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2014-03-04
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An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion

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Student Number 469 698

**A thesis submitted in fulfillment of the
Requirements for the degree of Doctor of Philosophy**

University of the Witwatersrand

September 12 2013

ABSTRACT

Conflicts of rights involving the freedom of religion should be approached on the basis of a close examination of the proper competence of law and religions. This examination begins by asking what questions law and religion are best suited to answer in a post theocratic age that views constitutional laws as operating under and within the conditions of diversity and pluralism.

An analysis of religious employer exemption cases in two jurisdictions, South Africa and Canada, shows that certain contemporary "liberal" approaches fail to accord sufficient respect to associational diversity. An historical view of the relationship between law and religion, reviewing both "the goods of religion" and "the limits of law" suggests that contemporary liberalism tends to diminish the role of religions and religious associations giving too much power to the State and/or the Courts with a corresponding failure to let religions play the role within culture that their proper jurisdictions, correctly understood, admit and that an open culture requires.

The analysis shows that the Canadian and South African courts have, in some cases, explicitly but more often implicitly, stepped into the role of answering metaphysical, philosophical and theological questions for which they are not suited. This problem -- erroneous jurisdictional *extension* by law -- is the use of law by equality activists who wish to force homogeneous conceptions such as "equality" or "non-discrimination" on all aspects of society, including religious associations, irrespective of whether those subordinate groups should be accorded the respect entailed by the principle of diversity- - a respect already allowed for in the laws related to religious employer exemptions. The arguments defending these practices inappropriately extend the ambit of law into theology and therefore away from its proper role as recognized within history, sociology, anthropology, psychology and theology. Moreover, they take liberal theory in an illiberal direction - a direction that should be rejected in favour of a conception of deep diversity.

It is concluded that with a **legal presumption in favour of associational diversity** and the use, in adjudication of rights conflicts, of the "**oculus"** (that is, explicitly seeing issues that involve religious associations from *the perspective of* the religious association) a fairer treatment of diversity and difference can occur in constitutional democracies. An approach to rights adjudication based on this presumption and informed by this attitude will promote greater diversity and better "fit" with the principles of "pluralism", "multiculturalism", "diversity" and "accommodation" that underlie the *modus vivendi* rather than a "convergence" approach to liberalism and accord better with constitutional rights and freedoms taken as a whole.

DECLARATION

I, _____IAIN TYRRELL BENSON_____, declare that this thesis is my own unaided work. It is submitted in fulfillment of the requirements of the degree of Doctor of Philosophy (PhD) in the Faculty of Commerce, Law and Management at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.



_____

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ACKNOWLEDGMENTS

In the years of preparation in various universities, courtrooms and assorted settings, I have incurred many debts and points of gratitude - - intellectual, spiritual and emotional. There are people and organizations I have, undoubtedly, missed out in the list that follows; I ask their forgiveness. I would like to thank the following universities and colleges at which I have given lectures and the audiences whose questions have made me think more deeply:

McGill University, York University, University of British Columbia, Augustana College, Catholic University of America, University of Dallas, University of Tulsa, University of Navarre, Harvard Law School, Oxford University, The University of Toronto (and Regis and St. Michael's Colleges), University of the Witwatersrand, Regent College, University of Stellenbosch, Seminary of Christ the King, Mission, B.C., Seattle Pacific University, University of Johannesburg, UNISA, University of Adelaide, University of Auckland, University of Sydney, St. Thomas More College, St. Mary's College, Lakehead University, University of Waterloo, University of Ottawa, The University of the Free State; and the following Institutes and Foundations that have provided assistance and encouragement:

Members of the Board of the Global Centre for Pluralism, Ottawa and His Highness the Aga Khan and its Secretary General John McNee; The Pontifical Academy of Social Sciences and its President Mary Ann Glendon; Members of the Board and Research Council of the Centre for Cultural Renewal (1993-2009), The South African Institute for Advanced Constitutional, Public, Human Rights and International Law (Johannesburg) and its Director David Bilchitz and former Director Theunis Roux; The International Institute for Religious Freedom and its Director Christof Sauer, The Chester Ronning Centre for Religion and Public Life (Alberta, Canada) and its Director David Goa; The Foundation for Science and Culture, Istanbul, Turkey and its President Faris Kaya; the Order of Malta, (Canadian and British Associations), The Ontario Human Rights Commission and its Chair, Barbara Hall and researchers Remi Warner and Shaheen Azmi;

The following persons deserve particular mention and they appear here in no particular order:

Robin and Hilary Butler, Peter Jervis, Christo Lombaard, Hakan Gulerce, A. Alan Borovoy, William Conklin, David Jennings, Benno Friesen, Roland Priddle, Mary Ann Glendon, Sir Norman Anderson (†), John Keown, Matthew Lamb, Chuck Helms, Logan and Barbra Craft, Ted Spear, Douglas Farrow, Russell Hittinger, Beverly Boutilier, Khalil Sharif, Sandra Reimer, Daniel Cere, Kathryn Young, Paul Nathanson, Charles Taylor, Margaret Somerville, Rocco Mimmo, David

Blankenhorn, Carolyn Evans, Neville Rochow, Robert Royal, David Coolidge (†), Sir John Baker, George Marlin, Jack Swan (†), Christopher Wolfe, Hadley Arkes, Jamie Hardigg, Loot Pretorius, Michael and Jenny Cromartie, Vern and Elfreida Heinrichs, Maxime Gauze, Armina Lodewick and Ibrahim Adams, Chris Landman, Gustav and Frances Hoexter, Nicholette Stuart-Russell, Ian Leigh, Dennis Danielson, John and Sally Patrick, Barry McLoughlin and Laura Peck, Theunis Roux, Albert Moritz, Clive Middlemas, Patricia Stern, Clement Ng, Peter Lauwers, Penny Plowman, Habib Malick, Susan Crossman, Anna-Liza Kozma, Christof Sauer, Alison Watt, Artur Rosman, Jan and Crispin Elsted, Michael Pakaluk, Raymond Perrier, Deborah Gyapong, Kevin Boonstra, Louis Dupré, Alex Fielding, Cindy Silver, Ernest Fortin (†) David Schneiderman, Silvio Ferrari, George Rawlyk (†), William Galston, Jonathan Chaplin, Paul Diamond, George Egerton, Ibrahim Abu-Rabi'(☪), Markus Bockmuehl, Alan Torrance, Ray Sawatsky, Greg Pennoyer, Annie Leatt, Wilfred McClay, Janet Epp Buckingham, Anita Thiessen, Frank Falzon, Geoff Cowper, Michael Brear, Robert and Mollie Brow (†) (†), David Cayley, John von Heyking, Nicholas Wickenden, Richard Moon, David Novak, Muhammed Fadel, Thomas Cardinal Collins, Hesma van Tonder, George Weigel, Jody Bottom, Brad Miller, Mathole Mosheka, E.R.A. Edwards (†), Colleen Kovacs, Paul and Adrian Clark, George Copley, Phillip Blond, Charles Gonthier (†) Peter L. Pound, Mark Cameron, Marc Friedman, Jason Kenney, Christopher Champion, Ian Narbeth, Isa Petzer, Derrick de Kerckhove, Don Hutchinson, Franziska Sucker, Ernest Caparros, Julie Owen, Crystal Mason, Cora Hoexter, James van den Hever, Charles Ngwena, Muhamed Nur Nordien, Hawa Monier, Andrea Parliament, Lori Beaman, Roger Scruton, John McKay, David Bernard, Richard John Neuhaus (†), Marc Ryan Rees, Arlyn Culwick, Paul and Lorna Culwick, Vera Leckie, George and Maggie Graham (†), Thomas Langan (†), Janine Langan, Pieter Coertzen, Lewis and Caroline Silberbauer, Nokuzola Mndende, Claire Rolf O.P., Judith McBride, Robert Morgan, Graham and Sue Ritchie, Susan Munro, Brad and Julie Ovenell Carter, George Grant (†), Sheila Grant, John Witte Jr., Claude Ryan (†), Jean Bethke Elshtain (†), David Walsh, William Mathie, William Hurlbut, Aidan Mackey, Alvin Esau, Azim A. Nanji, Kenneth Schmitz, Colin and Margaret Visser, David Lyon, Elizabeth Craig Woollacott, Ron Dart, Williard Johnston, Lizzi Luminati, R.N. Gooderson (†), David Loukidelis, Robert Grant, Alan Markin, Grant Bartlett, Ali Lakhani, Bob Bates, Russell Wills (†), Victor Chan, John Haldane, Peter Emberley, Ray Hartley, Yiull Damaso, Rainer Knopff, Craig Gay, Loren Wilkinson, Joan and Oliver O'Donovan, Melissa Lehr, Michael Czerny S.J., Kristof Vanhoutte, Richard Osler, Christoph Engel, Lu and Joan Beaulieu, Lila Lieberman, Ian and Charlotte Townsend-Gault, Julia Dentel, Philip Marchand, W. Cole Durham Jr., Daniel Matej, Bud Gallagher, Brent Mullins, Gerry Ferguson, Michael Coren, Lauri Ann Fenlon, Michael and Sheila O'Brien, Stuart Brown, Patrick Lenta, Stu Woolman, Benjamin Berger, Mark Andrews and Shelagh Scarth, Mark Charlton, David Brown, Anne Leahy, Justine and Hugh Brown, Yash Ghai, Alan Torrance,

Oliver and Joan O'Donovan, Hanlie Bruwer, Anthony Garber, Dennis Willms, Paul Marshall, Albie and Vanessa Sachs, Remi Warner, Shaheen Azmi, Les Jacobs, Rassie Malherbe, Alan and Charlotte Frazer (†) (†), Robert Spitzer S.J., Don and Nancy Curry, Yashika Singh, Hsin-Chi Kuan, Javier Martínez-Torrón, Marta Cartabia, Michel Fromont, Allen Hertzke, Paulus Zulu, Ruma Pal, John Dixon, Keith Thompson, Moss Ntlha, Jonathan Wilson, Partha Dasgupta, Rocco Buttiglione, Joseph Weiler, Bill and Linda Britton, Kate Lazier, Kevin Ryan, Don Stuart, Ted Morton, Malcolm and Kitty Muggeridge (†) (†), Denise Woods, James and Rachel McKee, Teresa Conradie, Pru Avis, Michael Cassidy, Craig Jones, Nora Beaumont, Jacques and Martine Hubert, Jonathan Reilly, Larry Schmidt, Brad Addison (†), Malise Ruthven, Moira McQueen, Bambie Rutledge, Philip Horgan, Sean Murphy, Frank and Terry McCullough, Marion and Dot Montgomery(†) (†), David Bovenizer, David Lyle Jeffrey, Joey Haynes (†), John Finnis, Denis and Gladys Clark(†) (†), Patricia Murphy, Alec and Jenny Anderson, Sam and Rapalang Ramosa, Roma Thompson, Panos Lazanos, K.I.G. Benson (†), Margaret England, Neil Benson, Heather Benson, Eleanor Benson, Aidan Benson, Callum Benson, Alasdair Benson, Cairstie Benson, Piers Benson, Sisley Benson, and Iain Currie who supervised this thesis.

Six people deserve special mention: without their acts of supererogation (owing to time-zones sometimes in the small hours of the morning!) this thesis would not have been completed on time, or at all, given the complexities of travel, research materials and production in several countries. For my assistant in France, Genevieve Gauze, my editors Suzanne Chiodo in Canada and Shaun de Freitas in South Africa and Turkey; my beloved daughter, Rowan Benson in France and London, who started the Bibliography; and my untiring and insightful assistant over many years in Canada, Mary Maieron, and, lastly but certainly not least, to Shanaaz Adams, who provided a lovely garden room in Johannesburg in which the bulk of the writing occurred as well as sage advice and continual encouragement, my deepest gratitude. I have insufficient words to convey it but wish to record my deep and sincere appreciation here.

Iain T. Benson

Ferme Loudas
St. Pé de Bigorre, France
Maundy Thursday
March 28, 2013/
September 12, 2013

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CHAPTER ONE:

INTRODUCTION AND GENERAL FRAME OF THESIS

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Introduction: Seeing the Continuity and Differences of Law and Religious Tradition

On Robben Island, tantalizingly close to Cape Town, there is a famous prison. Those who were sent here[1] were sent according to law. On the island there is a church. Those who were sent to the island were permitted the freedom of worship. In addition to the Anglican Church of the Good Shepherd there is also a Muslim shrine to a Sheik who died here long ago. Religion and law and the effects of both are side by side on Robben Island, and this struggle is itself one that involved religious insights and debates about the nature of law. During what South Africans refer to as "the struggle", religion played an important role, both in attempts to provide theological rationales for the system of apartheid and to challenge those same assumptions. The law operated throughout. Law not only spells out the conditions for interim measures; it then superintends what follows when one legal regime is replaced by another; religions subsist, succour and sometimes subsume.

[1] Part of this introduction was written on Robben Island whose centuries of human occupation provided a fertile environment for reflections upon the long history of oppressions, incarcerations, vicissitudes of forms of justice and the place of religions and, now, pluralism, within and surrounding the many uses to which the island has been put. A partial list would include: a slaver's staging post, workhouse, jail, madhouse, leper colony, military coastal defense battery, mission station, lighthouse, village and, most recently, tourist attraction. The prison is now empty, tours are well attended with former prisoners as guides and the church continues to operate for locals and is a popular place for weddings.

Overview: The Scope and Limitations of this Thesis

This thesis will explore a continuing tension – the relationship between law and religion – to which we must now add the implications of pluralism. Law and religion are only beginning to consider the implications of diversity on what are, all too often viewed as homogenous conceptions.

Law has yet to understand itself under the conditions of pluralism. This is, in part, because law both responds *to* pluralism and is partly constitutive *of* pluralism. Because pluralism requires recognition of diversity and rules to protect it, the long tension between law and religion takes on a different formulation under the conditions of pluralism. It is this long tension or struggle between law and religion that takes on interesting forms in relation to law in our increasingly pluralistic age.

This thesis will examine law and religion under the conditions of pluralism; conditions not yet fully understood within law or by the religions themselves. Recent scholarship and case law will be examined that will illustrate the tensions that exist in our imagination of law and religion in relation to what we say about diversity and co-existence with different beliefs and community affiliations. The topic of Law and Religion and a framework for reconciliation contains a limitless number of possibilities for analysis: narrowing the topic is essential.

I offer, in this thesis, a description of various ways to approach law and religion. In so far as this description is normative, it will suggest that law and religion should be approached by recognizing their different competencies and applying a legal presumption in favour of associational diversity. The law seldom articulates, much less formulates into legal tests and rules, the approach I will recommend though I shall argue that the law implies such approaches when it is approached correctly. The development of such an approach, genuinely sensitive as it is *to the nature of associational diversity and to the limits of law and politics,* is long overdue.

My goal is not to create a "comprehensive scheme" but to illustrate the richer potential of a certain kind of argument.[2] The legal decisions analyzed are drawn almost exclusively from Canada and South Africa but the principles at issue could be illustrated from other jurisdictions as well. This is due to the fact that the tension between law and religion (as the opening Chapters of this thesis demonstrate) is a tension natural to all human communities within which laws operate. The law does not create that tension, but must work within it. Similarly, because of their claims to follow “higher law”, religions have

[2] Daniel Vokey. *Moral Discourse in a Pluralistic World* (2001) 284, who employs this elegant formulation.

continuously had to operate within this tension. To it we must now add commitments within law and politics to honour diversity, pluralism and multi-culturalism. Yet the various meanings each term may carry and the implications of each use for law, religion and diversity is very much subject to debate and analysis.[3]

The form of argument I develop seeks to build up a richer conception of the common good - - a term I shall discuss below. This concept, the common good, as philosopher Joseph Raz has pointed out, can help overcome the problem of individualism so it is important today.[4] I focus on the problem which arises when law fails to recognize its limited ability to answer questions better dealt with by other aspects of culture - namely associations and particularly religious associations. I examine evidence of the law's own insecurities and express recognition of its limitations, alongside the questions that religions ask and insights they offer on many of the pressing questions of the day.

I draw the conclusion that the law needs to be much less confident about its ability to "answer" certain questions, and on contested matters should explicitly give the benefit of the doubt and defer to associational diversity. This is because diverging viewpoints on legally contestable matters are important for civil society and constitutional formation itself. A crucial part of a *transformative* constitutionalism is that it resiles from attempting to answer *through law* questions that are better answered through the broader culture. I hope to illustrate this wider problem by examining a particular question that has recently been before the Courts of both Canada and South Africa: that of religious-employer exemptions.

Academic commentary has recently emerged that neatly frames some of the theoretical questions at the heart of the debate. I shall review the strengths and weaknesses of the various approaches and point out that a new approach is needed. I am aware that both my diagnosis and prescription are going to be viewed as controversial by those who have a radically different view of law - - those concerns, however, must take second place to the accuracy of what is developed The common-good is, after all, for everyone even though what is considered “good” might not be to everyone’s liking-

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[3] Both pluralism and multi-culturalism are terms that are seen by some as “in crisis” and it is clear that a variety of interpretations are possible for both. See on “multi-culturalism” Tariq Modood “Post-Immigration Difference” (2012) 43 and on “pluralism” Nicholas Rescher, *Pluralism* (1993) 79 and Ian S. Markham, *An Introduction to Said Nursi* (2011) 51 ff. and His Highness the Aga Khan, *Where Hope Takes Root: Democracy and Pluralism in an Interdependent World* (2008) 24-25, 145 “Without support for pluralism, civil society does not function. Pluralism is also essential for peace....the failure to see value in pluralism is a terrible liability.”

[4] Joseph Raz, *Ethics in the Public Domain* (1994) 121.

- particularly those who have had control of the interpretations for a certain period of time. That "consensus" about the nature of constitutional principles is now, I shall suggest, at an end if, in fact, it ever existed in the first place. That such an interpretive hegemony should end or be re-understood, in order for constitutions to do the tasks properly assigned to them, is part of the case I have to meet. I argue, in short, that we are about to have a paradigm shift in how we need to understand constitutional principles. Part of this shift will involve the work of understanding "hidden" meanings in relation to the concept of paradigm shifts. In this task, the work of Thomas Kuhn and Michael Polanyi is exigent. Kuhn was influenced, as I have been, by Polanyi's *Personal Knowledge* and the concepts of "paradigm shift" and "hidden meanings" can most usefully be held together. In an important passage, Polanyi observed:

> [o]ur objectivism, *which tolerates no open declaration of faith, has forced modern beliefs to take on implicit forms*....And no one will deny that those who have mastered the idioms in which these beliefs are entailed do also reason most ingeniously within these idioms, even while....they unhesitatingly ignore all that the idiom does not cover".[5]

This critically important point is close to the essence of what this thesis will demonstrate: former understandings of the scope of law and religion must adjust to the conditions of pluralism and the claims, *often implicit or hidden*, for "transformative constitutionalism" and, in fact, to the category of the relationship between law and religion(s) themselves.

This "new approach" is offered as the groundwork for a more sensitive set of legal guidelines that recognize how we actually live in society,[6] and how viewpoints about the kinds of lives we live

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[5] Michael Polanyi *Personal Knowledge*, (1958) 288 (emphasis added). See also, Owen Barfield, *Speaker's Meaning* (1984). "…this is a crucial point….the most fundamental assumptions of any age are those that are implicit in the meanings of its common words….One good reason for troubling to concentrate on the moment of change of meaning is that it directs our attention- awakens us- to fundamental assumptions so deeply held that no one even thinks of making them explicit" 44-46. Our time is paradigmatically (!) where we must re-think key terms particularly under the conditions of so many "hidden" and "implicit" meanings within developing, or what should be developing, understandings of law in relation to "pluralism" and religion. See, also, on "paradigm shifts", Thomas S. Kuhn, *The Structure of Scientific Revolutions* (1970) 43 where the historian, in relation to "shared paradigms" is directed to "…compare the community's paradigms with each other and with its current research reports. In doing so, his object is to discover what isolable elements, explicit or implicit, the members of that community may have *abstracted* from their more global paradigms and deployed as rules in their research…if his experience has been at all like my own, he will have found the search for rules both more difficult and less satisfying than the search for paradigms…the search for a body of rules competent to constitute a given normal research tradition becomes a source of continual and deep frustration" (43-44, emphasis in original). What Kuhn says about scientific research applies equally to law. Though there are obvious differences, with respect to paradigms and rules, their changes and development and, in particular, the nature of "hidden" or "implicit" meanings, the two areas shares common ground. See: C. Niles "Epistemological Nonsense" (2003) who also recognizes the relevance of Kuhn in relation to the analysis of key terms - - in her case - - "secular."

[6] Loren Lomasky, *Persons, Rights and Moral Community* (1987) 254 writes: "The theory of basic rights is but one component of the theory of right, which, in turn, rests on axiology. And that hierarchy collapses under its own weight unless there is a foundation of objective value in the world." On the meaning and importance of axiology and value theory, see: Noah Lemos "Value theory" in *The Cambridge Dictionary of Philosophy* (1995) 830-831. That there is, in the contemporary age,

together are various and often irreconcilable. Attempts to "reconcile" diverse viewpoints can lead to the pursuit of “one solution”, that is serve to mark illiberalism rather than a set of principles that genuinely provide for living together *with* disagreement.

Various forms of liberal theory are comfortable with the state/society distinction and recognize that voluntary associations independent of the state can provide important human goods.[7] What these theories often fail to address sufficiently, however, is what flows logically from the diversity of voluntary associations and fears about comprehensive doctrines: that diversity itself needs to be affirmed as a *legal* good and that this affirmation should take the form of a legal presumption.

In short, the debate should be viewed "*through* the associational lens" rather than from some supposed ly 'objective' juristic perspective that, in Rawlsian fashion, strips the religious dimension from the conflict. In fact, 'the religious dimension' provides some of the key materials for civil debate and cannot, without injustice, be pre-emptively excluded from it.[8] It is often within these religious traditions that viewpoints are most richly framed. These traditions have thick, philosophical and theological underpinnings. Ignoring them is as historically blind as it is theoretically unwise. Recognizing the importance of religious and other associational perspectives provides important data as well as theory to contemporary debate. Controversial questions are central to human communities and need to be encouraged in public and legal debate, not foreclosed by the law’s treatment of those issues.

I argue for the importance of religious diversity in relation to law by pointing out that certain kinds of debates are perennial, whether or not they are acknowledged. Recognizing the importance of these tensions throughout history provides an argument for greater contemporary sensitivity towards the diversity of religious associations.

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serious doubt about there *being* a “foundation of objective value” in the world provides one of the most significant arguments as to why explanations about meaning and truth (such as those made within religions) matter so significantly and need to be analyzed with seriousness and respect.

[7] William A. Galston, *Public Matters* (2005) 151.

[8] Daniel Vokey, *Moral Discourse* (2001) 273, notes as follows: “As an integral part of their search for satisfactory moral points of view, advocates of competing religious, philosophical, political and other traditions have engaged in moral discourse for the last three thousand years. The plurality of moral standpoints is not exclusively a modern phenomenon; nor are efforts to assess the strengths and limitations of incommensurable moral perspectives against the expectation of wide reflective equilibrium. *We do not need to invent new forms of enquiry, argument, or practice to pursue the convergence of moral points of view. Rather, we need to challenge the unnecessarily narrow conceptions of rationality and morality that have displaced moral discourse at the margins of moral society”* (emphasis added). Narrow conceptions are, sadly, as we shall see, no longer simply “at the margins of moral society.”

What is offered, therefore, is not a singular framework within which disputes involving religious liberty can be "reconciled ", but rather insight about the different frameworks that exist, and why a presumption in favour of associational diversity, *an associational framework* – as the title suggests, would add considerably to policy formation and the judicial tool chest.

I hope that the presumption of associational diversity and the express recognition of the *oculus* ("seeing through the associational lens") will provide a richer conceptualization of constitutional law and the diversity of the civil society that surrounds it. That, in any case, is the goal of this thesis.

Lawyers, judges and legal academics are at home with the analysis of cases. They are less comfortable when this analysis requires the recognition of the limits of law. Religion makes lawyers nervous.

Law and religion have historically been subject to two main threats: the threat of merger and the threat of alienation. Merger, when one discipline submerges the other, and alienation, when one acts as if the other does not exist. In fact law and religion, properly ordered, have necessary and complementary roles. Religious associations are better equipped to answer the kinds of questions that contemporary law cannot properly address, given its requirement to objectivity and its operation in a multi-cultural setting.

I have chosen the issue of religious employer exemptions, in the South African and Canadian context, to illustrate the flaws in contemporary approaches and their historical antecedents. I shall discount the “civic totalist” and “secularist” conceptions and suggest that respect for diversity and freedom require a more “agnostic” or respectful way of viewing religious associations within free and democratic societies.

My analysis will examine the related question: “can freedom of religion be suppressed by one's view of the relationship between religion and law?” Throughout history both law and religion have made claims upon each other. At times the area of claim is minimal because there is a virtual merger of the two. At other times, there is a strongly demarcated distinction. When this occurs there is often tension, with one or both claiming supremacy. Tensions build, struggle ensues and often blood is spilt. Our age is no different.

What is novel about the contemporary period is that an alternative form of co-existence seems to be emerging. That new form, endorsed here, offers a space for freedom because it resiles from

dominance by either law or religion. This new form, which I call *principled pluralism*, to distinguish it from *relativistic pluralism*, attempts to develop distinctions between the roles of the state (understood as law and politics) and the associations which form an important part of the culture. This thesis contributes to the architecture of principled pluralism. Though it is broad in its approach, I seek to make substantive contributions in three major areas:

1. I define an alternative approach to religious employer exemption cases (I refer to this as **"the permeated ethos test"** though it has also been discussed as the "organic approach");

2. I suggest an alternative approach to cases in which the rights of associations (particularly religious associations) are in conflict with individual rights claimants (I call this approach **"the Oculus"**[9] or "seeing through the associational lens") and, finally;

3. I suggest the use of a *rebuttable presumption* in favour of religious associational diversity that will be of assistance when views of religions conflict with dissenting individuals or other associations (the **"rebuttable presumption in favour of associational and religious diversity"**). I also set out some guidelines in relation to the rebuttal including the "associational integrity" test.

The illustrative and testing ground for these new approaches is narrow- religious employer exemption cases that exemplify how our countries value diversity and the freedoms of religion and association.

The "Two Pillars" of Law and Associations

Two quotations from legal decisions, one South African and one Canadian, set out the "pillars" within which the overall architecture of this thesis is formed. In the first, by Justice Albie Sachs, the goods of religion are clearly understood to be pivotal to society including law itself:

> [F]reedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. *Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's*

[9] *Oculus* is the Latin term for "lens."

> *view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.*[10]

In the second quotation, law is understood to be inherently limited in its abilities and capacities - - it has a limited jurisdiction:

> The court is not required to enter into the philosophical and theological debates about whether or not a foetus is a person, but, rather, to answer the legal question of whether the Quebec legislature has accorded the foetus personhood. Metaphysical arguments may be relevant but they are not the primary focus of inquiry. Nor are scientific arguments about the biological status of the foetus determinative in our inquiry. The task of properly classifying a foetus in law and in science is different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties – a matter which falls outside the concerns of scientific classification. *In short, this court's task is a legal one. Decisions based upon broad social, political, moral and economic choices are more appropriately left to the legislature.*[11]

In this quotation, law is understood to have limitations in relation to those areas of culture that deal more expressly with metaphysical or theological claims. The second "pillar" maintains the line between law and religion by law's own recognition of its limitations. [12]In the first "pillar", law respects religion by recognizing the importance that religions play within society.

These two insights, the goods of religion and the limits of law, form a stark juxtaposition with the liberal individualistic approach that seeks, either implicitly or explicitly, to dominate the place of associational life within which difference finds a home. The liberal individualistic approach manifests itself in two ways:

1. It defines or tends to describe the right of religion as an *individual* right merely, or
2. It defines or tends to describe the public sphere in ways that exclude full participation and religious involvement in that sphere. *Individualism* and *exclusionism* persist.

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[10] *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 36, (emphasis added) per Albie Sachs J. ("*Christian Education*").

[11] *Tremblay v Daigle* (1989), 62 D L R (4th) 634 (SCC) at 650 a – c by the court (unsigned) (emphasis added) ("*Tremblay v Daigle*")

[12] Further examples of judicial reticence or at least equivocation in relation to having to decide on "moral" claims may be seen if we compare the earlier overt moral evaluation of Canadian Supreme Court Justice Antonio Lamer's characterization of prostitution as 'at its most basic level a form of slavery' (*Reference re ss. 193 and 195.1(1)(c) of the Criminal Code* [1990] 1 SCR 1123, 1193(Lamer J) [the *Prostitution Reference*] with the standard disclaimer recited by the Ontario Court of Appeal in the recent prostitution case *Bedford* (2012): "…prostitution is a controversial topic, one that provokes heated and heartfelt debate about morality, equality, personal autonomy and public safety. It is not the court's role to engage in that debate. Our role is to decide whether or not the challenged laws accord with the Constitution, which is the supreme law of the land." *Bedford* (Ont. CA) para 9. Other examples include the issues of abortion (*R v Morgentaler*, [1988] 1 S C R 30, p. 138 (McIntyre J (dissenting)) and euthanasia (*Rodriguez v British Columbia (Attorney General)*, [1993] 3 S C R 519).

This second form, *exclusivism*, involves a "narrative" that constructs the shared "public sphere"[13] as something it believes to be distinctly other than religion. In this form of analysis, terms such as "public", "secular" or "civil" are construed, implicitly or explicitly, as necessarily non-religious. Inter-penetration between religion and the public sphere is ignored or expressly denied. This interpretation is at stark variance with one that sees the rights of religion as *necessarily* having a public dimension, and therefore the public having, *in some measure*, a religious dimension. One thing is clear; the relationship between law and religion cannot properly be analysed from simply within law itself, because the nature of law and its limits is a key part of the co-penetrative analysis. It is the nature of that limitation on law in relation to associations which forms the backbone of this thesis.

The tension between the principles of transcendence which inform or ought to inform law and law as it actually is, are never far below the surface of human cultures. Law and religion need each other. Law without religion becomes unjust, and religion without law becomes ungovernable. The orders of law and religion and their interface is constantly being renegotiated and re-understood. Our post-enlightenment age offers the opportunity to rethink how we negotiate the semi-permeable membrane between law and religion. Such renegotiation understands the possibilities of peaceful co-existence between communities that, not only disagree, but *must be entitled to disagree*. As such, legal conceptions which use fine-sounding words such as "equality" and "non-discrimination" may work hardships on co-existence and the recognition of difference.

Language is always open to alternative forms of interpretation and law is in the business of interpretation. What informs legal interpretation; however, are background notions such as a "liberal consensus". A wide variety of contemporary scholars have come to the conclusion that the "liberal consensus" which for a time guided certain conceptions of law has now broken down. There are those who may wish to deny that this consensus no longer exists and who will continue to advocate for forms of interpretation that give their viewpoint particular advantage in the courts and politics. However, the

[13] On the definitions and constituent dimensions of "public sphere" see Charles Taylor "Liberal Politics and the Public Sphere" in *Philosophical Arguments* (1995) 257- 287 "…society is not constituted by the state but limits it" (287). See, also, discussing models of civil society, Russell Hittinger "The Coherence of the Four Basic Principles" in Archer and Donati, (eds) *Pursuing the Common Good* (2008) at 94 ff noting that "…in modern times most revolutionary regimes will attempt to forbid subsidiary societies" (99). In the same volume, Roland Minnerath, in commenting on the somewhat specialized lexicon of Roman Catholic social doctrine, comments: "It is well known that the concepts used in the Church's social doctrine are submitted (sic) to semantic mutations in the different cultures, especially in the context of the current exacerbated individualism" (56). As I shall show, "semantic mutations" are not limited to simply "different cultures" but are to be found quite well entrenched between sub-cultures and in relation to legal terminology as well. A good part of developing clarity in relation to the themes I am developing is precisely to interrogate these "mutations" and "hidden" or often "implicit" usages.

fact remains that there is no longer, if there ever was, a consensus as to either the meaning of liberalism in relation to law, or how law should approach certain kinds of disputes involving rights. No overlapping consensus about the original position exists.

