin & Alison Conway, eds, *Mind, Body, Motion, Matter: Eighteenth-Century British and French Literary Perspectives* (Toronto: University of Toronto Press, 2016) 92.
- Appiah, K Anthony. "Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction" in Charles Taylor et al, eds, *Multiculturalism: Examining the Politics of Recognition* (Princeton, NJ: Princeton University Press, 1994) 179.
- Askar, Jamshid Ghazi. "Scholar Michael W McConnell Mixes Law, Religion", *Deseret News* (9 January 2011), online: <www.deseretnews.com>.
- Barkey, Karen. "Islam and Toleration: Studying the Ottoman Imperial Model" (2005) 19 *Int'l J Pol Culture & Soc'y* 5.
- Benson, Iain T. "Notes toward a (Re)Definition of the Secular" (2000) 33 *UBC L Rev* 519.
- Berger, Benjamin L. "Assessing *Adler*: The Weight of Constitutional History and the Future of Religious Freedom" (2019) 39 *NJCL* 35.
- . "Law's Religion: Rendering Culture" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008).
- . "Liberal Constitutionalism and the Unsettling of the Secular" in Rex Adhar, ed, *Research Handbook on Law and Religion* (Cheltenham, UK: Edward Elgar Publishing, 2018) 198.
- . "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State" (2002) 17 *CJLS* 39.
- . "Religious Diversity, Education and the 'Crisis' in State Neutrality" (2013) 29 *CJLS* 103.
- . "Religious Freedom in Canada: A Crucible for Constitutionalism" (2018) 1 *Quaderni di Diritto e Politica Ecclesiastica* 111.
- Berlin, Isaiah. "The Pursuit of the Ideal" in Henry Hardy, ed, *The Proper Study of Mankind: An Anthology of Essays* (New York: Farrar, Strauss and Giroux, 1998) 1.
- Berlin, Isaiah & Bernard Williams. "Pluralism and Liberalism: A Reply" (1994) 41 *Political Studies* 306.
- Chan, Joseph. "Legitimacy, Unanimity, and Perfectionism" (2000) 29 *Phil & Public Affairs* 5.
- Chan, Kathryn. "The Duelling Narratives of Religious Freedom: A Comment on *Syndicat Northcrest v Amselem*" (2005) 45 *Alta L Rev* 451.
- . "Identifying the Institutional Religious Freedom Claimant" (2017) 95 *Can Bar Rev* 707.
- Cormier, Andr ee-Anne. "Must Schools Teach Religion Neutrally? The Loyola Case and the Challenges of Liberal Neutrality in Education" (2018) 45 *Religion & Educ* 308.
- Cover, Robert M. "Violence and the Word" (1986) 95 *Yale LJ* 1601.

