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## The legal revolution against the place of religion: The case of Trinity Western University Law School

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Barry W. Bussey

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## The Legal Revolution Against the Place of Religion: The Case of Trinity Western University Law School

*Barry W. Bussey\**

*The special legal status of religion and religious freedom in liberal democracies has become an issue of controversy among legal academics and lawyers. There is a growing argument that religion is not special and that the law should be amended to reflect that fact. This Article argues that religion is special. It is special because of the historical, practical, and philosophical realities of liberal democracies. Religious freedom is a foundational principle that was instrumental in creating the modern liberal democratic state. To remove religion from its current legal station would be a revolution that would put liberal democracy in a precarious position. This is in part because the right to believe and practice one's religion has been described as a "prototypical" right. It blazed the trail for other commonly recognized rights such as freedom of association, assembly, speech, and fair trial. There is a broad need for a deeper appreciation of religion; in particular, it is vital to understand how its protection makes democracy work by keeping in check the tendency of the state to demand ultimate allegiance at the expense of individual conscience.*

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## I. INTRODUCTION

This Article posits that religious freedom is a foundational right and principle that was instrumental in creating the modern liberal democratic state. The historical, practical, and philosophical realities of liberal democracies justify maintaining religion's special treatment in Canadian law. In fact, respect for religious freedom as it accommodates religious practice is necessary for the practical implementation of liberal democratic theory. Religious freedom is a prototypical right that helped forge the path for the legal recognition of other rights such as freedom of assembly,<sup>1</sup> and freedom of speech. Indeed, as noted by James Q. Whitman, "the history of the common law is inextricably bound up with the general Western history of Christianity."<sup>2</sup> Whitman's account of the legal right to a fair trial beyond a reasonable doubt is but one example. It was the Christian moral theology that: "A judge who sentenced an accused person to a blood punishment while experiencing 'doubt' about guilt committed a mortal sin, and thus put his own salvation in peril," that underlay the concept of reasonable doubt.<sup>3</sup> However, there is a significant group of academics and practitioners in the legal profession that is challenging the role and respect that law has traditionally given to religious freedom in Canadian society. This opposition is becoming more pronounced in cases that arise from the clash of religious freedom with sexual equality rights.

This phenomenon is likened to a revolution. Revolutions have existed throughout history in various forms and areas of human existence. The theory of scientific revolutions is used to analyze the current legal revolution against the place of religious freedom in society. The Article also contrasts legal revolutions from scientific revolutions in its goals, methodology, and perspectives. These differences are based in the varying values and desired outcomes of each profession. The present legal revolution to strip religion of its favored legal status puts liberal democracy in a precarious position.

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1. JOHN D. INAZU, *LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* 164 (2012) (Inazu notes that in the United States it was the work of William Penn and Roger Williams that ensured dissenting religious groups could exercise their freedom in opposition to majoritarian norms.).

2. JAMES Q. WHITMAN, *THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL* 5 (2008).

3. *Id.* at 4.

There is a need among legal practitioners, academics, and judiciary alike for a deeper appreciation of religion and how its protection stabilizes democracies and keeps in check the state's tendency to demand ultimate allegiance at the expense of individual conscience. Through exploring Trinity Western University's ("TWU") law school proposal and the opposition to it by the legal profession, this Article seeks to demonstrate the practical application of its contention that opposition to religion's legal protection is revolutionary and, if successful, foreshadows a denial of democratic values and principles. Instead of an expansion of human rights, this opposition to religious freedom leads to a degradation of those rights, both institutionally and individually.

TWU is a private Christian university located in Langley, British Columbia ("BC"). To understand TWU's law school case you must first know that in 2001 the Supreme Court of Canada ("SCC") ordered the BC College of Teachers ("BCCT") to accredit TWU's education degree.<sup>4</sup> The BCCT had denied accreditation because of TWU's requirement that its students sign a "Community Standards" document that outlined the school's behavioral expectations of students.<sup>5</sup> Among those was the requirement that they not engage in activity outside of its religious sexual norms. The BCCT felt that TWU graduates who became public school teachers would discriminate against homosexual students.<sup>6</sup> The SCC recognized that the BC human rights legislation and the *Charter* did not apply to TWU.<sup>7</sup> It held that there was no evidence for the BCCT's claim<sup>8</sup> and allowed the mandamus order for the accreditation of TWU's education degree.<sup>9</sup>

In 2012, TWU proposed a law school and sought accreditation at the Federation of the Law Societies of Canada.<sup>10</sup> That submission

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4. Trinity W. Univ. v. B.C. Coll. of Teachers, 2001 SCC 31, [2001] 1 S.C.R. 772, para. 43 (Can.).

5. *Id.* at paras. 5,6.

6. *Id.* at para. 21.

7. *Id.* at para. 25.

8. *Id.* at paras. 35, 42.

9. *Id.* at para. 43.

10. TRINITY W. UNIV., PROPOSAL FOR A SCHOOL OF LAW AT TRINITY WESTERN UNIVERSITY, (June 2012), <https://www.twu.ca/sites/default/files/assets/proposal-for-a-school-of-law-at-twu.pdf>.

created a huge controversy in the legal profession because TWU continued to require students to sign a “Community Covenant” that stated, in part, “[i]n keeping with biblical and TWU ideals, community members voluntarily abstain from . . . sexual intimacy that violates the sacredness of marriage between a man and a woman.”<sup>11</sup> The legal profession’s regulators in BC,<sup>12</sup> Ontario,<sup>13</sup> and Nova Scotia<sup>14</sup> carried out an unprecedented review of the law school proposal despite the Federation’s approval.<sup>15</sup> These law societies ultimately rejected the law school and are now defending their decisions in court.<sup>16</sup>

The TWU case illustrates the legal community’s awkwardness in having to support a legal framework that is out of step with their own current thinking on religion’s place in the public sphere. For many, religion has no place outside houses of worship.<sup>17</sup> That position argues

11. *Community Covenant Agreement*, TRINITY W. UNIV., <https://www.twu.ca/student-handbook/university-policies/community-covenant-agreement> (last visited Nov. 5, 2016).

12. *LSBC Seeks Input on Proposed TWU Law School*, DYE & DURHAM, <https://www.dyedurhambc.com/news/bc-law-watch/lsbc-seeks-input-on-proposed-twu-law-school/> (last visited Jun. 14, 2016).

13. *Treasurer’s Remarks on the Law School Program Proposed by Trinity Western University* (Jan. 23, 2014), <http://goo.gl/Os1qZF>.

14. *Seeking input on Trinity Western’s application for a law school*, N.S. BARRISTERS’ SOC’Y (Feb. 13, 2014), <http://nsbs.org/event/2014/02/seeking-input-trinity-westerns-application-law-school-feb-13>.

15. *Trinity Western University’s Proposed Common Law Program*, FED’N L. SOC’YS CAN., <http://www.flsc.ca/en/twu-common-law-program/> (expressing concerns with TWU’s teaching of legal ethics and public law and the budget of the proposed law program.).

16. The Law Society of British Columbia’s materials are found at: <https://www.lawsociety.bc.ca/page.cfm?cid=3912>; The LSBC lost TWU’s judicial review at the BC Supreme Court in *Trinity W. Univ. v. Law Soc’y of Upper Can.*, 2015 ONSC 4250 (Can.), and the LSUC was successful at the Ontario Court of Appeal in *Trinity W. Univ. v. Law Soc’y of Upper Can.*, 2016 ONCA 518 (Can.). The ONCA decision is currently on appeal at the SCC. *See also TWU Matter*, Nova Scotia Barristers’ Society (<http://nsbs.org/twu-matter>). The NSBS lost TWU’s judicial review at the Nova Scotia Supreme Court in *Trinity W. Univ. v. Nova Scotia Barristers’ Soc’y*, 2015 NSSC 25 (Can.), and further lost at the NS Court of Appeal in *Nova Scotia Barristers’ Soc’y v Trinity W. Univ.*, 2016 NSCA 59 (Can.). The NSBS decided not to appeal to the SCC. *See Update on Trinity Western University Matter*, Nova Scotia Barristers’ Society (<http://nsbs.org/news/2016/08/update-trinity-western-university-matter>).

17. Robert Wintemute, *Religion vs. Sexual Orientation: A Clash of Human Rights?*, 1 J.L. & EQUAL. 125, 141 (2002) (“Although religious individuals may find it hard to put their religious beliefs aside when they enter the public sphere, a liberal democracy cannot function in any other way. This also means that religious individuals who accept employment in the public sector cannot insist on being exempted from serving LGBT individuals or same-sex couples,

that religious communities must abide by public norms when operating a state-recognized university. The complex relationship between the individual and the state is laid bare. State denial of TWU's law degree, because of its admissions policy, is being challenged in court as an unconstitutional interference with the freedom of religion. This Article presents an argument that such a denial is problematic. In short, it argues that the individual, being the basic unit of our democracy, must maintain the right to determine his or her responsibility to the spiritual sovereign<sup>18</sup> of his or her life; otherwise the individual is no longer free.

In Part II we begin with a description of religion's special legal status before the legal revolution that seeks to change that status. I argue that religion's peculiar place in the law is due to the human search for meaning and purpose. The truth claims that came as a result of that search were often at odds with the demands of the state. There were (and still are) two claims on a person's allegiance—the personal conscience (religion) and the state. However, through historical, practical, and philosophical realities in the Western context we ended up with religion's special place in the law.

Part III introduces the concept of revolution and how it applies to the current debate about religion and its interaction with sexual equality claims. To help with this analysis, I use the work of Thomas S. Kuhn and his evaluation of how new scientific ideas could go from being outliers to mainstream scientific understandings of the world. Kuhn's analysis forms a backdrop to consider whether a similar process might also happen in law. There are a number of acknowledged differences between science and law. However, I suggest it is a good vantage point to consider how religion's special place in the law, which would not have been challenged in a significant way fifty years ago, is today deemed an unnecessary relic of the past.

Finally, the Article closes by arguing that we have to agree to disagree if we are to live in peace, order and good government on the same real estate. It is my position that religion's special status is critical for the democratic experiment because it is a prototypical right, in that it has trailblazed for other rights.

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whether this involves selling them stamps, teaching them, or a few years from now, marrying them.”).

18. “Sovereignty” is defined *infra* Section II.C.



## II. BEFORE THE REVOLUTION: RELIGION IS SPECIAL AND UNIQUE

*A. Religion's Special Legal Treatment*

A cursory glance at the law of liberal democracies reveals the prominent role religious accommodation plays in liberal society. Religion has been, and continues to be, treated by the law as special. Consider, for example, that holy days must be accommodated in the workplace,<sup>19</sup> but a day off to attend a political rally is not. Similarly, a student in school may wear a religious ceremonial dagger,<sup>20</sup> but a student wearing a hunting knife in school would not be tolerated. Further, an individual of the Jewish faith may erect a sukkah on his or her condominium balcony during his or her religious holy days, but a person would not be permitted to set up a small tent for non-religious purposes.<sup>21</sup> These are three examples of religiously motivated acts that are accommodated, despite the fact that those same acts motivated by non-religious beliefs would not be tolerated. We must conclude that there is something unique about religion that created a willingness in Western law to be flexible in exempting religious practices from generally applicable legal norms.<sup>22</sup> In order to have a coherent conception of freedom of religion, we must first affirmatively value religion.<sup>23</sup>

Broad respect for religious rights is deeply rooted in the traditional and important place of the Christian faith in Canadian history. Justice Rand in *Saumur v. City of Quebec* provides a brief history of this fact

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19. Ont. Human Rights. Comm'n v. Simpsons-Sears, Ltd., [1985] 2 S.C.R. 536 (Can.).

20. Multani v. Comm'n scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256 (Can.).

21. Syndicat Northcrest v. Amselem, [2004] 2 S.C.R. 551 (Can.).

22. An in-depth study about the "public good" of religion is not something this paper is addressing though it would certainly be germane to a larger work. Brevity requires that the "public good" tributary not be canvassed here. There are a number of compelling pieces on that point that I refer the reader to James Davison Hunter, *Law, Religion, and the Common Good*, 39 PEPP. L. REV. 1065 (2013). For a provocative psychological argument see ARA NORENZAYAN, *BIG GODS: HOW RELIGION TRANSFORMED COOPERATION AND CONFLICT* (2013). For an empirical analysis of religion's economic value to society see Brian J. Grim & Melissa Grim, *The Socio-economic Contribution of Religion to American Society: An Empirical Analysis*, 12 INTERDISC. J. RES. ON RELIGION (2016), <http://www.religjournal.com/pdf/ijrr12003.pdf>.

23. As Jeremy Webber notes, "we are fooling ourselves if we think we can define a coherent conception of freedom of religion without recognizing that the freedom presupposes an affirmative valuing of religion." Jeremy Webber, *Understanding the Religion in Freedom of Religion*, in *LAW AND RELIGION IN THEORETICAL AND HISTORICAL CONTEXT* 27 (Peter Cane, Carolyn Evans & Zoë Robinson eds., 2008).

in Canadian law.<sup>24</sup> “The Christian religion,” Justice Rand maintained, “stands in the first rank of social, political and juristic importance.”<sup>25</sup> From 1760, religious freedom has been recognized in the Canadian legal system “as a principle of *fundamental character*.”<sup>26</sup> That the “untrammelled affirmations of religious belief and its propagation, personal or *institutional, remain as of the greatest constitutional significance throughout the Dominion is unquestionable*.”<sup>27</sup> Further, he suggested that freedom of religion was among the “original freedoms,” and thus was a necessary attribute and mode of human self-expression that forms the primary conditions of “*community life* within a legal order.”<sup>28</sup> Rand not only saw the importance of the religious life of the individual but also understood the “communal” aspect of religion that has a powerful impact on society as reflected in the law.

The legal imposition of distinctly Christian norms, as seen in the former Sunday legislation, is no longer given the same recognition in Canadian law.<sup>29</sup> This is true, for that matter, in most other Western democracies as well.<sup>30</sup> However, there are vestiges of that heritage that

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24. *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, 329 (Can.).

25. *Id.* at para. 88.

26. *Id.* at para. 89 (emphasis added).

27. *Id.* at paras. 89, 96 (emphasis added).

28. *Id.*

29. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 337 (Can.). In this case, Chief Justice Brian Dickson rejecting the constitutionality of The Lord’s Day Act stated:

To the extent that it binds all to a sectarian Christian ideal, the Lord’s Day Act works a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture.

Non-Christians are prohibited for religious reasons from carrying out activities which are otherwise lawful, moral and normal. The arm of the state requires all to remember the Lord’s Day of the Christians and to keep it holy. The protection of one religion and the concomitant non protection of others imports disparate impact destructive of the religious freedom of the collectivity . . . .

*Id.* (emphasis omitted).

30. Consider for example the changes in the U.K. that has relaxed blue law restrictions on larger stores at *Trading hours for retailers: the law*, GOV.UK (Sept. 23, 2016), <https://www.gov.uk/trading-hours-for-retailers-the-law>.

remain in the law. In Canada, for example, the Roman Catholic Church elementary and secondary schools in the Province of Ontario still retain government funding because of the provisions of the *Constitutional Act, 1867*.<sup>31</sup> Philosophers such as Jürgen Habermas continue to observe the pivotal role Christianity played in laying the foundation of our current liberal democracy.<sup>32</sup>

Habermas is of the view that Christianity's normative force in modern self-understanding is more than a mere precursor or a catalyst.<sup>33</sup> Egalitarian universalism and ideas of freedom, individual rights, human rights, and democracy directly flow from the Judaic ethic of justice and the Christian ethic of love.<sup>34</sup> He sees no alternative, and we continue to draw on this heritage. For Habermas, "Everything else is just idle postmodern talk."<sup>35</sup>

Religion has played a crucial role in Western legal tradition and it continues to influence cultural and legal norms. However, there are different social and legal streams of thought seeking to dismantle and remove all vestiges of Christian normativity. In particular, the opposition is directed at the Christian sexual norm of heterosexual marriage.<sup>36</sup> Although such a norm is not limited to Christianity, this Article emphasizes the Christian religion because of its profound influence in Western law.

Religion's special treatment by the law is based on the presupposition that religion is valuable. Lawmakers, public policy makers, opinion leaders and society at large have held this view, both now and in generations gone by. The next Section will demystify why the law has so tenaciously protected religion as part of the liberal democratic legal framework.

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31. Constitution Act, 1867, 30 & 31 Vict. c. 3 (U.K.); *see also* *Adler v. Ontario*, [1996] 3 S.C.R. 609 (Can.).

32. SOC. SCI. RESEARCH COUNCIL, *THE POST-SECULAR IN QUESTION: RELIGION IN CONTEMPORARY SOCIETY* (Philip S. Gorski et al. eds., 2012).

33. JÜRGEN HABERMAS, *TIME OF TRANSITIONS* 150–51 (Ciaran Cronin & Max Pensky eds. & trans. 2006)

34. *Id.*

35. *Id.*

36. Bruce MacDougall, *The Separation of Church and State: Destabilizing Traditional Religion-based Legal Norms on Sexuality*, 36 U.B.C. L. REV. 1 (2003).

*B. The Search for Meaning and Purpose*

The special status of religion is rooted in what it means to be human. From the very beginning of human consciousness, many have posed fundamental questions about the meaning and purpose of human life. The search for those answers led to the ontological and epistemological struggle toward knowledge by introducing questions such as, “what do I know,” “how can I know that I know,” “who am I,” “where did I come from,” “what is my purpose,” and “where am I going.” Such questions are fundamental to human existence and coexistence.

Our search for meaning has had a profound impact on the place of religion within our legal framework. As Harold Berman suggests, “neither law nor history can be understood, and more than that, neither can be preserved, if the legal tradition of which they are both part is forgotten or rejected.”<sup>37</sup> Beyond any doubt, Christian religion highly influenced Western legal tradition.

The historical record suggests that religion was not added to the constitutions of liberal democracies by chance, but rather by design.<sup>38</sup> This design is firmly established in a history steeped in human events and philosophical inquiry as to the meaning of life. Religion was not an invention for political manipulation of the colonial populations as “a means of pinning down and managing the ideas and practices”<sup>39</sup> for the best interests of the West. Religion has always had and continues to have a major role assisting humanity in understanding the world and one’s duty toward the other in alleviating human suffering.

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37. HAROLD J. BERMAN, *LAW AND REVOLUTION II: THE IMPACT OF THE PROTESTANT REFORMATIONS ON THE WESTERN LEGAL TRADITION* 382 (2003).

38. Consider the full debate over the First Amendment in the US Constitution so aptly retold in JOHN WITTE, JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* 64–86 (2000).

39. DEREK PETERSON & DARREN WALHOF, *THE INVENTION OF RELIGION: RETHINKING BELIEF IN POLITICS AND HISTORY* 7 (2002).

*C. A Tale of Two Sovereignties*

“Sovereign is he who decides on the exception.”<sup>40</sup>

This classical definition of sovereignty by Carl Schmitt is an appropriate place to start the discussion about sovereignty. With whom does the “buck” stop? Who is the authority that has the ultimate say on ultimate things? These questions bedevil us.<sup>41</sup> Schmitt noted that an exception to a legal norm is not contained in the norm.<sup>42</sup> It can only be permitted by the sovereign—the one who has “the authority to suspend valid law.”<sup>43</sup> That is “unlimited authority.”<sup>44</sup>

“Whether God alone is sovereign,” said Schmitt, in the form of God’s representative on earth, “or the emperor, or prince, or the people . . . the question is always aimed at the subject of sovereignty, at the application of the concept to a concrete situation.”<sup>45</sup> The interplay between law and religion that is addressed by this Article involves concrete realities over how the body politic will deal with the non-conformist religious entities who claim allegiance to a sovereign beyond the political sovereign.

Sovereignty is bifurcated into political and religious sovereignty. Indeed Schmitt noted that:

All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development – in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver—but also because of their

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40. CARL SCHMITT, *POLITICAL THEOLOGY* 5 (2005).

41. F.H. HINSLEY, *SOVEREIGNTY* (2d ed. 1986); DIETER GRIMM & BELINDA COOPER, *SOVEREIGNTY: THE ORIGIN AND FUTURE OF A POLITICAL AND LEGAL CONCEPT* (2015); ROBERT JACKSON, *SOVEREIGNTY: EVOLUTION OF AN IDEA* (2007); *SOVEREIGNTY IN FRAGMENTS: THE PAST, PRESENT AND FUTURE OF A CONTESTED CONCEPT* (Hent Kalmo & Quentin Skinner eds., 2010).

42. Schmitt, *supra* note 40, at 6.

43. *Id.* at 9.

44. *Id.* at 12.

45. *Id.* at 10.

systematic structure, the recognition of which is necessary for a sociological consideration of these concepts.<sup>46</sup>

Every person is faced with two claims (or spheres) of loyalty or allegiance: state and religious. Both claim sole allegiance. The first claim is the state where one lives and/or has citizenship—it may be called “the secular claim of sovereignty.” The state, did not always consider itself “secular” (that is to say, religiously neutral).<sup>47</sup> Rather, the state has often claimed to be divine, thereby having ultimate authority. The other claim of sovereignty comes from within the personal conscience. It is separate from the state and referred to as the private realm. It often has a personal and/or communal conception of the divine or Supreme Being. This is the religious claim of sovereignty.

Throughout history there has been a constant struggle between the two claims. The state, in whatever form, has often sought to impose its authority on the individual conscience. The one consistent exception to that general rule is the modern liberal democratic society. However, even when liberal democracies have failed to protect the individual conscience, they often did so knowingly and in exceptional circumstances, with the specific promise that it would be monitored in accordance with democratic principles and restored in due course.<sup>48</sup>

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46. *Id.* at 36.