The meaning of central terms such as "equality" and "non-discrimination" need to be viewed "through the associational lens" if the differences between communities on important matters such as gender and sexual orientation are to be realized. At the moment the manner in which a term such as "equality" is being placed in opposition to religion (itself an equality right) shows a failure to appreciate associational diversity. Similarly, we need to be wary of claims that a particular position represents "*the* state interest". More often than not, when what is at issue is a contestable viewpoint, the state interest is multiple, not singular. The state, simply put, should not have only "one" view on controversial matters. These are questions that the state should keep "open" as far as possible. It is the nature of the pressures on pluralism, however, that, as with theocracies of old, the "new sectarians"[14] seek to claim "the state interest" and their own viewpoints as one and the same. The theocratic temptation is omnipresent.

Also important to note is the corresponding development that, at a time when liberalism is becoming insecure about its capacity to generate binding commitments from the citizenry, certain approaches seek to give law or the state divine status. Whether expressed as "constitutional theocracy",[15] "political theology",[16] "human rights or political idolatry"[17] or "civil religion",[18] these moves invariably clothe forms of politics and law with the mystique and authority of religion. This attempt is always dangerous because it provides no place outside of politics or law from which to argue for justice since politics and law, in such an idolatrized condition, *are* justice. The walls are much harder to scale when the castle is built so high.

We would do well to remember the salutary words of Michael Ignatieff:

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[14] Graham Good, *Humanism Betrayed* (2001).

[15] Ran Hirschl, *Constitutional Theocracy* (2010).

[16] Paul W. Kahn, *Political Theology* (2011); Leszek Kolakowski, *Modernity on Endless Trial* (1990) 146-161.

[17] Michael Ignatieff, in Amy Guttman, ed *Human Rights as Politics and Idolatry* (2001) 53 ff and, in particular, 77-92 which discusses the danger of human rights "idolatry" being based upon a genuine "spiritual crisis" in the West.

[18] Silvio Ferrari. *"Civil Religions: Models and Perspectives"* (2010) 749 – 763; see, also John von Heyking, "Civil Religion and Associational Life under Canada's 'Ephemeral Monster" in Ronald Weed et al, *Civil Religion in Political Thought* (2010) 298 – 328. See, also, Ronald Beiner, *Civil Religion* (2011) 417 who wrongly views civil religion as a middle position between "liberal extremity" and "theocracy." He misses "diversity pluralism" entirely so fails to see civil religion as a threat to associations.

> The idea of idolatry calls all believers, secular or religious, to sobriety; it asks them to subject their own enthusiasm, their overflowing sense of righteousness, to a continual scrutiny. Religious persons aware of the dangers of idolatry scrutinize their worship for signs of pride, zeal, or intolerance toward other believers; nonbelievers ought to guard against Voltarian contempt for the religious convictions of others. *Such contempt presumes that human reason is capable of assessing the truth content of a competing form of belief. Secular reason has no such power. For both a religious and a secular person, therefore, the metaphor of idolatry acts as a restraint against both credulity and contempt.*[19]

Writing from his Jewish tradition, rabbi and political philosopher David Novak has indicated that the chief difficulty with "civil religion" is that it "usurps the role of historic traditions of faith". Such traditions, Novak argues, provide "the continuing limitation on the governing range" of a democratic social order. "Without such limitation" Novak writes, "…any society tends to expand its government indefinitely. But such limitation cannot come from within; it can only come from what is both outside it and above it".

What is key to the necessary limits on the over-weaning tendency of government is the recognition that:

> Today…. external and transcendent limitation can be found in the freedom of citizens in a democracy to find their primal identity by being and remaining a part of their traditional communities. That is what has come to be known in democracies as religious liberty. Membership in these traditional communities is outside the range of civil society because they have historical precedence, and it is above the range of civil society because of the ontological status given these communities through their relationship with God. Indeed, these communities claim both ancient and cosmic privileges. That is what both limits the secular and, within its limited range, entitles it.[20]

Quite apart from their lack of competence to perform religious functions and formulate adequate dogmas, the notion of civil religion(s) confuse(s) the issue by attributing to the state (and law) a divine or quasi-divine status that places this religion in conflict with religious claims better left to associations.[21] Establishment of any one belief system that claims dominance (rather than *modus vivendi*) is necessarily going to lead to institutional conflicts between state religion and associational

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[19] Ignatieff, above, note # 17 at 87 (emphasis added). It is useful to recall, in this context, that the former Minister of Justice for Canada and himself a noted human-rights expert and academic, Irwin Cotler, has referred to human rights, without irony or qualification, as "the new secular religion of our time". See: Irwin Cotler, "Jewish Nongovernmental Organizations" in John McLaren and Harold Coward, (eds), *Religious Conscience, the State and the Law* (1999) 77 – 96 at 77.

[20] David Novak, "Human Dignity and the Social Contract" in D. Farrow (ed) *Recognizing Religion* (2004) 51 – 68 at 56-57. See also: Charles Taylor "Invoking Civil Society" in *Philosophical Arguments* (1995) 204 – 224;

[21] Harry H. Hiller, "Civil Religion and the Problem of National Unity" in David Lyon et al *Rethinking Church, State and Modernity* (2000) 182 – 183 has noted that civil religion has partly gone into decline due to its appearance as a form of "cultural imperialism" whose rhetoric is seen as "exclusionary" as well as the fact that, with post-modernism, the notion of a singular "civil religion" has been replaced by multiple "civil religions" that further the problem of social fragmentation. See, also: Collin May "Lording it Over Democracy", book review of David Robertson, *The Judge as Political Theorist* (2010).

forms of religion. Citizens generally pledge allegiance to one state *qua* state and one God *qua* God. Establishing the "civil" as a "religion" places that religion (however defined) in conflict with other religions and turns the "civil" from a shared sphere with an equal stance to all religions into a religion itself.

Many examples of rights conflicts will need to be examined as law seeks to find a new theory. I, however, have chosen to examine an associational framework for the reconciliation of competing rights claims involving the freedom of religion and, more narrowly, in the context of religious employer exemptions. That said, it is hoped that the principles that are developed within the analysis will be applicable to other areas; for example, what is said with respect to crafting an exemption that is more nuanced in relation to the *kind* of religious employer, should apply equally to conflicts involving freedom of conscience and religion in relation, for example, to dissenting physicians or dissenting marriage commissioners.

In both of these latter examples, it is frequently the case that a homogenous and completely inaccurate conception of "the public sphere" or "the secular" is used to state why the dissenting viewpoint should not be entertained. This monistic approach to "the public" is, simply put, inaccurate. The public is made up of all of us, including those who have religious beliefs and are members of religious communities. Somewhere along the line the conception of "the secular" came to be read as the implicit affirmation of a "religious-free" zone.[22] The Supreme Court of Canada's adoption of a religiously inclusive notion of "secular" (contrary to its most commonly used meaning) seems to have come as a bit of shock to those who simply assumed that "secular" meant and should continue to mean "non-religious": it does not and should not.

This paradigm shift, slow to be understood in the law, and even slower in the wider culture, points to the need for a wider understanding of the co-existence of religion and law and why grasping the limits of each is important to a richer understanding of contemporary pluralism.

[22] Iain T. Benson "*Notes towards a (Re)definition of the Secular"* (2000) and "Considering Secularism" in Farrow, ed *Recognizing Religion* (2004) 83-98 at 83-85.

Old conceptions are now redundant; however cultures are slow in adapting to new ones. Pluralism and multiculturalism are here to stay and a deeper analysis reveals there is not one form of liberalism, but various liberalisms, some of which are anything but liberal.[23]

In my detailed examination of the religious employer exemption cases, I shall observe what Gray refers to as "convergence" liberalism in action, involving an "illiberal" set of moves by scholars who call themselves "liberals." The subject matter of this thesis therefore raises the important question: "Can law continue to further freedom when its central methods of testing disagreement are itself being used to eradicate dissent?" Most importantly, I shall argue for the need to establish not only a rebuttable presumption in favour of associational diversity, but the need to view disputes through the *Oculus* ("associational lens"). I will discuss this new concept (and term) in context below.

The analysis of law and religion against the backdrop of the breakdown of a liberal consensus requires a certain amount of historical background, to which the first part of this thesis will be devoted

Secondly, the tension between immanent law (man-made) and transcendent law (god-made) is one that, from the very beginning, has created a point of tension for those who wish that immanent laws covered the entire domain of law. That tension is very much with us today in terms of the jurisdictional limitations of law and a corresponding knowledge of what religions offer human communities. I shall examine the "goods of religions" and the limits of law in subsequent Chapters. Law and religion occupy different jurisdictions and a failure to respect the appropriate jurisdictions of each has always led to controversy, difficulty and worse.[24]

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[23] John Gray, *Two Faces of Liberalism* (2000) (hereinafter "*Two Faces*").

[24] Similar boundary questions necessarily occur in all disciplines where important "extra-disciplinary" insights tend to get squeezed out. Examples could be provided from every discipline. A partial list illustrating this observation would include, in addition to law: philosophy, theology, science and sociology. Thus: Philosophy; Thomas Langan, *Being and Truth* (1996) 366-367 and Claude Lefort quoted in Fred Dallmayr, *Integral Pluralism* (2010) 205, f.n.# 23; Theology; Catherine Pickstock, *After Writing* (1998) 267 and Jim Wallis, *The Soul of Politics* (1995)213 - 247; Science; Anthony O'Hear, *Beyond Evolution* (1997) 204 and Stanley L. Jaki, *The Road of Science* (1978) 312-313, ; Sociology; Peter Berger and Thomas Luckman, *The Social Construction of Reality* (1967) at 185: "We hope we have made it clear that the sociology of knowledge presupposes a sociology of language, and that a sociology of knowledge without a sociology of religion is impossible (and vice versa)." The blindness of our current epoch in relation to the inter-disciplinary and its cultural and disciplinary dimensions must be kept in mind as an aspect crucial to the arguments in this thesis. Politics that cannot acknowledge the importance of soul-craft, cannot do its job properly; similarly, law that does not understand the limits of its enterprise and, of what it needs to be aware, is bound to enter where it should not tread. See: generally on the problems of "an abstract and homogenous structure of jurisprudence" in our post-Enlightenment condition, José Ortega y Gasset, *The Revolt of the Masses* (1957) 125, 154. In order to have any chance of doing its work well and in order to properly understand itself, law needs to better comprehend religions and the key questions in related disciplines; continued educational deracination is unacceptable.

This thesis will examine the limits of law and religion and argue that the move to establish "civil religion" or "political theology" (including law as an aspect of that political theology) as with the move to turn human rights into "idolatry", are errors. They are akin to the error committed by King Creon in Sophocles' *Antigone* when he sought to usurp the rule of the gods by issuing an edict refusing sacred burial to Antigone's brother.[25] That over-reach by immanent law (including the King's statement that *he was the state and the law*) was recognized in its day and has resonated through the ages since. *Plus ça change, plus c'est la même chose.*

One of the benefits to reclaiming a clearer conception of the jurisdiction of law in relation to the jurisdiction of religion is that contemporary moves to expand the law beyond its proper scope would become more visible. Thus, as we shall see in some of the statements of the Chief Justice of the Canadian Supreme Court, Madam Justice McLachlin, below, and Elshtain's response, the claim that law carves out a place for religion "within itself" sounds a note not only false but eerily reminiscent of prior ages and distant battles. Similarly, calls for, or tendencies towards, an inappropriate privatizing of the place for religion, or the failure to accord respect for the communitarian dimension of religious activity, such as we will see in *Strydom* (2009) and *Christian Horizons* (2010) below, in relation to religious employer exemptions, help us to situate law where it should be so that it can be informed by the various political and religious positions that stand outside of itself.

Law at its best has recognized its limitations[26] above, and when it does so, may situate itself accurately in relation to the various communities between which it must mediate. Various paradigms of reconciliation exist but they have very different outcomes. The Supreme Court of Canada has suggested, for example, that conflicts may be avoided by defining the scope of the rights[27]. The "balancing of rights" which involves the weighing of rights to determine which right wins out, is distinguished from the

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[25] Sophocles, *Antigone*. It is startling to a contemporary person that for Aristotle the student of politics must not only study virtue but also "the soul" - - an observation relevant in relation to the overall themes we shall have occasion to reflect upon throughout this thesis. See: "Nichomachean Ethics" in *Aristotle Selections* (1927) 227 and Werner Jaeger, *Paideia* (1944) 356-357. The implications of the Aristotelian relationship of kinds of character to forms of constitution is also important and full of implications that I cannot explore here: see, Michael Pakaluk, *Aristotle, Nichomacean Ethics* (1998) 122. The idea of two realms in which the "spiritual/religious" co-exists with the "material" is neatly expressed in some lines from Fulk Greville's "Mustapha"[1609] V, 4: "Oh wearisome condition of humanity! Born under one law, to another bound; Vainly begot, and yet forbidden vanity; Created sick, commanded to be sound." See also, David Novak, *In Defense of Religious Liberty* (2009) 152, discussing the limits of human reason in relation to the universal law of man and god with the implications this has for religions.

[26] See, in particular, the Supreme Court of Canada passage in *Tremblay v Daigle* (the second of our "pillars" above).

[27] See *Trinity Western University v College of Teachers (British Columbia)* [2001] 1 S C R 772 and F. Iacobucci, *Reconciling Rights: The Supreme Court's Approach to Competing Charter Rights* (2003) 137.

"reconciling of rights" in which the rights in issue are, so it is claimed, harmonized. Justice Iacobucci stressed that the reconciliation of rights is superior to "balancing" and that it leads to the emergence of key principles which include:

1. Any rights reconciliation must be guided by the *context* of a particular case;
2. Rights *reconciliation* usually involves a proportionality-type analysis such as the one contemplated by *Oakes*,[28] especially the third part of the *Oakes* test which deals with salutary vs. detrimental effects;
3. That the "clash" imagery which often surrounds discussions of conflicting rights may not be appropriate; and
4. The exercise of reconciling rights, based as it is on a contextual approach, is necessarily *flexible* and is inevitably *uncertain*.

Much has been written about the limitations of "balancing" as a means of judicial determination and, in particular, the fact that balancing gives virtually a *carte blanche* to the judges to do what they want with respect to a specific dispute. There are others, of course, who continue to speak with confidence about proportionality. [29]

[28] *R v Oakes* [1986] 1 S C R 103

[29] Dieter Grimm,"Proportionality in Canadian and German Constitutional Jurisprudence" (2007). See also Julian Rivers, in his most helpful "Translator's Introduction" to Robert Alexy's *A Theory of Constitutional Rights* (2002), where he reviews "Proportionality" (xxxi). The decision by the Supreme Court of Canada in *Alberta v Wilson Colony of the Hutterian Brethern* (2009) showed that the court can essentially disregard the test if it wishes, at least in terms of serious application. Behind this shocking disregard of serious application of the test, Ran Hirschl, *Constitutional Theocracy* (2010) 198, suggests that "…a cynic might argue that the shadow of a potential request by face-covering nigab or burka wearers to be exempt from full-face photographs on identification documents played a role in the court's ruling." He is probably right. Constitutional legal tests are, for the most part, obstacles to be jumped over, run past, avoided or sometimes used in the process of writing convincing reasons for judgments; it really isn't about the tests, it is about the *assumptions* upon which the tests are based and those are not in the tests themselves - - as John Hart Ely, *Democracy and Distrust* (1980) said in relation to his review of Alexander Bickel's career: "No answer is what the wrong question begets" (72). A further rejection of proportionality may be found in Lorenzo Zucca, *Constitutional Dilemmas* (2008) 90-94. I reject completely the value of a balancing *"test"* for the same reasons as Zucca.

A growing number of scholars have questioned whether "balancing" is anything other than a task of justification. [30]

Over against this notion of reconciliation is an alternative paradigm, supported by authors such as John Gray, William A. Galston and Amartya Sen, which resists movements towards "convergence" that insist upon eventual agreement where legal contestability should remain open (in view of differing belief systems and the incommensurability of various view points). This is known as the *modus vivendi*.

In this approach, it is understood that part of "liberal" politics, rightly construed, involves a recognition that different viewpoints should be allowed to co-exist and that moves towards convergence or "one size fits all" smack of illiberalism. An example of this illiberalism can be seen in the religious employer exemption cases considered in **Chapter 5** of this thesis.

I argue, as well, that the only approach that gives appropriate respect to associational diversity is a paradigm which presumes the validity of associational difference and, in fact, builds such recognition into its legal tests. This associational presumption may be rebutted by arguments indicating, for example, that a particular associational belief or viewpoint must be viewed as unacceptable for society at large. Typically this would apply in areas such as criminal law where clashes around incommensurability are not at issue. This must, however, be proven on the evidence rather than simply assumed on the basis of a rhetorical position. In the discussion below, we shall see how rhetoric (particularly around "equality") is being employed as a "trump" against religious liberty. Thus, certain advocates for the advancement of sexual orientation or "deep equality" (the latest in a string of hidden trump claims) come to reject tolerance and accommodation since these interfere with the achievement of wider social goals. Such are the arguments of the proponents of "convergence liberalism".

The second paradigm, that of *modus vivendi*, may be supported by a wide variety of arguments, all of which depend upon some version of the belief that pluralism is beneficial for society and that

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[30] Brad Miller, currently a visiting fellow at Princeton University, shared a draft of his forthcoming "Proportionality's Blind Spot" (2013, unpublished); his insightful paper concludes as follows: "[t]he result [of how the proportionality tests are being used] is that the authority for making fundamental commitments of political philosophy has been removed from the legislative and executive branches of government on a basic misunderstanding that these matters were settled by the aspirational terms of bills of rights. Courts, which exercise the *de facto* power over these questions, have illegitimately used the tools of proportionality reasoning to maneuver discreetly-made commitments of political philosophy into a blind spot, where they are barely noticeable, and wholly immune to challenge" (20). Mattias Kumm, "The Idea of Socratic Contestation" (2010) states that the task of the judiciary has shifted from interpretation to justification. Lorenzo Zucca, ibid, 91, rejects balancing and writes that what is really at issue "…can be accounted for by the underlying liberal philosophy".

movements towards convergence threaten the valid place of human dissent as that expresses itself through the rights of conscience, religion and association.

Contemporary pluralism, arising out of an historic tug of war between law and religion, provides us the opportunity to craft an approach to law that has not yet been clearly articulated However, there has been judicial recognition in South Africa of the co-existence of spheres[31] of difference within a free and democratic society.

That the diversity presumption and the associational oculus approach will not satisfy those who view law as a means of "transformative constitutionalism" is certain because it suggests that the solution to such transformation is cultural and not simply legal. On the other hand, what it will do is explain why living together with disagreement is a perennial aspect of peace.

The use of law to affect a forced outcome over the objections of communities will not bring peace but, rather, resentment and eventual disobedience towards law itself. The narrow set of circumstances in which law must insist upon an irreducible set of conditions for all citizens and all associations is beyond the scope of this thesis, but has already been considered by various authors[32].

As the renowned scholar of law and religion, the late Harold Berman, once observed:

> ….law and religion stand or fall together; and if we wish law to stand, we shall have to give new life to the essentially religious commitments that give it its ritual, its tradition and its authority – just as we shall have to give new life to the social, enhance the legal, dimensions of religious faith.[33]

What Berman referred to as "the revitalization of law" depended upon what he referred to as "the dialectical interdependence of law and religion".[34] Berman recognized that fundamental social, economic and political change required "new legal solutions for the acute problems confronting us; unemployment, racial conflict, crime, pollution, corruption, international conflict, war".[35]

Canadian philosopher George Grant, once referred to the "darkness" that he believed had fallen upon contemporary justice because of, in part, its inability to answer questions about the nature and

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[31] See Justice Sachs in *Minister of Home Affairs v Fourie* (2006)

[32] See, for example, William Galston and Christopher Wolfe discussed in Chapters 5 and 6 below

[33] Harold Berman, *Faith and Order: The Reconciliation of Law and Religion* (1993) 13

[34] *Ibid* at 15

[35] *Ibid.*

purpose of human life.[36] Might it be the case, however, that Grant was asking too much of law? Might it be the case that law, rather than being brought in as an aspect of political theology that seeks to divinize politics should, rather, assume a more humble role as a referee between visions of the good where it attempts to maximize the diversity within society?

If the contemporary period has shown us anything, has it not shown us that reclaiming a proper sense of the limits of law and religion is important to the proper functioning of both?

Secularism, the ideology which first developed as such in the 19th century[37] was dedicated precisely to limiting the public role of religion but did not see its own beliefs, those constructed along atheistic and agnostic lines, as beliefs at all. As the Supreme Court of Canada found in *Chamberlain*, [38] however, atheism and agnosticism are forms of belief that "compete" alongside religions, and "secular principles" include religious believers and their perspectives.

In issues such as public school funding of religious education, how we understand the "pubic" and the "secular" will go a long way to how the law balances the equities when conflicts emerge.

In **Chapter 2** of this thesis, having reviewed some of the relevant history of law and religion, and touching on other relevant disciplinary insights, the concept of "social imaginaries" and "constitutional narratives" will be examined, since both offer valuable contributions about how we imagine our social architecture. Such re-imagining permits us to "tell ourselves other stories or narratives" in a way which better comports with deeper understandings of diversity and equality.

Having set out in Chapter 2, the nature of a "social imaginary" and "constitutional narrative", I will, in **Chapter 3**, delve further into the role and limits of law and the goods of religion in order to, in **Chapter 4,** "examine the problems of convergence and civic totalism." Having established these backgrounds, the thesis will turn to examine the case law and scholarship that has emerged recently in relation to the religious employer exemption cases. Here the focus will be on cases in Canada and South Africa, with a particular emphasis on recent exchanges in the South African Journal of Human Rights - - most particularly, on a special issue dealing with religion and law.

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[36] George Grant, *English-speaking Justice* (1985) 86.

[37] Iain T. Benson, "Considering Secularism*"* in Douglas Farrow (ed) *Recognizing Religion* (2004) 83.

[38] See *Chamberlain* (2002) above.

Following the analysis of case law in **Chapter 5**, **Chapter 6, the Conclusion,** will set out, in brief, the nature of the associational oculus and the rebuttable presumption in favour of associational diversity as two possible legal responses to the need to maintain pluralism in an open society and this will be followed by some concluding observations**.**

In closing this introductory overview, it is important to be aware of Harold Berman's insight that:

"...[b]y emphasizing the interaction of law and religion, we may come to see them not just as two somewhat related social institutions, but as two dialectically interdependent dimensions – perhaps the two major dimensions – of the social life of man…."[39]

A great deal hinges on a rethinking and reconfiguration of this "dialectical" relationship between law and religion. Writing some years ago, Harold Berman referred to what he called "the crisis of the western legal tradition" which consisted of the impotence of the western legal tradition "….to resolve the crucial conflicts of the 20th century and to maintain order and justice in a world mortally imperilled by violence and oppression".[40]

Berman pointed to the breakdown to this crisis being rooted in what he referred to as "….the breakdown of the communities on which the western legal tradition is founded."

For Berman, the establishment in the late 11th and 12th centuries of the western church as a visible, corporate, legal entity and "the articulation of autonomous bodies of ecclesiastical and secular law to maintain the cohesion of the church and of the state made sense"and "still makes sense" as a way of protecting spiritual values against corruption social economic and political forces. Here is what Berman said about the conditions prevalent in America and throughout the west: "….social life is characterized by religious apathy and by fundamental divisions of race, of class, of the sexes and of the generations where bonds of faith are weak and bonds of kinship and of soil have given way to a vague and abstract nationalism…."[41]

Berman concluded, and it is of central importance to this thesis, that "unless it is rooted in community, law becomes merely mechanical and bureaucratic". He stated that:

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[39] Harold Berman, *Faith and Order: The Reconciliation of Law and Religion* (1993) at 19.

[40] *Ibid* at 52

[41] *Ibid.*

> Today, law is something which is taught in law schools, practiced in law offices, tested and applied in law courts, made in legislatures. Today religion is something which is taught in schools of theology, practiced in churches, tested and applied by the clergy, made by holy synods, or else, as in some Protestant traditions, religion is something which resides in the heart and conscience of the individual believer. Religion is irrelevant in the law schools, and law is alien to the religious mind. Mind becomes just a mechanism, religion just an escape. This is the end of the 900 year old era of Western Law; dualism, or rather pluralism, becomes simply fragmentation and disunity.[42]

So what is to be done? Well, one thing which Berman saw clearly and argued strenuously against was the "profound mistake" of attempting to consider the relation of law and religion "solely from a legal point of view". He said that, in addition to viewing the legal foundations of religious freedom, it was important to consider the relationship in terms of the religious foundations of legal freedom.[43] To this I would add that religion needs to be understood *culturally* by law.

Noting the importance which the founders of the American Constitution placed upon religion (a point later developed by de Tocqueville) Berman noted that "…the radical separation of law and religion in contemporary American thought creates a serious danger for religion – namely, the danger that it will be viewed as a wholly private, personal, psychological matter, without any social or historical or legal dimensions"[44].

Berman argues against too radical a separation of law and religion and recognized that the opposite, namely making too close an interconnection between them, would also be a problem. Berman noted that religion and law are, as I set out above, in tension with each other and that each challenges the other. Most importantly, he stated that:

> Religion, by standing outside the law, helps to prevent legal institutions from being worships. Conversely law, by its secularity, leaves religion free to develop in its own way. The separation of law and religion thus provides a foundation for the separation of Church and State, protecting us against caesaropapism, on the one hand, and theocracy on the other. Yet the radical separation of legal and religious institutions does not require the radical separation of legal and religious values. It does not require the total secularisation of law and the total spiritualization of religion. (...) *in the western tradition it is a fundamental purpose of religion to challenge law to change continually in order to be more humane, and the fundamental purpose of law to challenge religion to change continually in order to be more socially responsible.* An organic theory of society does not protect the status quo when the theory itself conceives the society in terms of a dynamic process of development.[45]

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[42] *Ibid* at 52-53

[43] *Ibid* at 210

[44] *Ibid* at 216

[45] *Ibid* at 216-217 (emphasis added).

Berman rejected what he referred to as "a form of secular religion or idolatry" which involved "…the worship of a constitutional principle for its own sake, coupled with a high degree of scepticism concerning any justification for such worship other than immediate self-interest, whether individual or collective".[46]

He noted, as referred to above, that if religion is considered to be simply a private affair of each citizen and, on the other hand, "the public teaching of so-called scientific atheism is required in all schools and is promoted in the press and elsewhere" what occurs is the following:

> Thus, atheism, by claiming to be not a religion, but a science or a philosophy, is in fact, "established", and traditional religion such as Christianity, Judaism and Islam are withdrawn from public discourse. [What is needed is something quite other]….namely to help create a society in which political and legal values, on the one hand, and religious values on the other, freely interact, so that law will not degenerate into legalism but will serve its fundamental goals of justice, mercy and good faith, and religion will not degenerate into a private religiosity where pietism but will maintain its social responsibility.[47]

For Berman, therefore, the "reconciliation of law and religion" involves recognition of their inter-related ness and co-penetration but, as well, their distinctive roles and contributions.

Within Islam's various schools considerable attention has been paid to the roles of the religion and the state and, in particular, the danger of idolatry in relation to the state. One noted Muslim commentator has written:

> The Nation and the State are the new idols before which civilized man has fallen prostrate. And along with the old-perhaps the oldest-living-god, Mammon, a new Trinity has emerged in place of the Trinity of the Church….increased powers of the state, which must necessarily be exercised through individuals, are being used more for the enslavement and destruction of man than for his deliverance from tyranny and upholding the cause of truth and justice. It has been rightly remarked that while science has given man powers fit for the gods, to their use the civilized man brings the mentality of a savage. The state, instead of being helpful in increasing human happiness for which it was originally meant, has become a menace to human happiness, the individual, being so enthralled by this idol that, willingly or unwillingly, he is working as part of the machinery for the destruction of humanity. It is to remedy this evil that

[46] *Ibid* at 218, See also, Michael Ignatieff, *Human Rights as Idolatry* (2001) 53 "[h]uman rights is misunderstood, I shall argue, if it is seen as a "secular religion." It is not a creed; it is not metaphysics. To make it so is to turn it into a species of idolatry: humanism worshipping itself. Elevating the moral and metaphysical claims made on behalf of human rights may be intended to increase its universal appeal. In fact, it has the opposite effect, raising doubts among religious and non-Western groups who do not happen to be in need of Western secular creeds."

[47] Berman, *Ibid* at 219

> Islam requires the vesting of state authority in the hands of men who are God-fearing before all. [48]

Writing the first "systematic theory of justice from a Protestant Christian prospective in over 300 years", Emil Brunner in *Justice and the Social Order* (1945), sought to set out the relationship between justice and the political order and law and his insights show a remarkable agreement with those referred to above by Berman. Unlike Berman, however, Brunner noted the theological injustice of any attempt to "reduce the individual to an element without rights of an abstract, inclusive community"[49]. The State, within a Protestant understanding (and certainly within Roman Catholic understanding) is viewed as "God-given" and, "an ordinance of the creator"[50].

The tension referred to above is neatly described by Brunner who echoes the virtually identical understanding of Rabbi Novak, above, as follows:

> Insofar as man is a person in relationship, he is bound by the authority of the State, but insofar as he is a person before God, he is bound by no State. The State has never had rights over his soul; man never "belongs" to the State. Man never receives his human dignity through the State, but prior to the State and independently of it. [51]

What follows from this is that, while the State is in some respect part of God's ordinance, it is necessarily limited in its power and jurisdiction. Where the divine ordinance of the State is forgotten anarchy may arise and where the limitation on the State's power is forgotten, "the menace of the totalitarian State arises"[52].

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[48] Maulānā, Muhammad 'Alī. *The Religion of Islam* (1990) 562-563. See also: Abū-L-'Alā' Mawdūdī, "Political Theory in Islam" in Donohue and Esposito, (eds) *Islam in Transition* (1982) 252-260 at 257.

[49] Brunner, *Justice and the Social Order* 68

[50] *Ibid* at 68-69

[51] *Ibid* at 70 See, also, Roger Scruton, *Sexual Desire* (1986) 36 ff.who comments on the nature of the person in relation. See, also, John MacMurray, *The Self as Agent* (1957) 30-31 for his discussion of the nature of the person as influenced by religion - - particularly Christianity and "the crisis of the personal" that results outside religious understandings where "..the state becomes compelled to perform the functions of a church (for which by its nature it is radically unfitted)"; and, Charles Taylor "The Person" in Carrithers et al. (eds) *The Category of the Person* (1985) 257, 280; Thomas Langan, in *The Catholic Tradition* (1998) 390-398 and *Human Being: A Philosophical Anthropology* (2009) 11, 17, 154 ff; develops a rich religious and philosophical background to the concept of the person in relation to love and formation as well as the "social search for truth." Despite a sustained and extensive search outside religious sources, I have found nothing comparable to the depth of the spiritual writings in this area. The religious traditions described by Langan, David Novak's account of Jewish understandings in *Covenantal Rights* (2000), or that within the Islamic tradition of Said Nursi as adumbrated by Ibrahim Abu-Rabi' in *Theodicy and Justice in Modern Islamic Thought* (2010), are of a different *dimension*; why this is so remains a mystery but its significance ought not to be ignored. Again, the observation is to point out the place for divergent views not to argue for the truth of any particular one. That would be a question of faith beyond the scope here: at the deepest level, as to the future of human peace and freedom and why law, culture and religion must be held together, see: René Girard, note #56 below.