- Craig, Elaine. "The Case for the Federation of Law Societies of Canada Rejecting Trinity Western University's Proposed Law Degree Program" (2003) 25 Can J Women & L 1.
- Crowder, George. "Value Pluralism and Monotheism" (2014) 7 Politics & Religion 818.
- Danchin, Peter G. "Suspect Symbols: Value Pluralism as a Theory of Religious Freedom in International Law" (2008) 33 Yale J Intl L 1.
- D'Costa, Gavin. "The Impossibility of a Pluralist View of Religions" (1996) 32 Religious Stud 223.
- Dorfman, Avihay. "Freedom of Religion" (2008) 21 Can JL & Juris 279.
- Dworkin, Ronald. "Liberal Community" (1989) 77 Calif L Rev 479.
- Eisenberg, Avigail. "Identity and Liberal Politics: The Problem of Minorities within Minorities" in Avigail Eisenberg & Jeff Spinner-Halev, eds, *Minorities within Minorities: Equality, Rights and Diversity* (Cambridge: Cambridge University Press, 2005) 249.
- . "Religion as Identity" (2016) 10 L & Ethics Human Rights 295.
- Eisgruber, Christopher L & Mariah Zeisberg. "Religious Freedom in Canada and the United States" (2006) 4 Intl J Constitutional L 244.
- Epp Buckingham, Janet. "Catholic Schools Can Be Catholic" (2015) 4 Oxford JL & Religion 308.
- Farber, Barry A & Arielle Poleg. "Campus Diversity, Jewishness, and Antisemitism" (2019) 45 J Clinical Psychology 1.
- Fielding, Alex. "When Rights Collide: Liberalism, Pluralism and Religious Freedom in Canada" (2008) 13 Appeal: Rev Current L & L Reform 28.
- Feldman, Noah. "Morality, Self-Interest, and the Politics of Toleration" (2008) 48 Nomos 392.
- Forst, Rainer. "'To Tolerate Means to Insult': Toleration, Recognition, and Emancipation" in Bert van den Brink & David Owen, eds, *Recognition and Power: Axel Honneth and the Tradition of Critical Social Theory* (Cambridge: Cambridge University Press 2009) 215.
- Gallant, Jacques. "Top Court to Weigh In on Accreditation for Christian Law School", *The Toronto Star* (5 November 2016), online: <www.thestar.ca>.
- Galston, William A. "Expressive Liberty, Moral Pluralism, Political Pluralism. Three Sources of Liberal Theory" (1999) 40 Wm & Mary L Rev 869.
- . "Religion, Conscience, and the Case for Accommodation" (2014) 51 San Diego L Rev 1045.
- . "Two Concepts of Liberalism" (1995) 105 Ethics 516.
- Gray, John. "Agonistic Liberalism" (1995) 12 Soc Phil & Pol'y 111.
- Grayling, A C. "Can an Atheist be a Fundamentalist?" in Christopher Hitchens, ed, *The Portable Atheist: Essential Readings for the Nonbeliever* (Philadelphia: Da Capo Press, 2007) 470.
- Greaves, Ron. "The Borders between Religions: A Challenge to the World Religions Approach to Religious Education" (1998) 21 British J Religious Educ 20.

- Harding, Mark S & and Ranier Knopff. “Constitutionalizing Everything: The Role of *Charter Values*” (2013) 18 *Rev Const Stud* 141.
- Halstead, J Mark. “Liberal Values in Liberal Education” in J Mark Halstead & Monica J Taylor, eds, *Values in Education and Education in Values* (London: The Falmer Press, 1996) 17.
- Hennette-Vauchez, Stéphanie. “Is French *Laïcité* Still Liberal? The Republican Project under Pressure (2004-15)” (2017) 17 *Human Rights L Rev* 285.
- Heyking, John von. “Civil Religion and Associational Life under Canada’s ‘Ephemeral Monster’: Canada’s Multi-Headed Constitution” in Ronald Weed & John von Heyking, eds, *Civil Religion in Political Thought* (Washington, DC: The Catholic University of America Press, 2010) 298.
- Honneth, Axel. “Recognition as Ideology” in Bert van den Brink & David Owen, eds, *Recognition and Power: Axel Honneth and the Tradition of Critical Social Theory* (Cambridge: Cambridge University Press, 2009) 323.
- Horner, Matthew. “Charter Values: The Uncanny Valley of Canadian Constitutionalism” (2014) 67 *SCLR* (2d) 361.
- Hick, John. “Religious Pluralism and Salvation” (1988) 5 *Faith & Phil* 365.
- Hickling, James. “*Ktunaxa Nation v British Columbia*: Sacred Sites and Saving Graces” (2020) 9 *Oxford JL & Religion* 193.
- Kislowicz, Howard. “The Court and Freedom of Religion” (2017) 78 *SCLR* (2d) 221.
- . “Developments in Religious Freedom: What *Saguenay* and *Loyola High School* Tell Us—and Don’t—about the Trinity Western University Law School Cases” (2016) 72 *SCLR* (2d) 75.
- . “Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation” (2013) 39 *Queen’s LJ* 175.
- Kislowicz, Howard & Senwung Luk. “Recontextualizing *Ktunaxa Nation v British Columbia*: Crown Land, History and Indigenous Religious Freedom” (2019) 88 *SCLR* (2d) 205.
- Koppelman, Andrew. “Gay Rights, Religious Liberty, and the Misleading Racism Analogy” (2020) 45 *BYUL Rev* 1.
- . “How Shall I Praise Thee—Brian Leiter on Respect for Religion” (2010) 47 *San Diego L Rev* 961.
- Lajevardi, Nazita & Kassra A R Oskooii. “Old-Fashioned Racism, Contemporary Islamophobia, and the Isolation of Muslim Americans in the Age of Trump” (2018) 31 *J Race Ethnicity & Politics* 112.
- Laws, Sir John. “The Rule of Law: The Presumption of Liberty and Justice” (2017) 44 *Judicial Review* 365.
- Leiter, Brian. “Foundations of Religious Liberty: Tolerance or Respect?” (2010) 47 *San Diego L Rev* 935.
- Locke, John. “A Letter Concerning Toleration” in Ian Shapiro, ed, *Two Treatises on Government and A Letter Concerning Toleration* (New Haven: Yale University Press, 2003).
- MacDonnell, Vanessa. “Developments in Constitutional Law: The 2011-2012 Term” (2012) 59 *SCLR* (2d) 51.
- Macklem, Timothy. “Faith as a Secular Value” (2000) 45 *McGill LJ* 1.
- Matar, Nabil. “John Locke and the Jews” (1993) *J Ecclesiastical History* 45.
- McConnell, Michael W. “Religion and Its Relation to Limited Government” (2010) 33 *Harv JL & Pub Pol’y* 943.