47. Even the claim that there is such a thing as “religiously neutral” is not without its critics.

48. On June 18, 1940, Rt. Hon. MacKenzie King, Prime Minister of Canada, introduced the War Measures Mobilization Act, to authorize government to take all necessary means to fight Germany in WWII including the imposition of conscription and the right to expropriate property for the war cause. He said in the House of Commons, “It must be kept in mind that we shall be administering this legislation not as a body of dictators, free from any kind of control, but as a responsible government, responsible to the House of Commons and, through the House of Commons, to the people. If we bear this all important fact in mind, then I think it will be found that there is ample security as to the way in which the government may exercise the powers given it under the legislation.” House of Commons Debates, 18th Parliament, 6th Session: Vol. 1, p. 903, [http://parl.canadiana.ca/view/oop.debates\\_HOC1806\\_01/925?r=0&s=3](http://parl.canadiana.ca/view/oop.debates_HOC1806_01/925?r=0&s=3). Further, King recognized that his government would honour Canada’s historical commitment to religious groups not to force them to bear arms for their settling in the country. “I wish solemnly to assure the house and the country that the government have no desire and no intention to disturb the existing rights of exemption from the bearing of arms which are enjoyed by members of certain religious groups in Canada, as for example the Mennonites. We are determined to respect these rights to the full.” House of Commons Debates, 18th Parliament, 6th Session: Vol. 1, p. 904. Note he did not commit to those religious groups who had no such agreement with the government. However, eventually the government did provide a means for other religious groups to obtain religious exemptions from having to bear arms. See Barry W. Bussey, *Humbug!*

The fact that liberal democracies go to great lengths to explain why individual conscience had to be violated in a given situation is, in and of itself, a recognition of the importance of the concept.

Despite their differences, law and religion must cooperatively coexist in order to make liberal democracy work. Because both claim sole allegiance of the individual, they are required to arrive at a *détente* on the issue of sovereignty. Liberal democratic society works best when sovereignty is bifurcated in two spheres. One is temporal sovereignty, or the duty to follow the law of the land. This refers to human-made law, or “positive law,” as defined by legislatures, courts, and custom. The second is spiritual sovereignty, or the duty to follow the law of God. This refers to the non-human-made law that is defined by holy books or divine revelation, or “natural law,” as understood by the individual conscience. The current battles between law and religion are analogous to the ancient battles over sovereignty. Some two thousand years ago, it was stylized this way by Jesus: “Render therefore unto Caesar the things which are Caesar’s; and unto God the things that are God’s.”<sup>49</sup>

For a liberal democracy to work, both law and religion must have one common objective: to provide the most effective means whereby the individual has the greatest amount of freedom to pursue happiness, as he or she defines it, while at the same time maintaining civil peace in the political community. This will be referred to as the “Liberal Democratic Project.” The Reformation and its aftermath provided the West its paramount identity—individual freedom.<sup>50</sup> The individual is responsible to obey the respective sovereign demands of the state and his or her religious or conscientious conviction.

Any disruption to the delicate balance between the two spheres of sovereignty ultimately results in the modern state’s attempt to dominate both. This happens because the state has executive power; that is, an army and a police force that it can use to enforce its dictates.

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*Seventh-day Adventist conscientious objectors in WWII standing before the Mobilization Board*, 6.3 DIVERSITY MAG. (2012), <http://www.ohrc.on.ca/en/creed-freedom-religion-and-human-rights-special-issue-diversity-magazine-volume-93-summer-2012/humbug-seventh-day-adventist-conscientious-objectors-wwii-standing-mobilization>.

49. *Matthew* 22:21 (King James).

50. ALISTER E. MCGRATH, *CHRISTIANITY’S DANGEROUS IDEA: THE PROTESTANT REVOLUTION—A HISTORY FROM THE SIXTEENTH CENTURY TO THE TWENTY-FIRST* (2007).

In Western democracies, religions do not have armies.<sup>51</sup> While some militias have taken on religious garb over the years, as in Northern Ireland for example,<sup>52</sup> the reality is that throughout the modern period, meaning post-Reformation, Western religious groups have not taken up arms to enforce their edicts on society.<sup>53</sup> This crucial fact has not received much attention from Western critics of religion.

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

Once the state takes over both spheres of sovereignty, it takes on “divine” characteristics, meaning that it becomes omniscient and omnipotent. It assumes it can determine for the individual what will ultimately be sovereign.<sup>54</sup> At that point, the liberal democratic society that places high value on individual autonomy is in severe crisis and may, in fact, be over. This is the modus operandi of dictatorships. Therefore, the bifurcation of sovereignty forms the very foundation of liberal democratic theory and requires the continuation of the unique status of religion in liberal democratic societies.

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51. Perhaps the criticism of Christianity is due, in no small part, because of the fear of ISIL-like religion. Thanks to Paul Cliteur for this insight.

52. EX-COMBATANTS, RELIGION, AND PEACE IN NORTHERN IRELAND: THE ROLE OF RELIGION IN TRANSITIONAL JUSTICE 13 (John D. Brewer, David Mitchell & Gerard Leavey eds., 2013) (“[P]olitical and religious leaders who viewed politics as a religious battle succeeded in inspiring their followers to see the national cause with a similar intensity of conviction, whether or not those people shared the leaders’ religious beliefs.”).

53. It truly is absurd in Western religious thought to think that violence is the means to advance a religious cause. Consider the pacifists groups like the Quakers and the Mennonites. Or groups like Seventh-day Adventists with their refusal to bear arms in war. Even the mainstream Christian & Jewish groups eschew force. WILLIAM T. CAVANAUGH, *THE MYTH OF RELIGIOUS VIOLENCE* (2009) makes a convincing argument on this point. The view that the religion in the West is “dangerous” and should therefore be removed from the public is a myth says Cavanaugh. Rather, the myth becomes a justification for the violence of western democracies against Muslim societies. Today’s violence of the West is seen as “secular, rational, peace making, and regrettably necessary to contain *their* violence. We find ourselves obliged to bomb them into liberal democracy.” *Id.* at 4.

54. *See, e.g.*, DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN art. 3 (France 1789), [http://avalon.law.yale.edu/18th\\_century/rightsof.asp](http://avalon.law.yale.edu/18th_century/rightsof.asp) (“The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation.”).



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

*D. The Three Realities of Western Experience*

Liberal democratic societies found a formula that provides unprecedented peace and stability, leading to expansive personal and economic freedom. That formula is the rebuttable presumption that religious belief and practice should be as maximally accommodated as can be reasonably expected in the circumstances. This formula is the result of the three realities of the collective experience of Western democracies: the historical, the practical, and the philosophical.

*1. Historical*

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

The use of religion as a means of cementing loyalty to the state has a long pedigree. As we will see, such use of religion led to great abuse and we would do well not to repeat it. Polybius, after living seventeen years in Rome, wrote in 150 BC, “The quality in which the Roman commonwealth is most distinctly superior is, in my judgment, the nature of its religion. The very thing that among other nations is an object of reproach—i.e., superstition—is that which maintains the cohesion of the Roman state.”<sup>55</sup>

Western democratic thought has been profoundly influenced by Israel as well as the Greek and Roman civilizations. In ancient Rome, the “eternal city,”<sup>56</sup> the two sovereignties were combined. The sovereignty of man and the sovereignty of the divine were together in

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55. WILL DURANT, *CAESAR AND CHRIST* 93 (1944) (quoting 4 POLYBIUS, *HISTORIES* 56 (Loeb Classical Library ed. 1925)).

56. JOHN WITTE JR., *GOD’S JOUST, GOD’S JUSTICE: LAW AND RELIGION IN THE WESTERN TRADITION* 9 (2006).

the personhood of the emperor.<sup>57</sup> The emperor was both the king of man and God of man—the ultimate authority.<sup>58</sup> The temporal and divine authorities were personified in the emperor.

The advent of the Christian religion saw sovereignty bifurcated to the temporal and the divine. The emperor was merely human and not divine. Divinity existed only in the Christian God, expressed in the three Persons of the Godhead.<sup>59</sup> However, Constantine's conversion put in process the "syncretism of Roman and Christian beliefs" that "subordinated the Church to imperial rule."<sup>60</sup> State domination of the Roman Catholic Church continued until the Papal Revolution in the late 11th century when Pope Gregory VII led the clergy to throw "off their civil rulers and established the Roman Catholic Church as an autonomous legal and political corporation within Western Christendom."<sup>61</sup>

Over time the ascendance of the church brought the temporal and the divine back together in the office of the Roman Pontiff who "claimed the supremacy of the spiritual sword over the temporal," though he claimed to do so indirectly.<sup>62</sup> Christendom combined church and state, with the pope presiding over the territorial kings.<sup>63</sup> The church developed its own system of canon law administered by its courts, registered citizens by baptism, taxed by tithes, conscripted through crusades, and educated the populace in its schools.<sup>64</sup> In short,

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57. Indeed even before Rome the ancient Greeks recognized their kings as divine. Numa Denis Fustel de Coulanges describes it this way, "A king was a sacred being; βασιλεις λεργοι, says Pindar. Men saw in him, not a complete God, but at least 'the most powerful man to call down the anger of the gods; the man without whose aid no prayer was heard, no sacrifice accepted.'" NUMA DENIS FUSTEL DE COULANGES, *THE ANCIENT CITY: A STUDY OF THE RELIGION, LAWS, AND INSTITUTIONS OF GREECE AND ROME* 178 (Dover Publications 2006) (Willard Small trans., 1955).

58. Speaking of Augustus, Edward Gibbon writes, "Augustus permitted indeed some of the provincial cities to erect temples to his honour, on condition that they should associate the worship of Rome with that of the sovereign." 1 EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* 91 (1993).

59. That is to say, the Father, the Son, and the Holy Spirit.

60. WITTE JR., *supra* note 38, at 11.

61. *Id.* at 12.

62. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 115 (1983).

63. MCGRATH, *supra* note 50, at 326.

64. WITTE JR., *supra* note 38, at 15.

the church was the first modern state in the West.<sup>65</sup> Granted, it did not have the same freedoms we associate with a modern state, but it had a form of the executive, legislative, and judicial branches that we find familiar in today's states.

Of course, the church did not totally dominate the state in all situations, nor did the state dominate the church in all contexts. Which institution dominated was complicated by the personalities involved, the issues to be decided, and the territories concerned. Both clergy and lay—the spiritual and the secular—were ostensibly working for the salvation of embodied souls.<sup>66</sup> However, corruption was rife; both spheres were caught up with avarice, nepotism, and abuse of power. According to University of Notre Dame professor Brad S. Gregory, the Reformation would crystalize the dominance of secular leaders over the church.<sup>67</sup>

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

## *2. Practical: the tension between religion and the law*

When confronted with an obstinate citizenry, Western states could not force religious belief or practice without being willing to let rivers of blood, fear, and suffering appear on the streets.<sup>68</sup> Nor did the state

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65. BERMAN, *supra* note 37, at 113.

66. BRAD S. GREGORY, *THE UNINTENDED REFORMATION: HOW A RELIGIOUS REVOLUTION SECULARIZED SOCIETY* 132 (2012).

67. *Id.* at 166.

68. Canadian authorities tried to convince Mennonites to agree to alternative service camps under military control in light of the Mennonites refusal to bear arms in WWII. At one point during the negotiations Maj.-Gen. L. R. La Fleche, then deputy Minister of the National War Services, stated in frustration, "What'll you do if we shoot you?" Jacob H. Janzen, of the Mennonites and who had escaped the Bolshevik Revolution in Russia, replied, "Listen, Major General, I want to tell you something. You can't scare us like that. I've looked down too many rifle barrels in my time to be scared in that way. This thing is in our blood for 400 years and you can't take it away from us like you'd crack a piece of kindling over your knee. I was before a firing squad twice. We believe in this." WILLIAM JANZEN, *THE EXPERIENCE OF MENNONITE, HUTTERITE, AND DOUKHOBOR COMMUNITIES IN CANADA* 207 (1990).

have the resources to ensure that all citizens believed and practiced the state religion.

What was a state to do with a religious person or group of persons who refused to follow the social and legal norms because they violated their religious sensibility? While methods such as burning heretics at the stake for translating the Bible or drowning those who insisted on adult baptism were used during the Reformation as a means of maintaining order, they were ultimately found not to be the appropriate manners for maintaining civil peace. Religious freedom for the unpopular and even the most eccentric religious views was deemed the best way forward.<sup>69</sup>

Law is very much a pragmatic endeavor. As part of the liberal project, it is tasked with ensuring that societal rules are making peace, order, and good government possible. Allowing the individual the maximum amount of freedom in his or her religious pursuit, as long as it did not disturb the peace, provided general stability. Experience had taught liberal democracies that religion was to be accommodated. When the majority in society developed an orthodox position on views of the transcendent and codified them into law, it created a conflict with the religious conscience of minority and dissenting views.<sup>70</sup> The emotive content of the ensuing clash of wills resulted in bloodshed.<sup>71</sup> That experience, along with the growing philosophical understanding that the human heart could not be forced to believe that which it found repugnant and the theological view that God did not require

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69. BRIAN TIERNEY, RELIGIOUS LIBERTY IN WESTERN THOUGHT 29 (Noel B. Reynolds & W. Cole Durham, Jr. eds., 1996).

70. For example, the taking of an oath was often seen as a requirement for a witness to give evidence or for a public official to take office because it induced “the fear and reverence of God, and the terrors of eternity.” WITTE, JR., *supra* note 56, at 181. However, as Witte noted this requirement was eventually dropped to accommodate the religious minorities. *Id.* at 182.

71. Early in the Reformation period violence broke out between the state authorities and the emerging Protestants. The Anabaptist uprising in Germany of 1525 was at a cost of some 100,000 lives. JAMES M. STAYER, THE GERMAN PEASANTS’ WAR: AND ANABAPTIST COMMUNITY OF GOODS 20 (1991). French Huguenots were attacked in March 1562 in France when Francois, duke of Guise opened fire on some 500 whose only infraction was holding an illegal worship service. DIARMAID MACCULLOCH, THE REFORMATION: A HISTORY 296–97, 483 (2004). These events only increased in intensity in the coming decades. On August 24, 1572, some 5000 Huguenots suffered execution in the St. Bartholomew’s Day massacre. A semblance of peace arrived with the Peace of Westphalia when church and state recognized that “crusades simply had not worked” in maintaining a united church. *Id.* at 483.

forced obedience to the truth, permitted society to adopt an accommodating stance toward religious dissenters.<sup>72</sup>

The state could no longer be sovereign in the transcendent issues. It was finite. In matters of conscience it had to remain silent, and it had to accept diversity. Religious warfare had run its course. “A yearning for peace led to a new emphasis on toleration,” Professor Alister McGrath explained, “and growing impatience with religious disputes.”<sup>73</sup> By 1700 the religious wars were at an end and the Enlightenment<sup>74</sup> made the case that religion had to be a private matter otherwise it would be a source of conflict.<sup>75</sup> Soon it became evident that the search for truth was an ongoing project.<sup>76</sup> It had no end; therefore, individuals and religious communities would be granted the space to practice their own understanding of their requirements for compliance with the Sovereign God as they understood Him. The state had no jurisdiction in such matters.<sup>77</sup>

However, as the prominent Yale professor of Protestant history Rolland Bainton pointed out, religious freedom “has come to depend upon a diversion of interest.”<sup>78</sup> As long as the religious practice and belief is of no consequence to the state, the liberal state will not hinder its practice. However, the moment religious practice or belief becomes politically salient to the affairs of the state, one can always expect the liberal state to interfere in its own self-interest.

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72. NICHOLAS P. MILLER, *THE RELIGIOUS ROOTS OF THE FIRST AMENDMENT: DISSENTING PROTESTANTS AND THE SEPARATION OF CHURCH AND STATE* (2012).

73. MCGRATH, *supra* note 50, at 143.

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

75. MCGRATH, *supra* note 50, at 144.

76. This is readily seen in Thomas Jefferson’s writing of Virginia’s “A Bill for Establishing Religious Freedom.” The Bill noted, “that truth is great and will prevail if left to herself; that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them.” THOMAS JEFFERSON, *WRITINGS* 347 (1984).

77. JAMES MADISON, *Memorial and Remonstrance against Religious Assessments*, in 5 *AMENDMENT I (RELIGION)* 82 (1785), [http://press-pubs.uchicago.edu/founders/documents/amendI\\_religions43.html](http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html) (“We maintain therefore that in matters of Religion, no mans right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance.”).

78. ROLAND H. BAINTON, *THE TRAVAIL OF RELIGIOUS LIBERTY* 15 (1958).

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

### 3. *Philosophical*

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

Liberalism is "the philosophical tradition that undergirds the Western ideal of a political democracy."<sup>79</sup> It seeks to provide a basis for civil peace among the many varying, and often contradictory, ideas in society, thereby allowing for the maximum participation of individuals in society. Charles Larmore describes liberalism as "the hope that, despite [the] tendency toward disagreement about matters of ultimate significance, we can find some way of living together that avoids the rule of force."<sup>80</sup>

Defining liberalism with any great certainty is a precarious prospect as there are many philosophers comprising the liberal community, to which each has added a significant dimension. For example, John Rawls uses the term "full autonomy" to distinguish his version of liberalism from the "comprehensive liberalisms" views of Immanuel Kant and John Stuart Mill.<sup>81</sup> Rawls does not permit "comprehensive viewss" or general philosophical moral doctrine of the good life into his "political liberalism," unlike Kant and Mill.<sup>82</sup>

There are, however, some recognizable characteristics of liberalism that are the basis of the discussion: individualism, egalitarianism,

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79. REX AHDAR & IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE 51 (2013).

80. Charles Larmore, *Political Liberalism*, 18 POL. THEORY 339, 357 (1990); AHDAR & LEIGH, *supra* note 79, at 39.

81. JOHN RAWLS, POLITICAL LIBERALISM 78 (1993).

82. *See id.* at 78, 145, 196; AHDAR & LEIGH, *supra* note 79, at 39.

universalism, and meliorism.<sup>83</sup> Robert Sharpe adds freedom and neutrality.<sup>84</sup> Law professors Rex Ahdar and Ian Leigh further suggest rationalism—the favoring of reason over emotion.<sup>85</sup> In reality, all of these characteristics have a degree of overlap on the core concerns of liberal theory.

The primary focus of liberal theory is a quest to discover the rational explanation for the most effective relationship between the individual and the state that permits the greatest potential for self-realization in an atmosphere of civil peace. Although it is a quest that has all kinds of permutations, there are three core concerns of liberal theory: the rational argument, the individual, and the state. These three concerns form the basis that permits religious freedom in the liberal state.

The concept of religious freedom wherein the individual is free to believe and practice his or her own religion is very much a part of the liberal democratic emphasis on rationality<sup>86</sup>, individuality, and the neutrality of the state. Liberalism sees each individual person “as worthy as any other, that each must be treated with equal concern according to some coherent conception of what that means.”<sup>87</sup>

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83. JOHN GRAY, *LIBERALISM* xii (2nd ed. 1995); AHDAR & LEIGH, *supra* note 79, at 39 (“Common to all variants of the liberal tradition is a definite conception, distinctly modern in character, of man and society. What are the several elements of this conception? It is *individualist*, in that it asserts the moral primacy of the person against the claims of any social collectivity; *egalitarian*, inasmuch as it confers on all men the same moral status and denies the relevance to legal or political order of differences in moral worth among human beings; *universalist*, affirming the moral unity of the human species and according a secondary importance to specific historic associations and cultural forms; and *meliorist* in its affirmation of the corrigibility and improvability of all social institutions and political arrangements. It is this conception of man and society which gives liberalism a definite identity which transcends its vast internal variety and complexity.”).

84. Robert Sharpe, *THE CAMBRIDGE LECTURES 1991*, 265–66, (Frank E. McArdle ed., 1991); AHDAR & LEIGH, *supra* note 79, at 40. Freedom is the idea that the state’s role is to maximize the human dignity, self-fulfillment, and autonomy while minimizing the interference with individual moral choice; neutrality—the state and law is to be neutral as to the conception of the good life.

85. AHDAR & LEIGH, *supra* note 79, at 40.

86. However, it must be recognized that over the course of recent decades the idea that religious belief was rational has fallen off. Today the popular account is that religion is irrational as per BRIAN LEITER, *WHY TOLERATE RELIGION?* (2012), we have come a long way since Martin Luther’s statement at the Diet of Worms that he needed to be convinced by “clear argument.” 7 PHILIP SCHAFF, *HISTORY OF THE CHRISTIAN CHURCH* 304–05 (1995).

87. RONALD DWORKIN, *LAW’S EMPIRE* 213 (1986).

*E. Prototypical Nature of Religious Freedom*

The historical, practical, and philosophical realities of the experience with religion allowed the West to learn important democratic truths. The peculiar nature of and the struggle over religion required its special protection in the law. As former Chief Justice Dickson noted in *Big M Drug Mart*, “[r]eligious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*.”<sup>88</sup> Consider the following two examples.

First, freedom of expression, speech, and the press were noted by the Supreme Court of Canada in *Dolphin Delivery*<sup>89</sup> where the Court referenced author John Milton’s appeal to the British Parliament in 1664<sup>90</sup> against requiring authors to obtain a government license before publishing their books. Milton argued,

[W]ho kills a Man kills a reasonable creature, Gods Image; but hee who destroyes a good Booke, kills reason it selfe, kills the Image of God, as it were in the eye. Many a man lives a burden to the Earth; but a good Booke is the pretious life-blood of a master spirit, imbalm’d and treasur’d up on purpose to a life beyond life.<sup>91</sup>

Second, Chief Justice McLachlin and Justice LeBel recognized freedom of association in *Mounted Police Association of Ontario v. Canada*<sup>92</sup> as having “its roots in the protection of religious minority groups.”<sup>93</sup>

Religion is the manifestation of humanity’s quest to understand the meaning and purpose of life. The revelation of one’s personal opinion on his or her religious beliefs or non-beliefs engenders approbation from some but condemnation from others. It is, by nature, intensely personal and yet public at the same time. Western

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88. R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, para. 123 (Can.).

89. Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573 para. 13 (Can.).

90. John Milton, *Areopagitica; A Speech For the Liberty of Unlicenc’d Printing, to the Parliament of England (1664)*, [https://www.dartmouth.edu/~milton/reading\\_room/areopagitica/text.s.html](https://www.dartmouth.edu/~milton/reading_room/areopagitica/text.s.html).

91. *Id.*

92. *Mounted Police Ass’n of Ontario v. Att’y Gen. of Canada*, 2015 SCC 1, [2015] 1 S.C.R. 3 (Can.).

93. *Id.* at para. 56.