[52] Brunner, *Ibid* at 71.

With respect to the situation of the person or the "individual", Brunner notes that his theory of Justice and the social order can only properly deal with the relationship between individualism and collectivism by virtue of an awareness of the role that spiritual insight plays. He states:

> So long as the notions of freedom and the rights of man inspired radical individualism with religion feeling, it regarded itself as a radical opposition to all collectivism. *But when it loses the link with its transcendental and religious source – we may here recall what was said above on the religious character of Stoic Rationalism – when it becomes purely secular, by itemizing society it creates the conditions in which mechanistic collectivism can come into being.* (...) Radical individualism looses the organic bonds of society, grinds mankind into shifting sand which can settle nowhere, and this pulverized mass of humanity is subsequently welded by mechanistic collectivism into the artificial unity of the proletarian, totalitarian State. It is true that the fiction of the equal rights of all still subsists. Echoes can still be caught in the phrases of the ideology of freedom and equality underlying the revolution of individualism. In actual fact there are no individuals left. The mass-State is everything, the individual nothing[53]

For Brunner, as we saw in Berman and Novak, the religious (Christian and Jewish) conception of the individual and the community is what stands opposed to these various forms of collectivism and in the Muslim passage cited, Islam stands between the domineering "godless" state and the freedom of the individual from idolatrous state enslavement. All of the religions mentioned see the state and its laws as in need of the correction and guidance that only religion can provide. Writing long before John Rawls, Brunner notes as follows:

> In the Christian understanding of man, *a communal structure based on a contract is neither necessary nor possible*. Communities are just as much established in the divine order of creation as the independence of the individual….the absorption of the individual in the collective whole, however, is just as impossible in Christian thought as the construction of the community on the basis of a social contract. *The independence of individuals is just as much God's creation as the community founded on their diversity.* (...) the Christian view of the relationship between individual and community may be formulated thus: fellowship in freedom, freedom in fellowship. *The concrete form of such free fellowship is federation. The federative principle, however, must not be taken to mean a community based on a contract or a union.*[54]

Similar to other writers in the Jewish or Christian tradition[55] Brunner ends up his discussion of justice by invoking the importance of community in maintaining the influences of custom and tradition but, beyond these, he argues that the deepest sources of a good, just and selfless will are the essence of what transforms an unjust will into a just one and a self-seeking man into a man of public spirit. Here for Brunner, and we would see the same sorts of reach for the transcendental within Roman Catholic

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[53] *Ibid* at 77 (emphasis added).

[54] *Ibid* at 78 – 79 (emphasis added).

[55] See Novak, *Covenantal Rights* (2000) and Maritain's *The Things that are not Caesar's* (1930).

thought, that which lies beyond the reach of human effort or educational endeavours is necessary for the "redemptive" movement towards a richer conception of justice. This is how Brunner states this understanding:

> The experience of "rebirth", of becoming new and other, takes place only when the very spirit of good touches the human heart, when the creative God creates a turning-point, a "conversion" in the in-most soul of man by His word of salvation. No doctrine, no education, no co-operation, no organization, can create a just will where it is not already latent. It can only be created by an awakening through the spirit of the gospel. That that should happen is more important than any theory of justice, be it ever so necessary and right.[56]

For Brunner, religion can inform justice and human rights with conceptions that cannot be found within a social contract in the Rawlsian sense or with purely immanent conceptions of justice. Catholic social thought has developed, particularly since Vatican II in the early 1960's, a rich conception of the relationship between religion and law, the Church and the State. [57] While noting that "….the gap between Catholic social thought and liberal theory is much narrower than it was in the mid-19th century, or even in the mid-20th" Galston points out that important differences still remain:

> Some liberals embrace scepticism or relativism about the human good; some downplay the moral role of the state or seek to exclude faith-based arguments from public discourse; some emphasize the civic prerogative of the state at the expense of family and associational autonomy. Clearly Catholics must reject these versions of liberalism. Liberals for their part must resist the Catholic use of controversial thesis in theology and natural law as the basis of cohesive state policy. It is one thing for Catholics reasoning within the premise of their community to reach conclusions about abortion, assisted suicide and homosexuality that are held to be binding on the faithful; quite another to impose those views on others. Catholics may be affronted by a legal code that permits acts they view as abominable. But in circumstances of deep moral diversity, the alternatives to enduring these affronts may be even worse.[58]

Galston is remarkable for his capacity to articulate both the need for recognition of certain shared goods for a liberal society and the risk of certain conceptions of liberalism over-reaching to restrict the important diversity of goods within such a society. Thus, in relation to the claims of Catholics, Galston notes:

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[56] *Ibid* 229 See, also, the related and radical anthropological conclusions of René Girard here as well, *I See Satan Fall Like Lightning* (2002). Girard's masterful explanation of the nature of the "scapegoat" (contained within it) and its religious significance in widely diverse human communities may be key to understanding the anthropological and psychological dimensions of peace and violence in human communities (including law) in the years ahead.

[57] William A. Galston, *Public Matters* "Contending with Liberalism: Modern Catholic Social Thought" (2004) Chapter 11, 141-154.

[58] *Ibid* at 154, other essays in this volume touch on the relationship between American citizenship and Judaism and the prospects for pluralism between Jews and Muslims (at 169-173). Galston notes that Catholicism does not claim to "force its views" on others as so many ill- informed contemporaries imagine.

> It goes without saying that liberal public orders cannot reasonably require Catholic social thought to relativize its theological and philosophical understanding of the human good. (Indeed, no individual or group can be required to do so, though some may try.)…What liberalism requires, rather, is that the Church adopt a stance of severe and principled self-restraint in the face of the temptation to impose its beliefs on others through state coercion. As we will see, it is this requirement, the moral bed rock of liberal politics, that most squarely raises the spectre of a clash between liberal principles and Catholic social thought.[59]

Galston respects associational diversity and has, on numerous occasions in his academic writing, pointed out the importance of the bulwark of co-existent belief systems against the liberal temptation towards homogenization and the religious temptation to co-opt non-religious citizens. Galston embraces John Gray's conclusions with respect to *modus vivendi* liberalism or accommodational pluralism or what I call "deep diversity." That is to say, he stands for the affirmation of associational diversity within liberalism as against a convergence framework which, while calling itself liberal, may be anything but. Unfortunately, many other scholars do not share Galston's view, as we shall see below.

Taking Leave of John Rawls

Two more recent and, it has to be said, massive studies of justice and constitutional law provide the substance for the conclusion of this introduction. The first in time, *The Idea of Justice*, by Amartya Sen[60] and, more recently, Paul Horwitz' *The Agnostic Age.*[61] Both books are notable in calling for an entirely new approach to prevailing theories of justice. Both identify serious failures in the work of, amongst others, John Rawls, and particularly in Sen's case; deliver what will, quite likely, be fatal criticisms to that most influential work in the years ahead. Sen, after all, taught alongside John Rawls for some years and in his book is at some pains, not just to bury Rawls, but also to praise him. His work is a consummate example of academic courtesy. Similarly, Horwitz in the *Agnostic Age* calls for "conventional liberals" and "readers with strong religious views for or against the existence of God" to recognize that we can no longer reason together about the key questions related to Church and State "while laying questions of religious truth aside".[62] Horwitz argues that it is precisely a strategy of avoidance that characterizes most judges and legal scholars' approach to religious truth and that this "….has led to the state of confusion

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[59] *Ibid* at 146

[60] Amartya Sen, *The Idea of Justice*, (Harvard, 2009)

[61] Paul Horwitz, *The Agnostic Age: Law Religion and the Constitution* (Oxford, 2011).

[62] at xxiii. It is worth noting that a richer understanding recognizes that the actual relationship is between religion and culture rather than "church and state" *per se*. See: Joseph Koterski "Religion as the Root of Culture" in (editor anon.) *Christianity and Western Civilization* (1995) 26.

and dissatisfaction that permeates the theory in practice of the religion clauses of the first amendment."[63]

According to Horwitz, the theory of constitutional agnosticism that he propounds believes that these questions about religious truth must be confronted head-on rather than avoided and that such confrontation must be done with a measure of humility aware of the need to live amongst what he calls "…uncertainties, mysteries and doubts…"[64]

Horwitz is suspicious of "buzzwords" such as "equality", "neutrality" and "equal liberty" since these prevailing approaches play into a conception of law and religion that, in his words, while they purport to be neutral or to hold religious and non-religious beliefs alike in equal regard "routinely fail to do anything of the sort".[65] I share his concerns but go further by proposing, at least in small compass, some practical suggestions.

Horwitz has this to say about constitutional agnosticism:

> Constitutional agnosticism argues for a new way of thinking about the balance between law and religion, and between religion and liberal democracy more broadly. In some cases, it counsels in favor of different outcomes with respect to church-state conflicts than the ostensibly "neutral" courts might reach today. But it also concludes that there may be no perfect, final agreement between church and state. Constitutional agnosticism is an important and valuable ideal, and it has many important and achievable implications in practice. Like all ideals, however—and perhaps like agnosticism itself—it is tortuously difficult and perhaps impossible to attain in full. That, too, can be an important lesson.[66]

Having rejected Rawlsian claims for "pubic reason" as these bracket out claims for truth which, in many cases, are constitutive of our identity as persons and communities, Horwitz states, somewhat boldly, that:

> …we are now in the twilight of the liberal consensus as we have known it. It may survive, with important revisions. Or it may collapse all together, and new prophets will arise to predict what will come after it. *One thing, however, seems certain: the liberal consensus that emerged after the enlightenment, gelled in the nineteenth century, and reached a more or less stable form in the twentieth century, cannot last much longer as a basic, unquestioned assumption about the way we live.* From within and beyond its borders, the liberal consensus is under attack. On all sides we are hearing calls,

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[63] *Ibid.*

[64] *Ibid,* I shall discuss this further, below, in discussing Horwitz' use of "negative capability." The importance of "epistemological modesty" is neatly discussed in relation to one's own beliefs and culture in encounter with others by Kwame Anthony Appiah, *In My Father's House* (1992) 117.

[65] at xxiv

[66] *Ibid* at xxv

> sometimes measured and sometimes shrill, for a revision or an outright rejection of the terms of the liberal treaty.[67]

This is not the place, even if it were still necessary (which it no longer is) to embark upon a detailed analysis of *A Theory of Justice*. In any case, Sen's analysis will likely become the definitive description and rejection of Rawls' approach going forward. I do not intend to dwell upon it apart from noting that Sen endorses John Gray's critique in *Two Faces* (favouring *modus vivendi* over convergence) and, like Horwitz, calls for "…the need for a substantial departure in the prevailing theories of justice".[68]

Sen, in referring to the theory of justice put forward by Rawls, states that "…the theory of justice, as formulated under the currently dominant transcendental institutionalism, reduces many of the most relevant issues of justice into empty – even if acknowledged to be - - 'well-meaning' rhetoric".[69] Sen offers a succinct analysis of what he refers to as the "seriously defective" main planks of the Rawlsian theory of justice.[70]

Citing a long list of contractarian thinkers beginning with Hobbs through Locke, Rousseau, Kant and Rawls, Sen draws a helpful distinction between two approaches to justice amongst leading philosophers. The distinction he says has received far less attention than it deserves. The first, "transcendental institutionalism," has two features: first it concentrates its attention on what it identifies as perfect justice rather than on relative comparisons of justice and injustice. It tries only to identify social characteristics that cannot be transcended in terms of justice and the inquiry is aimed at identifying the nature of "the just" rather than finding some criteria for an alternative being "less unjust" than another.

The second aspect of "transcendental institutionalism" is that it concentrates primarily on getting the institutions right. Both of these features relate to the "contractarian" mode of thinking that Hobbes initiated and Locke, Rousseau and Kant developed. In contrast with transcendental

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[67] *Ibid* at 22, (emphasis added). These views are virtually identical to those of political philosopher David Walsh whose *After Ideology* (1990) and *The Growth of the Liberal Soul* (1997) I discuss further below.

[68] Amartya Sen. *The Idea of Justice* (2009) at 27

[69] *Ibid,* 26

[70] *Ibid,* 52-58; CharlesTaylor, *Sources of the Self* (1989) 89 and Ronald Beiner, *Civil Religion* (2011) 294-300, both refer to Rawls' theory as, on its deeper levels, "incoherent" ; Beiner mounts a strong set of arguments against Rawls' approach generally and I believe that the points made by both are decisive arguments against Rawls' overall theory of justice.

institutionalism, Sen points out that a number of other enlightenment theorists took a variety of different approaches which, rather than focusing the search for transcendentally established principles of a perfectly just society, were interested primarily in removing manifest injustice from the world that they saw around them. Sen refers to this second strand of thinking as being theorized in the work of Adam Smith, de Condorcet, Jeremy Bentham, Mary Wollstonecraft, Karl Marx and John Stuart Mill. [71]

Sen points out that the first tradition, transcendental institutionalism, is the one "on which today's mainstream political philosophy largely draws in its exploration of the theory of justice"[72] Sen, in a nutshell, states that the pursuit of perfectly just social arrangements "is incurably problematic" and as such, "the entire strategy of transcendental institutionalism is deeply impaired ".[73] I agree with his terminal condition diagnosis. The second approach challenges injustice evident in the world.

Sen notes that "sectarian demagoguery" can only be overcome through the championing of broader "values" (his term, one I abominate, and have written about elsewhere)[74] that go across divisive barriers. Thus he urges Hindus, Muslims, Sikhs and Christians in India to realize that they not only share a nationality but, depending on the individual, share other identities such as language, literature or professional vocation and many other basis of categorization.[75] As such, Sen is urging a larger vision of citizenship than simply religious identity. He is reaching towards an articulation of what might be termed civic virtues, as these have been termed by amongst others, William A. Galston and Stephen Macedo. Rather than strive for some transcendental test or perfection such as the Rawlsian conception of "the original position" which Sen categorically rejects, Sen points out that it is in how we behave in relation to others – an unashamedly realist perspective, that any theory of justice will ultimately depend. The question then, is which sorts of institutions within society are best fitted to influence behaviour and, in particular, behaviour towards civic virtues and the moral insights that the religions and communities have expressed?

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[71] *Ibid*, 52-58

[72] *Ibid*, 7

[73] *Ibid,* 11

[74] Iain T. Benson, "Do Values Mean Anything at All?" (2008). The general theme of which fits very nicely within the overall framework of this thesis.

[75] *Ibid,* 353

For it is the civic virtues that we share and recognize as goods *in common* that enable us not only to be affirmed in our own beings and in communities that share what we believe, but to recognize what we hold in common across lines of division. This is a work of identification with "the other" which is well beyond a merely legal prescription.

I agree with this perspective and it is largely one that I shall describe and propose in this thesis. Recent developments in South Africa show that the religions are quite capable of working together around sets of core principles for the purposes of influencing laws, not only through government action itself *but through their own associational work recognized and protected by law and not created by it.* That is the genius of Section 234 of the South African Constitution.[76] Sen calls for a new and expanded approach to constitutional theory that he argues is necessary because of the limitations of liberalism generally and Rawlsian liberalism in particular.

Enter Constitutional Theocracy and Political Theology

I have discussed the rejection by religious thinkers of the concept of "civil religion", above. What also needs to be mentioned here is the concept of "constitutional theocracy." Under the heading "Curbing Traditional Law in South Africa" Canadian scholar Ran Hirschl bluntly states that:

> One of the main reasons constitutional law and courts have become secularist darlings in predominantly religious polities is the embedded resentment the modern state and its laws share toward alternative sources of authority or competing systems of collective identity…[and Hirschl then refers to] this almost organic antagonism of the modern state and its laws toward alternative schemata of meaning and authority…we can assume that the reluctance expressed by guardians of the civil religion to grant support to alternative interpretation systems is driven, in part, by their interest in retaining the secular court as the primary and commanding legitimate interpreter of laws, as well as the ultimate arbiter of the legal system.[77]

Moreover, while courts and legislatures may extend "olive branches" to "non-state, alternative, and potentially competing systems of orthodoxy":

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[76] Iain T. Benson, *the South African Charter of Religious Rights and Freedoms* (2011). This was the first use of Section 234 of the *South African Constitution* and the draft Charter was signed by all the major and minor religions of South Africa in September 2010, details of which are in this article. The author was privileged to be one of the principal drafters of the *Charter*.

[77] Ran Hirschl, *Constitutional Theocracy* (2010) 187 (emphasis added). Less sanguine about this situation, however, are those such as Alasdair MacIntyre, *Whose Justice?* (1988) 344-345 who notes that: "[t]he lawyers, not the philosophers, are the clergy of liberalism" which is a theory that "….while initially rejecting the claims of any overriding theory of the good, does in fact come to embody just such a theory. Moreover, liberalism can provide no compelling arguments in favour of its conception of the human good except by appeal to premises which collectively already presuppose that theory. The starting points of liberal theorizing are never neutral as between conceptions of the human good; they are always liberal starting points… [l]ike other traditions, liberalism expresses itself socially through a particular kind of hierarchy." See also, Francis Sparshott, *Taking Life Seriously* (1994) 356-358 and Charles Taylor's critique and rejection of Rawls in *Sources of the Self* (1989) 88-89.

> …the high priests of constitutionalism have not hesitated, when encountering what they have perceived as unruly challenges to their own standing as supreme and ultimate lawgivers, to expel their competitors to the no-man's-land of legal exile. Those who do not comply with the constitutional religion's metanarrative come to encounter the outer limits of law's accommodation – and it is a cold place to reside on this side of the new wall of separation.[78]

From the perspective of the other authors just cited, all of whom view the separation of law and religion as essential to the integrity of both and to the state as well, Hirschl's analysis is perhaps the bleakest yet on offer. Hirschl makes the serious mistake of failing to evaluate the content differences between the sorts of things religions do culturally and the things of which law is capable. So for Hirschl it is possible and rather uncontroversial to view constitutionalism as in competition with religion and, for Hirschl, this may have some good outcomes. I disagree strongly with some of his conclusions in what follows.

Note how, in the following passage, he fails to evaluate differences between law and religion in terms of function and social impacts (think of the first "pillar" quotation earlier this Chapter from Justice Sachs in *Christian Education*):

> The assumption that constitutionalism and religion are diametrically opposed domains, or at best unrelated to each other, is often unquestioned But these two domains are in many respects analogous symbolic systems that vie to establish, maintain, or enhance their hegemony, worldviews, and preferences vis-à-vis each other. Very few, if any, constitutional orders in today's world, their various outlooks notwithstanding, are outright separable from religion. In many countries constitutional law and religion law do coexist in an admitted ly tense relationship, but one that is not more overwrought than that of constitutionalism and democracy. Precisely because constitutionalism has certain religion-like aspects to it, all fostered by the modern state and by the post-Westphalian international community, *it may be better positioned than blunter, more forceful means to control and pacify principles of theocratic governance effectively. The religion-like nature of the constitutional scripture – its overarching, larger-than-life, and omnipresent character – may just turn it into an effective counterpoint to a religious scripture.* In that respect, constitutionalism might very well emerge, or perhaps already has emerged, as tomorrow's "opiate of the masses.[79]

Hirschl fails to distinguish between theocratic forms of governance in which it might be necessary to find legal alternatives or "counterpoints" to "religious scripture" and the risk of law itself assuming a theocratic stance, but as he gives no examples it is difficult to know precisely what he is envisioning. More worrying is the suggestion that this extension of law into something that "walks and talks like" religion is either inevitable or to be welcomed There is no real comparison between what religions can offer a culture and what law offers owing to the very different nature of community life

[78] *Ibid*, 202

[79] *Ibid*, 249 (emphasis added).

(amongst other things). Law has no lived community in the same way religions do. Law does not undertake in a communal format, works of upliftment. Law has, as the second "pillar" quotation (from *Tremblay v Daigle*) shows, no real confidence that it can answer the same sorts of questions (even if it raised them) that religions take as their home ground and its doing so implicitly is something to be avoided and reduced if possible. Hirschl fails to note any differences at all. This is a serious error. For only when the differences between the two conceptions "law as religion" and "religion as religion" are made clear in terms of their cultural impact, can we be in a position to fairly evaluate the claims of the jurisdictional conflicts. I hope to remedy Hirschl's omission in what follows.

If Hirschl wishes to allow for, or is sanguine about, the divinization of law and commits an error in so doing, Paul Kahn does the same with respect to *politics*. In his insightful extended meditation on the *Essays on Sovereignty* by Karl Schmitt, Paul Kahn re-reads Schmitt through the American experience of revolution and sacrifice, and also notes the limitations of contemporary liberal theory. His conclusions are interesting but, in key respects, unsatisfying, since Kahn fails to note the differences that "political theology" has from the lived community-based theological understandings of religions. While dying for ones' country is undoubtedly a form of sacrifice, and there are religious overtones to how States treat their fallen (how can there not be?) this is all a far cry from the robust theological and lived reality *within communities* that religions celebrate and maintain. It is in the movement of theological beliefs from diversity nurturing associations, to conceptions of a political theology empowering the state and justifying and giving a rationale for sacrifice and violence, that make Kahn's claim that "political theology recognizes a multiplicity of forms of the sacred" ring hollow.[80] Kahn is right to note the limitations with "the lens of contemporary liberal theory" in that "elements of political experience grounded in faith and sacrifice will be ignored," but he fails to examine sufficiently, or at all, where deeper conceptions of sacrifice and faith are to be found alongside rich conceptions of justice and obligation.

Like Hirschl's endorsement of "constitutional theocracy", Kahn's description of "political theology" fails to view culture through the lenses that actually explain the sacred dimension of politics and that do so respectful of associational diversity and the proper limits of law and politics: *that is the lens of religious associations.* Kahn should have viewed culture through the lens of associational life and diversity rather than through further play in the direction of the divinization of Caesar. Political theology

[80] Paul Kahn, *Political Theology* (2011) 26. States under secularism are far less accommodating to religious variety than Kahn suggests. Such states as the United States and Canada increasingly tend to use religious liberty as window-dressing.

and constitutional theocracy, like civil religion in an earlier time, are simply different denominations of the same theocratic religion and in periods of secularism these need no further encouragement.

That these most current theorists, turning their minds to the limitations of liberal theory in dealing with the most important questions of the day, have opted for a "solution" in law or politics itself merely plays into an old problem in which the challengers to religions, sooner or later, use the power of the state to attempt to do what religions do differently. On some level law is, as Kahn notes, about violence (as we shall see in subsequent Chapters) and the moral and ethical viewpoints that must inform it are found most richly developed within the religious traditions that make up the modern state. Kahn helpfully cites Michael Perry with respect to the problem many "liberals" have with the morality of human rights as follows:

> The morality of human rights is, for many secular thinkers, problematic because it is difficult – perhaps to the point of impossible – to align with one of their reigning intellectual convictions, what Bernard Williams called Nietzsche's thought: '[T]here is not only no God, but no metaphysical order of any kind'." [81]

Whether one agrees with this normative statement or not, the descriptive dimension of the problem is evident particularly where, as I shall note below, various philosophers have identified commitment to some conception of objective good as essential to any meaningful conception of ethics.

Conclusion to Chapter One

This Chapter has shown that there is both a need and opportunity for new approaches to the law and, as we shall see in subsequent Chapters, how we imagine law and religion in our times. There are active theoretical projects that are willing to view politics as theology and constitutional law as theocracy if not as idolatry. Against this post-Rawlsian recognition of new ways of seeing law stand theories that approach law with humility in light of recognized diversity. I place this work in general sympathy with this latter group of scholars and, with them, reject Rawlsian proceduralism and its hegemonic claims to a certain kind of procedural "rationality." Amartya Sen has, I believe, created arguments that *should* put an end to the confidence with which most contemporary liberals have embraced Rawls - - that is, if they decide in future to come to terms with Sen's critique. Some concepts, however, like dead Legionnaires propped at castle gun-slits, can continue to give the appearance of vitality and strength for a time.

[81] ibid. 182 citing Michael Perry, "The Morality of Human Rights: A Nonreligious Ground?" (2005) 103.

With this ground work established, I will now move to the next Chapter in which I shall examine some points of history and the ideas of "social imaginaries" and "constitutional narratives." As a qualification for what follows, I conclude with the words of Emil Brunner:

> This attempt… lays no claim to exhaustive treatment of the individual problems....hence a thousand questions are raised in the course of the consideration of these problems, only to be left unanswered Many justified points of view are not taken into account, many pronouncements of weight unquoted. Indeed, what is quoted and what omitted, what views illustrate an argument and what not, is to a certain extent a matter of chance.[82]

Despite these caveats, Brunner's work stands as a highly significant contribution. It is hoped profoundly that these efforts of mine, standing firmly as they do on the insights and work of many others, across a wide variety of epochs and disciplines, will prove useful as well. In the next Chapter I turn to examine some important historic themes and the concepts of social imaginaries and constitutional narratives.

[82] Emil Brunner, *Justice and the Social Order* (1945) at 8. Anthropologist Clifford Geertz, in *The Interpretation of Cultures* (1973)52-54, 119 notes the importance of "descending into detail, past the mis-leading tags…if we wish to encounter humanity face to face." Such a set of tasks, observes Geertz, involves the interplay between different disciplines and "a terrifying complexity." Essential to recognize is the related understanding that to fathom religion as a cultural system "…the dispositions which religious rituals induce thus have their most important impact-from a human point of view- outside the boundaries of the ritual itself as they reflect back to color the individual's conception of the established world of bare fact." We are here on deeply existential ground – a ground that lies well beyond the important but limited terrain of the interpretation of immanent law and that, as we shall see, requires us to be aware of and honest about our deepest conceptions and beliefs.

CHAPTER TWO:

"SOCIAL IMAGINARIES", "CONSTITUTIONAL NARRATIVES" AND THE QUESTIONS OF POLITICS, LAW AND RELIGION

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"Nowhere is the spirit of an Age better mirrored than in the theory of law."

Walter Ullman – *The Medieval Idea of Law*[83]

Early Images of Church and State: Classical Culture, Constantine and Augustine

Historian, sociologist and Gifford lecturer Christopher Dawson once observed that:

> In all ages the first creative works of a culture are due to a religious inspiration and dedicated to a religious end. The temples of the gods are the most enduring works of man. Religion stands at the threshold of all the great literatures of the world. Philosophy is its offspring and is a child which constantly returns to its parent. And the same is true of social institutions. Kingship and law are religious institutions and even today they have not entirely divested themselves of their numinous character, as we can see in the English coronation rite and in the formulas of our law courts. All the institutions of family and marriage and kinship have a religious background and have been maintained and are still maintained by formidable social sanctions.[84]

Early Christians faced a particular problem with respect to whether they should recognize rulers who claimed divine mandates. What is fascinating is that from the very beginning mysticism and "questions of religious policy" were close to the foreground of public interest.[85]

One of the first acts of Constantine was to restore to the Christians "the free exercise of their religion and their god".[86] The many persecutions which had been carried out for centuries against

[83] Walter Ullman, *The Medieval Idea of Law* (1946) vii.

[84] Christopher Dawson, *Religion and Culture* (1948) 50 (emphasis added).

[85] Andrew Alföldi, *The Conversion of Constantine and Pagan Rome* (1998) 11

[86] *Ibid* 8.

Christians had failed to destroy that religion and in AD 310 Emperor Galerius "felt himself compelled to acknowledge the futility of bloodshed, while still absolutely declining to give up his essential point of view. His edict of toleration was revolutionary in its implications…the church buildings rose from their ruins before the eyes of the Pagans".[87] The political reliability of the faithful could now be attested to everybody's satisfaction by the simple prayer for the head of the state, for the ruling classes, and for the subjects of the empire. What concerned the state, the loyalty of citizens, could be satisfactorily accommodated with a simple oath that was not obnoxious to the religious faithful.[88]

From the earliest centuries, therefore, fidelity to the state's rules and the commands of religion required adjustment and recognition from both sides. The previous Chapter established the conditions of an impasse between the freedom of religion and contemporary liberal theory. This Chapter will examine some themes that emerge from the history of the relationship between religion and the state, with a view to providing useful background for later discussion of the interaction of religion and constitutional law. What I wish to do is "pull the lens back" to show that there has been a wide variety of relationships between religious principles and the state, and that these have changed over time. I will focus on a particular tradition -- that of western Christianity -- with only occasional commentary on the other great religions. The point of doing this is to suggest that the current impasse in liberal theory described in the first Chapter can be overcome by the kinds of fresh thinking about justice Examined in the first Chapter. History has witnessed adjustments of accommodation both within religions themselves and in the prevailing theories of the state. The principles discussed in Chapter one about the necessary relationship between law and religion should be kept in mind here.

In his monumental study of the relationship between Christianity and classical culture, Charles Norris Cochrane discussed the differences between a Christian conception of religion, the state, and the idea of the "gods" in Graeco-Roman times. There follows a striking similarity between classical attempts to promote civic virtue through a State regarded as "the ultimate form of community" and the current thinkers' arguing for a resurgence of "political theology".

According to Augustine, the greatness of the Roman Empire should not be ascribed either to chance or to fate, but to the fact that human empires "are constituted by the providence of God".[89] While the hand of God could be seen working through history, as Cochrane puts it, visiting "the sins of

[87] *Ibid* 9.

[88] *Ibid* 10.

[89] C.N. Cochrane, *Christianity and Classical Culture* (1944) 496

the fathers upon their children from generation to generation", Augustine imposed a form of realism upon history that "classicism stubbornly and persistently refused to do"[90]. Cochrane uses the term "secularism" (not coined until the mid-19th Century) to describe the classical "ideology of power" in a form which sought to rationalize it by "reconciling practice with theory and action with thought."[91]

According to Cochrane, rationalization, however, did not get rid of "primitive ideology" which "survived in numerous and varied forms of fashion and to boot, in the reunification of fancies, fears and hopes, not to speak of elaborate techniques of perpetuation and sacrifice".[92] The state was, from the beginning, aligned with mysticism and superstition. The persistence of this impulse towards self-preservation amidst "the dangers of an obscure and mysterious environment" in Graeco-Roman times, says Cochrane, "...is due to the birth of the gods." This somewhat startling insight includes the fact that the gods were classified in two forms: i) civic and poetic; and ii) "natural" or philosophical.[93]

The civic gods or "official" deities were the gods of household and state and their genesis in history corresponded, says Cochrane, with that of society itself:

> For, with the collapse of the heroic social structure and the rise of the *polis*, these gods as Augustine points out, come to be selected for economic and political reasons, ie. with a view to the promotion of civic virtues; the selection so made going to form what, following Cicero, he designates as the "constitution of religions".[94]

What follows from this is the development of a conventional form of relationship between gods and the State that is considered "eminently conservative and safe". With respect to this, however, "the sense of security is, however, illusory" because the "superstition of today becomes the licensed cult of tomorrow". What occurs is then said to pose a grave threat to political stability due to what Cicero referred to as the "confusion of religions".[95] A precise parallel, in fact, to concerns about quests to establish, a new “civil religion” within the framework of contemporary post-modernism.[96]

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[90] *Ibid.*

[91] *Ibid* 496-497

[92] *Ibid* 497

[93] *Ibid* 497

[94] *Ibid.*

[95] *Ibid* 497

[96] Harry H Hiller, “Civil Religion and the Problem of National Unity” in David Lyon and M. Van Die, *Rethinking Church, State and Modernity* (2000) 182] and Weed and von Heyking, *Civil Religion* (2010) “Introduction” 1-15 at 6-7; and John von Heyking “Civil Religion and Associational Life” 298-328 where the author observes: “This democratic faith has the potential to challenge and marginalize those faiths whose practice run counter to the articles of the democratic faith in part because those faiths take their cues from ancient tradition, revelation, or revelation expressed through natural law” (328). This is the point that Paul Kahn misses in *Political Theology* (2011) as I discussed in the first chapter.