- McLachlin, Beverley. "Freedom of Religion and the Rule of Law: A Canadian Perspective" in Douglas Farrow, ed, *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal: McGill-Queen's University Press, 2004) 12.
- Minow, Martha. "Rights and Cultural Difference" in Austin Sarat & Thomas R Kearns, *Identities and Rights* (Ann Arbor, Mich: University of Michigan Press, 1995) 347.
- Moeller Okin, Susan. "Is Multiculturalism Bad for Women?" in Joshua Cohen, Matthew Howard & Martha C Nussbaum, eds, *Is Multiculturalism Bad for Women?* (Princeton, NJ: Princeton University Press, 1999) 7.
- Moon, Richard. "Christianity, Multiculturalism, and National Identity: A Canadian Comment on *Lautsi and Others v. Italy*" in Jeroen Temperman, ed, *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden: Martinus Nijhoff Publishers, 2012) 242.
- . "Freedom of Religion under the *Charter of Rights: The Limits of State Neutrality*" (2005) 45 UBC L Rev 497.
- . "*The Law Society of British Columbia v. Trinity Western University: Complicated Answers to a Simple Question*" (2019) 94 SCLR (2d) 335.
- . "Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*" (2005) 29 SCLR (2d) 201.
- Murphy, James Bernard. "Religious Violence: Myth or Reality? A Symposium on William T Cavanaugh's *The Myth of Religious Violence*" (2014) 15 Political Theology 480.
- Patten, Alan: "Liberal Neutrality: A Reinterpretation and Defence" (2012) J Political Philosophy 249.
- Petričušić, Antonija. "The Rights of Minorities in International Law: Tracing Developments in Normative Arrangements of International Organizations" (2005) 11 Croatian Intl Rel Rev 47.
- Plantinga, Alvin. "A Defense of Christian Exclusivism" in Thomas D Senior, ed, *The Rationality of Belief and the Plurality of Faiths: Essays in Honor of William P Alston* (Ithaca, NY: Cornell University Press, 1995) 191.
- Polèse, Mario. "Quebec's Bill 21: Is There Room for More Than One View of Religion in Canada?", *Policy Options Politiques* (4 August 2021), online: <[www.policyoptions.irpp.org](http://www.policyoptions.irpp.org)>.
- Rawls, John. "The Idea of an Overlapping Consensus" (1987) 7 Oxford J Legal Stud 1.
- Ross, Derek B M & Ian N Sinke. "Advancing Religion in a 'Neutral' State: Understanding Religion as a Constitutional Good" in Barry W Bussey, ed, *The Status of Religion and the Public Benefit in Charity Law* (London: Anthem Press, 2020) 129.
- Ryder, Bruce. "The Canadian Conception of Equal Religious Citizenship" in Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008) 87.
- . "State Neutrality and Freedom of Conscience and Religion" (2005) 29 SCLR (2d) 169.
- Schultz, Kevin M. "Religion as Identity in Postwar America: The Last Serious Attempt to Put a Question on Religion in the United States Census" (2006) 93 J American History 359.
- Scotti, Monique. "Support for Abortion Rights Strong in Canada, but Ipsos Poll Shows We Are 'Middle of the Pack' Globally", *Global News* (6 March 2017), online: <[www.globalnews.ca](http://www.globalnews.ca)>.
- Sirota, Leonid. "Unholy Trinity: The Failure of Administrative Constitutionalism in Canada" (2020) 2 J Commonwealth L 1.