Christianity, including the Reformation, required the West's acquiescence in granting religion space to freely operate. The modern spin suggests that religion can only operate in the "private" sphere. For example, Richard Rorty argues, "we shall not be able to keep a democratic political community going unless the religious believers remain willing to trade privatization for a guarantee of religious liberty."<sup>94</sup> Rorty is not necessarily demanding that religion is to be cloistered, or that religious people are required to hide their religion, as religion will often surface in public discussion and debate. To the extent that one does not want religion to dominate the state, one could agree with him wholeheartedly. However, the genius of the West to maintain a peaceful society is the recognition from the state that it cannot be sovereign in matters of individual conscience. Trouble ensues the moment the state thinks it is God and rejects the Liberal Democratic Project.

*F. The Law Must Maintain Religion's Special Status*

The growing skepticism<sup>95</sup> within the legal establishment toward religion's special place in constitutional law is robust and problematic. The repudiation of religion's special status will greatly upset the structure of liberal democracy. It denies the historical lessons learned. Pragmatically, it will make it very difficult for religious individuals and their collective communities to obey a law that violates their conscientious commitment to "God's law." Philosophically, the state will have taken jurisdiction over the individual so that he or she is no longer free. Sovereignty will no longer be bifurcated. The state will see itself as having all knowledge of truth and being the final arbiter thereof. Such omniscience would intrude on an individual's self-understanding of what his or her obligation is to truth. In short, the state will be divine, not unlike the ancient Roman emperors. The state alone will possess the keys to ultimate reality and become sovereign in every sense of the word. In truth, a liberal democracy, by definition, will not be considered a dictatorship, as was ancient Rome. However, that does not mean that a liberal democracy will not struggle, based on a host of circumstances such as external crises (perceived or actual) that make a population willing to forego individual protections in the

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94. RICHARD RORTY, *PHILOSOPHY AND SOCIAL HOPE* 170–71 (1999).

95. YOSHI NEHUSHTAN, *INTOLERANT RELIGION IN A TOLERANT-LIBERAL DEMOCRACY* (2015); LEITER, *supra* note 86.

name of security. While state divinity is a problem in dictatorships and much less of an issue in democracies, it is nevertheless a possibility—especially when the populace has made up its own mind that a minority view, such as a religious viewpoint (e.g. TWU’s view and practice on marriage), is categorically unacceptable.

State divinity is a problematic concept. It removes the power of choice in determining the ultimate meaning and purpose of life from the individual. It destroys free will, which is the very essence of humanity. The core of religious freedom is the core of humanity’s search for meaning. To suggest religion be removed from constitutional protection is to strike at the very core of humanity; it would be unethical and immoral.

Religion is an intrinsic part of the human experience and the desire for meaning, and, like science, is part of the search for truth. My reading of liberal democratic theory is that it seeks to maximize the freedom of the individual while maintaining civil peace in the search for ultimate reality. Liberal democracies are linear in outlook in that they are ever striving for the “pursuit of happiness.” The concept of progress with its ideas of a brighter future motivates the populace. The relationship between religion and democracy has struggled over sovereignty but found equilibrium by granting religion special status. To trifle with that status will weaken, if not dismantle, the Liberal Democratic Project and will force Western society to relearn why religion was designated as special in our law to begin with.

Individual religious freedom was a protection of the new world order where sovereignty was again separated in the temporal and spiritual, thus allowing the individual to fulfill his or her personal religious obligation. The temporal sovereignty of the nation state was thereby kept in check. If the special treatment of religion, as found in most constitutions of Western democracies, is removed by reading down the protection by judicial interpretation (which is more likely than actually amending a constitution to remove the religious head), then spiritual sovereignty will again be united with temporal sovereignty. The individual would no longer have the right to fulfill his or her duty to his or her spiritual sovereign. Such a move would destroy the liberal democratic society as currently understood.

## III. THE REVOLUTION AGAINST RELIGION

“As the spirit of a people changes, so inevitably does their law.”

John Witte, Jr.<sup>96</sup>

The special place of religion in the law is under the scrutiny of an influential segment of the legal profession. The denunciation of religious norms on human sexuality is driving this reevaluation of religion’s status. More particularly, the religious norm regarding marriage as between one man and one woman is what offends religion’s legal detractors. The critical position of the legal profession and the legal scholars that reject religion’s special legal status will be a legal revolution.

*A. The Scientific Revolution: A Comparative Model*

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

The scientific community has at least two distinct sub-communities: the theoretical and the experimental. The first works with “pure” scientific theory and experiments to understand nature. The other is a more practical scientific group—the applied scientists. They belong to the “technological” group. The technocratic fruits of science are often co-opted by business entrepreneurs who manufacture goods for public consumption. Thus, in many quarters there is a symbiotic relationship between science and business. This is not an easy path to follow, as there are a number conflicting interests, as can be seen in the ongoing debate about business support of universities.

There are distinct characteristics in science that are essential for our purposes: the community is seeking the truth of what is, it has a dedicated group that works with theory and experiential knowledge to determine what is true, and there are practical implications that impact society at large. The scientific community relies on established paradigms to determine how best to address any anomaly that research

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96. JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN THE WESTERN TRADITION 13 (1997).

may uncover. Such paradigms are based upon the researchers' presuppositions and assumptions when they ask questions to determine what should or should not be done to address any new development the scientific community faces.

Like the scientific community, the legal community has at least two subgroups. One is comprised of those who spend a considerable part of their careers addressing the theoretical and social constructs of the law and are often confined to academic pursuits at the university. The other is the practitioners of law—the lawyers—who apply the principles they learned from their legal training to the problems faced by their clients in day-to-day living. The pursuit of law, at least in theory, has lofty aspirations such as justice, equality, human rights, free and democratic society, and the rule of law. These ideals, and more, are used in law's pursuit of making society a better place. Like the scientific community, the legal community has its own paradigms that provide its presuppositions and assumptions on how practical matters should be approached. Law is different from the scientific community in that it has hierarchical structure that settles professional debate—at the top of which is the SCC. The scientific community has no such arbiter.

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

*B. The Qualitative Difference: Law Settles Disputes; Science  
Seeks Truth*

The practice of law is not science. It does not seek to find the truth of the matter in the same way the scientific field seeks truth; rather, law's emphasis is on settling disputes. The legal practitioner is concerned about achieving the best possible result for his or her client. For good or for ill, the common law system is adversarial. Nevertheless, truth of a sort is a goal of the legal apparatus. The legal system as a whole is meant to decipher the truth (the "what happened?") in any given case, provided all parties and systems are working as they should. As long as the judge, or jury, remains neutral

to the outcome of the dispute and the advocates present their respective clients' best positions in conformity with all of the rules of procedure and ethical standards of the profession, then we presume that truth will emerge. However, it is not science. It cannot be said with absolute certainty that the truth was established even when the legal system worked, that is to say, solved the dispute.

To illustrate this peculiar nature of law, seeking a settlement within the established legal rules despite the "truth" of the matter, consider the fact that a lawyer will often have a personal opinion of justice that is different from his or her client's opinion. The lawyer, in other words, is expected to advocate even for a position that he or she would not personally hold. It is the lawyer's role to represent the client. Science, at its best, however, would not do that. A scientist would not be expected to advocate for a position that he or she knows to be wrong *ab initio*. Rather, he or she would be expected to present his or her research in as objective a manner as possible, recognizing that he or she does so within the scientific paradigm, as noted above. His or her research is to discover the universal, the necessary, and the certain by means of observation, explanation, prediction, and control. That does not mean there is no rogue scientist who would sacrifice professional opinion in favor of his or her pharmaceutical employer for fear of job security. Yet, hopefully that is rare and such a scientist would not be applauded.

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

### *C. The Commonalities Between Revolutions*

History is replete with revolutions of all kinds, social, political, scientific, technological, and I suggest, legal. Although revolutions are often styled as eruptions that originate within the hearts and minds of the common people, it is more likely that revolutions arise from one group of elites who are dissatisfied with the rule of other elites in power and who capture the imagination of the populace with the idea that life will be better under a new regime.

Consider the parallels between political and scientific revolutions.<sup>97</sup> First, a political revolution arises from a sense among the ruling political community that existing institutions are no longer able to adequately govern in the current environment.<sup>98</sup> A scientific revolution arises when scientists recognize that the current paradigm is no longer adequate and accurate to explain a particular natural phenomenon. Second, political revolutions attempt to change political institutions that prohibit such change.<sup>99</sup> The only way forward is to destroy the old institution. This creates a crisis gap where no institution is ruling. The conservative camp demands a return to the old, while the progressive seeks to implement new institutions. Appeals are made to the masses either by persuasive means or political force. Likewise, in the scientific community, there may be a number of different groups—with each group favoring one particular paradigm as the accurate description of the scientific fact and therefore being the legitimate explanation of the particular phenomenon. For an indeterminate amount of time, depending on the situation, arguments made for the respective paradigms tend to be persuasive only to those within that group.<sup>100</sup> “As in political revolutions,” says Thomas Kuhn, “so in paradigm choice—there is no standard higher than the assent of the relevant community.”<sup>101</sup> However, over time as more evidence gathers and as opinions coalesce one group’s paradigm will gain favor in the wider community vis-à-vis the rest. Ultimately, the broader scientific community as a whole will decide what paradigm is legitimate.

#### *D. The Anatomy of a Scientific Revolution*

The scientific community argued for hundreds of years that its discoveries were an accurate description of reality. It argued that its discoveries were universal, necessary, and certain.<sup>102</sup> Scientists describe their process of discovery as the scientific method applied to data in an objective and consistent manner. Objectivity is paramount.

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97. THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 93 (1970).

98. *Id.* at 92.

99. *Id.* at 93.

100. *Id.* at 94.

101. *Id.*

102. 1 STEVEN L. GOLDMAN, *SCIENCE WARS: WHAT SCIENTISTS KNOW AND HOW THEY KNOW IT* 14 (2006).

Therefore, logical reason, not emotion or intuitive bias, is the means of analysis and organization of the data. The ubiquitous scientific method consists of a multi-staged experiential process of deductive analysis that includes observation of a specific phenomenon, measurement, and experiment to establish a theoretical hypothesis of what scientists think is reality or truth. Once a theory is formulated which can explain, predict, and control phenomena, it will be tested, yet again, with further experimentation to determine whether modification of the hypothesis is necessary. This method is deemed the proper *objective* approach for determining the reality of what is.<sup>103</sup>

However, we have now come to understand that scientific truth is temporal and therefore not immutable. What was determined to be true years ago has subsequently been found to be inadequate. For example, Sir Isaac Newton's law of gravity was found by Albert Einstein to have fallen short of the truth in that "[i]t did not explain why the gravitational force on an object was proportional to its inertial mass."<sup>104</sup>

New revelations of scientific discovery displacing an older truth in one form or another has become a common feature of scientific experience. Previously, the accepted view was that new discoveries did not replace the truth of the past, but actually built upon that truth. Thomas Kuhn discovered otherwise, as will be discussed below.

### *1. Paradigm*

Scientists operate within a conceptual paradigm that explains the world. Whenever there is an anomaly, it is explained either as part of the paradigm or it is ignored. The paradigm creates a bias or a lens through which everything is viewed. Kuhn noted in his book *The Structure of Scientific Revolutions* that "something like a paradigm is prerequisite to perception itself."<sup>105</sup> The paradigm is the accepted view of the world. It is perceived as the "correct" view from which flow the assumptions and presuppositions that are automatically applied to any new data that must be interpreted. This results in the use of subjective analysis when making decisions about what the data revealed.

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103. For an introductory description see HUGH G. GAUCH, JR, SCIENTIFIC METHOD IN BRIEF 267–68 (2012).

104. See *Gravity as Curved Space: Einstein's Theory of General Relativity*, U. WINNIPEG, (Sept. 29, 1999), [http://theory.uwinnipeg.ca/mod\\_tech/node60.html](http://theory.uwinnipeg.ca/mod_tech/node60.html).

105. KUHN, *supra* note 97, at 113.

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

## 2. *Crisis*

With the passage of time, anomalies accumulate that do not fit the paradigm. The normal course for scientists faced with “anomalies” in their scientific study is to address them in one of two ways: first, to see them as being part of the “dominant paradigm,” or second, to ignore them altogether.<sup>106</sup> However, as anomalies increase over time they stretch the paradigm's ability to explain them. Then, inexplicably, there comes an epiphany—someone in the community realizes that such “anomalies” challenge the very legitimacy of the paradigm itself. This creates a crisis that is met with resistance from scientists that continue to look to the dominant paradigm.<sup>107</sup>

Such resistance is not negative, as it forces scientists not to be lightly distracted. The resistance also means that when there is a discovery it will lead to a “paradigm change [that] will penetrate existing knowledge to the core.”<sup>108</sup> “Retooling,” in this framework, “is an extravagance to be reserved for the occasion that demands it.”<sup>109</sup>

The time of crisis is when scientists focus their attention on the anomalies. This focus has the effect of loosening expectations while providing incremental data necessary for the paradigm shift.<sup>110</sup> Resolution is possible by either reconfiguring the paradigm or establishing a new paradigm that explains, predicts, and controls the anomalous findings.

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106. *Id.* at 52.

107. *Id.* at 64.

108. *Id.* at 65.

109. *Id.* at 76.

110. *Id.* at 89.



### 3. *Eureka moment*

After much debate, the crisis is solved as a scientist connects the dots between the anomalies and the paradigm to discover that there is a need for a new paradigm. This creates tension with those who have invested their career in the old paradigm.

How the new paradigm forms remains a mystery. One who is deeply immersed in the crisis connects the dots, “sometimes in the middle of the night.”<sup>111</sup> Kuhn notes that scientists speak of “scales falling from the eyes” or a “lightning flash” enabling them to see the solution in a new way and for the first time.<sup>112</sup> They are “flashes of intuition through which a new paradigm is born.”<sup>113</sup> Often, the discoverers are young scientists, new to the field. They are “little committed by prior practice to the traditional rules of normal science, [and] are particularly likely to see that those rules no longer define a playable game and to conceive another set that can replace them.”<sup>114</sup>

“[W]hen paradigms change, the world itself changes with them. . . . It is rather as if the professional community had been suddenly transported to another planet where familiar objects are seen in a different light and are joined by unfamiliar ones as well.”<sup>115</sup>

### 4. *Consolidation*

The new paradigm eventually takes precedence as the community coalesces with the new. The scientific community is effective at solving the problems that its paradigm identifies, but it is not effective in creating new approaches.<sup>116</sup> Those in the insular scientific community, with their shared training and experience, are the sole possessors of the rules of science and what counts as progress. When a community decides that a revolution has occurred, there will be only one paradigm that gains prominence and authority for defining the new problems for science to investigate.<sup>117</sup>

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111. *Id.* at 90.

112. *Id.* at 122.

113. *Id.* at 123.

114. *Id.* at 90.

115. *Id.* at 111.

116. *Id.* at 166.

117. Kuhn describes it this way:

The scientists who lead the charge for a new paradigm when going through the crisis are usually young or so new to the scientific field that they are less committed than their colleagues to the worldview and rules determined by the old paradigm.<sup>118</sup> Charles Darwin expressed that his findings would have difficulty being accepted by his colleagues: “I look with confidence to the future,” he stated, “to young and rising naturalists, who will be able to view both sides of the question with impartiality.”<sup>119</sup> It does take time, often a generation, for the old paradigm to lose its influence.

Scientists who operated under the old paradigm throughout their entire careers are loath to give it up. “The transfer of allegiance from paradigm to paradigm is a conversion experience that cannot be forced.”<sup>120</sup> Despite the new paradigm’s ability to solve the crisis and the objective proof that it does so, it remains very difficult to convince members of the community to shift paradigms. Therefore, the process of switching allegiances is gradual. There is no single argument that is persuasive.<sup>121</sup>

The triumphant group supporting the new paradigm within the scientific community gets to be on the edge of progress “and they are in an excellent position to make certain that future members of their community will see past history in the same way.”<sup>122</sup> The repudiation of a past paradigm means that it is no longer “a fit subject for professional scrutiny” and all previous works based on that paradigm are of no use.<sup>123</sup> This “drastic distortion in the scientist’s perception of

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When, in the development of a natural science, an individual or group first produces a synthesis able to attract most of the next generation’s practitioners, the older schools gradually disappear. In part their disappearance is caused by their members’ conversion to the new paradigm. But there are always some men who cling to one or another of the older views, and they are simply read out of the profession, which thereafter ignores their work. The new paradigm implies a new and more rigid definition of the field. Those unwilling or unable to accommodate their work to it must proceed in isolation or attach themselves to some other group.

*Id.* at 18–19.

118. *Id.* at 144.

119. *Id.* at 151 (quoting 2 CHARLES DARWIN, ON THE ORIGIN OF SPECIES 295–96 (6th ed. 1889)).

120. *Id.*

121. *Id.* at 155–56.

122. *Id.* at 166.

123. *Id.* at 167.

his discipline's past" makes the member of the scientific community a "victim of a history rewritten by the powers that be."<sup>124</sup>

### *E. The Legal Revolution*

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

However, arguments are now being advanced that religion is not special,<sup>125</sup> or, if it is special, such "distinctiveness provides reasons for not tolerating it."<sup>126</sup> Such arguments would take away the special accommodations given to religion. One of the galvanizing issues for those against religion's unique treatment is the religious norm regarding human sexuality that defines marriage as being limited to one man and one woman. This religious norm is seen as repugnant and not worthy of legal accommodation. The new legal position is so different from the current legal paradigm on religion that it is revolutionary.

The opposition to TWU's law school proposal clearly illustrates that the legal revolution on the status of religion is now in the crisis stage.<sup>127</sup> There is a significant group within the legal profession that would deny TWU's right to rely upon the current legal paradigm on religion.<sup>128</sup> For lack of a better term I will label the group "the anti-

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124. *Id.*

125. Micah Schwartzman, *What if Religion Is Not Special?* 79 U. CHI. L. REV. 1351 (2012).

126. NEHUSHTAN, *supra* note 95, at 191.

127. While the TWU case is Canadian, I suggest the same principles are at stake for the legal profession in every liberal democratic country.

128. For example, The Schulich School of Law Outlaw Society, in its factum at the Nova Scotia Court of Appeal (2015 C.A. No. 438894), argued, at paragraphs 29–31, that "the fact that TWU is not subject to the *Charter* is irrelevant." In other words, the current paradigm that exempts private religious universities from *Charter* scrutiny since the *Charter* only applies to government means nothing. The law, therefore, is apparently immaterial because "*Charter values*" of "equality and respect for human dignity" trump.

TWU group.”<sup>129</sup> This anti-TWU group advocates for a new paradigm that takes away religious accommodation, as historically understood,<sup>130</sup> especially when religious belief and practice are at odds with its own norm on human sexuality.<sup>131</sup> This anti-religion faction has been highly influenced by legal academics who have advocated this position for a number of years.<sup>132</sup>

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129. By using the term “anti-TWU group” I am not meaning it in a disparaging manner. It is descriptive. This group of academics and legal professionals are of the view that TWU represents the old bigotry of years gone by. They see TWU as not only anachronistic in its religious beliefs and practices but somehow dangerous to liberal democracy. This is most unfortunate as there is every indication that TWU and its graduates have been exemplary in providing university education and service. The Law Society of B.C. conducted its own investigation into whether TWU graduates were involved in discriminatory conduct at BC’s three public law schools. They came up empty. What they did find from the University of Victoria was that the 2011 gold medalist was a former TWU student. (Memorandum from Policy and Legal Servs. Dept. to The Benchers (Mar. 31, 2014). The fact that the Law Society felt that was even necessary shows, in my view, a stereotypical anti-religious bias against TWU. It is reasonable to imagine the public outcry if a similar investigation was conducted on graduates of B.C. public universities. “Anti-TWU group” seems therefore appropriate but it is indicative of all academics and legal professionals who wish to expunge from the law any semblance of traditional protections given to religion in the law that TWU has been relying on in its defense.

130. The justices of the Ontario Division Court challenged the argument that TWU’s discriminatory Covenant is entitled to the protection of exemptions in human rights legislation. Said the Court, “discrimination is still discrimination, regardless of whether it is unlawful. The fact that, for policy reasons, a Provincial Legislature has chosen not to make certain acts of discrimination actionable under human rights legislation does not mean that those acts are any less discriminatory. The Community Covenant, by its own terms, constitutes a prejudicial treatment of different categories of people. It is, therefore, by its very nature, discriminatory.” *Trinity W. Univ. v. Law Soc’y of Upper Can.*, [2015] 126 O.R. 3d 1, para. 108 (Can.).

131. Paul Bramadat, *Managing and Imagining Religion in Canada from the Top and the Bottom: 15 Years After*, in BENJAMIN L. BERGER AND RICHARD MOON, *RELIGION AND THE EXERCISE OF PUBLIC AUTHORITY* 67 (2016), describes the opposition to TWU law school on the basis that “the covenant: a) discriminates against individuals engaged in lawful sexual activities, b) is not in keeping with the ostensibly secular professional standards governing other law programmes and legal societies in Canada, and c) is contrary to the spirit and the letter of the Charter of Rights and Freedoms that protects same-sex relationships.”

132. See e.g., Robert Wintemute, *Religion vs. Sexual Orientation: A Clash of Human Rights?* 1 J.L. & EQUAL. 125 (2002); MacDougall, *supra* note 36; Bruce MacDougall & Donn Short, *Religion-based Claims for Impinging on Queer Citizenship*, 33 DALHOUSIE L.J. 133 (2010); Elaine Craig, *The Case for the Federation of Law Societies Rejecting Trinity Western University’s Proposed Law Degree Program*, 25 CAN. J. WOMEN & L. 148 (2013) [hereinafter Craig, *Rejecting Trinity Western’s Proposal*]; Elaine Craig, *TWU Law: A Reply to Proponents of Approval*, 37 DALHOUSIE L.J. 621 (2014) [hereinafter Craig, *TWU Law*].

As evidenced by the decisions on TWU in the Supreme Courts of Nova Scotia<sup>133</sup> and British Columbia,<sup>134</sup> there yet remains, at least within the judiciary, some allegiance to religion's special legal status as historically understood. Their decisions on TWU suggest that the proposal of the new paradigm is still too radical a departure from the law. However, even the judiciary is not unified, as evidenced by the decisions of the Ontario Divisional Court<sup>135</sup> and the Ontario Court of Appeal<sup>136</sup> against TWU.

If this legal revolution against religion travels on the same trajectory that scientific revolutions have in the past, there are a number of long-term implications that need to be considered. This Section will outline the legal revolution on religion and consider its implications.