The search for civil religion in classical times, therefore, failed to establish its stated goals of achieving social stability. The next stage is extremely interesting and important for subsequent developments. Cochrane simply refers to this as the work of "regeneration" within the "divine necessity and human history". The law of love which Augustine saw as being ushered in since it "comprehends all the discussions and writings of all the philosophers, all the laws of all states"[97] must first "deflate the idols of the market-place and academy, ie. the mythology of secularism".

In both the dominant cases, classical materialism and classical idealism, Cochrane informs us that the cosmos was envisioned as either one big machine (materialism) or one big soul (idealism). Augustine rejected both of these and, as the one-big-soul-cosmology was "much the more 'prevalent' in classical antiquity" and "much more seductive and dangerous, in as much as it appealed to the spirit of devotion and self-sacrifice which is one of the most fundamental and deep -seated instincts of the race" it required particular efforts to overcome it.[98]

So what did Augustine do to deflate these twin idols? Here Cochrane's conclusions are most helpful. He notes:

> To subvert the ideology of secularism was not to destroy the actual structure of secular society; it was merely to envisage it in a new light. Yet this was of immense importance. For it was to see the State, no longer as the ultimate form of community, but merely as an instrument for regulating the relations of what Augustine calls the "exterior" man (*exterior homo*).[99]

Augustine could work with "the institutions of the secular order" because these had a "certain reason and utility" but, and this is important, "the rule of the State is purely formal" and "as such, it can 'reconstruct' or 'renovate' but it cannot possibly 'regenerate'". So, very early on, we see a distinction between the aspects of the person (soul and body) that the State could comprehend and the State’s limitation with respect to the spiritual “regenerative” realm.[100] This division of competencies was, at least in embryo, seen to overcome the insecurity of the state and the exclusive claims of religion. We are at a similar point today but can learn both from the mistakes Augustine made and from the long history that brought us to more developed understandings of “church and state” since that time.

Cochrane concludes on this point that:

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[97] *Ibid* 508

[98] *Ibid* 508

[99] *Ibid* 509

[100] *Ibid* 510

> In these terms Augustine marks a sense of the limitation of political action which disassociates him, not merely from the claims of classical idealism, but also from much of the ill-conceived legislative activity undertaken by the nominally Christian empire....to him it is evident that, ultimately, there can be no compromise between the claims of Caesar and those of Christ. Caesar must therefore abandon his pretension to independence and submit to Christian principles, or he must be prepared for the doom which awaits sin and error in its secular conflict with justice and truth.[101]

The vision of society which Augustine develops is a "solidarity" based upon a "unity in nature"[102]. According to Cochrane, such a vision "...transcends all distinctions of race, class, culture and sex". In this schema "Adam is every man" and, for this reason, "every man is my neighbour". The society that results from this vision is constituted as "one body in Christ".[103]

Cochrane notes that the vision developed is one that "rejects the secular idea of totalitarianism, whatever guise it may assume; its idea was not one of communism or fascism but of community, the "community of saints".[104]

Such a vision is, says Cochrane, "profoundly democratic" because it recruits its citizens from all races and cultures without regards to differences of custom, law and institutions, imposes upon all alike the same obligations and duties (these prescribed in "the law of love") and because it assumes that all alike are sinners -- therefore, it rejects the claims of any "superman-saviour" in which some sort of "earthly providence" will save mankind if he commits his destiny to him. Cochrane is clearly writing in the shadow of the Second World War (1944) when the notion of a "superman" loomed large in the spirit of National Socialism. For Augustine, however, the peace to which the members of this "perfect society" pledged themselves was a sacramental peace based upon a sacramental oath.[105]

Cochrane notes that human history is viewed, here, as a conflict of opposites, but it was “not what Classicism had supposed” It was, at its essence, the struggle for the realization, materialization and embodiment within history of "truth, beauty and goodness which are thus, so to speak, thrust upon it as the very condition of its life and being".[106] Only in this way, says Cochrane, could the “secular” effort of the human spirit become intelligible.

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[101] *Ibid*

[102] *Ibid* 511

[103] *Ibid*

[104] *Ibid* 512

[105] *Ibid* 512-513

[106] *Ibid* 513

Thus, the State is seen as the battle ground between the conflict of sin and error with the "perfect society" that, through its baptismal promises and realization, alone can deal with human frailty: the state needs the Church.

According to Cochrane, Augustine's conception is not a myth, "the unsubstantial dream of a golden age", rather "....it is a prospect held out to human beings, a prospect for which they are called upon to work and fight because it constitutes the fulfillment of their humanity."[107]

In conclusion, Cochrane notes that the Christian Kingdom "...is nothing more or less than a divine society, the congregation of the faithful, the Church in the world....in human history, therefore, the hand of God is the power of God, and the power of God is the power of the good, i.e. of the fully integrated will."[108]

This vision of the Kingdom of God realizing itself through the "united effort of hand and heart and head" so as to “expose the fictitious character of secular valuations and to vindicate the reality of Christian claims” constituted a battle but one which, according to Cochrane, was to be “waged without rancor or bitterness, but mainly with pity and love”.[109] In this vision, “as Christian truth alone is genuinely salutary, its immediate acceptance is of the highest possible moment to the welfare of the race”.[110] What stands in the way of the realization of this vision is “the blind and obstinate resistance of mankind”.[111]

What Cochrane describes is a radical departure from the flux and indeterminacy of the Classical period and the development, driven in large part by Augustine, of a vision of at least spiritual, if not entirely practical, political unity. This concept clearly poses problems for the very democratic openness just described where points of conflict arise. Here we have the spiritual background to a unified state seen as not just a material but a spiritual/religious reality. The stage is set for other tensions to begin. Jurisdictional disputes are a necessary part of life in human communities and any articulation of a

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[107] *Ibid* 515

[108] *Ibid*

[109] *Ibid* at 516

[110] *Ibid* 516

[111] *Ibid* 516 John von Heyking, *Augustine and Politics* (2001) 260-261, sums up Augustine’s political thought as: “…rooted in a philosophical anthropology more robust than that offered in various modern accounts….[i]ts view of love of God and of neighbor is more satisfying than shallow proceduralism, and more respectful of meaningful pluralism and religion than is humanitarianism. The cultivation of a civic attitude of gratitude….within a context of meaningful pluralism can….help to prevent the present regime of tolerance from degenerating into a regime of secularism by providing a constant reminder that nothing in the *saeculum* can fully satisfy human longings.“

"perfect society" sooner or later, usually sooner, runs into the practical questions of how such "perfection" deals with jurisdictional quandaries.[112]

Although Augustine's talk of a "perfect society" and political unity might appear to be the antithesis of pluralism, his work bears the nascent seeds of what would, many centuries later, be understood as pluralism. Clearly the idea of a limit on the state's power in relation to religion is the beginning of at least a framework in the plural direction. However, Augustine was not yet where *Dignitatus Humanae* was to bring his Church centuries later.

Beyond Augustine: Aquinas and the Fourteenth Century, Lucas de Penna

In his description of the medieval idea of law, seen through the eyes of a contemporary jurist by the name of Lucas de Penna, Walter Ullman provides examples of how the Christian faith had to deal with disputes of jurisdiction in the 14th Century. [113] The Pope, holding the place of the divine Ruler, handed over the temporal government of the world to the secular Ruler in the form of the Emperor. Whereas the Pope's authority concerned the soul, the Ruler's authority governed the "corporal"; yet it was said that all authority, both spiritual and temporal, was delegated by the Pope to the Emperor.[114] This is a development from the Augustinian schema. Obvious, and to the 14th Century jurisprudential mind, fascinating and vexing questions arose. For example, "in what legal position is the Ruler before the confirmative and declarative act of coronation has taken place? Are his acts preceding his coronation invalid? Or have they the same validity as after coronation?"[115] The answer recognizes the distinction between matters that are merely "public order" and may be understood to be within the ambit of administrative government (immanent law), and those that required the exercise of "his divine

[112] We shall hear echoes of the idea of "perfection" in the notion of the "transformation/transformative constitution" and some of the statements made about one view of the role of constitutions in later chapters. However it is useful to note here that the movements to establish transformation of society through re-arrangement of social conditions that dissolve natural ties of family and religion have a long and troubled pedigree. The historical record does not paint a pretty picture of such attempts at "immanent" transformation, see: Igor Shafarevich, *The Socialist Phenomenon* (1980). Compare D. Bilchitz, "Should Religious Associations be allowed to Discriminate?"(2011),219 discussed below in chapter five. For the implications of eschatological immanentization in relation to "passions", "orientations" and "spiritual distorientations", see: Eric Voegelin, *New Science of Politics* (1952) 166 and 185-186. It could be said, with some justice, that those who have no idea what an escaton *is* are not really in the best place to assess the benefits, detriments or non sequitur(s) of its "immanentization."

[113] I am here, obviously, skipping over many figures and movements including the significant frame of Thomas Aquinas. His thoughts on the state and religion are many and detailed. I do not need to discuss them here except to refer to where an analysis may be located and, as that discussion does not add to what I am considering here, I shall say no more about it; see: John Finnis, *Aquinas* (1998) where "church and states" are discussed at 320 ff. For Aquinas the source of the division of responsibilities between Church and "secular purposes" (notably states and families) "….is the wisdom and will of God" (322-323). In this respect Aquinas is on the same large page as Augustine whom I have already discussed.

[114] Michael Ullman, *The Medieval Ideal of Law* (1946) 174.

[115] *Ibid,* 176

mandate" (higher law). Here the details of immanent law are beginning to take shape out of the "pure spiritual" theory of Augustine we saw described by Cochrane. Ullman writes as follows:

> Before coronation those acts of the Ruler are valid which are necessary for the maintenance of public order and discipline – acts, that is to say, within the ambit of administrative government….specific sovereign rights, whose exercise is the effluence of his divine mandate, and which received therefore divine sanction, are not within the scope of his powers before coronation. For instance, new legislation, abrogation of laws, new fiscal policy confirmative privileges and the like cannot be validly exercised [116]

A distinction has entered in which "public order and discipline" may be seen as outside of, but not inconsistent with, the wider "divine sanction" within which the legal system and state find their complete justification.

The back and forth between Protestantism and Catholicism and the enactments imposing or repealing disabilities, form the background and, for some, the justification for the political disputes and bloodsheds of history. Yet it is interesting to note that by the 19th Century, statutes had for some time dealt with disputes at the heart of Church doctrine, not least of which was the Supremacy of the King as "Defender of the Faith", a title previously reserved for the Pope in Rome. In addition, disputes about doctrinal matters such as "trans-substantiation" and the "invocation of Saints" or "the sacrifice of the mass" were the subject matter of various Acts, Oaths and Declarations. The *Roman Catholic Emancipation Act* (1829), for example, included a statement denying "temporal or civil jurisdiction" to "the Pope of Rome" or "any other prince." [117]

Dicey, in his classic work on Constitutional Law, [118] has very little to say about the role of religion. In a footnote, commenting upon "the limits of the jurisdiction of 'ecclesiastical courts'" he speculates that "…the king, acting together with the two Houses, manifestly represented the nation, and therefore was able to wield *the whole moral authority of the state*."[119]

It is some distance from the concurrence of pagan dieties with the power of the Emperors of the Roman period to Dicey's perfunctory statement about the "whole moral authority of the State" being wrapped up in the king acting together with the two Houses! Nonetheless, the confidence with which the statement is made, and the fact that there is virtually no discussion of religion in Dicey's seminal

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[116] *Ibid*, 178

[117] W.C. Costin and Steven J. Watson *The Law and Working of the Constitution: Documents 1660 – 1914* (1952) Vol. 2, 46.

[118] *Introduction to the Study of the Law of the Constitution* (1927, 8th ed)

[119] *Ibid*. footnote 2, 306-307. (Italics added)

work, indicates the relative unimportance of the religious disputes in England at that time, at least as far as constitutional theorists were concerned. It was not so for philosophers of religion such as John Henry Cardinal Newman, or historians such as Lord Acton in the 19th Century, who devoted a great deal of thought to the problems of church and state, the importance of religion to culture and our changing conceptions of freedom . Their work, important though it is, is beyond the scope of this thesis. I must be satisfied with a more recent scholar, French Catholic philosopher Jacques Maritain, and it is to his work that I now turn.

Maritain develops an elaborate analysis of the nature of the Church as a "meta-political unity" in relation to the "sphere of the terrestrial State" and comments upon the temptation to link religion to some political party either "of the left" or "of the right".[120] Maritain, similar in some ways to Cochrane's description of the religious vision of Augustine, notes that "the spiritual must free itself from the earthly fetters which threaten to enslave it." However, he then takes the spiritual vision to an important place for our purposes, in noting a key distinction between Catholics functioning *as Catholics* in contra-distinction to their actions as *citizens*. He puts it this way:

> If Catholics are required , as Catholics, to stand outside and above every political party of whatever sort, it goes without saying that, as citizens, they can still give their adhesion to any political party they may consider useful to the common good, once the Church has not condemned it either or doctrinal error or dangers of spiritual deviation. The distinction, however, must be properly grasped …their adhesion to any particular political party is a moral choice which remains subordinate to their destination to the ultimate end and their appreciation of spiritual values. But it is directly ordered to the service of the terrestrial state and its subordination to the eternal good, not to the service of the Church itself. And this personal choice of theirs, as Catholic members of the terrestrial state, not as members of the Catholic state, in no way pledges the Church and affirms no necessity of means linking the faith of Catholicism to any human party…[121]

Thus, for Maritain, expressing the Catholic thinking of the time (it was to change in important ways at the Vatican Council in the 1960's, particularly in *Dignitatis Humanae*) Catholic citizens were able to function in two realms and had to keep the two appropriately separated even while they overlapped. We would do well to note this conceptual development of "overlap", as it will reappear later on in the analysis of contemporary theory and case-law.

Keeping the two realms "appropriately separated" harkens back to the medieval recognition of the temporal/administrative capacity of the Emperor within the general spiritual justification of God and the Church. Jacques Maritain's more programmatic description of the role of the Christian, compared to

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[120] Jacques Maritain, *The Things that are not Caesar's* (1930) 64

[121] *Ibid* 66 (italics in original)

the generalized spiritual language of Augustine, links the Christians' role with practical projects within the State that remain quite distinct from the role of the Church. Here is one way of formulating the distinction:

> Men in our time are summoned to an integral restoration of Christian values, to a universal reinvention of order. They must expel from their minds all the barbarism, both capitalist and communist, of the naturalist and atheist world; not only in the political sphere, but also in the economic and social sphere which has been corrupted by the system of the fertility of money, and in the sphere of international relations and – most important of all – in the sphere of intellectual and religious life. There can be no true and complete order in human life unless grace and charity are predominant, for every practical order presupposes the will is in direct relation to its ends and therefore the pre-eminence of the love of the supreme Good….the function of justice is to remove the obstacles in the way of peace, such as acts of injustice and injuries, peace being peculiarly and particularly charity in operation.[122]

Having examined various misunderstandings about democracy and liberalism, Maritain turns his attention, again, to the relationship between the temporal good of the State and the spiritual good of the Church, "the mystical body of Christ". He states:

> So we see that the Church alone, not the State, has jurisdiction over the spiritual, over what directly comes into contact with the salvation of souls and the worship of God – "the Church alone has been invested with such a power to govern souls to the complete exclusion of the civil authority" – and that, leading us to eternal life, she has a sovereign right of education and control over the moral life of man. But we also see that civil society can, and ought to aim positively at procuring to the best of its power the virtuous life of the multitude….[141] The peculiar end of civil society, therefore, is not only to secure respect for the individual liberties and rights of every citizen, or to ensure material comfort, but also to procure the truly human and therefore moral good of the social body.[123]

Here, the state has not only the competence but the "obligation…without claiming jurisdiction over conscience…" to secure "…the *moral good* of the social body" (emphasis added). The state, therefore, has an obligation not only to further a singular moral vision but to protect conscience. Here we see the lineaments of what was to dove-tail with certain later views of pluralism, although Catholic social thought had not by 1930 developed to that point. Further on, Maritain analyzed different conceptions of nationalism and, in the course of doing so, rejected, wholeheartedly: "*…the blind worship of the nation (State or country), considered as transcending every moral and religious law, nationalism*

[122] *Ibid* 70 footnotes omitted emphasis added. We cannot fail, here, to note echoes of Emil Brunner's discussion of "love" in Chapter 1 above.

[123] *Ibid* 140-142, (emphasis added).

as opposed to God and the kingdom of God: as such it refuses to acknowledge the independence of the Church of Christ and her authority over temporal matters…"[124]

Maritain, in his view of the religious citizen who is both fully involved in the State and faithful to the teachings of the Church, espouses the jurisdictional relationship that would develop further in the Church in the Second Council in the 1960's and that will be discussed further later in this thesis. His approach is at stark variance with "civil religion", "constitutional theocracy", "political theology", "egalitarian absolutism"[125] and any attempts to blur the line between religious authority and state governance, to reinvigorate forms of joinder between religion and state that have been problematic in other periods of history.[126]

Malcolm Evans has observed that international protection of religious freedom has passed through three main stages, which are relevant to the current disputes between religious and non-religious belief systems:

1. The *cuius regio eius religio* model ["whose the region (or realm), his the religion" is a literal translation of this phrase]. This model provided for the territorial separation of people of different religious persuasions, keeping for example Catholics, Lutherans and Reformed apart in different countries and providing for modicums of toleration at the circumscribed dissidents and their right to immigration should a new confession be imposed in the realm: It has not comprehended the idea of "secular" man in charge of the "secular" state;

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[124] *Ibid* 154 in his later book, *Christianity and Democracy* (1945) 39, 41-42 Maritain puts the point in a straight-forward manner: "Not only does the democratic state of mind proceed from the inspiration of the Gospel, but it cannot exist without it." For Maritain, the spiritual is the necessary and sufficient guide for the political order. The tension continues, but in all these writers the relationship is considered essential even though the emphasis changes from time to time. Thus, in Fulk Greville's "Poems of Monarchy and Religion" (1670) stanza 246 we see the relationship between church and government mediated by law: "Yet in Mans darkness since Church rites alone/ Cannot guard all the parts of Government,/ Lest by disorder States be overthrown, / Power must use Laws as her best instrument;/ Laws being Maps, and Councellors that do/ Shew forth diseases, and redress them too." This suggests the jurisdictional distinctions based upon differential capacities as well as a necessary relationship between the three orders.

[125] Patrick Lenta, in his response to David Bilchitz' reply to Lenta's earlier paper, suggests, rightly, that Bilchitz' position amounts to "equal opportunity absolutism." This is a variation of the totalist perspectives that all need to be rejected and that will be discussed in chapter 4 below. See: Lenta (2012) "The Right of Religious Associations to Discriminate" 235. Of primary formative importance in relation to the developed Catholic position is the work of John Courtney Murray, *We Hold These Truths* (1960).

[126] I have benefited from the overviews of the history in the area of religious liberty and law and the philosophical aspects set out in: Malcolm D. Evans, "Historical Analysis of Freedom of Religion or Belief as a Technique for Resolving Religious Conflict" and Tore Lindholm, "Philosophical and Religious Justifications of Freedom of Religion and Belief" in Tore Lindholm, et al. *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 1-17 and 19-61.

2. The *minority protection* model. In this model bilateral or multi-lateral international treaties provided for protection of religious minorities within the State territory of an otherwise homogenous ethnic or religious majority; and

3. The *human rights* model. International treaties codified international standards and provided for international monitoring of universal human rights of individual human beings and of religions or "life-stance communities" to freedom of religion or belief.[127]

The useful term "life-stance communities" in the third category is drawn from the work of Tore Lindholm[128] whose long essay appears in the same volume as that of Evans. In what follows, I will use it along with "non-religious belief systems" since it refers to the same concept namely that "belief" is common to everyone whether they are religious or not. This insight, of critical importance, remains strangely opaque to most contemporary scholars- - even those writing on religion and law. The common dualism "believer/non-believer" is yet another of the false dualisms of our time and serves, along with the others ("religion/secular", "faith/reason") to give a false picture of the realities around us. We shall see more of this at the end of this Chapter when I examine the concept of "social imaginaries."

Tore Lindholm goes into greater detail than Evans with respect to religious history looking beyond Christianity to discuss Buddhist and Muslim developments. For our purposes, the key insight here is that "[t]he memory of the role of religion in the origins of modernity powerfully reinforces the contemporary prejudices that religion in the public square is divisive, intolerant and destructive of civil society."[129]

Pannenberg suggests, as a remedy to this problem of divisiveness, that Christians overcome "their inherited controversies" and incorporate "the idea and practice of tolerance" into their understanding not only of freedom but of truth itself. Rejecting the use of the term "tolerance" in the rather open-ended manner in which Pannenberg used it, Lindholm observes:

> The Lockean remedy of toleration - always a half-hearted policy - is not, or at any rate no longer, what is called for; toleration may even be held to be as much a part of the problem as it is a solution to the challenge of intra-religious and inter-religious indifference. The problem is that toleration does not go beyond political prudence and provide grounds for principled mutual respect across religious and life-stance divides.

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[127] *Ibid,* 4-5

[128] *Ibid,* 27

[129] Lindholm quoting Pannenberg at 41

> Hence scepticism, relativism and liberal gag rules against public religious discourse thrive all too well under the auspices of toleration.[130]

More importantly, Lindholm rejects Pannenberg's proposals on the ground that Pannenberg failed to take into account "the religious, moral and political upshot of the fact that contemporary inter-religious and intra-religious differences can be eliminated peacefully, non-coercively and without affront to human dignity and freedom ".[131]

Excluding the possibility of a return to any particular political hegemonic religion or life-stance, what is needed , so Lindholm argues, is to found social unity and civil peace on mutual solidarity and respect between many (preferably all) religions, life-stances and denominations. "...each party adapting to the fact of divisiveness by way of internally well-grounded espousals of the legitimacy of a secular and pluralist order."[132] As long as “secular” is understood in the sense of “including everyone and the appropriately public dimension of religious and other beliefs” (my words) one can agree with Lindholm. Again, one has to cut through the strongly secularist readings of “secular” to make the point of inclusion.[133] Again, “civic virtues”, are not addressed by Lindholm.

While Lindholm welcomes the "de-secularization" of local and international public discourse about matters of public politics, he cautions that "....how we draw the line of demarcation between legitimate and illegitimate’re-entry' of religion into modern politics" is very important. The "normative constraints" that Lindholm believes are essential for religions and presumably for what he refers to as “life-stances,” though he does not make this point, are that religions and these other stances are loyal to the principles of human rights generally and abide by the basic standards of representative democracy, constitutionalism, the rule of law and the separation and mutual checks of public powers.[134] It is difficult

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[130] *Ibid* 42 Lindholm wishes to reject or narrow use of “toleration” or “tolerance” because he perceives it reducing the public place for religious viewpoints. In Chapter four, I shall discuss the work of scholars who reject tolerance for the opposite reason - - that it is perceived to give too great a place to viewpoints that stand in the way of “deep equality.” See also: M. H. Ogilvie, *Overcoming the Culture of Disbelief* (1995) 22 who rejects “tolerance” because it is a “power-word” that connotes, inter alia, lack of respect for others. Joseph Raz *Ethics* (1994) 121 notes that, properly understood, toleration “requires concern for *and involvement with* others” (emphasis added) My own opinion is that appropriate tolerance need neither endorse relativism nor negative judgment but should reflect the conditions of living together with disagreement or *modus vivendi* under the conditions of pluralism and civic virtues. William Galston. *Liberal Purposes* (1991) 256-257 notes that “…early liberal theorists worked to disentangle civil society from destructive religious quarrels. But they nevertheless assumed that civil society needed virtue and that publicly effective virtue rested on religion.” Galston relates the discussion of “public virtues” to “civic freedom” and notes that “…neither juridicalism nor fundamentalism can serve as an adequate basis for a liberal society.” I agree with Galston’s observations.

[131] *Ibid*.

[132] at 42-43.

[133] See Chapter 1, note #5.

[134] *Ibid* 43-44

to disagree with these as necessary limits on religious organizations with the proviso that “loyal to the principles of human rights” does not entail accepting claims that fail to recognize religious distinctiveness and associational rights.

Should civil peace or social solidarity be threatened then religious voices may be appropriately limited however, and this is an important qualification, "....a political and legal-regime has public legitimacy only if it can be reasonably endorsed by all who are a party to it: hence the quest for overlapping justification of freedom of religion or belief across religious and life-stance divides".[135]

Lindholm's use of the phrase "overlapping justification" is apposite, as it does not imply agreement in the way "overlapping consensus" does.[136] Thus, certain justifications, while they might disagree, might nonetheless "overlap". A good example of this would be that religions and life-stances might recognize the important justification of alternative viewpoints to human sexuality but as part of their overlapping justification, recognize the priority of allowing free expression of these different beliefs. Thus, there is no “consensus” on sexual behavior expression in certain areas, such as sexual acts between those of the same sex (there may be in others such as a general prohibition on rape or abuse of children), and there can, therefore, be accord on the ability to have differing viewpoints. It is precisely this sort of concession between differing viewpoints that is missing in much of the contemporary debates on sexual orientation as we shall see later, particularly when differing approaches to religious employer exemptions are examined in Chapters 4 – 5.

Lindholm takes the analysis of history that I have outlined to a new level that recognizes the importance of the change within the Roman Catholic Church with respect to religious freedom and diversity. Lindholm reminds us that the Catholic Church has undergone “profound and irreversible

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[135] *Ibid* 41.

[136] On “consensus” within Rawls and other theorists and to what extent these are accepted, see: Jonathan Chaplin, (2000) “Beyond Liberal Restraint” 625 ff.; Ian Leigh, “Towards a Christian Approach to Religious Liberty” (1998) “The discussion of Rawls alerts us to the fact that religious belief is something essentially foreign and incomprehensible to Liberals” 37; Rex Adhar, and Ian Leigh, (eds) *Religious Freedom in the Liberal State* (2005) 49 ff. where the authors cite Kent Greenawalt as arguing that “..the overlapping consensus makes it easier for comprehensive liberals to offer public reasons for their proposals than it does for people with religious comprehensive world views” 49 f.n. 74.; Mohammed H. Fadel, “Public Reason as a Strategy” (2007) discusses “overlapping consensus” at 4ff. and the concept of “public reason” as acceptable generally for Muslims. Fadel, however, concludes that some of the “rhetoric of human rights” themselves would have to change to be acceptable to most Muslims. 4 ff; David Novak, *Covenantal Rights* (2000) 20 ff. discusses limits to Rawls from a Jewish covenantal perspective. Generally on concerns with Rawls’ failure to give adequate considerations to “religious pluralism” see: Catherine Audard, *John Rawls* (2007) 226. See additional critiques in footnote # 70 above.

doctrinal transformations" and that the Catholic Church's position on human rights is "crucial" because "…there are one billion Catholics in the world!"[137]

Lindholm notes that "the Catholic position has, over the last two centuries, shifted from outright rejection and condemnation of human rights to unqualified embrace." I do not believe Lindholm is accurate in this claim because the Catholic Church does, in fact have genuine concerns about the individualizing dimension to certain human rights approaches.[138]

This said, principles of solidarity and subsidiarity developed within Roman Catholic doctrine and subsequently picked up by other bodies are seen by Lindholm to have general applicability. Lindholm concludes his short discussion of the change within Catholicism by noting that transformation in Catholic doctrine has been "…from outright rejection to well-grounded and authoritative doctrinal espousal of the human right to freedom of religion or belief" and that this demonstrates that religious traditions can change."[139]

Catholic understanding of the role of Church and State sets out a recognition both of the continuing rights of religions to define and live their own conceptions of truth amongst their members, and also that *the state* has an obligation to maintain the open space for *different* religious communities expressing widely different views. As such, the Catholic Church has come to endorse pluralism alongside the notion of moral truth and the importance of the pursuit of that truth through different communities and expressions.

Lindholm sums up, rather neatly, the importance of mutual respect and solidarity in a way that encourages dialogue about what religious and life-stance communities consider important. Given the litigious nature of the struggles between and within life-stance communities, the following passages are important:

> ...remembering past violations of the precept of mutual respect and understanding between religions and life-stance communities, a religious community should not keep

[137] Lindholm, above at 54.

[138] See, for example, Mary Ann Glendon, *Rights Talk* (1991). This book was written before Professor Glendon became either U.S. Ambassador to the Holy See or President of the Pontifical Academy of the Social Sciences (she still occupies the latter of these positions) but it represents a strong rejection of certain aspects of "rights talk". For Glendon "...the prominence of a certain kind of rights talk in our political discussions is both a symptom of, and a contributing factor to, [the impoverishment of our political discourse]".[138] Similarly, "....our rights talk, in its absoluteness, promotes unrealistic expectations, heightens social conflict, and inhibits dialogue that might lead toward consensus, accommodation, or at least the discovery of common ground" (at xv).

[139] *Ibid* 56 See, also, George Weigel, "Roman Catholicism" in Peter Berger, ed *The Desecularization of the World* (1999) 34-35.

> secret its internal grounding for endorsing the principles of freedom of religion or belief. It should rather invite and probably has to expect critical scrutiny from other religions and life-stance traditions of its internal doctrine in support of its freedom of religion or belief, and of its internal interpretation of the scope, force and limits of that right.[140]

The case for inter-religious solidarity in tandem with inter-religious argument and rivalry can thus be stated simply: Once we talk seriously across religious divides about the grounds of religious freedom, we cannot deny that we may disagree thoroughly, even and in particular about the foundations of our commitments to protect, observe, and stand up for the religious liberty of all.

That disagreement is as it should be. Inter-religious disagreement about the grounds of our commitment to freedom of religion or belief, as well as other inter-religious disagreements, is no longer a minefield once we have all become thoroughly committed to the principles of religious freedom.[141]

Lindholm, in line with the arguments of Maritain that have been detailed , above, influenced by the developments within religions generally and Roman Catholicism in particular, espouses a vision of co-operational courtesy in which mutual respect and commitment towards dialogue provides a form of solidarity that links communities around shared concerns. Most importantly, this approach does not seek to elevate one particular viewpoint on contested matters into one that is normative for a political or legal regime, a development that has more often than not been the cause of great friction throughout human history. Lindholm's insights, alas, have yet to become accepted within the broader legal fraternity in which singular conceptions continue to sing a seductive siren's song.