Stueck, Wendy & Sunny Dhillon. "B.C's Trinity Western University Drops Mandatory Covenant Forbidding Sex outside Heterosexual Marriage", *The Globe and Mail* (14 August 2018), online: <www.theglobeandmail.com>.

Tannehill, Brynn. "The Difference between Tolerance and Acceptance", *The Huffington Post* (9 September 2014), online: <www.huffpost.com>.

Thakur, Ramesh. "From the Mosaic to the Melting Pot: Cross-National Reflections on Multiculturalism" in Chandran Kukathas, ed, *Multicultural Citizens: The Philosophy and Politics of Identity* (St Leonards, NSW: Centre for Independent Studies, 1993) 105.

Todd, Douglas. "The Bible Tells Them So: Why Homosexual Behaviour is Not Allowed at Trinity Western", *Vancouver Sun* (3 February 2013), online: <www.vancouversun.com>.

Tushnet, Mark. "Accommodation of Religion Thirty Years On" (2015) 38 Harv Women's LJ 1.

—. "The Constitution of Religion" (1986) 18 Conn L Rev 701.

Wall, Steven. "Public Reason and Moral Authoritarianism" (2013) 63 Phil Q 160.

Webber, Jeremy. "A Two-Level Justification for Religious Toleration" (2012) 4 J Indian L & Soc'y 25.

—. "Understanding the Religion in Freedom of Religion" in Peter Crane, Carolyn Evans & Zoë Robinson, eds, *Law and Religion Theoretical and Historical Context* (Cambridge: Cambridge University Press, 2003) 23.

Williams, Kent. "How the *Charter* Can Protect Indigenous Spirituality; or, the Supreme Court's Missed Opportunity in *Ktunaxa Nation*" (2019) 77 UT Fac L Rev 1.

Witten, Mark A. "Tracking Secularism: Freedom of Religion, Education, and the Trinity Western University Law School Dispute" (2015) 79 Sask L Rev 215.

Zaver, Arzina. "The Complexities of Neutrality in Teaching Religious Education: The Ethics and Religious Culture Program as a Case Study" (2015) 50 McGill J Educ 39.

#### SECONDARY MATERIAL: MONOGRAPHS

Audi, Robert. *Epistemology: A Contemporary Introduction to the Theory of Knowledge*, 3rd ed (New York: Routledge, 2011).

Asad, Talal. *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, Calif: Stanford University Press, 2003).

Barras, Amélie. *Refashioning Secularisms in France and Turkey: The Case of the Headscarf Ban* (London: Routledge, 2014).

Barry, Brian. *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Mass: Harvard University Press, 2001).

Beaman, Lori G. *Deep Equality in an Era of Religious Diversity* (Oxford: Oxford University Press, 2017).

Bejan, Teresa M. *Mere Civility: Disagreement and the Limits of Toleration* (Cambridge, Mass: Cambridge University Press, 2017).

Berger, Benjamin L. *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015).