*1. The paradigm: religion is special and should be accommodated*

We have already established that Canadian law treats religion as special. However, it is worthwhile to step back and consider just how widespread the accommodation of religion remains in Canadian law. Religion is accommodated in a myriad of legal statutes and judicial decisions. Consider that human rights legislation continues to allow religious communities to discriminate in their hiring practices based upon their religious beliefs and practices.<sup>137</sup> Provincial legal regimes also recognize religion in such matters as providing for special legislation for the ownership of land<sup>138</sup> and numerous special religious exemptions, including exemptions from:

- consumption or sales tax on religious literature<sup>139</sup>
- property tax<sup>140</sup>

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133. *Trinity W. Univ. v. N.S. Barristers' Soc'y*, 2015 NSSC 25, [2015] N.S.J. No. 32 (Can.); *N.S. Barristers' Soc'y v. Trinity W. Univ.*, 2016 NSCA 59 (Can.)

134. *Trinity W. Univ. v. Law Soc'y of B.C.*, [2015] B.C.J. No. 2697 (Can.); *Trinity W. Univ. v. Law Soc'y of B.C.*, 2016 BCCA 423 (Can.).

135. *Trinity W. Univ. v. Law Soc'y of Upper Can.*, 126 O.R. 3d 1; *Trinity W. Univ. v. Law Soc'y of Upper Can.*, 2016 ONCA 518 (Can.).

136. *Trinity W. Univ. v. Law Soc'y of Upper Can.*, 2016 ONCA 518 (Can.).

137. *Human Rights Act*, R.S.N.S. 1989, c 214, s. 6(c)(ii) (Can.).

138. *E.g.*, *Religious Congregations and Societies Act*, R.S.N.S. 1989, c 395 (Can.).

139. *Excise Tax Act*, R.S.C. 1985, c E-15, Sched. III, Part III, s. 1 (Can.).

140. *E.g.*, *Assessment Act*, R.S.N.S. 1989, c 23, s. 5(1)(b) (Can.).

- regular school activities for religious observance<sup>141</sup>
- entertainment tax<sup>142</sup>
- having photographs taken for gun licenses<sup>143</sup>
- having to eat regular food in prisons.<sup>144</sup>

One of the better-known special treatments of religion is found in Canada's charity law, which allows religious organizations to receive registered charitable status and the consequent charitable tax donation privileges for the advancement of religion.<sup>145</sup> Further, religious views on marriage were protected when the *Income Tax Act* was amended to shield religious charities from tax penalties due to exercising their religious freedom on the issue of same-sex marriage.<sup>146</sup>

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

## 2. *The paradigm under siege*

The legal paradigm that presumes religion is special and ought to be accommodated is now challenged by legal academics and has erupted into a robust debate.<sup>147</sup> An increasing chorus suggests that

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141. Schools Act, 1997, S.N.L. 1997 c S-12.2, s. 10 (Can.).

142. City of St. John's Act, R.S.N.L. 1990, c C-17, s. 271(1) (Can.).

143. Firearms Licences Regulations, SOR/98-199, s. 14 (2) (Can.).

144. Correctional Services Act, S.N.S. 2005, c 37, s. 58(2) (Can.).

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

146. R.S.C. 1985, c 1 at s. 149.1(6.21). This was a consequential amendment to the *Civil Marriage Act*, necessitated by challenges threatened to religious communities by certain activists at the time.

147. Tore Lindholm & W. Cole Durham, *Do We Need the Right to Freedom of Religion or Belief* (May 25, 2011) (paper presented at the Norwegian Centre for Human Rights, Oslo, Norway); Brian Leiter, *Why Tolerate Religion*, 25 CONST. COMMENT. 1 (2008); Brian Leiter,

religion, as a constitutionally protected right, is redundant, and argues that there are other constitutional protections religion could avail itself of, such as freedom of association and freedom of speech.<sup>148</sup> In fact,

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*Foundations of Religious Liberty: Toleration or Respect?*, 47 SAN DIEGO L. REV. 935 (2010); Dieter Grimm, *Conflicts Between General Laws and Religious Norms*, 30 CARDOZO L. REV. 2369 (2009); Micah Schwartzman, *What if Religion Isn't Special*, <http://ssrn.com/abstract=1992090>; Andrew Koppelman, *Is It Fair To Give Religion Special Treatment?*, 2006 U. ILL. L. REV. 571, (2006); Andrew Koppelman, *How Shall I Praise Thee? Brian Leiter on Respect for Religion*, 47 SAN DIEGO L. REV. 961 (2010); Steven G. Gey, *Why Is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75 (1990); E. Gregory Wallace, *Justifying Religious Freedom: The Western Tradition*, 114 PENN ST. L. REV. 485 (2009); Iain T. Benson, *The Attack on Western Religions by Western Law: Re-Framing Pluralism, Liberalism and Diversity* (Sept. 20, 2013), <http://ssrn.com/abstract=2328825>; Iain Benson, *Notes Towards a (Re)definition of the Secular* 33 U.B.C. L. REV. 519 (2000); Iain Benson, *Physicians and Marriage Commissioners: Accommodation of Differing Beliefs in a Free and Democratic Society*, 66 ADVOCATE 747 (2008); Iain Benson, *The Freedom of Conscience and Religion in Canada: Challenges and Opportunities*, 21 EMORY INT'L L. REV. 111 (2007); Mike Madden, *Second Among Equals?: Understanding the Short Shrift that Freedom of Religion Is Receiving in Canadian Jurisprudence*, 7 L. & EQUALITY 55 (2010); Jeremy Webber, *The Irreducibly Religious Content of Freedom of Religion*, in DIVERSITY AND EQUALITY: THE CHANGING FRAMEWORK OF FREEDOM IN CANADA 178 (Avigail Eisenberg ed., 2006); Webber, *supra* note 23, at 26; Benjamin L. Berger, *The Cultural Limits of Legal Tolerance*, 21 CAN. J.L. & JURIS. 245 (2008); Benjamin Berger, *The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State*, 17 CAN. J.L. & SOC'Y 39 (2002); Benjamin L. Berger, *Law's Religion: Rendering Culture*, in LAW AND RELIGIOUS PLURALISM IN CANADA 264 (Richard Moon ed., 2008); Paul Horwitz, *The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond*, 54 U. TORONTO FAC. L. REV. 1 (1996); Jonathan Chaplin, *Beyond Liberal Restraint: Defending Religiously-Based Arguments in Law and Public Policy*, 33 U.B.C. L. REV. 617 (2000); Lorenzo Zucca, *The Place of Religion in Constitutional Goods*, 22 CAN. J.L. & JURIS. 205 (2009); Bryan Thomas, *Secular Law and Inscrutable Faith: Religious Freedom, Freedom of Conscience, and the Law's Epistemology* (Nov. 25, 2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1275351](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1275351); Avihay Dorfman, *Freedom of Religion*, 21 CAN. J.L. & JURIS. 279 (2008); Timothy Macklem, *Faith as a Secular Value*, 45 MCGILL L.J. 1 (2000); Anthony Ellis, *What Is Special About Religion?*, 25 L. & PHIL. 219 (2006); Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994); CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION (2007); PAUL HORWITZ, THE AGNOSTIC AGE: LAW, RELIGION, AND THE CONSTITUTION (2011); MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY (2008); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313 (1996); Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869 (2009) (book review); Steven D. Smith, *Unprincipled Religious Freedom*, 7 J. CONTEMP. LEGAL ISSUES 497 (1996); Steven D. Smith, *Is a Coherent Theory of Religious Freedom Possible?*, 15 CONST. COMMENT. 73 (1998); Kent Greenawalt, *Moral and Religious Convictions As Categories For Special Treatment: The Exemption Strategy*, 48 WM. & MARY L. REV. 1605 (2007).

148. Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 72 (2001).

scholar Brian Leiter argues that there is no moral reason to continue to honor religion's special legal status.<sup>149</sup> Academics are not alone in those views.

Judges are also openly questioning the special status given to religion. In his dissenting judgment in *Hutterian Brethren of Wilson Colony*, Justice LeBel observed that the constitutional guarantee of freedom of religion has been difficult to interpret and apply.<sup>150</sup> He stated, “[p]erhaps, courts will never be able to explain in a complete and satisfactory manner the meaning of religion for the purposes of the *Charter*.”<sup>151</sup> He went on to opine that other Charter rights such as freedom of opinion, freedom of conscience, freedom of expression, and freedom of association could have been sufficient to protect religious freedom, but that since freedom of religion was in the Charter it “must be given meaning and effect.”<sup>152</sup>

Justice LeBel's musing that religion could have been protected by other constitutional freedoms, with no need for a specific religious constitutional head, suggests that religious freedom is an unnecessary appendage rather than a foundational principle of our democratic state. As noted above, it was the struggle to obtain religious freedom that had a profound impact on the creation of our Western democratic traditions. A strong argument can be made that a proper understanding of religious protection is the opposite of what Justice LeBel suggests. In that sense, Justice LeBel may have put the cart before the horse. History suggests that it was the accommodation of religious belief and practice that gave rise to freedom of opinion, conscience, expression, association, and assembly. Justice Ivan Rand<sup>153</sup> and former Chief Justice Brian Dickson<sup>154</sup> understood that historical position during their respective tenures on the Court.

Justice LeBel's position that courts may not be able to completely understand religion is particularly pronounced by academics and the

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149. LEITER, *supra* note 86.

150. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 (Can.).

151. *Id.* at para. 180.

152. *Id.*

153. Rand noted, in *Saumur v. Quebec*, [1953] 2 S.C.R. 299 (Can.) (“From 1760, therefore, to the present moment religious freedom has, in our legal system, been recognized as a principle of fundamental character.”).

154. *R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295, 346–47 (Can.) (“Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously held beliefs and manifestations and are therefore protected by the Charter.”).



legal profession's governing bodies over the issue of human sexuality. The issue in the TWU case is whether a private religious institution (a university, in this case) is allowed to maintain the religious belief and practice that marriage is between one man and one woman.

### 3. *Religion and sex*

Religions—particularly those within the Judeo-Christian worldview—have profoundly influenced our legal and moral norms. Such norms include human sexuality. TWU has consistently maintained a traditional Christian understanding of human nature. Under this understanding, humankind has a binary nature of equal importance: male and female. That binary understanding has a long theological history. At the beginning of human life on earth, which Christians believe was recorded in the ancient Book of Genesis,<sup>155</sup> God created male and female: “So God created man in His own image; in the image of God He created him; male and female He created them.”<sup>156</sup> Further, the Bible states, “[t]herefore a man shall leave his father and mother and be joined to his wife, and they shall become one flesh.”<sup>157</sup> In the Christian tradition, this biblical passage is widely understood to be God's establishment of the institution of marriage. Jesus of Nazareth further expounded upon this foundational worldview by unequivocally stating,

And He answered and said to them, “Have you not read that He who made them at the beginning made them male and female,” and said, “For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh? So then, they are no longer two but one flesh. Therefore what God has joined together, let not man separate.”<sup>158</sup>

Western democracies and their laws were once in agreement with that Judeo-Christian moral norm of the heterosexual monogamous relationship of marriage.<sup>159</sup> It was “a society of shared social values

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155. Genesis is the first book of the Christian and Jewish Bibles.

156. *Genesis* 1:27 (New King James).

157. *Genesis* 2:24.

158. *Matthew* 19:4–6.

159. Don S. Browning, *Family Law and Christian Jurisprudence*, in *CHRISTIANITY AND LAW: AN INTRODUCTION* 169–82 (John Witte, Jr. & Frank S. Alexander eds., 2008); *see* WITTE, JR., *supra* note 96; *see also* *Hyde v. Hyde* [1866] 1 P. & D. 130, 133 (Eng.).

where marriage and religion were thought to be inseparable.”<sup>160</sup> This is no longer the case. The late 20th and early 21st centuries marked a turning point. No longer were the religious moral norms in sync with the law regarding sexuality and marriage.<sup>161</sup> The advance of equality claims based on sexual orientation and the redefinition of marriage called into question the place of religious influence in law and public policy.

The “elephant in the room,” so to speak, with the TWU case is the propriety of a religious community maintaining a traditional sexual norm in its operation of a “public” institution. While there have been other cases that dealt with the right of a religious charity to enforce a lifestyle and faith commitment on its employees, such as *Christian Horizons*,<sup>162</sup> the TWU case has gone beyond that. TWU requires not only its employees but also its students—in other words, its “clientele”—to adhere to its strict moral view on sexuality.

This is not unusual. It has been the practice of many religious universities since their inception.<sup>163</sup> In 2001, the SCC recognized this practice as a part of religious freedom. The SCC was able to justify TWU’s religious freedom to mean “that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost” because

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What, then, is the nature of this institution as understood in Christendom? Its incidents may vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs have (however varied in different countries in its minor incidents) some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

160. Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, para. 22 (Can.).

161. SYLVAIN LAROCQUE, *GAY MARRIAGE: THE STORY OF A CANADIAN SOCIAL REVOLUTION* (2006).

162. Ont. Human Rights Comm’n v. Christian Horizons, [2010] 102 O.R. 3d 267 (Can.).

163. Religious universities do not see themselves as simply peddling knowledge for knowledge’s sake but concerned with educating the individual “for the purpose of illuminating the Divine.” Emily Longshore, *Student Conduct Codes at Religious Affiliated Institutions: Fostering Growth*, U.S.C. SCHOLAR COMMONS (2015). This is evident in many university codes such as Baylor University’s sexual conduct policy, BU-PP 031, wherein it is stated, “Baylor will be guided by the biblical understanding that human sexuality is a gift from God and that physical sexual intimacy is to be expressed in the context of marital fidelity.” BAYLOR, SEXUAL CONDUCT: BU-PP 031 (May 15, 2015), <https://www.baylor.edu/content/services/document.php?id=39247>; see *Church Educational System Honor Code*, BYU.EDU (Nov. 9, 2015), <https://policy.byu.edu/view/index.php?p=26> (stating that Brigham Young University students are expected to “[l]ive a chaste and virtuous life”).

“TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions.”<sup>164</sup> As a private institution, TWU is exempted, in part, “from the British Columbia human rights legislation and to which the *Charter* does not apply.”<sup>165</sup> It was therefore inconceivable for the SCC to require a section 15 equality rights analysis on the voluntary adoption of a code of conduct based on a person’s own religious beliefs in a private institution. Such a position “would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality.”<sup>166</sup> In other words, it would be against the legal paradigm of religious freedom to deny TWU its accreditation based on its code of conduct.

Canadian jurisprudence acted as a jealous mistress by ensuring that religion and religious freedom maintained special status. This was evident in the pre-*Charter* jurisprudence<sup>167</sup> and was greatly enhanced during the early years of the *Charter* with the elimination of state-imposed religious holy days<sup>168</sup> and with the accommodation of religious practice in a number of areas including the workplace,<sup>169</sup> the school,<sup>170</sup> and condominiums.<sup>171</sup> The religious paradigm worked well with the *Charter*. However, the paradigm became strained in trying to reconcile religious freedom and human sexuality interests.

When the SCC recognized the constitutional protection of “sexual orientation” as an analogous ground<sup>172</sup> in section 15 of the *Charter*, although a welcome relief for the LGBTQ community, it resulted in friction between sexual orientation and religion. The drafters of the *Charter* were aware of the anticipated widespread challenges that the addition of “sexual orientation” as a protected ground from discrimination was going to have. They decided not to

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164. *Trinity W. Univ. v. B.C. Coll. of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772, para. 25 (Can.).

165. *Id.*

166. *Id.*

167. *Saumur v. City of Que.*, [1953] 2 S.C.R. 299, 329 (Can.).

168. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 (Can.).

169. *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 (Can.).

170. *Multani v. Comm’n scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256 (Can.).

171. *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 (Can.).

172. *Egan v. Canada*, [1995] 2 S.C.R. 513 (Can.).

include sexual orientation but drafted the language so that the courts would deal with it in due course.<sup>173</sup>

Over the ensuing years, the SCC has been navigating uncharted waters by trying to juggle three major constitutional principles: protection of religion, protection of sexual orientation, and the constitutional doctrine that there is no hierarchy of rights.<sup>174</sup> The growing consensus among legal scholars is that the SCC's attempt to balance the interests to date has been trying to "square the circle."<sup>175</sup> This reconciliation attempt has been difficult, and it would appear that the future will not be any easier. The inconsistencies of affirming sexual equality while at the same time respecting religious pluralism without passing judgment on the religious norms of sexuality appear to have come to a head in the TWU law school case.

The SCC will be faced with a crucial decision: whether to reject its long-held no-hierarchy principle and allow equality or religion to trump the other, or to maintain the status quo by protecting both religious freedom and equality rights while recognizing that there will be, by necessity, a palpable dissonance on the views and practices of human sexuality, and that such differences must be respected in a plural and liberal democratic society. This Article argues that it is the latter position that makes the most sense going forward.<sup>176</sup>

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173. Barry L. Strayer, was Assistant Deputy Minister of Justice under the Pierre E. Trudeau government that brought in the Charter. Strayer was instrumental in the design of the Charter. He writes, "The addition of the words "in particular" [of s.15] was thought to make the grounds of discrimination open-ended: it left open the possibility that non-enumerated grounds could also be found by the courts in the future, such as sexual orientation and matters on which there was no consensus in 1981." BARRY L. STRAYER CANADA'S CONSTITUTIONAL REVOLUTION 265 (2013).

174. *Dagenais v. Can. Broad. Corp.*, [1994] 3 S.C.R. 835, 877 (Can.).

175. Richard Moon, *Sexual Orientation Equality and Religious Freedom in the Public Schools: A Comment on Trinity Western University v. B.C. College of Teachers and Chamberlain v. Surrey School Board District 36*, 8 REV. CONST. STUD. 228, 283 (2003).

176. This is precisely the view expressed by the British Columbia Court of Appeal in *Trinity W. Univ. v. Law Soc'y of B.C.*, 2016 BCCA 423, para. 193:

A society that does not admit of and accommodate differences cannot be a free and democratic society—one in which its citizens are free to think, to disagree, to debate and to challenge the accepted view without fear of reprisal. This case demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is in itself intolerant and illiberal.

*4. Religion as nemesis*

When considered from a macro perspective, religious scruples about sex outside of the traditional institution of marriage have become but a whimper in today's cultural milieu of Western democracies. Consider the fact that censorship of movies, pornography, bathhouses, and prostitution based upon religious norms have become virtually a non-issue.<sup>177</sup> In the truest sense, the attitude has become "live and let live." As long as there is mutual consent on any sexual adventure involving more than one person, "you do your thing and I'll do mine" sums up contemporary society.

Therefore, it seems odd that such a liberal and permissive democratic society would have government actors who find it necessary to investigate, criticize, and demand a private religious university<sup>178</sup> to put away its voluntary code of conduct requirement that its student body agree to abide by a traditional moral code on sex. No one is forced to attend. No ongoing government support is given to the institution. No one suggests that the quality of education is anything but exemplary. The graduates in other disciplines, such as education, have not been found to discriminate against the LGBTQ community. Yet, the legal profession insists that TWU law school not

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177. Emile Durkheim was convinced that religion was "one of the forces that create within individuals a sense of obligation to adhere to society's demands," noted ANNE HENDERSHOTT, *THE POLITICS OF DEVIANCE 2* (2002). However, Hendershott describes the fact that concept of deviance is no longer part of our social lexicon. "The commitment to egalitarianism, along with a growing reluctance to judge the behaviour of others, has made discussions of deviance obsolete." *Id.* at 3. Yet Hendershott concludes her work with the provocative statement, "Perhaps we will begin to recognize that a society that continues to redefine deviance as disease, or refuses to acknowledge and negatively sanction the deviant acts our common sense tells us are destructive, is a society that has lost the capacity to confront evil that has a capacity to dehumanize us all." *Id.* at 163.

178. Even though TWU is private, it is also a charity. Some suggest that, because of its charitable status, TWU is a public actor that relies on the state and therefore should follow public norms. For an example of this type of reasoning see Saul Templeton, *Re-Framing the Trinity Western University Debate: Tax, Trans and Intersex Issues*, 40 *L. MATTERS* 40 (2015), <http://www.cba-alberta.org/Publications-Resources/Resources/Law-Matters/Law-Matters-Summer-2015-Issue/Re-Framing-the-Trinity-Western-University-Debate>. However, the fact that a religious institution is a charity, or that it is issuing state recognized degrees, or that it receives other state acknowledgement does not change the analysis; it is still entitled to Charter protection. Otherwise, there is no end where such an argument may go—for example, the state recognizes TWU's property rights and will send in police to protect it from violence—is that state recognition contingent upon TWU's acceptance of public norms on marriage? It runs into the absurd.

be accredited. Why? There are a couple of rational explanations: First, TWU's Covenant creates an inequality of access to legal education against the LGBTQ community. However, the BCCA agreed with the Federation's finding that was not the case.<sup>179</sup> Second, the religious belief regarding traditional marriage has become such a controversial issue that the legal community is embarrassed to have a bona fide law school that stands for that belief in its midst.<sup>180</sup> Finally, there is an inherent harm in recognition of such a law school.<sup>181</sup> Such harm may be seen as dignitary harm resulting from being offended.<sup>182</sup> However, as the BCCA noted, "there is no *Charter* or other legal right to be free from views that offend and contradict an individual's strongly held beliefs...."<sup>183</sup>

So offensive is the traditional marriage belief and practice of TWU that law societies are willing to ignore a 2001 SCC ruling that remains authoritative in the opinion of BC Chief Justice Hinkson.<sup>184</sup> The *Charter* does not apply, nor does the applicable human rights legislation.<sup>185</sup> Yet three law societies insist that they do, and these law societies are championed to carry on the fight by every common-law faculty across the country.

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179. *Trinity W. Univ. v. Law Soc'y of B.C.*, 2016 BCCA 423, at paras. 171–180 (Can.).

180. Justice Campbell suggests in *Trinity W. Univ. v. Law Soc'y of B.C.*, 2015 NSSC 25, paragraph 255 (Can.) that perhaps the NSBS "is motivated by the question, 'What will people think?' If the NSBS allows students from a law school that discriminates against LGB people it will appear hypocritical in light of its strong advocacy for equality rights."