Social Imaginaries and Constitutional Narratives

Social Imaginaries: The Work of Charles Taylor

The question to be analyzed in this section is as follows: Can we *imagine* a different way of thinking about the central concepts in our constitutional law or, put another way, can we find a principled manner of plugging our ears to the singular siren's song?

In his recent and monumental work *A Secular Age*, Charles Taylor discusses the idea of a "social imaginary." Of the three main social imaginaries said to be "crucial to modernity", Taylor identifies "the public sphere" as the second (the other two are "the economy" and "the practices and outlooks of democratic self-rule").

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[140] *Ibid* 61

[141] *Ibid*

These form the "background of our way of life and how we live together." Taylor says that it is the background nature of these concepts that leads him to speak of them as "imaginary" and not as theory. Most importantly for my theme is his statement that"….for most of human history and for most of social life, we function through the grasp we have on the common repertoire without benefit of theoretical overview. Humans operated with a social imaginary, well before they ever got into the business of theorizing about themselves."[142]

His analysis also applies to other wide-spread notions such as "the secular", "equality – in - general" and "non - discrimination – in - general" though Taylor does not push his analysis with the latter two. Since law and religion must deal so frequently with the nature of the "public" and the extent to which religion is "in" the public, it is important to see what this concept of "social imaginary" can add to our analysis. A social imaginary is described as "….the ways in which [people] imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations which are normally met and the deeper normative notions and images which underlie these expectations." [143]

He writes further that:

> A social imaginary is that common understanding which makes possible….a widely shared sense of legitimacy….These social imaginaries are complex and incorporate a sense of "the normal expectations that we have of each other; the kind of common understanding which enables us to carry out the collective practices which make up our social life.[144]

This insight of Taylor's is reminiscent of Lord Acton's comments on "notions" and "ideas" over a century earlier to the effect that "…..as men's notions are…..in respect of their position towards God, such must their notion of temporal power and obedience also be…….theological error affects men's ideas on all other subjects and we cannot accept in politics the consequences of a system which is hateful to us in its religious aspect."[145]

In discussing the social imaginary of the public sphere, Taylor states that this is "a central feature of modern society" and that it arose out of an elite conception about communication formed in the 18th century.[146] Drawing on the work of Jürgen Habermas, *The Structural Transformation of the*

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[142] *Ibid.* 173

[143] Charles Taylor *A Secular Age* (2007) 171

[144] *Ibid.* 172

[145] Lord Acton, "Political Thoughts on the Church", in *The History of Freedom* (1907) 188, 193-94.

[146] Charles Taylor, *A Secular Age* (2007) 176

Public Sphere, Taylor points out that what emerges in the 18th century is a "new concept of public opinion" and that the public sphere and the related notion of public opinion are so much a feature of modern life that, as he puts it, "….even where it is in fact suppressed or manipulated, it has to be faked".[147]

This notion of the given-ness and imagining of a public sphere is readily visible in press reports or legal decisions where "the public" or "the secular" is held against "the religious". Though Taylor does not draw upon the current debates with respect to the public offices of "marriage commissioners" and the nature of "the public" or "the secular" (for example), his social imaginaries fit these debates very well and are a helpful contribution. The idea of a "public opinion" framing the notion of a "public sphere" is said by Taylor to "…..reflect the fact that a public sphere can only exist if it is imagined as such".[148] Moreover, "new, unprecedented kinds of spaces require new and unprecedented understandings. Such is the case for the public sphere."[149] The social imagining of the "public sphere" or "nonreligious secular" has two features in particular which Taylor wishes to develop or comment upon; both are relevant to other sorts of "imaginings." First, with respect to what the public sphere *does* – it is a "locus of a discussion potentially engaging everyone" and second, what the public sphere *is* – it has a normative status: "Government ought to listen to it." Yet, and here is the key point, the public sphere, like the religiously stripped "secular", is an imaginary. It is something that is said to exist and has political force and is framed by our preconceptions *and that can change*.[150]

Taylor notes that the "debate between belief and unbelief goes on"[151] and that "....modes of belief are disadvantaged by the memory of their previously dominant forms, which in many ways run

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[147] *Ibid.*

[148] *Ibid* 186

[149] *Ibid.* 187

[150] As did the concept of "secular" from the trial decision "excluding decisions based upon or influenced by religion" to the Supreme Court of Canada decision "involving religious decisions and citizens in the public sphere" in *Chamberlain v Surrey School Board* (2000) and [2002]; see Madam Justice Saunders and Iain T. Benson in Mark Charlton and Paul Barker (eds) *Crosscurrents* (2012). James Tully, *Strange Multiplicity* (1995) 201 cites Isaiah Berlin and a host of feminist scholars to point out that ideas of "uniformity and unity dominate modern European political philosophy so thoroughly that diversity is scarcely ever even considered as anything but a threat to law and order" and the many ways in which "…liberal, communitarian and rationalist theories exclude the contingency and differences of concrete others in the quest for an imaginary unity" and concludes by observing: "[i]t is not too extravagant to suggest, therefore, that *the failure mutually to recognise and live with cultural diversity is a failure of imagination; a failure to look on human associations in ways not ruled by these dubious images*" (emphasis added).

[151] Charles Taylor, *A Secular Age* (2007) 533

athwart the ethos of the times, and which many people are still reacting against."[152] What results from this is a "fragmented search" in which people have lost touch with their "traditional religious languages" but nonetheless seek for an authentic spirituality. What results is a "minimal religion" that is: "…born outside of any confessional structures, has its own kind of universalism [and] a sort of spontaneous and reflective ecumenism in which the co-existence of plural forms of spirituality and worship is taken for granted ".[153]

This "new age of religious searching whose outcome no one could foresee" has arisen in part because the period of secularization and "the hegemony of the main stream master narrative of secularization" has been challenged and its hegemony "has helped to effect the decline".[154] Thus, Taylor's impressive analysis of what it means to be in a "secular age" must be seen alongside a passing away of a "post-atheism" and a narrative of "secularization" that was, until recently, dominant. It is now useful to hold this emerging new epoch alongside the insights (from Sen and Horwitz) about the end of a certain phase of and confidence in liberal justice theories. With both the theories of religion and justice at a stage for new evaluations, the thrust of the arguments in this thesis in which these two realities are brought together, calls for serious and wide-spread attention.

Similar to Taylor's insight regarding "social imaginaries" but preceding it by some decades, is the work on “constitutional narratives” of Robert M. Cover.[155] Held together the two concepts sharpen considerably how we approach questions of constitutional law and our implicit understanding of religious associations in relation to that law. Placing them together is new. It is unnecessary to give an exhaustive review of Cover's oft-cited article, but several of its key points are important to the argument which I will develop further. I will address those now.

Constitutional Narratives: The Work of Robert Cover

Cover begins by stating that we inhabit a *nomos* which is "a normative universe." This world of right and wrong, of lawful and unlawful, of valid and void is one "we constantly create".[156] We are told that "no set of legal institutions or prescriptions exists apart from the narratives that locate it and give it

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[152] *Ibid*.

[153] *Ibid* at 534

[154] *Ibid* 534-535

[155] Robert M. Cover, *The Supreme Court, 1982 Term - Foreword: Nomos and Narrative* (1983).

[156] *Ibid* 4

meaning”. [157] Thus the world of our understanding in relation to law and the stories we tell about it is one that, like Taylor's social imaginaries, is adjustable and, by its nature, changing. The insights in Cover's article are so numerous and their interconnections so elegantly woven that it is difficult to pick apart his analysis for present purposes. That said, what is clear from Cover's analysis is that the richness of legal narratives contributes to the richness of the civilization around which law is constructed. Most importantly, for our purposes, is Cover's insight that "....the meaning of law is determined by our interpretive commitments, so also can many of our actions be understood only in relation to a norm. Legal precepts and principles are not only demands made upon us by society, the people, the sovereign, or God, they are also signs with which each of us communicates with others".[158] Cover observes that “…[t]o live in a legal world requires that one know, not only the precepts, but also their connections to possible and plausible states of affairs. It requires that one integrate not only the "is" and "ought", but the "is" the "ought" and the "what might be". [159]

So far, Cover points out that the *nomos* that he has described "requires no State". The creation of legal meaning - or what he refers to as "jurisgenesis" "takes place always through an essentially cultural medium". When the State becomes central to the process, Cover informs us, it is not because it is well suited to the creation of legal meaning (jurisgenesis) but because "an active commitment is a central aspect of legal meaning."[160]

Quoting a 16th Century codifier, commentator and mystic in the Jewish tradition, one Joseph Caro, Cover points out that the virtues that are needed to ensure that "the co-existence of strong normative meaning" such as religious worship and deeds of kindness create the normative worlds in which law is predominantly a system of meaning rather than an imposition of force. These strong forces of normative meaning, which religion offers and Cover refers to as “paideic”, constitute "world creating patterns." Cover uses this term because it suggests 1) a common body of perceptive narrative, 2) a personal way of being educated into the corpus of teachings; and 3) a sense of direction or growth that is constituted as the individual and the community work out the implications of their law.

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[157] *Ibid*

[158] *Ibid* 7-8

[159] *Ibid* 10

[160] *Ibid* 11

Religious law is pedagogic and "paideic". Cover points out that this vision is not limited to Judaism but is in fact a vision of strong community, of common obligations that is at the heart of the Christian conception of the Church.[161]

The second ideal type or pattern is not "world creating", as we have just seen, but "world maintaining" and Cover calls this, for short, "imperial". In the "imperial" model interpersonal commitments are weak and premised only upon a minimalist obligation to refrain from coercion and violence, obligations that make it possible to have discourse about the neutral application of norms.[162]

Cover notes that "no normative world has ever been created or maintained wholly in either the paideic or the imperial mode" but that the normative worlds that are created exist between these polarities of normative commitment and understanding - - between the strong allegiances of religious communities and the weaker but important role of the “imperial.” Of critical importance for this thesis are Cover's insights that the modern nation- state is one in which the social organization of legal precept approximates the "imperial ideal type" while, as he puts it, "....the social organization of the narratives that imbue those precepts with rich significance “...have approximated the paideic".[163] Too often as we shall see below, the state / imperial makes claims that ought to be reserved for the religious / paideic.

Cover observes that the conclusion one might draw from this set of principles "is simple and very disturbing" and it is this:

> There is a radical dichotomy between the social organization of law as power and the organization of law as meaning. This dichotomy, manifest in folk and underground cultures in even the most authoritarian societies, is particularly open to view in a liberal society that disclaims control over narrative. The uncontrolled character of meaning, exercises a destabilizing influence upon power.[164]

In other words, the character of the normative forming power of the paideic/religious is essential to what kind of culture we will have and it is a grave and foundational error to confuse the differing capacities and natures of the two: state *or* religious. The next critical insight from Cover's work relates to when there is a conflict in kinds of *nomos*, and Cover uses the example of American cases

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[161] *Ibid* 12-13

[162] *Ibid* 13 In Chapter 5, we shall see that Stu Woolman, “On the Fragility of Associational Life” (2009) 290-291, identifies, helpfully, that distinction in the literature on “Social Capital” looking at “bridging” in contradistinction to “bonding.” Religions at their best are clearly both whereas law, if it bonds or bridges, does so out of very different sorts of “virtues”. Law is obligatory; religion is not in the same way: love is not love under the gavel of coercion. Religions are most powerfully *voluntary* and derive their deepest bonding and bridging from this fact. This is a point that Woolman’s analysis does not draw out at all. The limitations of the state and law itself are, with respect, insufficiently noted.

[163] *Ibid* 16 emphasis added

[164] *Ibid* 18

dealing with the Amish community, in which that community had to choose whether they would "obey God rather than men."

What exists here is a "self-referential supremacy of each system" that "...mitigated by the partly principled, partly prudential rules of deference that each manifests in relation to the other", make the more exclusive legal meaning of the Amish function alongside the rules of the broader community. Cover cautions against the tendency to "lightly assume the status to perspective" and notes that the *nomos* of officialdom is also "particular" and that officialdom, too, “...reaches out for validation and seeks to extend its legitimacy by gaining acceptance from the normative world that lies outside its core".[165]

What all sorts of communities offer the state are alternative and necessary forms of meaning. [166] Groups exist not just for themselves, but also to "change the social world in which they live" -- Cover calls this "redemptive constitutionalism".[167] But note that this “redemption” is predicated upon the involvement of diverse communities, not submission to one over-arching “state” conception of meaning or a state conceptualized and enforced “redemption.”

Cover notes that when a group dedicates itself to "transformation", citing Leninist cadres and their class-consciousness-raising activity, as an example of a group that "seeks the transformation of the surrounding social world",[168] its members are seeking what Cover refers to as "redemptive constitutionalism." Those who inhabit this framework have "sharply different visions of the social order" and "require a transformational politics that cannot be contained within the autonomous insularity of the association itself."[169] This description is strikingly appropriate for those who have one particular viewpoint on certain contested issues and seek to make this normative for everybody else.

Cover's next step is to point out that "the jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence. Interpretation always takes place in the shadow of coercion."[170] This makes perfect sense since law is about rules backed by punishments.

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[165] *Ibid* 33

[166] *Ibid* emphasis added

[167] *Ibid*

[168] *Ibid* at 34

[169] *Ibid* at 34

[170] *Ibid* at 40

We now come to the nub of Cover's article. Those whom Cover describes as "modern apologists for the jurispathic function of courts,” usually state the problem not as one of *too much* law, but as one of *unclear* law.[171]

Cover says that this is a "status formulation" and is either question begging or misleading for what it fails to do is "acknowledge the nomic integrity of *each of the communities* that have generated principles and precepts".[172] Most importantly we should:

> .... recognize that different interpretive communities will almost certainly exist and will generate distinctive responses to any normative problem of substantial complexity...to state the problem as one of unclear law or difference of opinion about the law seems to presuppose that there is a hermeneutic that is methodologically superior to those employed by the communities that offer their own law."[173]

This takes us into the heart of the matter. What Cover describes as "the status position" is, in fact, that occupied by many activists in the contemporary period (we shall see this later in Chapter 4 when we examine “convergence” and “civic totalism”). Those who seek to obtain expansion of recognition for "sexual orientation" claims and "gender rights", for example, speak frequently as if their view of "equality" or "non-discrimination" *just must* be binding on everyone else. This despite the fact that the logic of associational diversity calls for, at least in some respects, different conceptions of equality and non-discrimination. The radical nature of Cover's analysis has not, I think, been fully appreciated and some who cite his work fail to recognize that it provides the basis for a wholesale critique of certain aspects of contemporary rights theory. Put Cover’s insights alongside Taylor's on “imaginaries” and we have the basis for an entirely new kind of thinking about law and religion.

The next step is crucial, for Cover points out that "the status position may be understood to *assert implicitly,* not a superior interpretive method, but a convention of legal discourse: the state and its designated hierarchy are entitled to the exclusive or supreme jurisgenerative capacity."[174] Here again we need to recall the insights of linguistic theorists such as Michael Polanyi and Owen Barfield who have noted "hidden" or "implicit" meanings and their power at times when paradigms are shifting.[175]

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[171] *Ibid* at 42

[172] Ibid (emphasis added)

[173] *Ibid*

[174] *Ibid* at 42-43 emphasis added

[175] See Chapter 1 note # 5.

With respect to the State, Cover notes that "…everyone else offers suggestions or opinions about what the single normative world should look like, but only the State creates it."[176] What Cover is describing is, in effect, the move to divinize the constitutional document and to clericalize the judiciary to, for example, 'seize the rhetoric" of contemporary law to secure the advantage of *the* (note the singular) public norm articulation. Note how the claim of the transformative constitutionalist is to "expand *the* law" (singular) not the laws recognizing diversity: this is the convergence modality of transformative constitutionalism. It operates as a kind of juristic steamroller over associational diversity, pressing variety into homogeneity. Cover has unleashed an extremely useful analysis to uncloak what is a very powerful contemporary drive to use law to trump associational diversity. What has been lacking, until now, is a sufficiently rigorous epistemological criticism to lay bare this contemporary usurpation of diversity in the name of equality and non-discrimination.

Cover's insights on this point are important:

> The challenge presented by the absence of a single, "objective" interpretation is, instead, the need to maintain a sense of legal meaning despite the destruction of any pretences of superiority of one nomos over another. By exercising its superior brute force, however, the agency of State law shuts down the creative hermeneutic of principle that is spread throughout our communities. The question, then, is the extent to which coercion is necessary to the maintenance of minimum conditions for the creation of legal meaning in autonomous interpretive communities.[177]

In other words, put more simply, communities have different views of some things or may do them better, but the risk of a single supposedly objective interpretation is that it is either an invitation to the state to exercise "brute force" to "shut down" other "creative" viewpoints, or it involves use of the law itself to perform the silencing of voices which may provide important alternative insights. And this silencing is twofold: involving the state *qua* politics and *qua* law.

One final point, however, needs to be emphasized; Cover's concluding paragraph contains a passage that it is important to place at this juncture in our analysis: *"…*just as constitutionalism is part of what may legitimize the state, so constitutionalism may legitimize, within a different framework, communities and movements. Legal meaning is a challenging enrichment of social life, a potential restraint on arbitrary power and violence. We ought to stop circumscribing the *nomos*; we ought to

[176] *Ibid* at 43 emphasis added

[177] *Ibid* at 44 (emphasis added).

invite new worlds."[178] The "new world" is diversity maintained and expanded - - the "old world" is homogeneity and the fight for control of the *one* "public" viewpoint.

Returning to Charles Taylor's analysis of civil society so as to conclude this section, Taylor notes that it is not easy to answer the question of the role a concept of civil society has to play in the future defense of freedom.[179] Taylor cautions against assuming that "civil society" is "guaranteed" a future role in the state. This is because he, like Cover, is aware of "....the extent [to which] the modern state is still drawn to a vocation of mobilizing and reorganizing its subjects' lives..."[180] The distinction between civil society and the state has been, says Taylor, "....shouldered aside by supposedly simpler and more arresting definitions of a free society which turn on the idea of a general will or a politics-free sphere."[181] Taylor urges a rejection of "these seductively limpid formulas" and suggests, as does John Gray in *Two Faces*, that the conception of "civil society" we choose to imagine "...will have important consequences for our picture of the free society and hence our political practice".[182] It will also have a significant determining factor on the kind of *law* we envision. For Taylor, and for the approach I put forward here, the appropriate understanding of the role and nature of "civil society" is important so that it can be a "counter-thrust" to the over-reach of judicial as well as bureaucratic power.[183]

The Questions of Politics, Law and Religion

This section aims to identify certain key requirements of politics and law in order to show why and how religion can play an important and irreplaceable role in culture. Similarly, we should note law's lack of expertise or jurisdiction in comparison in each.

James Schall has stated that politics has three central "problem" areas:

1. The problem of evil or coercion;
2. The problem of virtue; and

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[178] *Ibid* at 68 (emphasis added). For an application of Cover's analysis to religion clauses in terms of what *kind* (democratic or otherwise) of state the constitution is operating within, see Carolyn Evans' insightful article "*Constitutional Narratives"* (2009). On the tendency of contemporary politics, under the conditions of technology, to move towards homogeneity, see Wiliam Mathie "The Technological Regime" in Larry Schmidt ed, *George Grant in Process* (1978) 157, 166.

[179] Charles Taylor, *Philosophical Arguments* (1995) 223

[180] *Ibid* 223

[181] *Ibid* 223-224

[182] *Ibid 224*

[183] *Ibid* Taylor does not apply his analysis to the law in this passage but the logic applies and I follow that logic where it leads.

3. The problem of contemplation of the highest things.

Schall notes that "the case for this unity is not often made within the discipline." The incompleteness of political philosophy to completely explain the reality of evil or the possibility of good is, says Schall, "…a defect in the discipline but it does indicate its very limit, the nature of its own understanding of what it is, of what it can do…in reflecting on these very political things, political philosophy is open to metaphysics and revelation, themselves…"[184]

Clearly, what Schall draws from the historical view of politics may also be said of the historical view of law; both are very different from the social imaginary of a "public sphere" or "secular world" in which ultimate questions about metaphysics and the nature of the human person, virtue and vice are considered "irrelevant" or are left inchoate. George Jacob Holyoake's project of secularism (it was Holyoake who coined the term in 1851)[185] set itself up expressly to reconstruct the public dimension of culture "on a materialist basis". He viewed metaphysical claims as inherently suspect and believed that they could be avoided[186] all the while ignoring his own in just the manner referred to by Michael Polanyi.[187]

Recall that Polanyi concluded that contemporary forms of knowledge *imagine* that it is possible to avoid metaphysical claims or the relevance of metaphysical commitments in human projects. This is, however, impossible, and what occurs is that the metaphysical assumptions are often hidden. Epistemological insecurity is papered over by avoidance or, worse, simplistic and superficial appeals to shared conceptions that exist only because they were developed in other traditions - - and are no longer upheld by those "teaching" those frameworks and concepts.[188]

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[184] James Schall, *At the Limits of Political Philosophy* (1996) 2- 3; Hannah Arendt, *Men in Dark Times* (1968) 74 recalls that "political questions are far too serious to be left to the politicians." The same could be said with respect to the questions of justice and judges.

[185] See Iain T. Benson, "Considering Secularism" in Farrow, ed *Recognizing Religion* (2004) 83-98

[186] *Ibid*, 86-87

[187] Michael Polanyi, *Personal Knowledge*, *supra*

[188] Here one might use the modern use of "dignity" as an example of a concept that is used frequently but whose origin and content is identified as arising from earlier religious conceptions and problematic if not impossible to derive without them; see, Michael J. Perry, *The Political Morality of Liberal Democracy* (2010) 50 ff. "…it is open to serious question whether a secular worldview can bear the weight of the claim that we should – that we have conclusive reason to- live our lives in accord with the fact that every human being has inherent dignity" 52 – 53; and John M. Rist, *Real Ethics* (2002) 267; and George Grant, *English – Speaking Justice* (1985) which will be discussed in Chapter 3.

In his important but rarely-cited book of published lectures, *Science, Faith and Society*, Michael Polanyi noted the following three points that neatly undergird my observations on the inestimable importance of religion to the public interest in a free and democratic society. He writes first:

> …if the citizens are dedicated to certain transcendent obligations and particularly to such general ideals as truth, justice, charity and these are embodied in the tradition of the community to which allegiance is maintained , a great many issues between citizens, and all to some extent, can be left – and are necessarily left –for the individual consciences to decide. The moment, however, a community ceases to be dedicated through its members to transcendent ideals, it can continue to exist undisrupted only by submission to a single centre of unlimited secular power.[189]

Second, Polanyi observes that "…I do not assert that eternal truths are automatically upheld by men. We have learnt that they can be very effectively denied by modern man. Belief in them can therefore be upheld now only in the form of an explicit profession of faith. In my view this would be quite impracticable but for the existence of traditions which embody such professions and can be embraced by men. Hence, tradition, which the rationalist age abhorred, I regard as the true and indispensable foundation for the ideals of that age."[190]

One need not agree with all of Polanyi's conclusions to recognize the importance of his claims and their relevance to our own days, particularly when placed alongside my observations on contemporary law and the tensions with normative communities between "higher" and "immanent" law.

This approach reconstitutes law and its conflicts as conversations around different interpretations of moral meaning and raises the importance of different traditions of interpretation, including those of religious associations. The approach we see in some of the case analysis artificially constrains the potential for diversity and puts increasing pressure on associations to toe some sort of "party line" regarding matters on which reasonable people disagree (such as the nature of marriage or gender roles in religious leadership). In this sense, de-constructing monistic conceptions of the state or legal principles that ought to be seen through the *oculus* is essential to a renewed conception of justice and indeed constitutionalism itself.

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[189] Michael Polanyi, *Science, Faith and Society*, (1946, 2nd Imp. 1966) at 78-79. Polanyi does not address an implied dimension of his analysis, namely that the most important and primary locations for the maintenance of "traditions" are associations, particularly religious associations.

[190] *Ibid* at 82-83 (emphasis added); generally on the nature and importance of "tradition" see: Jaroslav Pelikan, *The Vindication of Tradition* (1984) citing Clifford Geertz (at 56) "…It is, in fact, precisely at the point at which a political system begins to free itself from the immediate governance of received traditions…that formal ideologies tend first to emerge and take hold." See, also: James Tully, *Strange Multiplicity* (1995) 96.

Another aspect of the relationship between law and religion is important to mention at this juncture. This is the danger to religion that occurs from placing too great a focus on law. This danger has been recognized by religious thinkers in all traditions throughout history. Giorgio Agamben, a thinker highly regarded within theology and philosophy in Europe at the moment, recently referred to the religious significance of an over-extension of legalism in our time. Agamben highlights the polarity between the spiritual role of the law or state and that of religious associations. While state and law focuses on the economy and time and governance of the world, the religious focuses on "the economy of salvation" which points to eternity. Practical love, so important to life in community, cannot, without significant loss to its richness, be discussed only in terms of what is given in “time.”

Agamben makes the observation that "the only way that a community can form and last is if these poles are present and the dialectical tension between them prevails. It is precisely this tension which seems today to have disappeared".[191] He observes that all that is left of the economy and governance when the community which points to an economy of grace has been eradicated is the economy's “…blind and derisive dominion to every aspect of social life".[192] Agamben then delivers his chilling description of the times:

> With the eclipse of the messianic experience of the culmination of the law and of time comes an unprecedented hypertrophy of law - one that, under the guise of legislating everything, betrays its legitimacy through legalistic excess. I say the following with words carefully weighed. Nowhere on earth today is a legitimate power to be found; even the powerful are convinced of their own illegitimacy. The complete juridification and commodification of human relations - the confusions between what we might believe, hope and love and that which we are obliged to do or not do, say or not say - are signs not only of crises of law and state, but also, and above all, of (sic) crises of the Church...the model of contemporary politics - which pretends to an infinite economy of the world - is thus truly infernal. And if the Church curtails its original relation with the *paroikia*, it cannot but lose itself in time. For this reason, the question that I came here today to ask you, without any other authority than an obstinate habit of reading the signs of the time, is this: Will the Church finally grasp the historical occasion and recover its messianic vocation? If it does not, the risk is clear enough: It will be swept away by the disaster menacing every government and every institution on earth.[193]

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[191] Agamben, *The Church and the Kingdom* (2012) 35.

[192] *Ibid.*

[193] *Ibid* 40-41 The word *paroikousa*, in Greek thought, refers to the sort of sojourning in which foreigners and those in exile dwelt. It was opposed to the Greek verb *katoikein* which designated how the citizens of a city, state, kingdom or empire dwelt. Thus, Agamben points to the stance the Church should have to the temporal world around it. While dwelling within time they point to transcendent verities which they recognize must inform life together. Human communities cannot live without justice and love and both conceptions are larger than, but do not exclude, the law.

Those of us involved in the drafting of the *South African Charter of Religious Rights and Freedoms*, had to consider the relationship between the state and religious associations, as well as the aspects of a nation that are furthered by religion. It took our discussions far afield from the usual language of legal enactments. We were faced with precisely the difficulties to which Agamben refers: about the fact that different "world-views" are in issue. This is how sections 3 and 7 of the Charter's *Preamble* (attached as an "Appendix" to this thesis) came to read:

> …3 WHEREAS religious belief embraces all of life, including the state, and the constitutional recognition and protection of the right to freedom of religion is an important mechanism for the equitable regulation of the relationship between the state and religious institutions…
>
> …7. WHEREAS religious belief may deepen our understanding of justice, love, compassion, cultural diversity, democracy, human dignity, equality, freedom , rights and obligations, as well as our understanding of the importance of community and relationships in our lives and in society, and may therefore contribute to the common good;

Note that the language we chose in clause 3, to describe the relation between religious beliefs and the state, has religious belief embracing all of life "…including the state" (not the other way around). Similarly, Preamble Clause 7 includes terms that one does not often see in legal documents: namely, "love" and "compassion." Note also, how in Clause 7 the claim is that religious beliefs "*may* deepen…etc." various understandings. Thus, the importance of "justice, love, compassion and dignity etc." are bracketed by an understanding of the need for humility ("may") in relation to them and what religious communities may claim to offer within the state.

In the final instance, perhaps those three alone, "justice", "love" and "compassion", provide a complete justification and the only framework for the reconciliation of competing rights claims involving not only the freedom of religion but all conflicts. It was a slow drift into an increasingly statist approach to law which led to the predominance in our discourse of concepts such as "equality" and "non-discrimination" against which I have set my analysis. Much of that drift was well intentioned. Many people did not foresee that some of the claims that would emerge would be so anti-religious – some, no doubt, did. What is undeniable is that the current position, in which law is once again increasingly arrayed against religion, is nothing new in history though has not been so evident for a very long time as it is now. [194]

[194] Rémi Brague, *The Law of God* (2007) 257, has observed that "the separation of the ethical and the cosmological occurred in modern times".

Conclusion to Chapter Two

As illustrated by the preceding theoretical and historical analysis, law must be informed by principles that are beyond it. The writings of many eminent men and women of recent times, such as Aleksandr Solzhenitsyn[195] and Václav Havel[196] who wrote in the shadow of state-enforced atheism, have, in various ways, noted the essential importance of religious traditions and the need for a conscious turn towards a more openly spiritual life for human civilization to have any prospect of continuing on a humane path. All have written most emphatically that only religion and "the spiritual" can provide effective anti-dotes to the horrors of recent centuries. With such testimonies from our own recent past readily at hand we ought to be concerned when any conceptions of "law" or "politics" or "social imaginaries" or "constitutional narratives" have *as their goal or as their perhaps unintended result* the further minimization and restriction of religious practice and traditions. Before discussing these limitations, however, it is first necessary to examine some important aspects of "civil architecture", the benefits of religion and the limits of law. The next Chapter examines these.

[195] Aleksandr I. Solzhenitsyn, "A World Split Apart" (1978) in *East and West* (1979) at 39-71.

[196] Václav Havel, *The Art of the Impossible* (1997) at 129, 222 and *Letters to Olga* (1989) at 375.

CHAPTER THREE:

SOME KEY DIMENSIONS OF CIVIC ARCHITECTURE, THE BENEFITS OF RELIGION AND THE LIMITS OF LAW

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Part 1: Key Dimensions of Civic Architecture

Political scientist John von Heyking has observed that:

> Canada has a court that wishes neither to trample religious freedoms, nor to hold them in highest esteem. It shows it is capable of preserving the rights of religious communities. However, it is inconsistent largely because it lacks a robust theoretical framework in which to ground religious freedoms in a genuinely pluralist society. Until it clarifies key concepts such as "secular" in the way it conceives political society, religious freedoms in Canada will remain fragile.[197]

[197] John von Heyking (2010) "Civil Religion and Associational Life under Canada's "Ephemeral Monster" in *Civil Religion in Political Thought*, 298 at 320

In this Chapter I will examine some key aspects of the "theoretical framework" that von Heyking identifies as lacking so that the discussion of religious goods which follows will have a clearer base upon which to rest.

It is a fact that key terms such as "secular", "secularism" and "public" are often used in ways which suggest that religion is pre-emptively bracketed outside of them. This occurs in contravention of the legal authorities such as *Chamberlain*[198] (which do not require the complete privatization of religion from a notion of "the public sphere") and of richer conceptions of inclusive pluralism or "deep diversity", in which the public sphere is understood as accessible to all and is not viewed as the hegemon of atheist or agnostic viewpoints.

Ernest Caparros has noted [199] that, in Canada, the lack of a state religion has led to a very beneficial co-operation between religions and the civil order. In fact, Canada has developed a wide range of legal measures respecting and re-enforcing religious beliefs and behaviours.