- Brown, Wendy. *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton, NJ: Princeton University Press, 2006).
- Brown, Wendy & Rainer Forst. *The Power of Tolerance: A Debate*, ed by Luca Di Blasi & Christoph F E Holzhey (New York: Columbia University Press, 2014).
- Crowder, George. *Liberalism and Value Pluralism* (London: Continuum, 2002).
- Eberle, Christopher. *Religious Conviction in Liberal Politics* (Cambridge: Cambridge University Press, 2002).
- Eisgruber, Christopher L & Lawrence G Sagar. *Religious Freedom and the Constitution* (Cambridge, Mass: Harvard University Press, 2007).
- Forst, Rainer. *Toleration in Conflict: Past and Present* (Cambridge: Cambridge University Press, 2013).
- Galston, William A. *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (Cambridge, UK: Cambridge University Press, 2002).
- Gray, John. *Two Faces of Liberalism* (New York: New Press, 2000).
- Kukathas, Chandran. *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press, 2003).
- Kymlicka, Will. *The Rights of Minority Cultures* (Oxford: Oxford University Press, 1995).
- Larmore, Charles. *The Autonomy of Morality* (Cambridge: Cambridge University Press, 2008).
- Leiter, Brian. *Why Tolerate Religion?* (Princeton, NJ: Princeton University Press, 2013).
- Manent, Pierre. *An Intellectual History of Liberalism* (Princeton, NJ: Princeton University Press, 1995).
- Mead, Walter Russell. *God and Gold: Britain, America, and the Making of the Modern World* (New York: Vintage Books, 2008).
- Nussbaum, Martha. *The New Religious Intolerance* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2012).
- Perry, Michael J. *A Global Political Morality: Human Rights, Democracy, and Constitutionalism* (Cambridge, UK: Cambridge University Press, 2017).
- Pettit, Philip. *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012).
- Plantinga, Alvin. *Warranted Christian Belief* (Oxford: Oxford University Press, 2000).
- Preece, Jennifer Jackson. *Minority Rights: Between Diversity and Community* (Cambridge, UK: Polity, 2005).
- Rawls, John. *Political Liberalism* (New York: Columbia University Press, 2005).
- Raz, Joseph. *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Oxford University Press, 1994).
- . *The Morality of Freedom* (Oxford: Oxford University Press, 1986).
- Quong, Jonathan. *Liberalism without Perfection* (Oxford: Oxford University Press, 2011).

Ryan, Alan. *On Politics: A History of Political Thought from Herodotus to the Present*, vol 1 (New York: Liveright, 2012).

Shrubsole, Nicholas. *What Has No Place, Remains: The Challenges for Indigenous Religious Freedom in Canada Today* (Toronto: University of Toronto Press, 2019).

Smith, Jonathan Z. *On Teaching Religion: Essays by Jonathan Z. Smith*, ed by Christopher Lehrich (Oxford: Oxford University Press, 2013).

Sullivan, Winnifred Fallers. *The Impossibility of Religious Freedom* (Princeton, NJ: Princeton University Press, 2005).

—. *Prison Religion: Faith-Based Reform and the Constitution* (Princeton; Princeton University Press, 2009).

Swinburne, Richard. *The Coherence of Theism* (Oxford: Clarendon Press, 1977).

Taylor, Charles. *The Malaise of Modernity* (Concord, Ont: House of Anansi Press, 1991).

—. *Varieties of Religion Today: William James Revisited* (Cambridge, Mass: Harvard University Press, 2002).

Taylor, Charles & Jocelyn Maclure. *Secularism and Freedom of Conscience* (Cambridge, Mass: Harvard University Press, 2011).

Tully, James. *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 2012).

Wilson, Peter H. *The Thirty Years' War: Europe's Tragedy* (Cambridge, Mass: The Belknap Press of Harvard University Press, 2009).

#### OTHER MATERIAL

Haigh, Richard A. *A Burl on the Living Tree: Freedom of Conscience in Section 2(a) of the Canadian Charter of Rights and Freedoms* (SJD Thesis, University of Toronto Faculty of Law, 2012) [unpublished].

Koppelman, Andrew. "No Respect: Brian Leiter on Religion" (2010) Northwestern Pritzker School of Law Working Paper No 31.

Moon, Richard. "Ktunaxa Nation and the Shape of Religious Freedom" (1 January 2020), *Social Science Research Network*, online: <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3502988](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3502988)>.

Ontario, Ministry of Education. "Private Elementary and Secondary Schools", (Toronto: Ministry of Education, May 2020).

Québec, Ministère de l'Éducation et de l'Enseignement supérieur. "Background for the ERC Program" (Québec, QC: Ministère de l'Éducation et de l'Enseignement supérieur, September 2017).

Statistics Canada. "2011 National Household Survey: Immigration, Place of Birth, Citizenship, Ethnic Origin, Visible Minorities, Language and Religion", (Ottawa: Statistics Canada, May 2013).