181. Consider that running throughout the litigation the law societies have argued that if they accredit TWU they would be seen as endorsing TWU's discriminatory practices. The Ontario Divisional Court stated that accreditation would be condoning discrimination which "can be ever much as harmful as the act of discrimination itself." *Trinity W. Univ. v. Law Soc'y of Upper Can.*, 2015 ONSC 4250, para. 116 (Can.).

182. Justice MacPherson of the *Trinity W. Univ. v. Law Society of B.C.*, 2016 ONCA 518, at paragraph 119 (Can.), held that the Covenant "is deeply discriminatory to the LGBTQ community, and it hurts."

183. *Trinity W. Univ. v. Law Soc'y of B.C.*, 2016 BCCA 423, at para. 188 (Can.). Also the BCCA noted that such fear of endorsement makes little practical sense since "no religious faculty of any kind could be approved. Licensing of religious care facilities and hospitals would also fall into question."

184. *Trinity W. Univ. v. Law Soc'y of B.C.*, 2015 BCSC 2326, [2015] B.C.J. No. 2697, paras. 78, 90 (Can.).

185. *Trinity W. Univ. v. B.C. Coll. of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772, para. 25 (Can.).

In her piece *Equality's Nemesis?*,<sup>186</sup> Queen's University law professor Beverley Baines argues for an interventionist, three-pronged approach to deal with religion and sex equality. While she argues in the context of women's equality, her argument that religion is equality's nemesis is applicable to equality rights generally. Her first assertion is that there should be a hierarchy of rights wherein religious and cultural claims are subject to the guarantee of equality.<sup>187</sup> She stated, "no reason exists to immunize [religious societies] from the constitutional guarantee of sex equality."<sup>188</sup> Second, she asserted that religious communities should operate jointly with the state in certain areas.<sup>189</sup> If a member of the religious community does not have his or her equality right accepted by the religious community, then he or she can appeal to the state for redress forcing the religious community to permit his or her right.<sup>190</sup> Her third argument advocates the privatization of religion. Since religious communities are private by nature, they should not be given any special protections such as those found in the *Charter*.<sup>191</sup> Rather, religious communities should rely on the freedoms of expression and association. Unfortunately, this argument ignores the fact that religion is an enumerated ground in section 15 of the *Charter* and therefore has its own equality rights.

Framing religion as equality's nemesis seems to be a stretch, given its long sociopolitical history in the evolution of human rights.<sup>192</sup> However, the diminution of religion is beginning to take shape. Baines's three-pronged approach is not too far from becoming reality. In the SCC case *Loyola High School*,<sup>193</sup> Justice Abella asked the counsel for the private Catholic school whether a religious community is exempt from having to teach a course that it says violates its religious freedom when that religion's "ethical framework" contradicts what the Court considers "national values."<sup>194</sup>

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186. Beverley Baines, *Equality's Nemesis?*, 5 J.L. & EQUALITY 57 (2006).

187. *Id.* at 76.

188. *Id.* at 75.

189. *Id.* at 77.

190. *Id.*

191. *Id.* at 78.

192. JOHN WITTE, JR. & M. CHRISTIAN GREEN, RELIGION AND HUMAN RIGHTS: AN INTRODUCTION (2011).

193. *Loyola High Sch. v. Quebec*, 2015 SCC 12, [2015] 1 S.C.R. 613 (Can.).

194. Transcript of *Loyola High School v. Quebec*, Monday, Mar. 24, 2014, StenoTran, at 7, lines 16–22.

Justice Abella wrote the majority decision and referenced those values:

These shared values—equality, human rights and democracy—are values the state always has a legitimate interest in promoting and protecting. They enhance the conditions for integration and points of civic solidarity by helping connect us despite our differences. . . . This is what makes pluralism work . . . “[a] multicultural multireligious society can only work . . . if people of all groups understand and tolerate each other.” . . . Religious freedom must therefore be understood in the context of a secular, multicultural and democratic society with a strong interest in protecting dignity and diversity, promoting equality, and ensuring the vitality of a common belief in human rights.<sup>195</sup>

The national values therefore are “equality, human rights and democracy” and “a common belief in human rights.” The groundwork is now set for future decisions to elaborate how those values trump religious freedom. It would not be difficult to find scenarios where national values may be at odds with long-held and well-understood religious norms.<sup>196</sup> For example, consider the struggle that religious communities face when hiring or firing individuals who do not share their religious norms. Will the national values of “equality” and “human rights” force such communities to hire those who no longer believe and practice as the religious employer? While there are exemptions for religious communities in human rights legislation, courts have narrowed those exemptions considerably.<sup>197</sup>

For Justice Abella, these values enhance “integration” and “civic solidarity” by ensuring that we connect despite our differences.<sup>198</sup> There can be no doubt that a multicultural society needs to have means of creating a civic understanding of mutual responsibilities. Religious communities, by their nature, tend to be absolutist in their truth claims, as *Loyola* demonstrated.<sup>199</sup> However, the legal profession

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195. *Loyola*, 1 S.C.R. at para. 47 (citations omitted).

196. Consider, for example, that membership in the Roman Catholic clergy is limited to unmarried men.

197. *Ont. Human Rights Comm’n v. Christian Horizons*, [2010] 102 O.R. 3d 267 (Can.); *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 (Can.).

198. *Loyola*, 1 S.C.R. at para. 47.

199. *Loyola*, as a Catholic institution, “continued to assert the right to teach Catholic doctrine and ethics from a Catholic perspective.” *Loyola*, 1 S.C.R. at para. 31.



and the media are increasingly scrutinizing that idea as they become progressively intolerant of religious differences of religious organizations as they operate in the “public sphere.”

A hierarchy of rights implies a generally accepted norm as to which right is to be above another. Such homogeneity of thought will be difficult to obtain and maintain in a multicultural society. However, some suggest that it ought to be tried. University of Windsor law professor Richard Moon wrote:

It is unrealistic to expect the individual to leave her or his religious beliefs or values behind when she or he enters public life. If religious values are part of public debate and decision-making, then the values of some individuals will lose out—for example, will not be included in the curriculum. If we believe that this is consistent with religious pluralism then we may have less sympathy for the demands of a parent, based on religious belief, that his or her children not be exposed to any affirmation of the value of same-sex relationships, or for the claim of an individual, who is opposed to the conception of human dignity or equality that informs the civic curriculum, to work as a teacher, or for the claim to accreditation of a teacher training program that affirms anti-gay/lesbian views.<sup>200</sup>

According to Moon, the right of a religious parent would lose out. In other writings, he is more emphatic when he says that public commitment to sexual orientation equality (in public schools) “will involve nothing less than a repudiation of the religious view that homosexuality is sinful.”<sup>201</sup> It is one thing to make the argument that homosexuality is not sinful, as Professor Moon suggests, but it becomes problematic to require everyone else, by means of state action, to accept that view. In other words, these are matters on which reasonable people may disagree. As Voltaire is apocryphally purported to have opined, “I disapprove of what you say, but I will defend to the death your right to say it.”<sup>202</sup> Or have we indeed come to the point where the legal profession is of the view that there is only one view?

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200. Moon, *supra* note 147, at 283–84.

201. Richard Moon, *The Supreme Court of Canada’s Attempt to Reconcile Freedom of Religion and Sexual Orientation in the Public Schools*, in FAITH, POLITICS, AND SEXUAL DIVERSITY IN CANADA AND THE UNITED STATES 321, 338 (David Rayside & Clyde Wilcox eds., 2011).

202. S.G. TALLENTYRE (pseudonym of Evelyn Beatrice Hall), THE FRIENDS OF VOLTAIRE 199 (1906).

In the 2001 TWU case, Justice L'Heureux-Dubé wrote a dissenting opinion. "I am dismayed," she wrote, "that at various points in the history of this case the argument has been made that one can separate condemnation of the 'sexual sin' of 'homosexual behaviour' from intolerance of those with homosexual or bisexual orientations. This position alleges that one can love the sinner, but condemn the sin."<sup>203</sup>

In rejecting the "love the sinner and hate the sin" view, Justice L'Heureux-Dubé agreed with the intervener EGALE, who argued that "[r]equiring someone not to act in accordance with their identity is harmful and cruel. It destroys the human spirit. Pressure to change their behaviour and deny their sexual identity has proved tremendously damaging to young persons seeking to come to terms with their sexual orientation."<sup>204</sup>

The SCC affirmed Justice L'Heureux-Dubé's dissenting opinion on this point in the context of the 2013 *Whatcott* case.<sup>205</sup> The court reasoned that Mr. Whatcott's flyer did not make a meaningful distinction between sexual acts and sexual orientation, and that the flyers' condemnation of the sex acts was therefore hateful.<sup>206</sup> While the court appears to have kept the distinction between the condemnation of sexual acts and the condemnation of sexual orientation, it nevertheless chills the environment for freedom of expression on the issue because there is bound to be confusion over the court's interpretation. The court stated that "[g]enuine comments on sexual activity are not likely to fall into the purview of a prohibition against hate."<sup>207</sup> However, confusion will naturally arise over what is "genuine." For example, the court said that if "Mr. Whatcott's message was that those who engage in sexual practices not leading to procreation should not be hired as teachers or that such practices should not be discussed as part of the school curriculum, his expression would not implicate an identifiable group."<sup>208</sup> But the reality is that non-procreative sex acts are what a same-sex couple does.

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203. *Trinity W. Univ. v. B.C. Coll. of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772, para. 69 (Can.).

204. *Id.*

205. *Saskatchewan (Human Rights Comm'n) v. Whatcott*, 2013 SCC 11, para. 176 (Can.).

206. *Id.* at para. 177.

207. *Id.*

208. *Id.*

Therefore, focusing solely on non-procreative sex is implicating only same-sex couples. Perhaps the court is saying, “you can use general comments on non-procreative sex but just don’t link the dots to an identifiable group.” I am not sure that is a sufficient distinction to allow religious citizens the comfort to actively engage in such conversations when they have to maintain such a tight and esoteric distinction. The chilling effect of this decision remains.

Professor Bruce MacDougall, of the University of British Columbia, stated, “[r]eligious ideology cannot be used to determine what people who are not of that religion can do or how they should lead their lives.”<sup>209</sup> The problem, of course, is that “religious ideology” in a pluralistic society ought to be given the same right as any other “ideology” in advancing a position in the public discourse. It is in the process of deliberative democracy that society is able to establish its norms. Even when there is a consensus, that does not mean that debate suddenly stops. Public debate on issues must continue if we are to remain free and democratic. That a particular opinion advanced in public debate is rooted in a religious worldview should not prevent it from being considered.

However, for some in the legal academy, the fact that marriage has been redefined and religious communities had an opportunity to participate in the public debate means that all further discussion must cease. Religious communities must be silent. Such a posture makes no room for the reality that religious communities differ and maintain the traditional definition of marriage within their own sphere.

MacDougall further argues that religions should not be able to maintain their religious views on marriage and sexuality even within their own communities. In the footnote to the above statement, he says:

In my opinion, [religious ideology] should not even be used to judge those who are of that religious persuasion. Even children being raised in a particular religious tradition should not be exposed to ideology that excludes and refuses to accommodate homosexuality in their education. The state has an interest in all education of the young and this ideal should prevail.<sup>210</sup>

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209. Bruce MacDougall, *The Celebration of Same-Sex Marriage*, 32 OTTAWA L. REV. 235, 247–48 (2000).

210. *Id.* at 248 n.63.

Suddenly the distinction between the “private” and “public” sphere becomes obsolete when it comes to human sexuality. There is no distinction. The public norm of human sexuality must prevail because “the state has an interest.” There is then no allowance for the individual to recognize the sovereignty of God in matters of sexuality; instead, the sovereignty of the state is now supreme.<sup>211</sup> It is a totalitarian concept that rejects any notion of accommodation of religious belief and practice as it affects sexual equality. MacDougall argues, “[o]nce the religious characterization is removed from an issue of racial or gender discrimination, the issue becomes much more straightforward. So it should be with homosexuality.”<sup>212</sup>

The problem with framing the issue this way is that it does not present the complete picture. From the very beginning of human experience, humanity has struggled over the issue of sovereignty wherein states have demanded sole allegiance at the expense of the individual conscience. Therefore, it is germane to the conversation to consider that liberal democracies changed the absolutist state paradigm to one where state sovereignty made provisions for religious belief and practice. The special status given to religion was what made other rights possible—it was “prototypical,” as noted above.

Virtually all of the “fundamental freedoms” had their origin in the protection of religion and its practice. Therefore, to suggest that religious views that do not accept nontraditional sexual norms are somehow “religiously based negative animus”<sup>213</sup> and not worthy of protection flies in the face of liberal democratic history and theoretical thought. Rather, there is an anti-religious bias that refuses to accept

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211. David L. Corbett, *Freedom from Discrimination on the Basis of Sexual Orientation Under Section 15 of the Charter: An Historical Review and Appraisal*, in *THE CHARTER AT TWENTY: LAW AND PRACTICE 2002*, at 415 (Debra M. McAllister & Adam M. Dodek eds., 2002). David Corbett has characterized the tension between religion and sexual orientation as “a struggle to protect our public policy from being infused with religious ideals for the purpose of denying a particular and disapproved group their equal place within Canadian society. . . . It is a conflict between the fundamental principles of our secular state – the Rule of Law, the principle of equality, and the primacy of the Constitution on the one hand, and a religiously based negative animus against homosexuality on the other.”

212. Bruce MacDougall, *Silence in the Classroom: Limits on Homosexual Expression and Visibility in Education and the Privileging of Homophobic Religious Ideology*, 61 *SASK. L. REV.* 41, 78 (1998).

213. Corbett, *supra* note 211, at 415.

the reality of religion's legal protection on matters of sexuality. Religion is now seen as the nemesis that must be eliminated.

### 5. *The crisis*

The legal system is faced with two opposing views of religion's place in the law. One demands the traditional protection of religion; the other rejects religion's place in the law. The TWU case is ground zero in the crisis.

*a. Trinity Western University's law school proposal.* TWU's law school submission to the Federation of the Law Societies of Canada took the Canadian legal community by storm. It raised considerable opposition among academics,<sup>214</sup> the Canadian Council of Law Deans (CCLD),<sup>215</sup> the Canadian Bar Association,<sup>216</sup> law students, and major newspapers such as *The Globe and Mail*.<sup>217</sup> Given that TWU has

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214. See Craig, *Rejecting Trinity Western's Proposal*, *supra* note 132; Dianne Pothier, *An Argument Against Accreditation of Trinity Western University's Proposed Law School*, 23 CONST. F., no. 1, 2014, at 1; Craig, *TWU Law*, *supra* note 132; Jeremy Webber, *Religion vs. Equality*, VANCOUVER SUN (Apr. 8, 2014), <http://www.vancouversun.com/life/Opinion+Religion+equality/9715430/story.html>. *But see* Dwight Newman, *On the Trinity Western University Controversy: An Argument for a Christian Law School in Canada*, 22 CONST. F., no. 3, 2013, at 1; Thomas M.J. Bateman, *Trinity Western University's Law School and the Associational Dimension of Religious Freedom: Toward Comprehensive Liberalism*, 66 U.N.B. L.J. 78 (2015); Mark A. Witten, *Tracking Secularism: Freedom of Religion, Education, and the Trinity Western University Law School Dispute*, 79 SASK. L. REV. 215 (2016).

215. Letter from Bill Flanagan, President of the Canadian Council of Law Deans, to John J.L. Hunter & Gerald R. Tremblay, Federation of Canadian Law Societies (Nov. 20, 2012), where he said in part,

The covenant specifically contemplates that gay, lesbian or bisexual students may be subject to disciplinary measures including expulsion. This is a matter of great concern for all the members of the CCLD. Discrimination on the basis of sexual orientation is unlawful in Canada and fundamentally at odds with the core values of all Canadian law schools. We would urge the Federation to investigate whether TWU's covenant is inconsistent with federal or provincial law. We would also urge the Federation to consider this covenant and its intentionally discriminatory impact on gay, lesbian and bi-sexual students when evaluating TWU's application to establish an approved common law program.

216. Letter from Robert C. Brun, Q.C., President of the CBA, to Gerald R. Tremblay, President, Federation of the Law Societies of Canada (Mar. 18, 2013), [https://www.outronbayst.org/wp-content/uploads/2016/03/CoverLetter\\_DocumentPackage.pdf](https://www.outronbayst.org/wp-content/uploads/2016/03/CoverLetter_DocumentPackage.pdf).

217. Editorial, *No gay-free law school should stand in Canada*, GLOBE & MAIL (Feb. 7, 2013), <http://www.theglobeandmail.com/commentary/editorials/no-gay-free-law-school-should-stand-in-canada/article8356107/>.

decided to appeal the Ontario Court of Appeal decision<sup>218</sup> the SCC will, yet again, have to decide if TWU can maintain its religious identity. In 2001, the SCC decided that “TWU is not for everybody”<sup>219</sup> and had the right to limit students to those who would live in accordance with its religious requirements. In other words, when the law allows a religious institution to be exempt from a general norm, the law is showing a “tolerance of indifference,”<sup>220</sup> as described by Professor Benjamin Berger. Thus, the SCC’s decision in 2001 may be described as the law being tolerant of a religious university and granting state-recognized degrees, while maintaining a campus with traditional sexual norms based on its religious beliefs.<sup>221</sup> Such tolerance was “based on the implicit judgment that the cultural differences found in the ‘tolerated’ [i.e. TWU] really ought not to bother the law.”<sup>222</sup>

Given the robust opposition to TWU’s law school proposal that “tolerance of indifference” toward the religious freedom right of TWU appears to have shifted in a large segment of the legal profession since 2001. The emphasis on equality rights at the expense of religious freedom considerations, among legal academics and the legal profession, is ample reason to be concerned that the SCC may decide the TWU law school case differently from its 2001 TWU education degree case.

It is not that the law has changed, which will be discussed below, as much as the fact that the legal culture has changed. In essence, it is the legal culture’s changing beliefs toward religion and how society should accommodate those religious beliefs that the legal profession has deemed repugnant. That legal bias is at the heart of the debate over TWU’s School of Law. It is that bias that is about to profoundly alter the fundamental freedom of religion, which is a pillar of liberal democratic society, and that will weaken the very fabric of human rights in the long term.

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218. *Trinity W. Univ. v. Law Soc’y of Upper Can.*, 2016 ONCA 518 (Can.).

219. *Trinity W. Univ. v. B.C. Coll. of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772, para. 25 (Can.).

220. BENJAMIN L. BERGER, *LAW’S RELIGION: RELIGIOUS DIFFERENCE AND THE CLAIMS OF CONSTITUTIONALISM* 112–32 (2015).

221. *Coll. of Teachers*, 1 S.C.R. 772.

222. BERGER, *supra* note 220, at 126.

Up until the TWU law school case, religious organizations, such as religious universities, carried out their public purpose underneath the constitutional protective shield of religious freedom. That is why in 2001 the SCC could say without hesitation that “TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions.”<sup>223</sup> And that, “The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected.”<sup>224</sup> The SCC was emphatic that the B.C. College of Teachers denial of accreditation was denied TWU “the right of full participation in society.”<sup>225</sup>

The aggressive stance of the legal academy<sup>226</sup> and the legal profession against TWU’s proposal is a revolutionary development. The legal profession has taken sides—it is willing to reject the well-established legal protection of religious practice to the claims of sexual equality rights.

That change would see the subservience of religion—beliefs and practices—to the current iteration of sexual equality. Nova Scotia Supreme Court Justice James Campbell declared, “[t]he *Charter* is not a blueprint for moral conformity. Its purpose is to protect the citizen from the power of the state, not to enforce compliance by citizens or private institutions with the moral judgments of the state.”<sup>227</sup> However, for many in the legal profession, using the *Charter* as a blueprint for moral conformity is an attractive prospect.

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223. *Trinity W. Univ. v. B.C. Coll. of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772, para. 25 (Can.).

224. *Id.* at para. 33.

225. *Id.*

226. In a telling article, law professors Carissima Mathen and Michael Plaxton, addressed the academic arguments against TWU, namely there is more to law schools than the “black-letter law,” and that legal education ought to encourage students to examine their own religious and moral commitments from a critical distance. Carissima Mathen & Michael Plaxton, *Legal Education, TWU and the Looking Glass*, in RELIGIOUS FREEDOM AND COMMUNITIES 229 (Dwight Newman ed., 2016). Their conclusion was, “We argue that many of the criticisms directed at TWU’s proposed law school would apply, in some measure, to many or all of its secular counterparts, and that it is inappropriate for critics to hold TWU to a standard to which they are unwilling to hold themselves.” *Id.* at 224. They also noted, “one can simultaneously hold a set of religious convictions and engage in meaningful critical thought and debate about legal obligations that are in apparent tension with them.” *Id.* at 241.

227. *Trinity W. Univ. v. N.S. Barristers’ Soc’y*, 2015 NSSC 25, para. 10 (Can.).

*b. Eureka moment.* As noted above, the “Eureka Moment” in a scientific revolution occurs when a member or members of the community “connects the dots” between the various anomalies and the realization that the paradigm no longer explains what they saw. They were convinced that a new paradigm was required to replace the old.

Likewise, in the debate over the place of religious accommodation and sexual equality, as exemplified in the two TWU cases (BCCT 2001 and the current law school case), a number of jurists have concluded that the current paradigm accommodating religion is not appropriate in a society that recognizes sexual equality. These jurists argue that by trying to accommodate religion and at the same time recognize sexual equality, the Supreme Court has tried to “square the circle.”<sup>228</sup> The challenges of trying to affirm sexual equality while respecting religious pluralism, but without passing judgment on the religious norms of sexuality, have come to a head. In the same way racism is rejected as wrong, both publicly and privately, so too must the traditional religious view of marriage as only between one man and one woman must not be tolerated publicly or privately. The greater community “must through democratic means choose or prefer some values or principles over others.”<sup>229</sup>

Allowing marriage for same-sex couples is a sign of the movement’s progress from “formal equality” to “real equality.”<sup>230</sup> Marriage is symbolic, but it is more than that. Marriage “is the institution that accords to a union the profound social stamp of approval and acceptance of the relationship as being of the highest value.”<sup>231</sup> It has “priceless social respect, cachet and honour. It is the signifier of societal approval for a relationship. . . . It is society’s way of *celebrating*—not just recognising—the union of two people.”<sup>232</sup> It is the recognition that those people are *valuable*<sup>233</sup> and society must, therefore, *celebrate* them. For the LGBTQ community that means society “not only accepts or condones [them], but *approves*

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228. Moon, *supra* note 147, at 283.