The Catholic Church in the Vatican II Ecumenical Council recognized and encouraged a mutually beneficial cooperative relationship between Church and State in the following terms:

> It is highly important, especially in pluralistic societies,that proper views exist of the relation between the political community and the Church. Thus the faithful will be able to make a clear distinction between what a Christian conscience leads them to do in their own name as citizens, whether as individuals or in association, and what they do in the name of the Church and in union with her shepherds.
>
> The role and competence of the Church being what it is, she must in no way be confused with the political community, nor bound to any political system. For she is at once a sign and a safeguard of the transcendence of the human person.
>
> In their proper spheres, the political community and the Church are mutually independent and self-governing. Yet, by a different title, each serves the personal and social vocation of the same human beings. This service can be more effectively rendered for the good of all, if each works better for wholesome mutual cooperation, depending on the circumstances of time and place.[200]

In this part of the Chapter, I will review some of the key aspects of "civic architecture" before turning to examine the "goods of religion", so that we see why the public sphere or the state or law cannot easily, or at all, replace these goods. This further strengthens the importance of giving a sympathetic approach, in fact a presumptive (and rebuttable) credit, to the benefit of religious associations.

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[198] *Chamberlain v Surrey* (2002) ("Chamberlain") (SCC)

[199] Ernest Caparros, "Le droit canonique devant les tribunaux canadiens" (1991) 307-342.

[200] Walter Abbott S.J. ed, *The Documents of Vatican II*,(1966) 287-288, quoting *Gaudium et Spes*, "The Pastoral Constitution on the Church in the Modern World", para 76.

What do we mean by Civil Society?

Philosopher Charles Taylor rightly notes that "which definition we accept of civil society will have important consequences for our picture of the free society and hence our political practice".[201]

Taylor has described civil society as follows:

> …a web of autonomous associations, independent of the state, which bound citizens together in matters of common concern, and by their mere existence or action could have an effect on public policy. In this sense, western liberal democracies were thought to have functioning civil societies.[202]

Taylor distinguishes this model from the Marxist-Leninist models which arose first in the Soviet Union but which were picked up by a number of countries in the developing world. The "essential virtue" of this model for its protagonists was said to be that:

> …it offered a kind of total mobilization of society toward what were seen as revolutionary goals. The central instrument was a vanguard party dominated by a revolutionary elite. And a crucial feature of this system was the satellitization of all aspects of social life to this party. Trade unions, leisure clubs, even churches, all had to be permeated and made into "transmission belts" of the party's purposes. Leninism in its heyday was one of the principal sources of modern totalitarianism.[203]

Taylor's paper, which explores several views of civil society and examines their origins, points out how the notion of the popular will has remained "the ultimate justification for all political structures and authority".[204]

Taylor then observes, and this is important to understanding why conceptions of the proper applications of state power are essential to any framework for reconciling competing claims, that:

> The most thoroughgoing destruction of civil society has been carried out in the name of some variants and successors of this idea in the twentieth century, notably the nation and the proletariat. A strange and horrifying reversal has taken place, whereby an idea whose roots lie in a pre-political concept of society can now justify the total subjection of life to *an enterprise of political transformation*. And in less spectacular form, the power of the state has often been enhanced by its self-definition as an instrument of the national will.[205]

Since law is an important aspect of the culture that surrounds civil society, our definition of civil society will also be important for the law and for religion which must exist in relation to it. The key aspect of Taylor's definition is that "civil society" has at times been co-opted by those seeking "political

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[201] Charles Taylor, "Invoking Civil Society" in *Philosophical Arguments* (1995) 204 – 224 at 204

[202] *Ibid.* 224

[203] *Ibid* 204 – 205

[204] *Ibid* 221

[205] *Ibid.* emphasis added

transformation".[206] When this happens, according to Taylor, the nature of civil society as it should be is undermined and reversed. In addition to civil society, there are several related concepts that give further guidance to the architecture of difference in constitutional democracies.

Mediating Institutions and Mediating Structures

Key to a notion of civil society is the identification and recognition of the role of "*mediating institutions*" or "*mediating structures*." These mediating institutions or structures are defined as "…institutions standing between the individual in his/her private life and the large institutions of public life." [207]

This concept has its theoretical home, within Catholic thought, in the principles of the human community. Chapter Two of Part Three of the *Catechism of the Catholic Church*, entitled "the Human Community" and related to the Ten Commandments, concerns the principles relevant to the person and society, the common good, social justice, dignity and equality of the person, solidarity, the family and society, and the role of civil authorities (to list a few). [208]

With respect to those exercising civil authority, the *Cathechism* observes that:

> Those in authority should practise distributive justice wisely, taking account of the needs and contribution of each, with a view to harmony and peace. They should take care that the regulations and measures they adopt are not a source of temptation setting personal interest against that of the community. [209]

The next paragraph is directed to political authorities who are obliged "to respect the fundamental rights of the human person. They will dispense justice humanely by respecting the rights of everyone, especially of families and the disadvantaged". [210]

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[206] Elsewhere Taylor has developed this distinction: Charles Taylor, *Philosophy in the Human Sciences* (1985) 316-317. He describes the difference between "distinguishing the issues of distributive *fairness* from those of *political transformation*". Doing this, would be salutary, in Taylor's view, because it would "make us defend our views about the former (fairness) in relation to our actual culture and history; and that will make it at least somewhat harder to espouse dogmatically one principle in utter blindness to the relative claims of the others. And with luck, it could greatly improve the discussion of the latter as well" [*Ibid*. 317]. We will see what I argue is just this sort of blindness in relation to the legal issue of religious employer exemptions and most of the legal commentaries in relation to it in Chapter 5.

[207] Peter L. Berger, Richard John Neuhaus, *To Empower People* (1996) 158 –159

[208] *The Catechism of the Catholic Church* (Ottawa: CCCB, 1994) divides the teachings of the Church into four main areas: Part One (the Profession of Faith); Part Two (The Celebration of the Christian Mystery); Part Three (Life in Christ) and Part Four (Christian Prayer) all of which are related to the person in the wider relationships of family, community, responsibilities of the state and politics and so forth.

[209] *Ibid.* para 2236, footnotes omitted.

[210] *Ibid.* para 2237

The vision of the human community put forward by the Catholic Church is based on the fact that all people are called to the same end: God himself. From this comes the principle that love of neighbour is inseparable from love for God.[211]

In his recent Encyclical, *Caritas in Veritate*, (2009 para 9) Pope Benedict XVI cited a variety of earlier Encyclicals and the *Compendium of the Social Doctrine of the Church* (2004, para 76), shedding light "upon humanity's journey towards unity" (para 8) and the importance of truth "wherever it is manifested " as the only possibility of "integral human development". He stated that:

> This mission of truth is something that the Church can never renounce. Her social doctrine is a particular dimension of this proclamation: it is a service to the truth which sets us free. Open to the truth, from whichever branch of knowledge it comes, the Church's social doctrine receives it, assembles into a unity the fragments in which it is often found, and mediates it within the constantly changing life-patterns of the society of people and nations. [212]

The Catholic Church vision, thus expressed, does not view its insights as limited to Catholics nor the journey to "truth" as reaching a homogeneous end; here, diversity is recognized. It views the description of the architecture of society as part of a human journey involving all religions across communities, nations and time. As such, in terms of the "empathic" dimension of other regarding actions described in the first Chapter, that vision - - an "agnostic" one, in terms of "public claims to truth" - ends up being in accordance with the Catholic Church's conception of the public and its own conception of its role for itself. Its claims are truth claims for the guidance of itself and others "of good will", but do not purport to be directive about government or other communities.[213]

The Principle of Subsidiarity

This principle, developed within Roman Catholic thought but now endorsed well beyond it, starts from the insight (which goes back to Aristotle's observation that man is a "social animal") that human persons need to live in society as a requirement of their natures. We develop in relationship as human

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[211] *ibid*. para 1878. The link in the Catholic tradition between the virtue of *latreia* (the service that is owed to God) in relation to that that is owed to man (or one's neighbor), which is also justice, is developed by John von Heyking, *Augustine and Politics* (2001) Chapter 6, 172-221. Applying Augustine's reasoning, von Heyking states that, because God's truth is insinuated into nature and cities share in truth, "…it is a mistake to embrace fully or to denounce completely the Enlightenment and liberalism, the philosophy and ideology that begat the sovereign state system" (221).

[212] *Caritas in Veritate*, para 9 citing *Compendium of the Social Doctrine of the Church* (para 76).

[213] Most Encyclicals are directed to the Church but also beyond it. Thus, the "address" at the front of *Caritas in Veritate* of Benedict XVI (2009) is addressed to: "The Bishops, Priests and Deacons, Men and Women Religious, the Lay Faithful and *All People of Good Will*" (emphasis added). The Encyclical deals with "Integral Human Development in Charity and Truth." The attempt is integrative yet respectful of diversity.

persons.[214] This socialization is important but presents dangers if the "larger" aspects of society dominate the "smaller" aspects. According to the leading Catholic document on the point:

> Excessive intervention by the state can threaten personal freedom and initiative. The teaching of the Church has elaborated the principle of *subsidiarity*, according to which "a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good".
>
> ….The principle of subsidiarity is opposed to all forms of collectivism. It sets limits for state intervention. It aims at harmonizing the relationships between individuals and societies. It tends toward the establishment of true international order.[215]

This principle of "subsidiarity" is very important within the Catholic tradition in relation to local initiatives (municipalities, school boards, education generally, and the role of the family to name a few) and connects directly with the wider "civil society" discussion just touched upon. It is particularly important to recall that churches themselves are part of the local aspects that must not be subsumed by the state.

In discussing the elements of subsidiarity, George Weigel has observed that there is both a positive and a negative aspect to the principle:

> *Positively*, the principle of subsidiarity means that all communities should encourage and enable (not merely permit) individuals to exercise their self-responsibility, and larger communities should do this for smaller communities. Put another way, decision-making responsibility in society should rest at the "lowest" level commensurate with the effective pursuit of the common good.
>
> *Negatively*, the principle means that communities must not deprive individuals, nor larger communities deprive smaller communities, of the opportunity to do what they can for themselves.
>
> Subsidiarity, in other words, is a formal principle "by which to regulate competencies between individual and communities and between smaller and larger communities." Because it is a formal principle its precise meaning in practice will differ according to circumstances; because it is rooted in the metaphysics of the person, it applies to the life of every society."[216]

Weigel, quoting several Encyclicals and referring both to Church and European history in the 20th century, notes that the principles of subsidiarity have been recognized for the manner in which they

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[214] Here it is worth noting the developing theory of "persons" in contrast to "individuals". It is important to recognize that a focus upon rights as individual or individualistic stands in contrast and even in contradiction to the notion of "person" constituted around rights and duties. Persons are in relation, individuals tend to be autonomous. The root of the word autonomous is two Greek words meaning "self-law". Autonomous individualism has been identified by many authors as key to the problem of fragmentation and anoemie in Western societies. See, for example, Mary Ann Glendon, *Rights Talk* (1991) and Jean Bethke Elshtain, *Democracy on Trial* (1995). See, also, note #223, below for further references on the "person."

[215] *Catechism*, *ibid*., paras 1883 and 1885 footnotes omitted, emphasis in original.

[216] George Weigel, *Soul of the World* (1996) 109 – 110.

limit the role of the state and encourage the moral and social importance of what Edmund Burke called the "small platoons" of family and citizens, acting as a barrier against the totalitarian temptation.

Recognized within the *European Charter*, this notion offers a framework that is useful to legal understandings about the role of the state in relation to sub-ordinate units such as municipalities and other associations. This idea will form a basis for the recommendation for a change in legal presumption in favour of associational diversity, which follows in Chapter 6. As Weigel notes:

> Citizens are reminded of their *duties* and that, along with civil authorities, they should contribute "…to the good of society in a spirit of truth, justice, solidarity and freedom …submission to legitimate authorities and service of the common good require citizens to fulfil their roles in the life of the political community". [217]

The duty of the citizen and those in authority are, however, limited in this crucial respect:

> The citizen is obliged in conscience not to follow the directives of civil authorities when they are contrary to the demands of the moral order, to the fundamental rights of persons or the teaching of the Gospel. *Refusing obedience* to civil authorities, when their demands are contrary to those of an upright conscience, finds its justification in the distinction between serving God and serving the political community. "Render therefore to Caesar the things that are Caesar's, and to God the things that are God's." "We must obey God rather than men".
>
> When citizens are under the oppression of a public authority which oversteps its competence, they should still not refuse to give or to do what is objectively demanded of them by the common good; but it is legitimate for them to defend their own rights and those of their fellow citizens against the abuse of this authority within the limits of the natural law and the Law of the Gospel.[218]

Here we need to note that much of the contemporary terminology used to describe the state (including law and politics) is deeply flawed and works against the speaker's meaning. One of the chief culprits here is, as John von Heyking referred to in the quotation at the head of this Chapter, is the term "secular." The *saeculorum*, understood as time in contradistinction to eternity has been horizontalized with the vertical axis, pointing us towards eternity, tipped on its side suggesting the irrelevance of the "eternal" or "spiritual" and then the religious cut off from some supposedly neutral public sphere that is stripped of religious beliefs. But note that this construction is entirely false.

Every citizen is a believer. Not all beliefs are religious. Thus, atheists and agnostics are believers as well in whatever they believe expressly or implicitly to be important to life and our dualistic uses of "believer/unbeliever" or "secular/sacred " are counterproductive in describing the public sphere and the competing beliefs within it.

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[217] *ibid.* para 2239

[218] *Ibid.* para 2242 footnotes omitted, emphasis in original.

The new "non-sacred secular" stands in confused contradiction to the earlier definition contained in the *Catechism of the Catholic Church*, which encompasses both "*secular* clergy" and "*secular* institutes", neither of which are non-sacred or non-religious. Many use the term "secular" when they really mean "public", while other times they use it to mean "non-religious" before applying it unthinkingly to the term "public" (which should be open to religious citizens, atheist and agnostic citizens alike). Using the term "secular" in its non-religious sense, when we mean instead to speak of "the public", often results in an isolation of religion from its proper place within the public sphere. John von Heyking is correct: in order for law and religion to become properly understood in relation to concepts such as "civil religion," "the role of the state" or "political theology", we require lexical re-crafting so we can understand what is being said and what other principles are simply being ignored [219]

The Distinction Between Public and Private Remains Important

In saying that conscience and religion have public aspects, however, one must be careful not to assume that the distinction between private and public has been or should be collapsed. An interesting aspect of the current debates about the public place of "sexual orientation" debates is the shift from private sexual moralities to very public demands for recognition. This shift and the danger it poses to genuine civil rights has been commented upon by Jean Bethke Elshtain who writes that:

> … the complete collapse of a distinction between public and private is anathema to democratic thinking, which holds that differences between public and private identities, commitment, and activities are of vital importance. Historically it has been the antidemocrats who have insisted that political life must be cut from one piece of cloth; they have demanded overweening and unified loyalty to the monarch or the state, unclouded by other passions, commitments, and interests….a politics of displacement is a dynamic that connects and interweaves public and private imperatives in a way that is dangerous to the integrity of both. [220]

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

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[219] Iain T. Benson, *"Notes towards a (Re) Definition of the `Secular'"* (2000) 33 U.B.C. Law Review, 519-549. A related concept that of "secularism", is also deeply confused. I have examined that from its historical origins to show that the movement had a specific set of "materialistic" goals, according to the man who coined the term "secularism" in the 19th century. See: "Considering Secularism" in Douglas Farrow (ed) *Recognizing Religion* (2004) at pp. 83 – 98.

[220] *Democracy on Trial* (1995) at p.p. 38, 40

privacy". [221] So, viewing the Supreme Court of Canada's finding in *Big M Drug Mart Ltd.* as an expression of one conception of religion and its public face, we note Chief Justice Dickson's holding that:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination….freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free…freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. [222]

The freedom of religion then is not just the right to have beliefs privately but the right to engage in the public dimensions of manifestation, declaration and teaching. Together with the cautions of Professor Elshtain, we might put it this way: while religion and conscience have public dimensions, these public aspects must not be taken to mean that there is no longer a private dimension to the lives of citizens and their groups. In fact, the maintenance of an appropriate sphere for private action is an indispensable part of a society that can craft public policy favourable to religion and its adherents, but that still respects the limits to such public entanglement.

The distinction between public and private has a personal as well as a community dimension. I have the right as a person to join associations that allow me to actualize my interests, and the group to pursue its goals in concert (goals that can often be accomplished only by joint action). This is the problem with construing rights in terms of individualism alone; it truncates both the community dimension of the good of "belonging" and the good of joining something pre-existing and larger than oneself. Group rights facilitate the capacity to join and take joint action in key respects. Personhood rests on these dual notions - - the self in relation to others.[223]

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[221] *Ibid.* at 57

[222] *R. v Big M Drug Mart Ltd.,* [1985] 1 S C R 295 at 353-354

[223] There is a vast literature on the distinction between a "person" and an "individual" and the social implications of the differences. See: Emmanuel Mounier, *Personalism* (1949, 1952 reprinted), John MacMurray, *The Self as Agent* (Faber, 1957) and *Persons in Relation* (Faber, 1958), Charles Taylor, *Sources of the Self* (Harvard, 2002) and, more recently, the late Thomas Langan, *Human Being* (Missouri, 2010). See also the discussion in relation to sexuality and "person" in Scruton, *Sexual Desire* (1986) 36ff. See also works cited at note #214, above.

Part 2: The Benefits of Religion and the Idea of "The Common Good"

The definitional aspects of "religion" are not a concern here and have been dealt with exhaustively elsewhere.[224] In this section I will address the wide variety of benefits that religions offer to cultures. I consider the question, "what goods do religions offer cultures that a reasonable person would think important to consider, and think it wise to not do without or overlook?" Some of these are scientifically measurable and others are not. Some are matters that religious officials and religions themselves consider important for their own communities or cultures. Many of these considerations are directed to "the international community" as having relevance for everyone. The social capital distinctions between "bridging" (reaching out to others) and "bonding" (furthering cohesion within the group) that many thinkers in this area see as significant are not so critical for religions, most of which see both as crucial to the religious vocation. We do not exist, as the African conception of *ubuntu* teaches us, simply for ourselves.[225] For religions, as for African tribal theorists, the idea of the unencumbered self is a strange, unrealistic and impious abstraction.

What follows is a brief survey of some of these religious goods, which aims to give a sense of how widespread religious concerns are and, when considered with the structure of religious associations themselves, suggests the need for vigilance in relation to any moves that might threaten their existence or well-being. For each example, it might be useful to reflect on this question: "which other groups can accomplish these goods culturally?" On some occasions there will be an answer (soup kitchens can be run by a service organization like the Lions Club or the Kiwanis) but often there will be no non-religious contender for the social good described. Certainly, the kind of services provided will be different in any case owing to the different ethos of a spiritual (to use the broadest term) project.[226]

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[224] See, for example, W. Cole Durham Jr. and Brett G. Scharffs, *Law and Religion* (2010), Chapter 2, 39 ff on "defining religion" and the "differentiating of the religious from the non-religious."

[225] P.T. Mtuze, *Introduction to Xhosa Culture* (2004) 103 " [Ubuntu] [h]as its foundations in a culture that regards life as a seamless garment that is so great and inclusive that there is no effective difference between the spiritual and the natural. In this kind of existence, one person's personhood and identity is fulfilled and complemented by the other person's personhood. Each person **is** because the other person **is**" (emphasis in original). See, also, P.T. Mtuze, *The Essence of Xhosa Spirituality* (2003) 21,22. Compare, notes #214 and #223, above.

[226] On this point see: Marvin Olasky, *The Tragedy of American Compassion* (1992) which details the author's experience as a "street person" in relation to the various kind of projects available, religious and non-religious, private and governmental and their different natures correlated to whether or not they were "religious." The "religious" were more compassionate and offered a very different kind of care according to Olasky.

In his recent book *The Political Morality of Liberal Democracy*, legal philosopher Michael J. Perry refers to "the fundamental warrant for a liberal democracy's commitment to the right of religious freedom":

> Political majorities are not to be trusted (ie. beyond a certain point) as arbiters of religious truths; moreover the coercive imposition of religious uniformity is (beyond a certain point) more likely to corrode than to nurture the strength of a democracy. The warrant which is rooted in historical experience, is fundamental in the sense that it is ecumenical: Both citizens who are religious believers and those who are not can affirm the warrant and that the warrant is ecumenical is ideal: Liberal democracies are religiously pluralistic; the citizenry of a liberal democracy typically includes not only religious believers – indeed, religious believers of various stripes – but also non-believers. It is ideal that all citizens of liberal democracy – believers no less than non-believers – have the same basic reason to embrace the right to religious freedom. [227]

It would have been better if Perry had recognized a fact that bears repeating, namely, that all citizens are *believers* in some framework. Strictly speaking, the division between believers and non-believers is an inaccurate dualism that bedevils clearer analysis in this whole area. Belief is an inevitable aspect of being human but religious belief, while it is by far the majority position, is not inevitable.[228] Perry's point is, however, important: the right of religious freedom, properly recognized in a democratic and pluralistic society, is in everyone's interest.

According to work by Brian Grim, "...a recent study of 101 countries conducted by the Hudson Institute's Centre for Religious Freedom determined that religious freedom is correlated with social-economic well-being".[229] The presence of religious freedom correlates statistically with the presence of other fundamental freedoms including civil and political liberty, press freedom and economic freedom, as well as "the longevity of democracy". In addition:

> The study [also] found that wherever religious freedom is high, there tends to be fewer incidences of armed conflict, better health outcomes, higher levels of earned income, and better educational opportunities for women. Moreover, religious freedom is

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[227] Michael J. Perry, *The Political Morality of Liberal Democracy* (2010) 79.

[228] That religious belief remains the majority position may be readily confirmed by consulting national census reports. See, for example, for South Africa: South African Government Information: South Africa's People - - Religious Belief www.info.gov.za/aboutsa/people.htm#religion (Census of 2011, released October 2012) "…almost 80% of South Africa's population follows the Christian faith. Other major religious groups are the Hindus, Muslims, Jews and Buddhists." A small minority regard themselves as "African Traditional Belief" or "Other Beliefs" or "Undetermined" with 6.7 million choosing "No Religion." (out of a total of 44.8 million); and for Canada, though the figures are somewhat older: Statistics Canada: Population by religion, by province and territory (2001 Census) out of a total population of almost 30 million, Catholics form the majority or religious adherents (12.9 million) followed by Protestants (8.6 million) together making up more than two-thirds of the population, with "No religious affiliation" making up 4.9 million: www.statcan.gc.ca/tables-tableaux/sum-som/l01/cts01/demo30a-eng.htm. For both countries most of the population is "religious", with that percentage being considerably higher in South Africa than in Canada.

[229] See Brian J. Grim, "Religious Freedom: Good for What Ails Us?" (2008) quoted in Durham and Scharffs (2010) at 61.

> associated with higher overall human development, as measured by the human development index…religious freedom , then, is *associated* with better social outcomes, but can we say there is causal relationship? More advanced statistical tests suggest that there is indeed a critical independent contribution that religious freedom is making. A growing body of research supports the proposition that the religious competition inherent in religious freedom results in increased religious participation; and religious participation in turn can lead to a wide range of positive social and political outcomes....furthermore, as religious groups make contributions to society and become an accepted part of the fabric of society, religious freedom is consolidated This can be conceptualized as a *religious freedom cycle*....[on the other hand] the attempt to restrict fair religious competition results in more violence and conflict, not less. Specifically [it has been] found that social restrictions on religious freedom lead to government restrictions on religious freedom and the two act in tandem to increase the level of violence related to religion - which in turn cycles back and leads to even higher social and government restrictions on religion. This creates what we call the *religious violence cycle*.[230]

A noted scholar in this area, John Witte Jr., comments on the state of religious human rights and points out that "the theories and laws of religious human rights invoked today were not formed out of whole cloth [but] were slowly learned through centuries of cruel experience".[231]

Witte's analysis suggests that the rise of a focus on universal declarations of rights created a situation in which there was an overlay of human rights on top of a tradition of rights rooted in religious liberty. He notes that "the rights revolution seemed to be passing religion by".[232] Witte speaks of a deprecation of religious rights that, in his words, "....was not simply the product of calculated agnosticism or callous apathy - though there was ample evidence of both",[233] and points out that rights leaders were forced by reason of political pressure or limited resources to address the most glaring rights violations. Thus, "torture, rape, war crimes, false imprisonment, forced poverty - [which are] easier to track and treat than spiritual abuses and often demanded more immediate attention" got the focus of human rights energy.[234] In this setting, there was, apart from the Roman Catholic Church, a "relative silence of religious communities until recently".[235]

Witte's analysis can be usefully compared to that of Michael Ignatieff, discussed more fully below, who has identified as a potential danger within the human rights movement - the "idolatry" of human rights. In such a situation, human rights are separated inappropriately from other

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[230] *Ibid* at 62

[231] John Witte Jr. "Introduction" to *Religious Human Rights and Global Perspective* (1996) at xxx.

[232] *Ibid* at xxxiii

[233] *Ibid*

[234] *Ibid*

[235] *Ibid*

complementary sources of goods, doing damage to a more holistic conception of rights and duties. Witte notes that various deprecations "in the general theory of human rights embraced by the rights revolution" occurred when human rights were, intentionally or by default, severed from their religious roots. His conclusion, shared by other authors such as Mary Ann Glendon, is an important one for this thesis:

> To ignore religious rights is to overlook the conceptual, if not historical, source of many other individual and associational rights. *On the other hand, this deprecation of religious rights has abstracted rights from duties. The classic faiths of the Book adopt and advocate religious rights in order to protect religious duties. A religious individual or association has rights to exist and act not in the abstract but in order to discharge discrete religious duties. Religious rights provide the best example of the organic linkage between rights and responsibilities. Without the example of religious rights readily at hand, leaders of the rights revolution have tended to lose sight of these organic connections and to treat rights in the abstract.*
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> Second, this deprecation of religious rights has sharpened the divide between western and non-western theories of rights. Many non-western traditions, particularly those of Islamic, Hindu, Buddhist, Taoist and Indigenous stock, cannot conceive of, nor accept, a system of rights that excludes religion. Religion is for these traditions inextricably integrated into every facet of life. Religions are thus an inherent part of rights of speech, press, assembly and other individual rights as well as ethnic, cultural, linguistic and similar associational rights. No system of rights that ignores or deprecates this cardinal place of religion can be respected or adopted. Since western notions of rights dominate international law, many non-western societies have neither accepted nor adopted the basic international declarations and covenants on human rights.
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> Third, this deprecation of religion has exaggerated the role of the State as the guarantor of human rights. The simple State versus individual dialectic of modern human rights theories leaves it to the State to protect rights of all sorts - "first generation" civil and political rights, "second generation" social, cultural and economic rights, and "third generation" environmental and developmental rights. In reality the State is not, and cannot be, so omni-competent - as the recently failed experiments of socialism have vividly shown. A vast plurality of "voluntary associations" or "mediating structures" stands between the State and the individual, religious institutions prominently among them (...) Religion and religious human rights must be re-integrated into the contemporary field of human rights.[236]

The large volumes edited by John Witte and Johan Van der Vyver, contain a host of articles relevant to my theme. One author in particular has noted that the teachings of the religions themselves serve as reminders to their adherents today "....that the sacred writings of their religious traditions endorsing religious human rights may constitute a basis for inter-faith relationships based on mutual respect and goodwill, even dialogue". [237] The challenge, of course, is to get contemporary thinkers in this area to take religion and religious claims as seriously as they take “rights”, “equality” and “non-discrimination”.

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[236] *Ibid*.

[237] *Ibid* James E. Wood Jr., "An Apology for Religious Human Rights", in John Witte and Johan Van der Vyver (eds) (1996), *Religious Human Rights and Global Perspective* at 457.

Thus, quite apart from governmental action, inter-faith dialogue and joint action provides another basis for engaging the needs of the global communities. Religions focus not only on their own adherents but beyond themselves, guided by the spiritual principles of their differing traditions.

James Wood, in his long "Apologia", discusses the teachings of a wide variety of religions and looks to the traditions of Hinduism, Buddhism, Jainism, Confucianism, as well as Sikhism, Hinduism, Christianity and Islam, and discusses their teachings on tolerance and respect.[238]

Nor have religious insights "sat still"; they continue to adapt to contemporary challenges with insights from their traditions. Thus, religious communities have been at the forefront of the debates about the "just society", "social justice", "economic justice" and a wide variety of challenges to political and economic structures.[239]

Comparing a "consumer society" that is kept going "by an endless process of stimulating, satisfying and re-stimulating desire...[that]...is more like an addiction than a quest for fulfillment", to religion understood as the search for a "human and humane social order", the Chief Rabbi of England, Jonathan Sacks, offers insights about the distinct contribution that a religious perspective brings to the contemporary world. He is particularly concerned, as the title of his excellent book indicates, with establishing the nature and importance of "the dignity of difference".[240]

Other human systems do not do what religion has traditionally undertaken to do, "....namely to offer an explanation of who we are and why, of our place in the universe and the meaning of events as they unfold around us".[241]

Sacks, notes the limitation of a post-enlightenment system, in which science, economics and political ideologies "have all retreated from their earlier roles as overarching philosophies". To take

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[238] *Ibid,* Wood at 456-483 (footnotes omitted). It is useful to juxtapose, from the sublime to the ridiculous, Wood's careful scholarship with the much better selling and slipshod bromides of a new atheist such as Sam Harris (2005) *The End of Faith: Religion, Terror and the Future of Reason*, who writes: "[r]eligious violence is still with us because our religions are intrinsically hostile to one another. Where they appear otherwise it is because secular knowledge and secular interests are restraining the most lethal improprieties of faith. *It is time we acknowledged that no real foundation exists within the canons of Christianity, Islam, Judaism, or any of our faiths for religious tolerance and religious diversity*" (225) (emphasis added).

[239] See Michael F. Czerny, "Liberation Theology and Human Rights" in Mahoney (1993) *Human Rights in the Twenty-First Century* (33). See also, in the same volume, Richard Devlin, "Solidarity or Solipsistic Tunnel Vision?" in which he refers to the important work to counter racism in South Africa, promote self-determination among the First Nations of Canada, and the work of women in sexual assault centres, all as part of what he terms "solidarity rights". These have been developed by, amongst others, "The Rainbow Coalition of Jessie Jackson" and "the traditionally conservative Catholic Church" out of which have emerged "base communities and the preferential option for the poor and the oppressed", 1002 - 1003.

[240] Jonathan Sacks, *The Dignity of Difference* (2002) at 40-41.

[241] *Ibid* at 40, compare this with the insights of Michael Polanyi, *supra*.

science as an example, what perhaps began as a quest for understanding the nature and role of science created or given by God, was replaced by a materialistic conception in which "science has become descriptive, economics transactional and politics ever more managerial...they tell us what and how, but not why...never before have we been faced with more choices, but never before have the great society-shaping institutions offered less guidance on why we should choose this way rather than that"[242].

Developing what he refers to as "a covenant of hope", Rabbi Sacks offers a stinging critique of contemporary economics with its tendency to concentrate wealth in fewer and fewer hands, leaving whole nations destitute and significant numbers of people, even with advanced economies, without stable employment, income or prospects".[243]

Out of the envy, anger and sheer sense of injustice that results, Sacks describes a fertile ground for frustration, protest, violence and terror. This has arisen, according to him, because "the substitution of market price for moral value renders us inarticulate in the face of the random cruelties of fate." Nor is Sacks simply concerned with the material description of the hazards of economics. The spiritual bankruptcy that, in his view, has arisen from the focus on the mere material turns to threaten the natural world as well. Thus, Sacks refers to "our habits of consumption....denuding the world of its natural resources, leaving future generations with ever less on which to survive".[244]

Sacks also describes global-warming, eugenic cloning and other questionable medical technologies that, in his words, "may lead humanity to promethean alterations of the human genome" in ways that would "privilege the few at the cost of the many" and reduce our richer understandings of "love, the human person and the non-negotiable dignity of a human life".[245] So, again, we see how the religious perspective, this time from within Judaism, provides holistic contributions to wide aspects of local and global culture - - there are no shared "public" equivalents in the manner in which a religious set of insights and commitments function.

He also discusses the growing fragmentation of politics, the rise of new forms of tribalism and religious extremism, the persistence of ethnic wars and the "capacity of highly decentralized groups, sometimes no more than a few individuals, to put security of life at risk".[246] Though we have a global

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[242] *Ibid* at 40

[243] *Ibid* at 193

[244] *Ibid*.

[245] *Ibid.*

[246] *Ibid.*

economy we do not have, according to him, "a global culture, global governance or coherent vision of global concern".[247]

Against all this, Sacks raises "the wisdom of the world's religions" which, far from being irrelevant, provides the richest conception of a moral base from which to critique and improve upon the foregoing problems. Sacks notes that the religious communities provide a necessary check on forms of control, such as government, which without a focus on the moral questions that "must be part of the conversation" can only further the problems they attempt to address.[248]

Near the end of his discussion on hope, Sacks observes that:

> My own view is that the world faiths embody truths unavailable to economics and politics, and these remain salient even when everything else changes. They remind us that civilizations survive not by strength but by how they respond to the weak; not by wealth but by the care they show to the poor; not by power but by their concern for the powerless. The ironic yet utterly humane lesson of history is that what renders a culture invulnerable is the compassion it shows to the vulnerable. The ultimate value we should be concerned to maximize is human dignity - the dignity of all human beings, equally, as children of the creative, redeeming God.[249]

What Sacks has just described is not simply relevant to politics and economics, but to aspects of culture with which they are intimately related -- including law. Reflecting that "the test of faith is whether it can make space for difference", Sacks notes that the challenge we face today is to "find positive value in the diversity of the human condition"[250] and "until this happens, we will have wars, and their cost in human lives will continue to rise".[251]

As with David Novak, Jonathan Sacks advocates a recovery of the concept of "covenant". This concept is rooted in the religious insight that the primary covenant, "between God and mankind" or those that are between a man and woman in marriage, or between members of a community or citizens of a society, "exists because both parties recognize that 'it is not good for man that he be alone.'" [252]

Here, Jonathan Sacks makes a point of real difference between notions of the self as an unencumbered rights affirming individual (the standard liberal sense of the individual) and the religious insight about the nature of the person. Sacks puts the distinction this way:

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[247] *Ibid.*

[248] *Ibid* at 195

[249] *Ibid*.

[250] *Ibid* 200

[251] *Ibid.*

[252] *Ibid* 203, Sacks takes this last quotation from *Genesis* 2:18.

> Members and citizens alone cannot sustain themselves, let alone establish a framework of collaborative action and collective grace. Covenants exist because we are different and seek to preserve that difference, even as we come together to bring our several gifts to the common good.[253]

This good, while it is "common", is not uniform. Sacks, therefore, endorses the conception of "a community of communities" that undergirds a developed religious insight about pluralism. For Sacks:

> Pluralism is a form of hope, because it is founded in the understanding that precisely because we are different, each of us has something unique to contribute to the shared project of which we are a part. In the short term, our desires and needs may clash; but the very realization that difference is a source of blessing, leads us to seek mediation, conflict resolution, conciliation and peace, the peace that is predicated on diversity, not on uniformity. Covenant tells me that my faith is a form of relationship with God - and that one relationship does not exclude any other, any more than parenthood excludes a love for all ones' children.[254]

Sacks calls not for a global government, nor a global civil religion, but for something more subtle and more profound. He calls for a "global covenant". Such a covenant would need to frame "our shared vision for the future of humanity". Hope, which requires courage, "....is the faith that, together, we can make things better".[255]

Hope differs from optimism in that optimism is a passive virtue whereas hope requires us to be involved in change. Setting this religious insight about covenant and hope and the global possibilities for covenant in juxtaposition to alternative explanations for the human situation, Sacks observes:

> We are not unwitting products of blind causes; the selfish gene, the Darwinian struggle for survival, the Hegelian dialectic of history, the Marxist war of classes, the Nietzschean clash of wills, the Durkheimian set of sociological trends or Freudian complex of psychological drives of which we are only dimly aware. Humanity has never been at a loss for world views that place the source of action outside ourselves, casting our faith to the winds and tides of fortune, which at best we can hope to appease, at worst we can resign ourselves to.[256]

To this list of "worldviews" one cannot help but add that we are not, according to religious conceptions of the person, subjected to what we might wish to term the "unencumbered" self in the "original position." This highly artificial conception of the self, imagining ourselves making decisions for justice while stripped of the constitutive attachments that enable us and form us to make these

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[253] *Ibid 203*

[254] *Ibid 203 - 204*

[255] *Ibid* 206

[256] *Ibid* 206 - 207

decisions, has been one of the most powerful visions on offer for several decades and seems to have exercised a debilitating reduction on the "liberal imagination".[257]

Noting that "difference does not diminish" but enlarges the sphere of human possibilities, Sacks makes a final statement emerging from the insight that "if we cherish our homes [religion] then we will understand the value of others".[258] Sacks notes that "in the midst of our hypermodernity" there is an old - new call to "a global covenant of human responsibility and hope" that will require the following:

> Only when we realize the danger of wishing that everyone should be the same - the same faith on the one hand, the same McWorld on the other - will we prevent the clash of civilizations, born of the sense of threat and fear. We will learn to live with diversity once we understand the God-given, world-enhancing dignity of difference.[259]

It is clear that for Sacks, as for others such as Maritain, Grant, Langan, or Taylor who entertain an essentially religious vision of the world around them, dignity and respect are rooted in his belief in God and his religious framework. This framework requires recognition of the dignity of "the other" as an obligation of the self-in-relation, not as a chance "feeling" or obligation about which one cannot form an explanation. These writers recognize that respect and an appropriate form of tolerance are what is required of "the other". Ultimately, in very different ways, they state that their moral visions emanate from their religious foundations, which in turn emerge from the religious insights of their various cultures.

Charles Taylor points out that human beings are, for him, ultimately "in the business of friendship." He continues:

> Now what does all this have to do with Christianity? Everything, to me: That is what it's all about. It's all about reconciliation. It's all about reconciliation between human beings, and it doesn't simply mean within the Church, and it doesn't mean that it's conditioned on being within the Church.[260]

For George Grant, a very different sort of Canadian philosopher yet also within the Christian tradition, writing some three decades earlier than Taylor's insight, it is contemporary liberalism's (and, in particular, John Rawls') inability to answer the fundamental questions that prompt a rejection of the "liberal" conception of the self. Grant asks:

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[257] Here there is no agreement at all between those who accept Rawls' procedural concepts and those who do not. Generally speaking, the more sympathetic the commentator is to the place and importance of religious communities and diversity, the less sympathetic he or she is to Rawls. The less religious, the more, in a sense, "Rawlsian".

[258] *Ibid* at 209

[259] *Ibid.*

[260] *Ibid* 320

> What is it, if anything, about human beings that makes the rights of equal justice their due? What is it about human beings that makes it good that they should have such rights? What is it about any of us that makes it our just due fuller than that of stones or flies or chickens or bears (...) How, in modern thought, can we find positive answers to the questions: (i) What is it about human beings that makes liberty and equality their due?(ii) Why is justice what we were fitted for, when it is not convenience? Why is it our good? The inability of contractual liberals (or indeed Marxists) to answer these questions is the terrifying darkness which has fallen upon modern justice"[261]

As we see, some of these commentators have raised a rather depressing view of the contemporary sphere: others have not. Rabbi Sacks adopted a hopeful stance as long as *the nature and place of religion was understood*. Grant seems to be of the view that the only stance left for contemporary religious believers is the "lament" for something past and lost.

Contemporary liberal accounts that tend to view the individual as sufficient outside of community or association are, against the traditions described, unsatisfactory because they are inaccurate and insufficient. It is also the case, of course, that because these traditions view their conception as in some sense "God-given", the liberal accounts tend not only towards inaccuracy, but towards blasphemy at their worst - - insisting upon alienated souls and civic loneliness.

In any case, it is clear that what is at issue are radically different conceptions of meaning, truth, the person/individual and the nature and place of associations. We have seen that the "goods of religion" cover virtually every imaginable category of human existence from the largest claims dealing with the importance of the environment (and responsibilities related to global warming), the relationship between parents and children, the nature of life (abortion, euthanasia), the meaning and scope of social justice, treatment of the poor, and the moral nature of the economy, politics and law themselves. In short, religious debates and discourse have something to offer a community searching for

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[261] George Grant, *English-speaking Justice* (1985) 72-86. For further descriptions of George Grant's thought and rejections of contemporary liberal theory, see: Hugh Donald Forbes, *George Grant: a Guide to his Thought* (2007) 47 ff. David Novak, *Covenantal Rights* (2000) criticizes Rawls 20ff. See his insight "The renewed government of Jewish law in civil society, of which the institution of individual human being must be developed, can only come when there is a true renewal of the covenant by the vast majority of the Jewish people with their God" (218). See also Richard John Neuhaus *The Naked Public Square* (1986) 257ff. Having reviewed various "liberal perspectives" Rex Ahdar and Ian Leigh (eds) *Religious Freedom in the Liberal State* (2005) 64 note that there are "significant doubts of whether liberalism can supply a value-free framework within which to examine questions about religious freedom". Paul Campos “Secular Fundamentalism” *Columbia Law Review* (1994) argues that Rawlsian notions simply reflect the beliefs of Rawlsians. As Stephen Macedo, *Liberal Virtues* (1990) 278 acknowledges frankly: “Liberalism holds out the promise, or the threat, of making all the world like California” (!). See, also, David Walsh, *After Ideology* (1990) 258, 259 and his *The Growth of the Liberal Soul* (1997) 15 and note Charles Taylor, *Sources of the Self*, and Ronald Beiner, *Civil Religion*, note #70, above.

meaning, as well as a legal system searching for what is core to constitutional notions of life, liberty, culture, religion and association (to name but a few).[262]

William Galston sets out a clear recognition of the importance of religion and the limits of politics and law:

> Like all politics [and the principles would apply to law as well] democratic politics is legitimate to the extent that it recognizes and observes the principled limits to the exercise of democratic power. The liberties that individuals and the associations they constitute should enjoy in all but the most desperate circumstances go well beyond the political rights that democratic politics requires. We cannot rightly assess the importance of politics without acknowledging the limits of politics. The claims that political institutions can make in the name of the common good co-exist with claims of at least equal importance that individuals and civil associations make, based on particular visions of the good for themselves or for human kind. *Liberal democracy rightly understood must steer a course between theocratic claims that subject politics to a single religious orthodoxy and a civic republicanism that subordinates faith to the functional requirements of the polity. This means acknowledging that there are multiple sources of authority within a shared social space and that the relation amongst them is not straightforwardly hierarchical.* As Chief Justice Hughes rightly observed in *Macintosh*, *our conception of religious liberty implies that for some purposes, religious authority is higher than political authority and should take priority in cases of conflict between them.* (…) A key aim of liberal democratic politics is the creation of social space within which individuals and groups can freely pursue their distinctive visions of what gives meaning and worth to human existence. There is a presumption in favour of the free exercise of this kind of purposive activity which I call "expressive liberty", and a liberal democracy bears and must discharge a burden of proof whenever it seeks to restrict expressive liberty.[263]

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[262] In a recent book related to the nature of torture and sovereignty, Paul W. Kahn whose conclusions with respect to the utility of "political theology" I rejected in Chapter 1, makes the following important observation with respect to the nature of what he terms "a politics beyond law". In *Sacred Violence* (2011), Khan, refers to what he terms the "ticking time-bomb scenario" of terrorism following 9/11 and makes the following important observation: "*The first mistake of legal theorists is to believe that there must be a legal answer to the problem, whether it is prohibition or judicial warrants.* The second mistake is to think that the right answer can be found by turning to an analysis of the moral content of our law. Neither of these moves will give us access to the fundamental problem: The relationship between the sacrificial space of sovereignty and the jurisdictional reach of law" (169, emphasis added). The shorter way of putting this, in light of his analysis in the book, is that law is not the answer because illegality is not the problem. But then, what is the problem? The answer lies beyond law and that is precisely the point that must be faced by those who tend to view the law as capable of matters better understood as rooted elsewhere. Charles Taylor and Isaiah Berlin have both contributed much to our understanding of matters important to understand if we are to affirm the freedom of association and religious liberty. Taylor, in discussing "the nature and scope of distributive justice" notes that the energy of both the left and the right needs to be redirected towards establishment of what he calls "a defensible and persuasive definition of one's own project of society…[m]aybe the social climate will not be more serene, but at least we will be fighting over what matters, as we are forced to be clearer and franker about our ultimate allegiances." see: Charles Taylor, *Philosophy in the Human Sciences* (1985) 316-317. He gives a very telling example of a problem, one we will see in later chapters in this thesis, when he describes the difference between "distinguishing the issues of distributive *fairness* from those of *political transformation*". Doing this, would be salutary, in Taylor's view, because it would "make us defend our views about the former (fairness) in relation to our actual culture and history; and that will make it at least somewhat harder to espouse dogmatically one principle in utter blindness to the relative claims of the others. And with luck, it could greatly improve the discussion of the latter as well" [*Ibid*. 317]. And see: Isaiah Berlin, *The Crooked Timber of Humanity* (1990) 47. We will see what I argue is just this sort of blindness in relation to the legal issue of religious employer exemptions and most of the legal commentaries in relation to it in Chapter 5.

[263] William A. Galston, *The Practice of Liberal Pluralism* (2005) 128-129.

Galston's analysis applies equally to the limits of the law, as both law and politics are capable of unjustified interference with the lives of persons and associations.

The Common Good

Louis Dupré has noted that "democratic freedom is perfectly compatible with a positive conception of the common good" and has warned that he sees:

> [N]o chance of regaining even a minimal agreement on what constitutes the common good without some return to a religious-moral view of the human place in cosmos and society. Without the restoration of some sense of transcendence, there remains little hope for a consensus on what must count as good in itself. For such a good must present itself in an objective, *given* order….what I am defending, in plain terms, is a return to virtue on a religious basis as an indispensable condition for any possibility of a genuine conception of, and respect for, the common good.[264]

If there is no "common good", how can there be meaningful justice? Against what standards can justice be measured and argued for if there is not some shared conception of "good", however general? Some have suggested that moves towards "liberal virtue" are enhanced by discussions of faith generally and religious faith in particular. Dupré's conviction, that it is only *religious* faith that can enhance this move towards virtue, should be considered widely and discussed in greater detail. At the very least it means that political and legal actors must consider the function of religious communities and projects before taking action that affects them.

Raising the Questions that Are Largely *Avoided* by Politics and Education

At the most general level, religious beliefs have significant influence on politics for reasons that are not at first apparent. James Schall, has reflected on the questions that are important to politics, and the answers that religions might provide is striking. Might it be the case that current angst about the absence of certain questions in the public sphere (about metaphysical verities, virtue or the contemplation of the highest things) can be addressed through greater engagement with the religious communities who contemplate these things? Schall and Michael Polanyi both answer this in the affirmative, and argue that the perspectives nurtured in religious communities are essential to maintaining freedom. Certainly mounting concerns about Western education suggest that the main

[264] Louis Dupré, *"The Common Good and the Open Society"* (1993) 687, 707-8 (emphasis in original). See, also, Isaiah Berlin, *The Crooked Timber of Humanity* (1990) 47-48.

public educative project is in free-fall when it comes to any kind of systematic education in "civic virtues".[265]

Writing from a perspective heavily influenced by Roman Catholic social thought, Jacques Maritain has spoken of the need for a clear distinction between what he refers to as a "human and temporal creed" and a "set of practical conclusions or practical points of conversion essential to common life." He writes:

> the body politic has the right and the duty to promote among its citizens, mainly through education , the human and temporal – and essentially practical – creed on which depend national communion and civil peace. It has no right, as a merely temporal or secular body, enclosed in the sphere where the modern State enjoys its autonomous authority, to impose on the citizens or to demand from them a rule of faith or a conformism of reason, a philosophical or religious creed which would present itself as the only possible justification of the practical charter through which the people's common secular faith expresses itself. The important thing for the body politic is that the democratic sense be in fact kept alive by the adherence of minds, however diverse, to this moral charter. The ways and justification by means of which this common adherence is brought about belong to the sphere of inner freedom of mind and conscience.[266]

Where education has failed or is failing in this area, associations have yet another reason to press a strong claim for recognition and respect.

Law's Contributions to "the Inarticulate Debates of the Contemporary Age" and What Religious Insights Might Offer as a Response

Charles Taylor has teased out some very important problems with political theory and the role of law in our time - - problems to which religious perspectives provide important contributions. Detailing these is not necessary here but I would like to highlight a number of his insights. First, and in helpful juxtaposition to what has just been reviewed about "goods of religion", Taylor refers to "the hold of

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[265] See, for example: Discussing Canadian education at the school and university levels; Hilda Neatby, *So Little for the Mind* (Toronto: Clarke, Irwin, 1953) or, Peter Emberly *Bankrupt Education: The Decline of Liberal Education in Canada* (Toronto: University of Toronto Press, 1994). Both authors building on a long history of critiques of western education that would include John Henry Newman, *The Idea of a University* (London: Longmans Green and Co. 1912), Jacques Maritain, Ed*ucation at the Crossroads. (*New Haven, CN: Yale University Press, 1943), C.S. Lewis, *The Abolition of Man* (New York: MacMillan, 1943), Martin D'Arcy, *Christian Morals* (London: Oxford University Press, 1944) and, a few years later, Christopher Dawson's *The Crisis of Western Education* (London: Sheed and Ward, 1961). Striking parallels, beyond the scope of this thesis but relevant to it, are to be found in Newman's insights about the categorization of religious education under "sentiment" (at the end of Discourse II in *The Idea of a University*) and C.S. Lewis' at the beginning of the *Abolition of Man* in relation to "feelings" and the subjective turn and the effects this has on culture. The shift from objective "virtues" to personal "values" is but one aspect of this turn - - and an important one with general cultural significance in every area. See: Iain T. Benson, *"Do "values" Mean Anything at all? Implications for Law, Education and Society"* (2008) 117-136. For the longer historical view of these philosophical developments one may turn to Alasdair MacIntyre's highly influential *After Virtue* (1984) and the virtual industry of commentary it has inspired.

[266] Jacques Maritain, *The Social and Political Philosophy,* Joseph W. Evans and Leo R. Ward, eds (1955) at 138.

moral subjectivism in our culture" according to which view "reason cannot adjudicate moral disputes".[267] He notes that social science, in the "normal fashion" of its contemporary explanations "...has generally shied away from invoking moral ideals and has tended to have recourse to supposedly harder and more down to earth factors in its explanation".[268] The result of this, according to Taylor, is that our debates, particularly about what constitutes a “good life”, have become extraordinarily "inarticulate" under the “liberalism of neutrality”[269] and the result has been to “thicken the darkness” around our moral ideals.[270]

Taylor describes two facets of contemporary political life that are having an increasing impact on this moral darkness. First, "more and more turns on judicial battles and the efforts of politics being directed towards judicial review";[271] Taylor gives abortion as a case in point and how battles to "stack the court" in the United States have resulted in "politics - as - judicial - review" in which the law schools are "the dynamic centres of 'social and political thought'..."[272] Taylor is too kind by half; a case can be made that, on the evidence of recent developments, the law schools have become bastions of one-sided politics, secularism and political correctness.

The second dimension of contemporary political life is that "interest or advocacy politics" based on "single-issue campaigns" become the focus of favourite cause advancement. Taylor points out that these two aspects, taken together, have led to the atrophy of a third important aspect which is "the formation of democratic majorities around meaningful programs that can be carried to completion".[273] This thesis of Taylor's is compatible with the "impoverishment of political discourse" observed by Mary Ann Glendon in her important book *Rights Talk* (1991), and Graham Good’s description of the contemporary university and attacks by the “new sectarians” on its open-ness of inquiry in which a religious type of fervor (but lacking the gentler qualifiers of religious adherence) has come to dominate contemporary university settings. [274] The shifting of focus to identity politics expressed in the courts has had a particularly negative effect on the proper role of politics and more holistic political programs. Taylor's next observation is particularly important:

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[267] Charles Taylor, *The Malaise of Modernity* (1991) 18.

[268] *Ibid* at 19

[269] *Ibid.*

[270] *Ibid* at 21

[271] *Ibid* at 114

[272] *Ibid* 114 -115

[273] *Ibid* 115

[274] Graham Good, *Humanism Betrayed* (2001).

> ....this style of politics makes issues harder to resolve. Judicial decisions are usually winner-take-all; either you win or you lose. In particular, judicial decisions about rights tend to be conceived as all-or-nothing matters. The very concept of a right seems to call for integral satisfaction, if it's a right at all; and if not then nothing. Abortion once more can serve as an example. Once you see it as the right of the fetus versus the right of the mother, there are few stopping places between unlimited immunity of the one and the untrammelled freedom of the other. *The penchant to settle things judicially, further polarized by rival-interest campaigns, effectively cuts down the possibilities of compromise*. [275]

Taylor notes that the tendency of "an unbalanced system such as this" is to entrench fragmentation and further increase what he calls "the atomist outlook". He points out that the effective antidote to individualism and individualistic politics and jurisprudence is a focus on the broader aspects of culture -- namely the nature of association (particularly around religions) and "the common good".

In answer to the question "how do you fight fragmentation?" Taylor responds that this is not easy and "there are no universal prescriptions". He points out, in particular:

> ...fragmentation grows to the extent that people no longer identify with their political community,that their sense of corporate belonging is transferred elsewhere or atrophies altogether. And it is fed, too, by the experience of political powerlessness. And these two developments mutually reinforce each other. Fading political identity makes it harder to mobilize effectively, and a sense of helplessness breeds alienation.[276]

In this new world of dominant judicial review, according to Taylor, citizens begin to feel powerless or threatened by the developments they see around them. However, Taylor notes that this sense of powerlessness can be mitigated by a "decentralization of power" as Tocqueville sought.[277] Principles dear to religions such as “subsidiarity” and the recognition of “mediating institutions”, as well as strong convictions that the state and the law have important but limited jurisdictions, offer principles for this theoretical “decentralization of power” on the one hand and associational recognition on the other.

Divisions of power exemplified in the federal system, "particularly one based on the principle of subsidiarity", can be good "for democratic empowerment" according to Taylor, and "this is the more so if the units to which power is devolved already figure as communities in the lives of their members.” Although Taylor does not refer to religious associations in particular, it is obvious, based on his other writing and the logic of his argument, that this kind of association is a prime example. Taylor concludes his important lectures on this point:

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[275] Charles Taylor, *The Malaise of Modernity* (1991) 116 (emphasis added).

[276] *Ibid* 118

[277] *Ibid* 119 - 120

> The effective re-enframing of technology requires common political action to reverse the drift that market and the bureaucratic state engender towards greater atomism and instrumentalism. And this common action requires that we overcome fragmentation and powerlessness - ...at the same time, atomists and instrumentalist stances are prime generating factors of the more de-based and shallow modes of authenticity; and so a vigorous democratic life, engaged in a project of re-enframing would also have a positive impact here… What our situation seems to call for is a complex, many-levelled struggle, intellectual, spiritual, and political.[278]

Based on the foregoing, there is clearly one form of association that is well situated to address the concerns expressed by Taylor and others: religious associations.

While other groups and associations may be involved, those with the traditions, the support bases and the commitment (of volunteers as well as others) are overwhelmingly the religious.

Here it is worthwhile pointing out that resistance to government and the creation or recognition of an "independent power basis" is another aspect of the importance of religious associations to democratic culture. This is important particularly in comparing democratic with totalitarian regimes.[278] Totalitarianisms tend to deny associational life,[279] unless those associations inculcate the philosophy of the state, and it is important to note the thinkers who have analyzed associational diversity and totalitarianism and shown the negative correlation that exists between them.

To sum up, therefore, we note that the goods of religion, in terms of the breadth of the subject matter religions may comment upon, their capacity to bridge the problems of atheism and the fragmentation of individualism, and the vision of associational diversity that they share with the best sort of "open-textured liberalism",[280] provide a strong basis for recognition.

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[278] *Ibid* 120

[279] See, for example, Stephen L. Carter, *The Culture of Disbelief* (1993) 132-133. Carter points out that one of the important reasons for accommodation of associational diversity is the preservation of religions as independent power bases so as to "resist the State". Hannah Arendt, *The Origins of Totalitarianism* (1973) 474-475, notes that isolation of citizens from each other plays a key role in furthering the goals of tyrannical government. So does the weakening of the “spiritual” and “religious.” This point has been powerfully made in the work of Aleksandr Solzhenitsyn, *The Gulag Archipelago* Vol. 2, (1975) 615-617; Václav Havel, *The Art of the Impossible* (1997); and Jean François Revel, *The Totalitarian Temptation* (1976). Revel has noted that "...the goal of the free State is to grant the members of society as much autonomy as is compatible with the effective management of public affairs. Today that aspiration is thwarted by the growing demands of group and individuals that the State intervene to protect and rescue them from all manner of difficulties" (213). On the ambiguity of modern freedom and its tendencies towards totalitarianism see: David L. Schindler, *Heart of the World* (1996) 182.

[280] Understood as opposed to the "monistic liberalism" or "civic totalism" that will be discussed in Chapter 4.

Do Religions Pose a Threat to Freedom?

What about the concern that religions are simply a form of domination against which only the law and the power of the state can provide a remedy? Here it is useful to look at the most recent articulation of the Catholic understanding of diversity and the limits of the state.

In the *Compendium of the Social Doctrine of the Church* (2004) the foundation and purpose of the political community, and the law, are set out. Here we observe that "a political community is established to be of service to civil society from which it originates". The Catholic Church sets out its commitment "on behalf of social pluralism" to "bring about a more fitting attainment of the common good and democracy itself according to the principles of solidarity, subsidiarity and justice."[281]

Here the State is understood to be limited and to have obligations:

> The political community and civil society, although mutually connected and inter-dependent, are not equal in the hierarchy of ends. *The political community is essentially at the service of civil society* and, in the final analysis, the persons and groups of which civil society is composed. The State must provide an adequate legal framework for social subjects to engage freely in their different activities and it must be ready to intervene, when necessary and with respect for the principle of subsidiarity, so that the interplay between free associations and democratic life may be directed to the common good. Civil society is in fact multi-faceted and irregular; it does not lack its ambiguities and contradictions. It is also the arena where different interests clash with one another, with the risk that the stronger will prevail over the weaker.[282]

With respect to religious communities, the *Compendium* seeks to challenge the "...mentality of conflict and unlimited competition that seems so prevalent today" (para 420) with a spirit of "cooperation" and, while stating that "the right to religious freedom must be recognized in the juridical order and sanctioned as a civil right" (para 422) states that, nonetheless, "it is not itself an unlimited right". The "just limits" on the exercise of religious freedom:

> ...must be determined in each social situation with political prudence, according to the requirements of the common good, and ratified by the civil authority through legal norms consistent with the objective moral order. Such norms are required by "the need for the effective safeguarding of the rights of all citizens and for the peaceful settlement of conflicts of rights, also by the need for an adequate care of genuine public peace, which comes about when men live together in good order and true justice, and finally by the need for a proper guardianship of public morality".[283]

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[281] *Compendium of the Social Doctrine of the Church* (2004) para 417.

[282] *Ibid* para 418 (emphasis added).

[283] para 422

With respect to the relationship between the Catholic Church and the political community, the *Compendium* notes that the nature of the two is different "because of their configuration and because of the ends they pursue".[284]

The political community has "the duty to respect religious freedom" which means to "guarantee the Church the space needed to carry out her mission". Interestingly, "for her part, the Church has no particular area of competence concerning the structures of the political community and must respect the legitimate autonomy of the democratic order and is not entitled to express preferences for this or that institutional or constitutional solution".[285] This does not mean, however, that the Church is not entitled to enter into questions dealing with the "religious or moral implications" of political programs.

Because she understands her mission to embrace "all of human reality", the Church claims "....the freedom to express her moral judgment on this reality, whenever it may be required to defend the fundamental rights of the person or for the salvation of souls".[286]

The list of rights which the Church "seeks" is, therefore:

> freedom of expression, teaching and evangelization; freedom of public worship; freedom of organization and of her own internal government; freedom of selecting, educating, naming and transferring her ministers; freedom for constructing religious buildings; freedom to acquire and possess sufficient goods for her activity; and freedom to form associations not only for religious purposes but also for educational, cultural, health care and charitable purposes.[287]

Two points should be made in closing. First, the Church recognizes that "the separation of Christian faith and daily life is one of the most serious errors of our day":[288]

> Without a metaphysical perspective, the loss of a longing for God in self-serving narcissism and the varied means found in a consumerist lifestyle; the primacy given to technology and scientific research as ends in themselves; the emphasis placed on appearance, the quest for image, communication techniques: all of these phenomena must be understood in their cultural aspects and placed in relation to the central issue of the human person...[289]

Thus the Church understands her role to be metaphysical, moral and practical. The Church understands her role to be in a dialogical relationship with contemporary politics. The Church rejects

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[284] para 424

[285] para 424

[286] para 426

[287] para 426

[288] para 554

[289] para 554

the "autonomy" of the state if that is understood to be an independence of the state from the moral law.[290] The question is, therefore, how is moral law to be mediated?

The *Compendium* sets out a second and indispensable aspect of the Catholic position in relation to the political order. The *Compendium* states that "because truth is one":

> A sincere quest for the truth, using legitimate means to promote and defend the moral truths concerning social life - justice, freedom , respect for life and for human rights - is a right and duty of all members of the social and political community.[291]

The moral obligation of the political order extends not just to the Catholic Church but in fact to all "communities of believers". A "pluralistic society" is expressly recognized and "secularity" is identified as providing "...a place for communication for different spiritual traditions and the nation".[292] Thus, an expressly pluralistic conception of society has been developed through Roman Catholic thought, but it is a pluralism connected to a wider moral vision that includes moral mediation through human communities. Connected to this is the recognition that democratic societies may not, in fact, extend the same courtesy of moral recognition to the Church. That is done in the following terms:

> Unfortunately, even in democratic societies there still remains expressions of secular intolerance that are hostile to granting any kind of political or cultural relevance to religious faiths. Such intolerance seeks to exclude the activity of Christians from the social and political spheres because Christians strive to uphold the truths taught by the Church and are obedient to the moral duty to act in accordance with their conscience. These attitudes even go so far, and radically so, as to deny the basis of a natural morality. This denial, which is the harbinger of a moral anarchy with the obvious consequence of the stronger prevailing over the weaker, cannot be accepted in any form by legitimate pluralism, since it undermines the very foundations of human society. In the light of this state of affairs, the marginalization of Christianity...would not bode well for the future of society or for consensus among people; indeed, it would threaten the very spiritual and cultural foundations of civilization. [293]

With respect to "the choice of political instruments", the *Compendium* expresses concern lest anyone place their faith "in one sole political entity" because "Christians cannot find one party that fully corresponds to the ethical demands arising from faith and from membership in the Church."[294] The ideal stance for the Christian in relation to party politics is one that should "never be ideological but always critical..."[295] This said, the choice of a party, political alliance, and the persons to whom public life is to be

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[290] para 571

[291] para 571

[292] para 572

[293] *Ibid* para 572 (footnotes omited).