229. *Id.* at 284.

230. MacDougall, *supra* note 209, at 237.

231. *Id.* at 242.

232. *Id.* at 252 (emphasis in original).

233. *Id.* at 253.



[them].”<sup>234</sup> Further, “[s]topping short denotes inferiority; it indicates that there is thought to be something problematic with the group and its members.”<sup>235</sup>

Therefore, when a religious institution carrying on what is considered a “public” service, i.e. a university, does not *celebrate* same-sex marriage, the LGBTQ community interprets this stance or lack of assent as society degrading them and treating them as inferior. In other words, the opposition to TWU sees the “marriage issue” as settled and that TWU needs to become progressive in its view. TWU, from this perspective, cannot act upon its religious beliefs, because those beliefs are not only unacceptable, but also morally wrong.

*c. Consolidation.* Kuhn noted that scientific revolutions often take time to consolidate or become accepted in the scientific community.<sup>236</sup> “[T]he transition between competing paradigms cannot be made a step at a time, forced by logic and neutral experience.”<sup>237</sup> The “transfer of allegiance from paradigm to paradigm,” says Kuhn, “is a conversion experience that cannot be forced.”<sup>238</sup> It is not a matter of proof or error. According to Kuhn:

[A] generation is sometimes required to effect the change, scientific communities have again and again been converted to new paradigms. Furthermore, these conversions occur not despite the fact that scientists are human but because they are. Though some scientists, particularly the older and more experienced ones, may resist indefinitely, most of them can be reached in one way or another. Conversions will occur a few at a time until, after the last

234. *Id.* at 256 (emphasis in original).

235. *Id.* at 257.

236. For example, “Copernicanism made few converts for almost a century after Copernicus’ death. Newton’s work was not generally accepted, particularly on the Continent, for more than half a century after the *Principia* appeared.” KUHN, *supra* note 97, at 150–51. Professor Iain Benson has written of the implications of both “paradigm shifts” and “hidden” or “implicit” uses of language in the area of law and religion in relation to the work on the nature of paradigms and language of Thomas Kuhn, Owen Barfield and Michael Polanyi. See Iain T. Benson, *An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion*, at 3–5 (Sept. 2013) (unpublished Ph.D. thesis, University of the Witwatersrand), and his earlier work for the Canadian Government’s “Religion and Public Policy Project,” Iain T. Benson, *Taking a Fresh Look at Religion and Public Policy in Canada: the Need for a Paradigm Shift*, (2008), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1654422](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1654422) (last visited November 15, 2016).

237. KUHN, *supra* note 97, at 150.

238. *Id.* at 151.

holdouts have died, the whole profession will again be practicing under a single, but now a different, paradigm.”<sup>239</sup>

A similar pattern could be expected in the legal community. However, the legal community is different due to its hierarchical structure, with the SCC being the final arbiter of any legal debate. Therefore, a legal revolution can be had quickly if the SCC agrees. The SCC could say that religious accommodation must now give way to the sexual equality claims. However, given the current jurisprudence, even if the SCC agreed with the brewing legal revolution taking place on this matter, the debate will not be extinguished indefinitely. In the same way that the SCC’s 2001 TWU decision did not end the debate within the legal profession, there is no guarantee that the SCC’s decision on the TWU law school will end the debate in the long term. The inability to end debate on such contentious matters is the result of a number of factors.

First, the very nature of a democracy is such that debates continue. Freedom of speech, no matter how much it is muffled in a given time period or on a particular subject, will resurrect at some point. Second, religious beliefs and practices last a long time. Christianity, for example, has existed for over 2,000 years. It is highly unlikely, therefore, that the traditional belief and practice on marriage will end with a court order. Of course, the SCC probably would not ever outlaw traditional marriage, but should it rule that marriage must not be practiced on TWU’s campus as it currently exists with all students required to sign the Community Covenant, then the SCC effectively determines how religious groups can practice marriage within religious communities. Third, recent SCC jurisprudence suggests that its own previous decisions may be overruled in subsequent decisions, given the right circumstances. This occurred most recently in the Supreme Court of Canada’s *Carter*<sup>240</sup> decision granting the right to physician assisted dying that over ruled an earlier decision.

The SCC’s *Bedford*<sup>241</sup> decision ruled that a trial court can reconsider a previous SCC *Charter* case if: (a) the new case constitutes a new legal issue “raised as a consequence of significant developments in the law,” or (b) “there is a change in the circumstances or evidence

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239. *Id.* at 152.

240. *Carter v. Canada*, [2015] 1 S.C.R. 331 (Can.).

241. *Canada v. Bedford*, [2013] 3 S.C.R. 1101 (Can.).

that fundamentally shifts the parameters of the debate.”<sup>242</sup> The *Carter* decision legalized physician-assisted suicide when it overruled the SCC’s 1993 *Rodriguez*<sup>243</sup> decision. The SCC held that *stare decisis* is not a straitjacket that condemns the law to stasis.<sup>244</sup>

The ability to revisit earlier cases means, regardless of the SCC’s willingness to do so, that constitutional debates will continue for generations. The SCC could accept the reasoning of the Ontario courts and rule that its 2001 *TWU* decision is distinguishable from the current case because in 2001 the SCC did not deal directly with the issue of TWU’s requirement that students sign the “Community Standards,” (as the Covenant was then known), but dealt solely with the issue of whether TWU graduates would discriminate against LGBTQ students in the public schools. However, the current case deals with the requirement that students sign the Community Covenant and be bound by it during their time as TWU students. Therefore, the TWU law school case is addressing a different legal issue, even though the facts are substantially similar. Further, the SCC could agree with the argument that circumstances have substantially changed because of the advance of equality rights since 2001. Social acceptance of LGBTQ rights has increased within the legal community, and equality rights have advanced. The SCC has shown a willingness to reject the presumption of religion’s accommodation, as evidenced in *Hutterian Brethren*<sup>245</sup> where, despite twenty-nine years of the Province of Alberta accommodating the Hutterite religious belief that their picture not be taken for a driver’s license, the SCC ruled that the change in government policy no longer required the religious accommodation.<sup>246</sup>

In the current TWU case, the losing side can be consoled by the fact that there is ample precedent that the fight could continue another day with a new case that has facts that meet the *Bedford* test. It may take time—perhaps a generation—for such a new case to materialize, but the possibility could give hope. Legal revolutions may come to be more common than previously thought.

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242. *Id.* at para. 42.

243. *Rodriguez v. Canada*, [1993] 3 S.C.R. 519 (Can.).

244. *Bedford*, 3 S.C.R. at para. 44.

245. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 (Can.).

246. *Id.* at para. 71.

*6. Ramifications of the revolution on religion*

*a. The immediate effects on TWU.* A SCC ruling against TWU's law school proposal would be a loss to an institution that has done nothing out of the ordinary but follow historic Christian teachings on human sexuality. TWU had been working on its law school proposal for five years.<sup>247</sup> Its vigorous effort to create a law school promised to make a significant contribution to the legal profession because its graduates were going to be "practice ready."<sup>248</sup> Unlike other law schools that do not give their students much practical legal experience, TWU's proposal would dramatically alter the current approach to legal education in Canada. The loss of TWU's program would be a loss not only to the university, but to the legal profession.

A ruling against the proposal may also mean that TWU would have to face yet another attack on its education degree. The 2001 case involved the BCCT's refusal of TWU's degree accreditation because of its concern about requiring students to sign the Community Standards.<sup>249</sup> The loss of the TWU law school proposal would encourage the BCCT to resurrect its opposition to TWU's degree, using the same approach as the legal profession.

Other professional programs at TWU, such as nursing and accounting, may suffer a similar fate as the law school proposal. The nursing and accounting programs would come under similar pressure to refuse recognition of TWU graduates. Though TWU graduates perform well in those respective professions, it would not matter. Accepting graduates from a program that is deemed to have discriminatory beliefs and practices on marriage—between one man

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247. Janet Epp Buckingham, *What's all the fuss about Trinity Western University?*, *CARDUS DAILY* (Feb. 10, 2014), <http://www.cardus.ca/blog/2014/02/whats-all-the-fuss-about-trinity-western-university>.

248. Janet Epp-Buckingham described this in her interview with CBC Radio program "The Current" in a show entitled, "Would a law school at a private Christian University discriminate against gays and lesbians?" on March 28, 2013 (online at <http://www.cbc.ca/radio/thecurrent/mar-28-2013-1.2910164/would-a-faith-based-law-school-be-discriminatory-1.2910166>):

What we are wanting to focus on is to graduate practise ready lawyers like a medical school that produces ready to work doctors. But right now the law schools across Canada have a more theoretical focus and they count on the articling year for law students to learn the actual practise skills. What we want to do here is to create a law school based on Christian values that's like a super high quality medical school.

249. *Trinity W. Univ. v. B.C. Coll. of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772, paras. 3–4 (Can.).

and one woman—would be considered politically incorrect for these professional organizations.

*b. The immediate effects on liberal democracy.*

(1) *The uniqueness of the TWU law school case.* Should the SCC rule against the TWU law school, the law will have crossed the Rubicon. It will no longer be neutral on the matters of religious belief, but will have accepted the view that a religious community can no longer operate its own institutions with the belief that marriage is between one man and one woman. That reality will make freedom to practice religious beliefs very difficult in Canada.

To suggest that religious freedom would be endangered by the loss of TWU's law school case may appear to be melodramatic and unwarranted given the long historical legal deference toward religion in Canada. It certainly would challenge the SCC's self-analysis that "[t]he protection of freedom of religion afforded by s. 2 (a) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence."<sup>250</sup> However, the TWU law school case is like no other religious freedom case in the history of Canadian jurisprudence for the following reasons.

(a) *Debate of public/private sphere.* There has been a massive pushback on the propriety of religious belief and practice concerning human sexuality. The TWU law school case has now become the epicenter of the competition between religion and sexual orientation. The claim is that religious communities have no right to maintain their own distinctive nature when operating in "public."<sup>251</sup> The premise of the argument is that religion, religious individuals, and religious communities have no business bringing their religious beliefs and practices into the so-called public sphere. Religion should only be confined to "the context of actual religious worship and observance."<sup>252</sup> Otherwise, any person could, on the basis of genuinely held belief, "demand an exemption from non-discrimination norms in the provision of services to the public."<sup>253</sup> If religious communities are

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250. Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, para. 53 (Can.).

251. MacDougall & Short, *supra* note 132, at 138.

252. *Id.* at 134.

253. *Id.*

involved in “public” enterprises, they must either yield to public norms or vacate the public field.

This argument requires a definition of “public” that describes the provision of services and endeavors outside of “actual religious worship and observance.”<sup>254</sup> Thus, religion is limited to a very narrow definition of the “private sphere,” but the “public sphere” is much broader, “where the rights of others ought not to be affected by religious beliefs.”<sup>255</sup> In essence, this argument demands that religion be confined to the four walls of a church, mosque, or temple. Any involvement of religion outside of the church is to be curtailed. This was the approach taken by the Ontario courts in their rulings against TWU. For example, the Divisional Court held that TWU can exercise its religious freedom “without acting in a manner that coerces others into forsaking their true beliefs in order to have an equal opportunity to a legal education. It is at that point that the right to freedom of religion must yield.”<sup>256</sup>

Another way to view this problem was described by Professor Víctor M. Muñiz-Fraticelli who applied Nathan Oman’s two theories of the market for anti-discrimination to the TWU case.<sup>257</sup> The public theory of the market analogizes the power relationship between the state and citizen to that of the market.<sup>258</sup> It argues that the private relationships in the market (being a public space) ought to be congruent with the state-citizen relationship that is found in a “well functioning liberal democracy.”<sup>259</sup> This creates a serious problem for religious organizations, like TWU, that engage in public endeavors within a religious context that does not accept public sexual norms and values. The mere fact of incongruence is problematic according to the public theory.

Thus, the TWU law school runs afoul because of the community covenant’s discrimination of the LGBT community. As Muñiz-

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254. *Id.*

255. *Id.* at 138.

256. *Trinity W. Univ. v. Law Soc’y of Upper Can.*, [2015] 126 O.R. 3d 1, para. 117 (Can.).

257. Víctor M. Muñiz-Fraticelli, *The (Im)possibility of Christian Education*, in RELIGIOUS FREEDOM AND COMMUNITIES, *supra* note 226, at 209, 217 (citing Nathan Oman, *Doux Commerce, Religion, and the Limits of Antidiscrimination Law*, 92 IND. L.J. at 14 (forthcoming 2016), <http://ssrn.com/abstract=2748585>).

258. *Id.* at 217.

259. Oman, *supra* note 257, at 16.

Fratlicelli points out, “Error—as the old Papal adage went—has no rights.”<sup>260</sup> Since TWU is not congruent with the policies of the law societies it forfeits accreditation. Otherwise, if accreditation were given despite the incongruence the law societies, under this view, would be “complicit” with TWU’s accreditation.<sup>261</sup> “But if every accrediting decision implies complicity with the values of the program that is licensed,” noted Muñoz-Fratlicelli, “then there is no possibility for diversity of values in any field that requires state approval.”<sup>262</sup> It would lead to a bizarre situation where religious education could not be different than public schools running on public values. Why permit religious schools at all?<sup>263</sup> I might add, it defies the whole constitutional protection of religion. The second theory is the private theory of the market. This theory is concerned with systemic discrimination that would prevent victims from participating in commerce.<sup>264</sup> TWU would be awful if its policy were part of the systemic denial of the LGBT community to legal education. However, “this is patently not the case,” Muñoz-Fratlicelli argues.<sup>265</sup> TWU has publicly embraced the value of ensuring all are eligible to attend its law school including those of the LGBTQ community with the proviso they follow the Community Covenant. There is also broad support of the LGBTQ community in the law schools and the legal profession.

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260. Muñoz-Fratlicelli, *supra* note 257, at 220.

261. *Id.* This is the same view of the Ontario courts. The Divisional Court, in *Trinity W. Univ. v. Law Soc’y of Upper Can.*, [2015] 126 O.R. 3d 1 (Can.), recognized that TWU had the religious freedom right to operate its school, “[t]hat right does not carry with it, however, a concomitant right in TWU to compel [the Law Society of Upper Canada] to accredit it, and this lend its tacit approval to the institutional discrimination that is inherent in the manner in which TWU is choosing to operate its law school. To reach a conclusion by which TWU would compel the respondent, directly or indirectly, to adopt the world view that TWU espouses would not represent a balancing of the competing *Charter* rights. Rather, such a conclusion would reflect a result where the applicants’ rights to freedom of religion would have been given unrestricted sway.” *Id.* at para. 115.

262. Muñoz-Fratlicelli, *supra* note 257, at 220. Indeed the Ontario Court of Appeal saw TWU as an exception from all the other law schools and that fact the LSUC could use as part of its reasons for denying TWU accreditation. *Trinity W. Univ. v. Law Soc’y of Upper Can.*, 2016 ONCA 518, para. 132, 134 (Can.).

263. Muñoz-Fratlicelli, *supra* note 257, at 220.

264. *Id.* at 218.

265. *Id.* at 219.

The private theory of the market gives space to religious communities to engage in public endeavors provided they are not denying access to public goods and services.<sup>266</sup>

The lines of reasoning of the public theory of the market, and the idea that religious communities cannot operate in the public sphere is problematic for more reasons than those suggested by Muñiz-Fraticelli. First, it ignores the historical reality of religious involvement in the so-called public sphere. For millennia, the Christian community has operated a number of “public” enterprises, such as hospitals<sup>267</sup> and universities. In fact, Christians have operated universities since the sixth century,<sup>268</sup> and though secular law schools may not acknowledge it, they are, to a large extent, “beneficiaries of a Christian heritage.”<sup>269</sup>

Second, while the historical fact of religious institutions in the “public sphere” does not necessarily require that it must always be so, it nevertheless suggests that the role of religion in the public sphere has been significant and demands respect rather than being treated as irrelevant. Religion has always played an important role in establishing public institutions in the form of religious schools from elementary to graduate school, which is not new, irrelevant, or illegitimate, but is part of what has made Western civilization the envy of the world.

Third, as noted above, in 2001 the SCC viewed TWU as a “private institution.”<sup>270</sup> However, the animus toward TWU has meant that there has been a concerted effort to redefine the meaning of “private institution” to encompass only those who stay cloistered in their religious houses of worship. The SCC in 2001<sup>271</sup> and the Nova Scotia Supreme Court in 2015<sup>272</sup> held to the traditional understanding of “private institution” as being what TWU is—a post-secondary

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266. *Id.* at 221.

267. Timothy S. Miller, *From Poorhouse to Hospital: How the Christian Hospital Evolved from a House of Charity that Cared for the Poor to the Medical Institution We Know Today*, CHRISTIAN HISTORY, no. 101, 2011, at 16.

268. See PIERRE RICHÉ, EDUCATION AND CULTURE IN THE BARBARIAN WEST (1978).

269. HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 351 (2000 ed.). Also note that Elmer John Thiessen, in his work, IN DEFENCE OF RELIGIOUS SCHOOLS AND COLLEGES (2001), details the many Canadian universities that started as Christian universities including Acadia, McMaster, McGill, and the University of Ottawa.

270. *Trinity W. Univ. v. B.C. Coll. of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772, para. 1 (Can.).

271. *Id.*

272. *Trinity W. Univ. v. N.S. Barristers' Soc'y*, 2015 NSSC 25 (Can.).



institution run by a religious community. To suggest that TWU loses its status as a private institution because it must receive government accreditation of its degrees is disingenuous.

Fourth, in reality the argument that religion has no public space is an attempt to re-imagine religion as a destructive force rather than a positive force that has contributed to the well-being of liberal democratic societies. This tactic appears to be necessary because it is the religious-based claims for exemption from modern sexual norms that have disturbed those who expect no contrary position. To eliminate all opposition to modern sexual equality norms requires a concerted effort to destroy the legitimacy of religion and religious institutions in the public eye. Fifth, this argument dismisses even a semblance of diversity by demanding that even within the self-described “private sphere,” only the public norm must prevail. The argument suggests that if a religious institution is “more centrally involved in instilling the tenets of the faith” there would be some room for it to operate while discriminating against those whose sexual norms are not in keeping with the religious institution’s faith, but “perhaps only in the specific contexts where those tenets are actually being instilled.”<sup>273</sup> Therefore, for example, this argument would not allow a church to ensure that its janitor accepts and follows its teachings on human sexuality. If not the janitor, then perhaps the church would not be allowed to discriminate against those whom it allows to collect church offering week to week. It is an argument that is intolerant of difference and is using law “as the means of forcing one set of beliefs to be dominant.”<sup>274</sup>

Sixth, the argument states that it is alarmist to suggest that accepting sexual orientation equality claims is bound to result in interference with religious worship on the issue of marriage.<sup>275</sup> If it is improper to be involved in a public enterprise and follow one’s religious convictions on human sexuality, then should it not follow that it is improper for clergy, performing a public function of marrying people, to refuse to perform a marriage based on religious scruples? In other words, a loss for TWU directly challenges the SCC’s holding

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273. MacDougall & Short, *supra* note 132, at 140.

274. Iain T. Benson, *The Attack on Western Religions by Western Law: Re-Framing Pluralism, Liberalism and Diversity*, (Sept. 20, 2013), at 113, <http://ssrn.com/abstract=2328825>.

275. MacDougall & Short, *supra* note 132, at 145–46.

in the *Marriage Reference* that clergy are protected from having to perform their public function of marrying people if it interferes with their religious beliefs.<sup>276</sup> I suggest that the refusal to allow marriage commissioners in Saskatchewan<sup>277</sup> an exemption from performing marriages that they are morally opposed to is not much different in principle than the ministers of religion or clergy who were given that right in the *Same-sex Marriage Reference*. Both the clergy and marriage commissioners are acting as public officials. Both are refusing to perform on the basis of religious grounds. The only difference is one is employed by the church and the other by the state. If, as Professor Richard Moon suggests, “freedom of religion does not support the accommodation of religious views about the rights and freedoms of others,”<sup>278</sup> then there is a dissonance between how the law treats clergy and marriage commissioners.<sup>279</sup>

(b) *Res judicata*. The TWU case is the only case in which the exact same litigant is facing a later identical challenge to its religious freedom. In 2001, the SCC decided that TWU’s religious freedom was unjustifiably infringed when the BCCT denied accreditation to its educational program.<sup>280</sup> The BCCT denial was not because of the lack of academic rigor of TWU. As noted above, the competency of TWU graduates to teach was not an issue. The issue was whether they would discriminate against LGBTQ students. The

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276. Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, para. 58. (Can.).

277. Three cases in Saskatchewan have ruled that marriage commissioners opposed to performing same-sex weddings cannot be accommodated. They are: *Nichols v. Dept. of Justice*, (25 October 2006, Sask. HRT); *Nichols v. M.J.*, 2009 SKQB 299 (Can.); *Re Marriage Commissioners Appointed Under The Marriage Act*, 2011 SKCA 3 (Can.).

278. Richard Moon, *Conscientious Objections by Civil Servants: The Case of Marriage Commissioners and Same-Sex Civil Marriages*, in BENJAMIN L. BERGER AND RICHARD MOON, RELIGION AND THE EXERCISE OF PUBLIC AUTHORITY 165 (2016).

279. Professor Moon suggests the difference is that marriage commissioners are state actors and their opposition cannot be protected as religious freedom under s. 2(a) of the Charter because their opposition is really not about religion but a political position about the rights of others in the public sphere. *See id.* at 163. I take Professor Moon’s position to be that once a person, like a marriage commissioner, takes a public role then personal conscience can no longer be protected under the Charter. While I do not have the space to adequately rebut that position it appears to suggest that those with religious conscientious positions against public norms need not apply to public offices. That, in my respectful view, cannot be positive for the long term health of a democratic society especially when there are ample ways to accommodate public officials without having to cause any substantive harm to anyone’s sexual equality rights.

280. *Trinity W. Univ. v. B.C. Coll. of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772 (Can.).

BCCT alleged that these graduates would discriminate against LGBTQ students in the BC schools. There was no evidence to support the allegation. In fact, no TWU graduate has ever been accused of committing such an act of discrimination. That lack of occurrence is telling. At best, such a fear of how TWU graduates might act was irrational; at worst, it was a direct act of discrimination by the BCCT against TWU because the BCCT did not approve of TWU's religious worldview on human sexuality.<sup>281</sup>

From an objective, rational basis, the similarities between TWU 2001 and TWU Law School Case are striking. The similarities may be visualized as follows:

2001 BCCT Case	TWU Law School Case
1. TWU Degree Accreditation—Education Degree	1. TWU Degree Accreditation—Law Degree
2. Professional Administrative Decision of Government Actor—BCCT	2. Professional Administrative Decision of Government Actors—BC Law Society; Law Society of Upper Canada; Nova Scotia Barristers' Society
3. Accusation—potential discrimination against homosexuals by TWU students anticipated	3. Accusation—Discrimination against LGBTQ by TWU—students deemed competent and will not be discriminatory
4. Instrument—Community Standards	4. Instrument—Community Covenant

Given these similarities, it seemed implausible that TWU would, yet again, have to fight for its right to have accreditation for a new degree, especially considering that the government actors admitted that TWU graduates would be fully qualified to enter into the

281. In its fall 1996 quarterly newsletter the BCCT stated:

Both the Canadian Human Rights Act and the B.C. Human Rights Act prohibit discrimination on the ground of sexual orientation. The Charter of Rights and the Human Rights Acts express the values which represent the public interest. Labelling homosexual behaviour as sinful has the effect of excluding persons whose sexual orientation is gay or lesbian. The Council believes and is supported by law in the belief that sexual orientation is no more separable from a person than colour. Persons of homosexual orientation, like persons of colour, are entitled to protection and freedom from discrimination under the law. *See Coll. of Teachers*, 1 S.C.R. at para. 6.

profession but for the admissions requirement. This requirement, incidentally, has absolutely no bearing on the academic qualifications of TWU graduates. I am aware of no precedent for such treatment by any other institution of higher learning in the history of Canada. Further, I have not seen, in any of my research, any other institution in the Western world having to face twice a very similar legal challenge at the highest court of the land. It is reasonable to conclude that TWU is being punished because the legal community finds TWU's religious belief and practice of marriage repugnant.

(2) *The loss of religious freedom.* A religious belief is nothing without the opportunity to practice that belief. Religious communities, such as TWU, and their constituent members do not hold religious views lightly. Such beliefs are their very identity. A ruling that effectively bans them from operating their university in accordance with their religious belief on marriage is not simply rebuking the belief but also the institution and the individuals. The religious community would no longer be truly free.

To deny TWU accreditation of its proposed law school is to deny the right of religious communities to establish their own institutions based on their religious beliefs. To suggest, as did the Ontario Divisional Court, that if TWU does not open its law school because the Law Society does not accredit it is “more an economic decision, as opposed to a religious one”<sup>282</sup> turns the logic of the *Charter* on its head. While denying TWU graduates access to the largest legal market in the country will create a serious financial impediment to TWU's law school, that financial circumstance is the direct result of the Law Society's denial of TWU's religious freedom rights.

It is true that exercising one's religious freedom may have a cost. However, when that cost stems from a government actor's disapproval of a religious belief that is not against public policy or illegal, that cost is unjust. It is not against public policy for TWU to operate its school based on the traditional definition of marriage.<sup>283</sup> The Law Society simply does not agree with TWU's definition and practice of marriage.

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282. *Trinity W. Univ. v. Law Soc'y of Upper Can.*, [2015] 126 O.R. 3d 1, para. 85 (Can.).

283. Consider the Preamble of the Civil Marriage Act, S.C. 2005, c 33, (Can.), which states in part, “WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage.”

The Law Society's attempt to enforce its moral view denies TWU graduates "full participation in society."<sup>284</sup>

Nova Scotia Justice Jamie S. Campbell understood this when he ruled: "[TWU's Community Covenant] is not unlawful. It may be offensive to many but it is not unlawful. TWU is not the government. Like churches and other private institutions it does not have to comply with the equality provisions of the *Charter*."<sup>285</sup> He noted that TWU has not breached any applicable human rights legislation. While its policies are not consistent with the preferred moral values of the Nova Scotia Barristers' Society Council, "[t]he *Charter* is not a blueprint for moral conformity. Its purpose is to protect the citizen from the power of the state, not to enforce compliance by citizens or private institutions with the moral judgments of the state."<sup>286</sup>

The Divisional Court's reasoning appears to be willing to make the *Charter* the blueprint for moral conformity. Yet, as we saw in 2001, the SCC ruled that TWU could not be forced to accept the public norm on human sexuality when it stated that "[t]he diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected."<sup>287</sup>

The Divisional Court's decision is also reminiscent of the SCC's now-overturned 1963 decision that upheld *The Lord's Day Act*, holding that the inability to open a business on Sunday did not interfere with religious freedom but only interfered with "a purely secular and financial" concern.<sup>288</sup> In its 1985 *Big M* decision, the SCC ruled that "[i]f a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free."<sup>289</sup> State compulsion in matters of conscience has historically been shown to be detrimental to a democratic state. It is a principle that the SCC understood in *Big M*.

The Divisional Court also stated that TWU has the right to create its own law school and exercise its religious freedom, but it does not

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284. *Coll. of Teachers*, 1 S.C.R. at para. 35.

285. *Trinity W. Univ. v. N.S. Barristers' Soc'y*, [2015] NSSC 25, para. 10 (Can.).

286. *Id.*

287. *Coll. of Teachers*, 1 S.C.R. at para. 33.

288. *Robertson & Rosetanni v. R.*, [1963] S.C.R. 651, 658 (Can.).

289. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, para. 95 (Can.).

have the right to “compel” the Law Society to accredit it, thereby lending the Law Society’s “tacit approval to the institutional discrimination that is inherent in the manner in which TWU is choosing to operate its law school.”<sup>290</sup> It would amount to “directly or indirectly” forcing the Law Society “to adopt the world view that TWU espouses.”<sup>291</sup> That result “would not represent a balancing of the competing *Charter* rights,” but would allow TWU’s freedom of religion to have “unrestricted sway.”<sup>292</sup>

The Divisional Court did not appreciate the reality that religious freedom provides religious adherents the space to practice their faith. The Law Society is no more adopting the worldview of TWU by accrediting its law school than is the licensing authority of motor vehicles adopting the worldview of those drivers who receive their driver’s licenses. The Law Society’s function is to ensure that TWU graduates are competently educated to practice law and then grant licenses accordingly, in the same way that the motor vehicle authority is to ensure the driver is competent to get behind the wheel of a vehicle and travel the highway. However, with the Divisional Court’s decision, does the Law Society now see itself as having the responsibility to inquire into the beliefs and practices of prospective lawyers before granting them licenses to practice law?

The Divisional Court’s logic appears to suggest that all government agencies would have to ensure that they agree with the worldviews of those receiving state permission (or privileges) in whatever form, such as: licenses, grants of money, building permits, accreditation of schools (elementary, secondary, and post-secondary), and special exemptions. In that case, the state would become the Grand Inquisitor to ensure that all citizens have the correct opinion. If the Divisional Court’s reasoning is upheld, then there will be no practical religious freedom in Canada. It would, in short, be the end of our free and democratic society.

(3) *State supremacy over individual conscience.* The loss of an individual’s ability to follow his or her conscience is the point at which the state becomes the sole sovereign. As noted above, throughout Western civilization there has been tension between the state claiming the sole allegiance of its subjects and the claim of individual conscience

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290. *Trinity W. Univ. v. Law Soc’y of Upper Can.*, [2015] 126 O.R. 3d 1, para. 115.

291. *Id.*

292. *Id.*

to follow his or her duty to divine sovereignty. The above discussion on the Reformation also showed that the bifurcation of sovereignty allowed for religious freedom as we know it today. Further, religious freedom was the prototypical right in modern states that blazed the trail for other basic human rights such as freedom of speech, assembly, and association. The reduction of religious freedom by the rise of state supremacy over the individual conscience is, if history is any indication, a troubling development.

State supremacy over individual conscience presupposes that the state has the power to force the will of society on the individual. The discretion to grant TWU accreditation is a solemn responsibility. To make granting accreditation subject to whether TWU's moral views harmonize with those of the state is unjust. The protection of religion in liberal democracies mitigated the brute forces that would deny freedom of speech, the press, association, assembly, conscience, and mobility, not to mention the right of fair trial.

The individual, and by extension fellow believers in a religious community, will either be denied the right to follow his or her conscience or be punished by the state for paying homage to divinity as he or she feels is their responsibility. The state would then be determining who will be sovereign in an individual's life. This approach takes on the characteristics of those ancient Roman emperors who demanded allegiance as both God and king to their citizens.

*(4) Suppression of religious charities.*

*(a) Religious charities will close.* Other Christian universities across the country with similar stands to TWU regarding marriage can be expected to either fall in line with the new political and legal reality of sexual equality rights or face similar retribution for being "on the wrong side of history." Our legal system will undertake a systematic recalibration as religion's protection and special status is removed from the law.

The loss of religious freedom for private religious institutions such as TWU to maintain their distinct religious beliefs and practice as they continue to operate will inevitably lead many, if not most, of those

institutions to close their doors.<sup>293</sup> It is the religious character of these institutions that establishes the very root of who and what they are as “a living faith tradition.”<sup>294</sup> TWU’s claim to operate with its Community Covenant “is a claim simply to live out the educational dimension of that Christian community’s life,” as Dwight Newman so aptly put it. He continues, “The TWU claim is not a claim to isolationism but a claim to manifest religious belief in community, well within the core of religious freedom.”<sup>295</sup> If the religious organization cannot be what it was set up to be, it will not exist. A religious community will not permit its time, money, and effort to go toward a project that is not in keeping with the community’s strongly held views. It has no interest in its institution being like the public institutions.

An example of a Christian humanitarian agency closing because of the state’s failure to provide for its religious freedom occurred in Massachusetts. Massachusetts law did not allow the Roman Catholic child adoption agency to take its religious view into account when arranging adoptions; the agency felt it had no choice but to close.<sup>296</sup> To do otherwise would have violated its strongly held religious belief about human sexuality and the importance of children being raised with both a mother and a father. Unfortunately, not even the fact that the Catholic adoption agency provided the lion’s share of special-needs children with adoptive homes was enough to convince the state of Massachusetts to accommodate the agency’s religious views.<sup>297</sup> The equality argument was such a potent force that it demanded full compliance with no opportunity for compromise. “Massachusetts has essentially made a qualitative judgment on religious views opposing homosexuality in finding them untenable in the arena of

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293. “Given how fundamental the biblical conception of marriage is to TWU’s identity, the alternative to TWU Law School *with* the discriminatory CCA [Community Covenant Agreement] is not TWU Law School *without* the CCA. The alternative is no TWU Law School at all, and thus no additional places for straight or LGBTQ, religious or secular students.” Muñiz-Fraticelli, *supra* note 257, at 219.

294. Dwight Newman, *Ties That Bind: Religious Freedom and Communities*, in RELIGIOUS FREEDOM AND COMMUNITIES, *supra* note 226, at 18.

295. *Id.*

296. Matthew W. Clark, *The Gospel According to the State: An Analysis of Massachusetts Adoption Laws and the Closing of Catholic Charities Adoption Services*, 41 SUFFOLK U. L. REV. 871, 873, 895 (2008).

297. *Id.* at 896



adoptions.”<sup>298</sup> Massachusetts sacrificed “one value judgment, the right of homosexuals to adopt, for another, the role of religion in determining a child’s best interests.”<sup>299</sup> Offended feelings over sexual identity took precedence over the very practical reality of special-needs children.

The Ontario Court of Appeal was similarly willing to remove TWU’s right to operate its law school because its Community Covenant “hurts.”<sup>300</sup> It mattered not to the Court of Appeal that TWU was willing to allow for the full range of diversity, including all sexual identities, to attend as long as they were willing to abide by the Covenant. Offended feelings over sexual identity again took precedence over the religious freedom right to run a Christian law school. These are among the practical realities of the legal revolution currently under way. However, it is a revolution that will, in all probability, meet strong resistance. In fact, the level of engagement of a wide array of Christian groups supporting TWU is evidence of that proposition. Religious communities are tenacious in maintaining their religious purposes and identities.<sup>301</sup> In the West, 2,000 years of history testify to that reality. Refusing religious communities the right to maintain their religious identities in their own private humanitarian institutions is unjust. It will have a negative effect on the greater good of our democratic society when religious charities are forced to close as a result.

Religious groups have been at the heart of equality rights in the West for centuries, from the William Wilberforce’s anti-slavery movement to the modern struggle for equality of immigrants from Syria to Canada. Christian groups have raised their voices for redress for hundreds of years. When political expediency during WWII demanded Canadian citizens of Japanese ancestry to be incarcerated and then later to be deported the religious communities rose up in fierce opposition to such “false, cruel, un-British and above all, un-

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298. *Id.* at 895.

299. *Id.*

300. *Trinity W. Univ. v. Law Soc’y of Upper Can.*, 2016 ONCA 518 para. 119 (Can.) (“My conclusion is a simple one: the part of TWU’s Community Covenant in issue in this appeal is deeply discriminatory to the LGBTQ community, and it hurts.”).

301. Consider that even today with the rise of the “nones” who prefer no religion, 66% of Canadians identify as Christian. See *Canada’s Changing Religious Landscape*, PEW RES. CTR. (June 27, 2013), <http://www.pewforum.org/2013/06/27/canadas-changing-religious-landscape/>.

Christian”<sup>302</sup> plans. As one clergy wrote, those “born in this country are no more responsible for what the militarists of the country of their racial origin have done . . . then are Canadian citizens of any other racial background.” He demanded the politicians answer why discriminate against Japanese Canadians but “not against Canadians whose ancestry is German, Italian, Finnish, Hungarian, Romanian, or Bulgarian?”<sup>303</sup>

Scholars Michael Barnett and Janice Gross Stein observed, “it is only a slight exaggeration to say ‘no religion, no humanitarianism.’”<sup>304</sup> The number of religious-based entities in humanitarian work is on the rise globally.<sup>305</sup> It is ironic that while the rest of the world benefits from religious-based humanitarian charities, the West is being denied such services because the legal revolution cannot accept religious agencies operating within a structure that supports traditional sexual ethics. The world and Western society benefit when such agencies are permitted to carry out their work without state imposition of sexual norms.

This is not to belittle the obvious pain that members of the LGBTQ community have experienced within religious communities as is evidenced by a number of LGBTQ advocates in the TWU Law School case.<sup>306</sup> However, the point remains that religious communities, despite all of their short comings, are contributors to the social good and they are not to be diminished, denied equal treatment, or maligned because they maintain traditional sexual norms within their own communities even though they are engaged in what is now perceived as “public” endeavors. As lawyer, and LGBTQ rights advocate, Kevin Kindred, stated,

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302. STEPHANIE BANGARTH, VOICES RAISED IN PROTEST: DEFENDING NORTH AMERICAN CITIZENS OF JAPANESE ANCESTRY, 1942-49, at 80 (2008).

303. *Id.*

304. SACRED AID: FAITH AND HUMANITARIANISM 4 (Michael Barnett & Janice Stein eds., 2012).

305. Andrea Paras & Janice Gross Stein, *Bridging the Sacred and the Profane in Humanitarian Life*, in SACRED AID: FAITH AND HUMANITARIANISM, *supra* note 304, at 212.

306. See the evidence of Professor Elaine Craig before the Nova Scotia Barristers’ Society, February, 2014, wherein she stated, “In my first year of law school, I came out to my family. My parents rejected me, disowned me, because of their belief that homosexuality is disgusting and perverted, vile and shameful, you might say.” N.S. Barristers’ Soc’y, Meeting of the Executive Committee of the Council, at 13 (Feb. 13, 2014), [http://nsbs.org/sites/default/files/ftp/TWU\\_Submissions/2014-02-13\\_NSBSTrinityWesternU.pdf](http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-02-13_NSBSTrinityWesternU.pdf).

What troubles me the most when I try to come to terms with questions like this [accreditation of TWU Law School] is the fear that sometimes the arguments for equality for gays and lesbians are used as a sword and are used in order to attack the valued place that religious dissenters and religious minorities ought to occupy in Canadian culture.<sup>307</sup>

Professor Andrew Koppelman notes, that those who are most concerned with the growing inequality would be making a “catastrophic error” in being hostile toward religion because of religion’s historic role in such issues as slavery, the New Deal, civil rights and protesting war.<sup>308</sup>

(b) *The removal of benefits and accommodations.* As this Article notes, religion has been accommodated in a myriad of ways in Canadian law. The removal of religious freedom from its protected status will lead to the removal of the law’s rebuttable presumption that religion is to be accommodated. A hierarchical regime where equality rights trump religion will mean that where there is a conflict, perhaps even only a perceived conflict, between religion and equality, the result will be the diminution of the perceived “religious privilege.”

(i) *Clergy accommodation.* The first religious areas to go, therefore, will be those areas where religion conflicts with equality. One cannot make an exhaustive list, but certainly the most obvious would be the removal of the accommodation given to clergy who cannot marry a couple because of religious scruples. In *Marriage Reference*, the SCC stated:

[S]tate compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(a) of the *Charter*. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the *Charter*.<sup>309</sup>

At first blush, this holding appears to be immovable. However, it is immovable only in the current legal paradigm that treats religion as special and worthy of constitutional protection. Once religion has been determined to be the nemesis of equality, religion will be seen in

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307. *Id.* at 150.

308. Andrew Koppelman, *Gay Rights, Religious Accommodations, and The Purposes of Antidiscrimination Law*, 88 S. CAL. L. REV. 619, 629 (2015).

309. Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, para. 58 (Can.).

a very different light. Should the SCC adopt the arguments being advanced against TWU that were accepted by the Ontario Divisional Court, religious scruples would no longer justify the refusal of clergy conducting a public function, namely, the marriage of any two persons. Allowing clergy to refuse would be fundamentally inconsistent with the new paradigm, which does not see religion as worthy of protection. In the new paradigm, the state act of granting authority to clergy to perform a public action would be legitimizing the religious beliefs underlying the clergy's refusal to marry, similar to the reasoning of the Saskatchewan court in refusing to respect the right of conscience for civil marriage commissioners.<sup>310</sup> In the same way, the Law Society would be condoning and accepting the worldview of TWU by allowing TWU graduates to practice law in its jurisdiction.

(ii) *Charitable status for advancement of religion.*

Throughout the current TWU litigation,<sup>311</sup> the law societies and/or their allies have argued that the case of *Bob Jones University*<sup>312</sup> in the United States is applicable because both it and the TWU case involved forms of perceived discrimination. Bob Jones University (BJU) was not allowed to maintain its charitable tax status because of its racist policies based upon religious beliefs.<sup>313</sup> TWU's requirement that students sign a community covenant is seen as religious discrimination against the LGBTQ community. Therefore, as the argument goes, just as BJU was not permitted charitable status for its discriminatory practice so too TWU law school should not receive accreditation because both are equally discriminatory and neither is to be preferred over the other—they are “on the same footing”.<sup>314</sup>

The analogy of Bob Jones University's racial policies to TWU's policy on traditional marriage is an analogy that simply does not apply. First, the TWU case is not about charitable tax status, but about accreditation. Loss of charitable status is a negative financial impact but a minor impediment compared to the loss of accreditation. In any

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310. Re Marriage Comm'rs Appointed Under The Marriage Act, 2011 SKCA 3, [2011] S.J. No. 3 (Can.).

311. The Ontario Court of Appeal accepted the BJU analogy. *Trinity W. Univ. v. Law Soc'y of Upper Can.*, 2016 ONCA 518 paras. 136–38 (Can.).

312. *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

313. *Id.* at 574.

314. Transcript of Oral Argument at 128, lines 1–6, *Trinity W. Univ. v. N.S. Barristers' Soc'y*, [2015] NSSC 25, para. 230 (Can.) (No. 427,840).

balancing of the public good and the burden imposed there can be little doubt that TWU's loss of accreditation would be far more egregious than the loss of charitable status. Loss of charitable status would make TWU more expensive but still able to run its program; loss of accreditation eliminates TWU's ability to provide the law degree program because of the public regulation of the legal profession.

Second, as pointed out by Professor Mary Ann Waldron, the history of black students' access to education in the U.S. is a very different issue than the history of LGBTQ community's access in Canada.<sup>315</sup> While not diminishing the struggles the LGBTQ community have had in Canada, Waldron noted, "no school and no public policy have ever barred LGBTQ students from attending a school or university."<sup>316</sup> "[T]hose with differing sexual orientations or genders are not under-represented in the well-educated or the professional classes."<sup>317</sup> Therefore there is no "remedial need for punitive public policy to require all institutions to accept same-sex marriage."<sup>318</sup>

Third, the IRS policy is an accurate reflection of US public policy on the issue of racial relations. Racial discrimination has no public good. However, in the case of TWU things are much different. The Canadian government and the Supreme Court of Canada<sup>319</sup> recognize the fact that reasonable people can have differing views on same-sex marriage. In 2005 Parliament made it clear in the *Civil Marriage Act*<sup>320</sup> that nothing in the *Act* that redefined marriage as being

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315. Mary Anne Waldron, *Analogy and Neutrality: Thinking about Freedom of Religion, in* RELIGIOUS FREEDOM AND COMMUNITIES, *supra* note 226, at 252.

316. *Id.*

317. *Id.*

318. *Id.*

319. Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, paras. 56–60 (Can.).

320. Civil Marriage Act, S.C. 2005, c 33 (Can.). The Preamble states in part:

WHEREAS everyone has the freedom of conscience and religion under section 2 of the Canadian Charter of Rights and Freedoms;

WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;

WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage;

between “any two persons” affects the religious freedom guarantee of members of religious groups to hold and declare their religious beliefs on marriage. It further sets out in section 3.1 that it is not against the public interest to hold and publicly express diverse views on marriage.<sup>321</sup> Also of note is that the *Income Tax Act*<sup>322</sup> was amended to ensure that a registered charity with the stated purpose of advancing religion would not be penalized and lose its charitable status because it exercised its religious freedom in relation to marriage between persons of the same sex.<sup>323</sup>

Fourth, there is a corollary to the third point and that is “all discriminatory acts are not the same and do not carry the same consequences.”<sup>324</sup> As Professor Waldron explains, discrimination that can be and ought to be remedied will not damage the institution.<sup>325</sup> However, when there is discrimination for which the remedy will destroy the very thing that is desired then that discrimination cannot be culpable.<sup>326</sup>

Applying this to TWU and BJU we see the following: the remedy to address BJU’s policy was to refuse it charitable status. Further, I suggest that the IRS policy was intentional. It was meant to encourage institutions like BJU to end its bigoted racial policies, not destroy the institution. Waldron suggests that that is acceptable because the theological position of BJU “never had a substantial tradition in Christianity, nor were they supported by any respectable theologian.”<sup>327</sup> It is also the reality that the facts of racial superiority have been disproved.<sup>328</sup> This reality, Waldron suggests, means that BJU’s policy “does not legitimately fall within the category of

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321. Civil Marriage Act, S.C. 2005, c 33 (Can.), s. 3.1.

322. Income Tax Act, R.S.C. 1985, c 1 (5th Supp.) (Can.), § 149.1 (6)(21) (“For greater certainty, subject to subsections (6.1) and (6.2), a registered charity with stated purposes that include the advancement of religion shall not have its registration revoked or be subject to any other penalty under Part V solely because it or any of its members, officials, supporters or adherents exercises, in relation to marriage between persons of the same sex, the freedom of conscience and religion guaranteed under the Canadian Charter of Rights and Freedoms.”).

323. *Id.*

324. Waldron, *supra* note 315, at 254.

325. *Id.*

326. *Id.*

327. *Id.* at 255.

328. *Id.*

philosophical or religious belief,”<sup>329</sup> and therefore, is not worthy of protection.

According to Waldron, same-sex marriage, unlike racial discrimination, does fall under the realm of belief that merits legal protection.<sup>330</sup> She views the U.S. Supreme Court *Obergefell*<sup>331</sup> decision as making it clear that marriage comes down to belief. Those advocating same-sex marriage, on the one hand, are of the belief that marriage is “wholly at the service of the state and of individual choice and autonomy.”<sup>332</sup> Marriage “is what the state says it is and that is the end of the matter.”<sup>333</sup>

On the other hand, marriage as a heterosexual institution is grounded in a different understanding of human nature based on a natural law view usually accompanied with a belief in God. Therefore, it is a belief worthy of protection.<sup>334</sup> Those of this view see men and women as complementary—men and women are not complete without the other and form the basic relationship upon which the community is built and expanded by the children the relationship produces.<sup>335</sup>

Since marriage is a matter of belief, both sides of the marriage debate are worthy of legal protection. Racial discrimination, debunked by historical animosity and science, is not worthy. Discrimination is not all the same. While the majority of society is of the view that same-sex marriage is considered a public good, there are those, perhaps of a minority position, who are of the view that heterosexual marriage is the public good. Both deserve protection. Room must be had for the TWU’s in the world to carry on their religious belief and practice of traditional heterosexual marriage. The justification for such a stand is

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329. *Id.*

330. *Id.* at 256.

331. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

332. Waldron, *supra* note 315, at 258.

333. *Id.*

334. *Id.*

335. *Id.* at 259.

that state must be neutral<sup>336</sup> on competing “unfalsifiable belief systems.”<sup>337</sup>

Finally, the rhetorical purpose of the BJU analogy is curious. It has the effect of maligning TWU. TWU has never held any such racist views or had any comparable policies on race. For that matter, there is no evidence that any Canadian religious university had such a view. During argument, the NSBS counsel stated, “I guess the most that can be said is that their [TWU] freedom of religion includes getting a recognized law degree from a law school where LGB people are not welcome. I don’t know any other way to articulate it.”<sup>338</sup> Another argued, “There’s nothing in the statement of faith . . . suggesting it is a religious requirement not to share the air in the classroom or elsewhere with persons who are nonbelievers in the dogma of the Evangelical Free Church.”<sup>339</sup>

Further, whatever one’s view about whether sexual orientation is akin to class or race is beside the point, because to make the analogy is to suggest that TWU is violating public policy by believing and practicing traditional marriage on its campus. There is no such public policy, either in law or social norms that suggests that a religious university supporting traditional marriage is wrong.

However, to be consistent, the legal revolution would also have to argue that TWU’s charitable tax status should be removed because TWU had discriminated against sexual equality by supporting

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336. In *S.L. v. Comm’n scolaire des Chênes*, 2012 SCC 7, [2012] 1 S.C.R. 235, para. 32 (Can.) (“[S]tate neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected.”), and in *Loyola High Sch. v. Quebec*, [2015] 1 S.C.R. 613, para. 159 (Can.), the SCC rejected the imposition of a neutrality requirement of Quebec’s religion and ethics curriculum on Loyola, a Catholic high school, that would force Catholic teachers to choose between expressing a neutral (and therefore insincere) viewpoint on an ethical question about the Catholic faith or simply remaining silent. Neither was acceptable, said the SCC. In *Mouvement laïque québécois v. Saguenay*, 2015 SCC 16, [2015] 2 S.C.R. 3, para. 132 (Can.), the SCC stated, “true neutrality presupposes that the state abstains from taking a position on questions of religion.”

337. Waldron, *supra* note 315, at 262.

338. Transcript of Oral Argument at 176, lines 27–31, *Trinity W. Univ. v. N.S. Barristers’ Soc’y*, [2015] NSSC 25, para. 230 (Can.) (No. 427,840).

339. *Id.* at 7 lines 6–14.



traditional marriage, and such discrimination is contrary to public policy and not a public benefit.<sup>340</sup>

To be successful, therefore, the legal revolution would have to either persuade Parliament to repeal those applicable sections of the *Civil Marriage Act* and the *Income Tax Act*, or convince the SCC to rule that those applicable sections are unconstitutional in light of the new interpretation given to religion's place in the law. And, if successful in accomplishing those goals, the legal revolution would, in all probability, turn toward all religious charities that uphold traditional marriage in their operations.

(5) *The effect on the legal profession.* Should TWU law school not be accredited, then the “damaging message to the public would be denying minority evangelical Christians the opportunity to earn their law degree in a private, faith-based setting that meets the technical requirements to qualify as a law school,” noted Professor Faisal Bhabha.<sup>341</sup> “This would,” he continues, “be like saying ‘evangelical Christians are not welcome’ in the legal profession.”<sup>342</sup>

The negative effect of the TWU Law School debate on Evangelical Christians in the legal profession ought not to be discounted. The Supreme Court of Canada in the TWU 2001 case noted “TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions.”<sup>343</sup> Denying accreditation to the law school would be in effect saying “TWU is not for anyone.” The 2001 case also recognized that the same logic that denied accreditation of the education degree because of the Community Standards could be applied to denying teachers who were members of a particular church.<sup>344</sup> This was problematic to the SCC in light of the fact that diversity of Canadian society is partly reflected in the multiple religious organizations. “[T]his diversity of views should be respected.”<sup>345</sup> If the legal profession has no room for the TWU School

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340. See Templeton, *supra* note 178.

341. Faisal Bhabha, *Hanging in the Balance: The Rights of Religious Minorities, in* RELIGIOUS FREEDOM AND COMMUNITIES, *supra* note 226, at 265, 282–83.

342. *Id.* at 283.

343. *Trinity W. Univ. v. B.C. Coll. of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772, para. 25 (Can.).

344. *Id.* at para. 33.

345. *Id.*

of Law then what is to prevent the profession from turning on those legal practitioners who hold the same views as TWU?

The lack of trust exhibited by the legal community toward TWU's law school proposal has meant the system has become totally inefficient. Rather than trust the Federation's exhaustive review and decision in favor of TWU, the law societies took the task upon themselves to re-examine the application *de novo*, that is, from the beginning. At each turn, TWU has had to incur additional expense, effort, time, and energy to meet the ancillary requirements of the examining law society for documentation, face-to-face consultation, and attendance at yet another public hearing of the benchers to answer the very same question decided by the Federation. It is redundant, inefficient, unnecessary and evidence of a lack of trust. In short, it grounded the national approval mechanism for law schools to a halt. We have yet to see the long-term effect of this development, but already there is one result: the promise of mobility of the legal profession is in serious jeopardy, as there is a patchwork of some law societies accepting TWU graduates and others not.

#### IV. THE DELIBERATIVE WAY FORWARD: ACCEPTING DISSONANCE

The ramifications of the emerging legal revolution against the current legal paradigm regarding religion will bring disruption to law, society, and the democratic project. This Article argues that the price to pay will be dire. It will not be an approach that encourages ongoing dialogue and respect between competing views on the public good. We need a deliberative approach that accepts dissonance as a strength, not a failure. The following seven suggestions introduce an attempt to move forward.

First, religion matters. Justice Ivan Rand's observation over sixty years ago is just as pertinent today: "a religious incident reverberates from one end of this country to the other, and there is nothing to which the 'body politic of the Dominion' is more sensitive."<sup>346</sup> However, there is a terrible lack of understanding about religion. Throughout the world, the number of conflicts with religious

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346. *Saumur v. Quebec*, [1953] 2 S.C.R. 97 (Can.).

overtones are significant<sup>347</sup> So much so that John Kerry, the U.S. Secretary of State, stated, “if I went back to college today, I think I would probably major in comparative religion because that’s how integrated [religion] is in everything that we are working on and deciding and thinking about in life today.”<sup>348</sup>

Religion matters because people believe and are willing to pay a high personal cost to practice their beliefs. In the past, the law made sense of this reality by seeking accommodation. Today is no different. There must be a willingness to engage in conversation that does not simply put religion in a private corner as if it has no bearing on our mutual well-being. Given the importance of religion to our increasingly diverse and plural society, the law must yet again turn its mind to allowing religious individuals and their institutions to continue to operate without fear of state reprisal.

Second, the legal profession ought to become knowledgeable about religion and its societal impact. It is not helpful to characterize religion as equality’s nemesis when even a cursory review of history and the development of the law and public policy will show a number of religiously motivated individuals who sought to break down barriers of inequality. Examples of such religiously motivated people include Mahatma Ghandi, Martin Luther King Jr.,<sup>349</sup> and Nellie McClung,<sup>350</sup> one of the “Famous Five” who championed women’s equality in the *Persons Case*.<sup>351</sup>

There needs to be an understanding of the historic and current place of religion in the law. Religion will not disappear with continued secular university education, as if education were some kind of cure for religion. Religion may change over time to some degree, but its basic principles will remain salient for a significant group in society. By maintaining religion’s legal status, the state can never be the sole determiner of the individual conscience. By necessity, our society will be one where not every person will agree on such intimate issues as

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347. Conflicts are by nature multifaceted involving politics, economics, social status and historical contexts. Religion is part and parcel of the mix. For a list of twenty-five conflicts involving religion see *Religious peace, violence, & genocide: Religiously-based civil unrest and warfare*, RELIGIoustOLERANCE.ORG (Jul. 7, 2015), [http://www.religioustolerance.org/curr\\_war.htm](http://www.religioustolerance.org/curr_war.htm).

348. *Faith-Based Community Initiatives*, C-SPAN (Aug. 7, 2013), <http://www.c-span.org/video/?314438-1/sec-state-kerry-launches-faithbased-community-initiative>.

349. MARTIN LUTHER KING, JR., *THE TRUMPET OF CONSCIENCE* (1967).

350. NELLIE L. MCCLUNG, *CLEARING IN THE WEST: MY OWN STORY* (1945).

351. *Edwards v. Canada*, [1929] UKPC 86, [1930] A.C. 124 (PC) (appeal taken from Can.).

human sexuality. Those with whom we disagree will continue to live out their lives as they see fit. Maintaining a living attitude of tolerance is a practical application of the Golden Rule—do unto others as you would have them do unto you. All human beings, religious or non-religious, have the right to be respected and allowed to live as their consciences dictate. No state actor, such as a law society, has a right to impose its view on human sexuality on another.

Third, protection of religious freedom does not depend on whether an individual's "beliefs are objectively recognized as valid by other members of the same religion, nor is such an inquiry appropriate for courts to make."<sup>352</sup> However, courts, lawyers, and legislators need to be mindful of the importance to which individuals attach to their beliefs. In other words, our law must be willing to see through the eyes of the believer—not to be "the arbiter of religious dogma,"<sup>353</sup> but to understand the sincerity of belief. Therefore, the law must ask, given the sincerely held belief of the claimant, what does it mean (in the case of TWU) that Evangelical Christians have a university that maintains a synchronicity with their belief of traditional marriage? It is here that the law must be willing to see as TWU (and all Christians of like mind who have such institutions) sees. This is exactly what Justice Campbell of the Supreme Court of Nova Scotia did. He clearly understood that Evangelical Christians have:

[A] religious faith [that] governs every aspect of their lives. When they study law, whether at a Christian law school or elsewhere, they are studying law first as Christians. Part of their religious faith involves being in the company of other Christians, not only for the purpose of worship. They gain spiritual strength from communing in that way. They seek out opportunities to do that. Being part of institutions that are defined as Christian in character is not an insignificant part of who they are. Being Christian in character does not mean excluding those of other faiths but does require that everyone adhere to the code that the religion mandates. Going to such an institution is an expression of their religious faith. That is a sincerely held believe [sic] and it is not for the court or for the NSBS to tell them that it just isn't that important.<sup>354</sup>

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352. *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551, para. 43 (Can.).

353. *Id.* at para. 50.

354. *Trinity W. Univ. v. N.S. Barristers' Soc'y*, [2015] NSSC 25, para. 230 (Can.).

Fourth, the Western state should be neutral in matters of religion while permitting religion a public role. That does not mean the state does not consider the practical impact of religious practices, but it does emphasize the state's reluctance to interfere with religion. Justice LeBel stated, "[t]he concept of neutrality allows churches and their members to play an important role in the public space where societal debates take place, while the state acts as an essentially neutral intermediary in relations between the various denominations and between those denominations and civil society."<sup>355</sup>

This Article argues that when religious communities run enterprises such as universities, the state has a "democratic imperative," to use the words of Justice Gascon,<sup>356</sup> to ensure that it does not favor "certain religious groups and is hostile to others. It follows that the state may not, by expressing its own religious preference, promote the participation of believers to the exclusion of non-believers or vice versa."<sup>357</sup>

Fifth, the Christian community has maintained the teaching and practice of traditional marriage for over 2,000 years. The length of time a community carries on a practice cannot, in and of itself, give it license to continue that practice if it violates basic human decency. However, the fact that such a community has practiced a religious belief for such a long time does entitle that community to have, at the very least, a rebuttable presumption that it should be entitled to continue that practice. The religious practice of marriage as one man and one woman has never been held to violate human rights. Even the UN Declaration of Human Rights in Article 16 recognizes the right to heterosexual marriage.<sup>358</sup>

Sixth, a citizen of a modern Western democracy can expect to have dissonance between his or her beliefs and practices and those of fellow

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355. *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine*, [2004] 2 S.C.R. 650, para. 67 (Can.).

356. *Mouvement laïque québécois v. Saguenay*, [2015] 2 S.C.R. 3, para. 75 (Can.).

357. *Id.*

358. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 16 (Dec. 10, 1948), <http://www.un.org/en/universal-declaration-human-rights/> ("(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. (2) Marriage shall be entered into only with the free and full consent of the intending spouses. (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.").

citizens or the state. The fact that another believes and practices differently in matters as intimately private as sexuality must not put that citizen, or the religious institution with which he or she is affiliated, at a disadvantage. This is similar to the Supreme Court of Canada's discussion about a public school student facing cognitive dissonance between the way she was raised and the way other students live their lives. Said the Court it "is simply a part of living in a diverse society. It is also a part of growing up. Through such experiences, children come to realize that not all of their values are shared by others."<sup>359</sup> So too must we all learn to accept that we will not all be the same. The SCC continued:

[T]he demand for tolerance cannot be interpreted as the demand to approve of another person's beliefs or practices. When we ask people to be tolerant of others, we do not ask them to abandon their personal convictions. We merely ask them to respect the rights, values and ways of being of those who may not share those convictions. The belief that others are entitled to equal respect depends, not on the belief that their values are right, but on the belief that they have a claim to equal respect regardless of whether they are right. Learning about tolerance is therefore learning that other people's entitlement to respect from us does not depend on whether their views accord with our own.<sup>360</sup>

Seventh, when an institution such as TWU is private, peaceable, non-commercial, and presents no "grave and impending public danger,"<sup>361</sup> and there is no evidence of abuse of private power,<sup>362</sup> then the law's indifference toward that institution's peculiar discrimination to maintain an ambiance that respects its religious sensibilities ought to be maintained. The choice comes down to whether we are a free and democratic society that allows for difference and the expression of that difference, or whether we will require sameness in all areas. Entities such as TWU depend upon the ability to discriminate for its very existence.<sup>363</sup> Destroying the ability to discriminate in favor of religious identity will destroy the democratic project—it denies individual freedom and will limit the ability of our society to maintain

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359. *Chamberlain v. Surrey Sch. Dist. No. 36*, [2002] 4 S.C.R. 710, para. 65 (Can.).

360. *Id.* at para. 66.

361. *Thomas v. Collins*, 323 U.S. 516, 532 (1945).

362. INAZU, *supra* note 1, at 184.

363. *Id.*

civil peace as religious people are denied their inalienable right to express their faith in the institutions they decide to found.

#### V. CONCLUSION

This Article has explained that a conflict between two sovereignties has run throughout human history: the sovereignty of the state and the sovereignty of the individual conscience, or religion. Western liberal democracies have been widely successful because they discovered an efficacious solution to the conflict—the recognition that the state has no jurisdiction to unduly interfere with the conscience. The state is not divine. On matters of individual conscience, it is impotent, and must recognize its proper jurisdiction in maintaining the democratic project. The history of the West, its practical political experience, and its philosophical understanding support the rebuttable presumption that religious belief and practice are to be accommodated except in the rarest of occasions.

That paradigm is now being challenged by legal academics and social activists, and has taken root in a large segment of the legal profession. Currently, there is a tension between those who want to allow religion's status to remain and those who demand limiting, if not expunging, religion's protected status in the law. The TWU Law School case has become ground zero in the revolutionary demand that the paradigm of religious protection be reformed to deny a minority religious group the ability to maintain its community based on its traditional sexual norms.

The religious freedom paradigm runs deep within Western law. Many of the social, political, and legal norms that once animated the West have given way to modern secular norms. In some respects, the challenge to the paradigm is but an evolution of those changing norms. However, this Article suggests that the challenge to religion's place in law goes much deeper and will have a profound impact on the law and society. Religion is not like the other social issues currently in discussion, such as the legalization of prostitution or physician-assisted suicide. Religion is more expansive—so expansive that it hovers over the entire body politic in the individual conscience.

Typically, after each revolution there is a new age. What might the future be without the old paradigm of accommodating religion? The more likely outcome, with the rising tension between religious practice and conflicting societal norms, is that state entities will require an increase of resources to address the non-conformists. For example,

despite the Alberta government not having to provide a legal exemption to the photograph requirement for issuing drivers' licenses to the Hutterites,<sup>364</sup> the Hutterites have every intention of continuing to seek that exemption. They continue to maintain "faith that things would eventually change."<sup>365</sup> In other words, religious conviction and practice is not going away simply because the Supreme Court denied the Hutterites' exemption. "[L]iving according to God's commands was more important to them than [sic] following the rules and regulations of men."<sup>366</sup> Trouble of this type is bound to increase. As this Article has illustrated, religious persecution is the result of state imposition on the personal space of individual conscience. State demands for total sovereignty will be met by a recalcitrance of the religiously committed. Western democracy has worked because the ruling class accepted religious accommodation in exchange for civil peace.

It is not difficult to speculate what conflicts might ensue in the event that religion is no longer accommodated as it once was. The "easy targets" are tax benefits, including the removal of registered charitable status and property tax exemption for religious institutions that refuse to adopt public norms. Ironically, such a development may allow religious communities, such as churches, to be more vocal on public issues because they would no longer fear removal of registered charitable status.

On the other hand, religious institutions that are defined as "public," such as schools and universities, might face denial of state accreditation. This would dampen their viability. Very few parents and students would be willing to pay for private education without state recognition.

Beyond the institutional effects is the greater societal impact of refusing to accommodate religion. Civil society would be considerably weaker as religious communities withdraw from society at large. Religious communities such as the Hutterites, the Amish and the Old Order Mennonite groups are constant reminders that religious communities are very resourceful in maintaining their religious

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364. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 (Can.).

365. Howard Kislowicz, *Law, Religion, and Feeling Included/Excluded: Case Studies in Canadian Religious Freedom Litigation*, 30 CANADIAN J. L. & SOC'Y 365, 380 (2015).

366. Bruce Bonta, *Alberta Hutterites Solve Photo ID Problem*, U. ALA. BIRMINGHAM (Mar. 4, 2010), <https://cas.uab.edu/peacefulsocieties/2010/03/04/alberta-hutterites-solve-photo-id-problem>.



lifestyle in the midst of opposition. These Anabaptist groups have had 500 years of creating a world within a world. While they do interact with the secular world, it is primarily limited to commerce. One can expect other religious communities to follow a similar path to protect their way of life.

Despite the best wishes of those who desire religion to be at an end, like Richard Dawkins<sup>367</sup> and Sam Harris,<sup>368</sup> it is inconceivable that religion will ever cease to be a force to be reckoned with. Religion, in all its forms, is a constant reality on the planet. Alister McGrath noted that “[t]here’s something about human nature that makes us want to reach out beyond rational and empirical limit, questing for meaning and significance.”<sup>369</sup> As Charles Taylor noted, religion “remains a strong independent source of motivation in modernity.”<sup>370</sup> Given the reality that religion shall remain, a legal revolution that eliminates or severely curbs religious accommodation in the public sphere will place significant pressure on the democratic project. Religious holy days, garb, food practices, and sexual ethics will not suddenly disappear because the law has not provided accommodation. The history of Western Civilization teaches us that we are best able to maintain civil peace when religious accommodation is a high priority in public policy. Losing this tradition, losing this paradigm will cause significant negative consequences to society’s efficacy. Whether the price of this revolution is worth it in the end will be determined by future generations.

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367. RICHARD DAWKINS, *THE GOD DELUSION* (2006).

368. SAM HARRIS, *THE END OF FAITH: RELIGION, TERROR, AND THE FUTURE OF REASON* (2004).

369. ALISTER MCGRATH, *WHY GOD WON’T GO AWAY* 146 (2010).

370. CHARLES TAYLOR, *A SECULAR AGE* 530 (2007).