[294] para 573

[295] para 573

entrusted, while a personal choice, is not one that is "exclusively individual" because even that choice is one that should benefit from the analysis and conversations that would occur within the Church. Christians are urged to "try to guide each other by sincere dialogue in a spirit of mutual charity and with anxious interest above all in the common good".[296] We are a long way from the individual as the unencumbered self and the state as sole arbiter of moral vision – there are dialogical relations at work.

In one of the Proceedings of the Pontifical Academy of Social Sciences discussing "democracy and debate", the following was stated by the then Chairman of the Academy, Professor Hans Zacher. It provides a helpful definition of "society".[297] According to Professor Zacher:

> "Society" is first of all the normality of a free private and public life, based on the principles of autonomy and self-accountability, interaction and trust (but also mistrust). This notion of "society" is a pre-condition for democracy - firstly, as a world in which people will experience human freedom and responsibility, are able to pursue interests, and possess goods and values; secondly, as a world in which endlessly much is done without state regulation and intervention, since no governmental machinery can provide the service for attaining the satisfactory life; and thirdly as a world in which such a vital free society is *also* the fruitful acre needed to produce critical movements to correct the one-sided ness of governmental structures.[298]

Part 3: Limits of the Law: Recognized and Recommended

The limitations on law, properly construed, mirror the place and limits of religion properly construed. For this reason, this section should be read in the light of the foregoing discussion on the nature of the goods of religion. As the second of the “pillar” quotations in the first Chapter made clear, the law occasionally expresses its own sense of its limitations on metaphysical, theological and even philosophical questions. Similarly, as we saw in the first “pillar quotation” from Justice Sachs in *Christian Education,* it is religions that form millions of people’s sense of community and “right and wrong.” Thus law is limited by both its own sense of itself (this may vary from time to time) and by the recognition of what other areas of culture (such as religions) can offer.

John Rist, writing from a classical ethicist’s point of view, has not only affirmed the importance that communities play in forming the moral foundations of ethics, but has cautioned against attempts to derive ethical or moral meaning from deracinated conceptions that are, in fact, dependent upon traditions they no longer articulate. This has direct implications for ideas and concepts that the law has

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[296] para 574.

[297] The concept of "civil society" differs from that of "society"; see Charles Taylor “Invoking Civil Society” (1995).

[298] Pontifical Academy of Social Sciences, *Democracy and Debate* (2005) 185.

inherited from religious traditions, such as "the dignity of the person", but the origins of which it is careful not to recognize. Rist observes that:

> We need to be aware of the past and of what traditions have been generated, while at the same time allowing the critical spirit to flourish, yet if our criticism forgets its roots, its success will kill the tradition itself. Conversely, if tradition tries to suppress or ignore not only those critics who wish to destroy it - but who can serve as its teachers - but also those who speak as informed friends from within, it is doomed to stagnation. [Here Rist addresses his "fellow Roman Catholics"] ...There is no point in our going on the defensive, becoming merely nostalgic or trying to impose continuity merely by impressing rules on our surviving supporters. In a liberalizing world oppression incites to further reckless scrapping of the achievements of the past, and - as one often sees with former Christians - reaction to an authoritarian implementing of rules normally takes the form neither of critical belief nor of critical unbelief, but of authoritarian secularism: The ex-nun animating the pro-abortion campaign.[299]

As both law and medicine increasingly demonstrate, the lack of confidence in dealing with issues at the margins of life and death supports Rist's concerns. [300]

Further Court Decisions Illustrate the Tension between Religious Belief and Public Involvement or the Respect for Associational Difference

In recent years there have been several cases, both in Canadian courts and in the human rights context, that illustrate the tension between the right to hold a belief and the ability to practice that belief in public, and the respect for the associational difference of religious associations. In the first category, a printer in downtown Toronto was initially ordered by a Human Rights Tribunal to print materials that went against his religious conscience. On appeal it was argued in Court by the counsel for the Ontario Human Rights Commission that the person in question, one Mr. Brockie, had the right to hold his religious beliefs at home or in his church, but when he went into the public space on Queen Street in Toronto, he was required to print the materials even though they went against his conscience. In the conclusion on that point, the Court held that Brockie was not required to surrender his religious beliefs when he entered any putative public space - - so it denied a bright line between religion and the public.

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[299] John M. Rist, *Real Ethics* (2002) 280-28. An editorial in the influential *British Medical Journal* supports Rist's concerns. Rejecting the concept of "the dignity of the person" as "a religious idea", ethicist Ruth Macklin says the concept is "useless" and adds nothing to the understandings of autonomy and respect. See: Ruth Macklin (2003) 1419.

[300] I refer elsewhere to the hesitancy regarding the status of the unborn human in the debate on abortion (see the case of *Morgentaler*). In *Rodriguez*, which dealt with physician-assisted suicide at the other end of life, the Supreme Court of Canada quoted Ronald Dworkin's "sanctity of life in the *non-religious sense*" from his *Life's Dominion*. Both these provide useful examples of the concern to which Rist refers. Such reticence bolsters the need for law to recognize its limitations in relation to insights from the more appropriately metaphysical, theological and philosophical communities. Eric Voegelin has reminded us that "altruism" was positivism's attempted replacement for "love" and that, to be sure, is a reduction of the love and compassion more fully described in Christianity and other religions. See: Eric Voegelin, *Science Politics and Gnosticism* (1968) 85 and Emil Brunner, *Justice and Social Order* (1945) 230 "Love is greater than justice – that love which is God Himself."

In other words, the public space in the *Brockie* decision was large enough to include his religious objections and accommodate them, but only insofar as the conflict was said to go to the core of his religious beliefs. Brockie was ordered to print what the court considered "ordinary business materials". This was a rather strange holding since, for a person who objects root and branch to a particular project, there *are* no such things as "*ordinary* business materials". Be that as it may, the Court overturned the narrow reading of religion as limited to the private.[301] We do well to note this narrow reading, however, as it is emblematic of a certain approach towards religion and its public place or lack thereof.

In more recent decisions dealing with religion, we see the same narrow reading of religion in the face of a state imperative. In the "Drummondville parents' case" decided in early 2012,[302] the Supreme Court of Canada refused to accommodate the concerns of several thousand parents who had sought exemption from a mandatory Provincial course on ethics and religious culture (ERC). The ERC course contained elements that these parents thought were relativistic or that subjected their religious beliefs to a form of teaching that would have been confusing to their children. The Supreme Court of Canada rejected the parents' application in a short and unanimous decision (with two sets of concurring reasons) by, somewhat surprisingly, determining that the parents had failed to show harm (that is, of interference with their ability to pass on their religious faith to their children). This is a rather extraordinary finding insofar as it requires the parents to prove the very harm that their exemption application sought to avoid. One can only speculate why respect for the sincerity of religious beliefs which was sufficient for the Court in other cases (such as *Amselem* and *Multani*, discussed below) failed to overcome the state interest in the *Drummondville Parents'* case. It cannot have been lost on the judges that there had been widespread concerns in the Province of Quebec following the earlier decision of the highest court in the *Multani* decision. Here the court found in favour of the state interest without even having recourse to the Section I balancing test that requires analysis of what is appropriate in a free and democratic society. The decision has surprised many.

Similarly, in another decision dealing with religious rights, the Supreme Court of Canada required members of Alberta's *Wilson Colony of the Hutterian Brethren* to have photographs taken if they wished to obtain drivers' licenses. Accommodation had been extended to the Hutterians for many

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[301] See: Bradley Miller, "Case Comment on *Brillinger v Brockie*" (2000) UBC Law Review 829 at 837. I declare an interest as I was co-counsel for Brockie on the appeal of this case.

[302] *S.L. and J.D. v Commission scolaire des Chênes* [2012]. Again, I should point out that I was counsel for two of the intervener associations in this case, arguing, generally, in favour of parental delegation and, therefore, in favour of the exemption requests.

years prior to the change of policy of the Alberta government. The argument of counsel for the Hutterians, that fingerprinting would satisfy the state objectives and was not objectionable to the Hutterians, was ignored by the Court. So, too, was the extremely small number of people involved (some 800). The interest of the government would not have been significantly affected had the Hutterians been accommodated and yet, again, religious interests were narrowly construed and easily ignored in favour of state interests.

In these cases, the state interest was protected , and the more accommodating approach that had been taken in earlier decisions such as *Amselem* (involving prayer tents on a Montreal condominium) and *Multani* (involving the wearing of a kirpan by a Sikh boy in a public school) was rejected. In both of these cases, the Court applied only a lower hurdle of a "sincerity" test and did not require that the requested accommodation be rooted in the tenets of the religion as a whole, or that proof of harm to the religious beliefs be shown before the religious accommodation is offered In the context of public education. Given the very serious concerns expressed by thousands of parents in Quebec, the "Drummondville parents' case" is somewhat astonishing for the manner in which religious concerns were ignored or minimized by the Court.

What is key for our purposes is that the court has shown itself on occasion to be mindful of a differential competence between law and religions in society. At other times it has been less accommodating. There is no consistency of approach or presumption to guide the application of tests.

Just as the courts can limit the scope of religious beliefs, so they can limit their content. One example is the determination by a trier of fact that a religious person's concern is, actually a "political" or an "ethical" concern. It may be the case, as a matter of fact, that what a person claims as religious, can, on investigation, not be based upon a religious tenet or belief. However, there are other ways in which a genuinely religious belief (sincerely held and in relation to religion) can be pre-emptively limited in inappropriate ways. For example, the Ontario Human Rights Commission's *Policy on Creed and the Accommodation of Religious Observances* currently contains a definition of creed which is reductive. As currently worded, the policy on creed does not protect ethics, morals or politics as aspects of religion (or "creed").

The OHRC's current Creed Policy contains a positive definition and a negative qualification. Positively, the document states that:

> "Creed" is interpreted to mean "religious creed " or "religion." It is defined as a professed system and confession of faith, including both beliefs and observances or

> worship….[and] "Creed " is defined subjectively. The Code protects personal religious beliefs, practices or observances, even if they are not essential elements of the creed provided they are sincerely held.

Negatively, the document states that:

> "Creed does *not* include secular, moral or ethical beliefs or political convictions". [303]

Needless to say this is in considerable tension with the more expansive understanding of "the essence of religion" referred to in the *Big M Drug Mart* decision, above. The exclusion of "moral or ethical" or "political" beliefs or convictions based upon religion is a significant reduction. The Creed Policy is currently being reviewed and one hopes that it will be revised to define creed and religion in a manner that recognizes and protects the ethical, moral and political stances flowing from religion.

Where society has failed generally "to satisfy the citizens' desire for meaningful community",[304] this is one of the goods offered by associations (and in particular religious associations). It has been said that both political and non-political associations are the means "…by which individuals who are weak when alone and isolated, join together to act from strength for common projects." [305] In addition, associations provide "…a more human level of organization that enables individuals to identify their individual self-interest with that of the association and enables them to regard the fruits of their labours more clearly than on the level of the state." [306] For Tocqueville, democratic principles required certain modifications (for example, against individualism) and religious groups and organizations were better situated than the state or politics to provide these. Quoting Tocqueville, von Heyking reminds us:

> [religious groups and associations'] mission is to offer a mirror to show the wider society a higher way of life to embrace, and to articulate sympathetically with the broader culture. In sum, the greatest counterbalance a religious group or organization can provide is to provide the fruits of friendship in the good that has always been the mission of the great world faith groups and their churches, and that cannot be obtained by the political realm.[307]

Many have commented on the problem of "individualism" and how that seems an inevitable part of the mainstream understandings of "liberalism" itself. One of the most astute critics of liberal

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[303] (italics in original) See Iain Benson, *"Two Errors in Relation to Respecting Religious Rights"* (2012) 20-24, discussing the Ontario Human Rights Commission *Policy on Creed and Religious Accommodation* (1996) 20 – 24, online: http://www.ohrc.on.ca/en/policy-creed-and-accommodation-religious-observances.

[304] Ronald Weed and John von Heyking (eds) *Civil Religion in Political Thought* (2010) 7.

[305] John von Heyking, in Weed, (2010) 313, discussing Tocqueville.

[306] *Ibid*. 311-312

[307] *Ibid*. 312. It is worth noting that "religion" itself has been listed as one of the basic forms of human good in the natural law theory of John Finnis. Finnis, *Natural Law and Natural Rights* (1980) 89-90, lists "religion" along with "life", "knowledge ", "play" , "aesthetic experience", "sociability (friendship)" and "practical reasonableness" as the seven forms of "basic good" to which he claims all the other "countless" objectives and forms of good relate.

individualism, which he analyzes as "the unencumbered self," is Michael Sandel. Of the sort of community that an "unencumbered self" might occupy, Sandel observes:

> The liberal attempt to construe all obligation in terms of duties universally owed or obligations voluntarily incurred makes it difficult to account for a wide range of moral and political ties that we commonly recognize. It fails to capture those loyalties and responsibilities whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are, as members of this family, or city or nation or people, as bearers of that history, as citizens of this republic….Those who share a common life informed by moral ties such as these may be said to comprise a community in the constitutive sense. The meaning of their membership cannot be described in wholly voluntarist or contractarian terms without loss. [308]

Sandel's purpose in making the distinction between "merely" chosen conceptions of the self and those that are "constitutive" in the deeper sense is to show that, as he puts it:

> …the version of liberalism implicit in contemporary constitutional law depreciates the claims of religion and fails to respect persons bound by duties they have not chosen. To this extent, this version of liberalism fails to secure the toleration it promises. But beyond the issue of toleration is the further question whether the liberal self-image is adequate to the demands of self-government. Is the unencumbered self too thin to sustain the obligations of citizenship? If so is religion among the forms of identity likely to generate a fuller citizenship and a more vital public life? (...) Perhaps an attempt to address [these questions] would itself enrich the discourse of American public life. [309]

What Sandel says of "American public life" has obvious relevance beyond that country for, as has been noted elsewhere, there are also theories of rights in Canada and South Africa that are reductive of the communitarian conceptions of rights. [310]

Many have recognized that religions provide a "standing place" against the dominance of the state or, put another way, religions can provide a way of organizing different perspectives on the state and law itself. They also provide the means to organize approaches to the transcendent within a community of those who believe the same thing - - for which neither the state nor its laws are fitted.

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[308] Michael Sandel "Freedom of Conscience or Freedom of Choice?" in Terry Eastland (ed). *Religious Liberty in the Supreme Court* (1993) 483 – 496 (emphasis added) and see other sources on the same point at note # 279 above.

[309] *Ibid*. 486, 496 (emphasis added).

[310] Unacceptably "individualistic" reading of rights and particularly religious liberty may be found all too easily in scholarly work in this area, see: Lorraine E. Weinrib "Ontario's Sharia Law Debate" in Richard Moon ed,. *Law and Religious Pluralism in Canada* (2008) 239, 246-247. For a striking individualizing of the right of religion, which purports to offer a "positive recognition" model of religion and state relations, see: David Bilchitz and Alistair Williams "Religion and the Public Sphere" (2012) 146 – 175. The last line of the article states: "we hope that as [South Africa's] unique model [of religion and state relations] unfolds, it will create the conditions in which *the diverse identities of all individuals* in its midst can flourish and be celebrated" (175, emphasis added); Throughout the article, associations, religions and groups are simply ignored and where they are by implication addressed (as in relation to "the alienation of minority communities") this is because of how "that may have some impact upon the manner in which *individuals* perceive the legitimacy of the state" (153, emphasis added). So, again, it is not that the state is damaging associations, religions or groups *per se* but how it might affect *individuals* that counts as relevant for these authors. Individualism is rightly viewed as being one of the by-products of this sort of "liberalism" and the reason why it has been so widely rejected by those inside and outside of religions.

One author has suggested that if newspapers and universities matter as the key means for "free-speech", then a comparable analogy could well be that churches matter as the key means for the "freedom of religion." I think the analogy is sound. As Garnett goes on to note:

> Just as the freedom of speech depends on an infrastructure of free expression, the freedom of religion depends an infrastructure of, well, religious freedom ….the existence and independence of religious institutions - - and specifically, of the Church – long served, and is still needed today, as the "social armature to the sacred order," within which the individual human person could be "secure in all the freedoms that his sacredness demands". [311]

Conclusion Regarding the Goods of Religions

The listing of a wide variety of "goods" of religion is not intended to suggest (for it could not do so and be true to history) that religion is always noble or without its own areas of struggle and difficulty and temptations to domination; that claim would be as absurd on the pro-religion side as some claims against religion are absurd on the anti-religion side. [312] This acknowledged, it is clear that religions provide many goods that are empirically verifiable. In their assertion of moral virtue and the rooting of human dignity in the acts of a creator within an ordered cosmos (rather than chance in a chaos) religions provide arguments for moral actions that continue to resonate through the communities within which these teachings are recognized.

We have seen that, in addition to the communal goods referred to of joining and belonging, the goods of religion take many other forms. Not only do religions provide a barrier between the citizen and the state (understood as law and politics) but they also provide different spheres of analysis for social debate and action. It is not surprising that so many leading reformers in the area of civil rights and social justice have and continue to come from religious communities of various sorts. The parable of the Good Samaritan continues to have powerful resonance in terms of the age old question: "who is my

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[311] Richard W. Garnett, "Religious Freedom and (and in) Institutions", in Gerard V. Bradley (ed), *Challenges to Religious Liberty* (2012) 71, 89 (internal quotations omitted).

[312] George Weigel "Roman Catholicism" in Peter Berger (ed) *The Desecularization of the World* (1999) sums up the Catholic position, in its "bad" and "good" phases by noting: "The more deeply "Catholic" the Church becomes the more robustly committed it will be to the achievement of a genuine pluralism in the world. This may be something of a genuine *novum* in history. Culturally assertive religion has, for the past five thousand years, tended to be politically aggressive religion, in the sense that self-confident religious communities have frequently sought to put political (and military) power behind their theological claims. Roman Catholicism has certainly been susceptible to this temptation over the course of its two-thousand-year history. But now, on the cusp of a new millennium, Catholicism has developed a serious theological rationale for rejecting the use of coercive state power in the service of religious truth, and for fostering a broad-gauged public conversation about the "oughts" of our common life, within and among nations, amidst a wide diversity of religious, philosophical, and cultural viewpoints….The model of religious engagement it can provide, and the examples of such engagement that this model will generate, are of utmost importance for the future of world affairs" (35).

neighbour?" Religions can and do co-operate increasingly around a host of cultural questions and this has frequently been identified as a good in which everyone, religious or not, can participate.

One can take notice of the "social upliftment" projects that continue to be done around the world by religious agencies using volunteer as well as paid workers, many of whom are strongly motivated by their religious beliefs. The goods of religion are manifest and continuing, and the criticisms of religion itself often takes the form of calling the religious to live out the teachings of their own traditions. This form of internal accountability is another earmark of religious traditions and one that holds out considerable scope for corrective measures over time when religions fail to live up to their self-confessed callings.

Having examined some of the architecture of an open and plural society and the goods that religions can offer, as well as the limits necessary to law and religion, the next Chapter will examine some of the key theoretical threats to the realization of these goods by examining the related conceptions of "convergence" and "civic totalism".

CHAPTER FOUR:

THE PROBLEMS OF CONVERGENCE AND CIVIC TOTALISM

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Having in the last Chapter examined some of the architecture of an open and plural society and the goods that religions can offer, as well as the limits necessary to law and religion, this Chapter examines the threats to the realization of those goods. Some challenges to diversity and an open society are less obvious than others and some come in strange guise. I shall examine rejections of "tolerance" or "accommodation" as well as forms of "pluralism" and "liberalism" that are neither plural nor liberal yet claim to be so.[313]

[313] Claims for "equality" that turn out to rank at least second behind quests for "reform" are not new. See: C.B. Macpherson, *The Real World of Democracy* (1965) 59 in which he observes: Marxian and Rousseauean concepts have "one thing in common"…." "[b]elieving as they do that the most important thing is the reformation of society, and realizing that this requires political power, they are not prepared to encourage or even allow such political freedoms as might hinder their power to reform the society. Thus political freedoms come a poor second to the drive for the new kind of society they believe to be necessary for the realization of equal human rights. Freedom is sacrificed to equality; *or, more accurately, present freedoms are sacrificed to a vision of fuller and more equal freedom in the future*. Freedom, in this view, contradicts itself…"(59, emphasis added). It is useful to recall Rousseau's formulation of and commitment to "civil religion" with the corresponding demand that religions other than, of course, civil religion "…must withdraw from civic life." See: Douglas Farrow "Of Secularity and Civil Religion" in Farrow (ed). *Recognizing Religion* (2004) 140 – 182 at 157-158. Thus, *faux* equality embraces *faux* religion. On some of the gnostic dimensions to "ersatz religion" and "civil religion" see: Eric Voegelin, *Science, Politics and Gnosticism* (1968) 81 ff

In general the theories and approaches may be discussed under the rubric of "convergence" or "civic totalism" as the approaches seek to have everyone in eventual agreement ("agreement" is used ironically since for some it is primarily to be achieved by force of law, not negotiated agreement).

There are three primary forms of Convergence or Totalism. I shall term these:

1. Ideological Convergence or Totalism;
2. Secularist Convergence or Totalism; and
3. Structural Convergence or Totalism.

These three categories are not water-tight compartments and there is often considerable overlap between them. That said, I believe this categorization offers some helpful insights into the ways in which "convergence and totalism" threaten "diversity" and the idea that a constitutional democracy must keep open areas of contestation.

The last Chapter made a case for the importance of debate about the things that matter deeply to associations and, therefore, to culture and suggested that different "normative communities" play a vital role in maintaining a strong cultural framework while at the same time permitting variations in how truths are understood and described.

There are several different theories going under the banner of "liberal" or "liberalism", and some of these theories actually pose threats to religions and to properly plural society itself. I will examine this phenomenon first in the writings of two political scientists in particular: John Gray and William Galston.

Ideological Convergence and Totalism: Understanding Convergence

In *Two Faces*,[314] John Gray suggests that there are two basic approaches to liberalism. In the first, disagreements are assumed to be way stations on the road to eventual agreement and it is thought that emerging social consensus will eventually lead to a coalescence of viewpoints. This

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and *New Science* (1952) 163 "...the totalitarianism of our time must be understood as journey's end of the Gnostic search for a civil theology."

[314] John Gray, *Two Faces of* Liberalism (2000); See, also: Peter Lauwers, "Religion and the Ambiguities of Liberal Pluralism: A Canadian Perspective" (2007) 17 SCLR (2d) 1–45 at 12 ff.

may be called "convergence liberalism",[315] but Gray prefers to call it "rational consensus". In the second, disagreements and different beliefs are viewed as necessary accompaniments to living in a world of incommensurate (and incommensurable) beliefs and values. Here the search is not for eventual convergence but for ways of co-existence or, as Gray calls it, the search for a *modus vivendi* way of living together. [316]

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

Gray writes that liberal thought:

> ….rarely addresses the deeper diversity that comes when there are different ways of life in the same society and even in the lives of the same individual. Yet it is the latter sort of pluralism that should set the agenda of thought about ethics and government today.[317]

Gray also observes that:

> Liberalism contains two philosophies. In one, toleration is justified as a means to truth. In this view toleration is an instrument of rational consensus, and a diversity of ways of life is endured in the faith that it is destined to disappear. In the other, toleration is valued as a condition of peace, and divergent ways of living are welcomed as marks of diversity in the good life. The first conception supports an ideal of ultimate convergence on values, the latter an ideal of *modus vivendi*. Liberalism's future lies in turning its face away from the ideal of rational consensus and looking instead to *modus vivendi*.[318]

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[315] Christopher Wolfe, "Issues Facing Contemporary American Public Philosophy" in Boxx and Quinlivan (eds) *Public Morality, Civic Virtue* (2000) points out that all contemporary liberalisms (he sets out six different versions) "overlap significantly at times" (213), and tend to "winnow out" the very things that their theories need to flourish. He gives two examples: the belief that it is possible to attain objective knowledge (including knowledge of human ends and moral values) and natural intermediary institutions "especially family and church" (206-207). See, also: Iain T. Benson, "Considering Secularism" in Farrow (ed) *Recognizing Religion* (2004) 83-98 at 96. George Grant's definition in *Technology and Empire* (1969) 114 f.n. 3 gives a somewhat laconic definition of liberalism that serves to typify another conception of the basket of theories: "…I mean by liberalism a set of beliefs which proceed from the central assumption that man's essence is his freedom and therefore that what chiefly concerns man in this life is to shape the world as we want it."

[316] Some of this Chapter is taken with permission and considerably revised from Iain T. Benson, *Living Together with Disagreement* (2012).

[317] *Ibid.* 12

[318] *Ibid*. 20–21

Gray cautions against a kind of illiberal "fundamentalism"[319] that can hide all too easily in what looks like a liberal approach to tolerance and diversity but is not.

> It is a mark of an illiberal regime that conflicts of value are viewed as signs of error. Yet liberal regimes which claim that one set of liberties – their own – is universally legitimate adopt precisely that view. They treat conflicts among liberties as symptoms of error, not dilemmas to which different solutions can be reasonable. *Liberalism of this kind is a species of fundamentalism*, *not a remedy for it*.[320]

Before giving two examples of this kind of error, one recent one from Canada and another from South Africa, I would like to discuss the work of a second contemporary scholar who highlights divergences within the liberal tradition: William A. Galston.

Galston was former policy adviser under the Clinton administration in the United States. Professor Galston approaches Gray's concerns from a slightly different angle and argues that autonomy and diversity are competing theoretical conceptions within liberalism. The accommodation of diversity within a determinate but limited conception of liberal public purposes is a better foundation for liberal philosophy than is the promotion of rational reflection or personal autonomy – however attractive these concepts may be to important professions and social classes within liberal societies.[321]

As Galston puts it:

> …pluralist politics is a politics of recognition rather than construction. It respects the diverse spheres of human activity; it does not understand itself as creating or constituting

[319] This term is also discussed in Ian Leigh "Towards a Christian Approach to Religious Liberty" in Paul Beaumont (ed) *Christian Perspectives* (1998) 38

[320] Gray, *Two Faces*, *ibid*. 105 (emphasis added).

[321] William Galston, *Liberal Purposes* (1991) 301

> those activities. Families are shaped by public law, but that does not mean that they are "socially constructed".[322]

What provides ways of agreement and civic discourse if not our conceptions of the good and the "civic glue" to keep us together more powerfully than religious beliefs and formation? If it is not the most formative, many would agree that religious beliefs and the morality derived from them are high on the list of cultural influences. Galston rejects "a strategy for justifying the liberal state that seeks to dispense with all specific conceptions of the good" as one that "cannot succeed".[323] He says that a justification of the liberal order must contain, at a minimum, the following elements:

> 1) social peace; 2) rule of law; 3) recognition of diversity; 4) tendency towards inclusiveness; 5) minimum decency; 6) affluence; 7) scope for development; 8) approximate justice; 9) openness to truth; 10) respect for privacy.[324]

Many things could be said of this list and the more detailed descriptions Galston gives. For my purposes, however, Galston notes in relation to privacy: "Liberal polities recognize that not everything of importance to human beings occurs in the public sphere or can be regulated by public decisions."[325] Political pluralism, he writes, elsewhere, "…is a politics of recognition rather than of construction. It respects the diverse spheres of human associations; it does not understand itself as creating or constituting those activities."[326]

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[322] William Galston, "Religion and Limits", in Farrow,(ed) *Recognizing Religion* (2004) 41 at 47. One of the more dominant conceptions that feeds the imaginaries of some people is this idea of "construction" that Galston rejects. This approach seems to be particularly evident in those with backgrounds in Critical Theory or sociology and as Berger and Luckman, *The Social Construction of Reality* (1967) have shown, "construction" need not assume an anti-religious stance whatever other aspects it might have. Not all constructions of construction need to assume a secularistic hue. According to some views, however, social relations (including law and religion) are "constructed" and this on the basis of "power relations." This is visible in the critique I will make, below, of certain essays in the recent book *Reasonable Accommodation* (2012) Lori G. Beaman (ed) but we may see it in an earlier book by the same author. In Lori G. Beaman, *Defining Harm* (2008) she writes "…the fluidity of these categories [public and private] rests on context and *is reconstituted according to the power relations within discourses*." Later the reader is informed about "…the *construction* of religion as a private domain" (151-152) and the last line of the book: "…this book is a call to pay closer attention to the discursive *construction* of religious freedom as it is worked out in a culture in which fear of the other plays a key role in *power relations*" (153, emphasis added). A theoretical pre-occupation with power relations, of course, like class membership, leads to what Graham Good, *Humanism Betrayed* (2001) has brilliantly described as forming a "carceral vision" for culture and, eventually, the betrayal of humanism itself.

[323] Galston, *Liberal Purposes* (1991) 154.

[324] *Ibid.* 301–304

[325] *Ibid.* 304

[326] William A. Galston, *The Practice of Liberal Pluralism* (2005) 2.

Understanding Civic Totalism

Galston provides a further useful concept in his discussion of "civic totalism" which I discuss briefly here. Civic totalists wish to use the law to drive all of society (both public and private spheres) towards their viewpoint of contested matters. Such positions, therefore, whether they emerge from religious communities or outside them, and whether or not they are advanced by religious or non-religious citizens, are inconsistent with the best sort of free and democratic society that honours diversity in practice.

Galston refers to three main types of civic totalism, the first is to be found in Aristotle "…that politics enjoys general authority over subordinate activities and institutions because it aims at the highest and most comprehensive good for human beings." The second, that of Thomas Hobbes, holds that "…any less robust form of politics would in practice countenance divided sovereignty….which cannot be divided even between civil and spiritual authorities." In the third, inspired by Rousseau: "… civic health and morality cannot be achieved without citizens' whole-hearted devotion to the common good." [327] Galston concludes his reflection by noting the limited nature of civil society understood within a properly pluralistic conception. He writes:

> …there is a distinction between basic human goods, which the state must defend, and diverse conceptions of flourishing above that base-line, which the state should accommodate to the maximum extent possible. There is room for reasonable disagreement as to where that line should be drawn. *But an account of liberal democracy built on a foundation of political pluralism should make us very cautious about expanding the scope of state power in ways that mandate uniformity*.[328]

One may believe, even vehemently, that everyone should accept his or her view of same-sex conduct or (to take another deeply held belief based on an equality right) that the priesthood within Roman Catholicism should be female as well as male; one may argue for that viewpoint in public and private spheres. One is not, however, entitled to force those who are in disagreement to have their views and presumably organizations "purged" from society or "coerced" to change by force of law- - at least so Gray and Galston counsel in their approaches to liberalism.

Hegemonic views about sexuality or religion are out of step, therefore, not only with the political theory of pluralism but the South African and Canadian jurisprudence regarding the nature of

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[327] William A. Galston "Religion and the Limits of Liberal Democracy" in D. Farrow (ed) *Recognizing Religion* (2004) 41-50 at 43-44, 49. The term "civic totalism' Galston acknowledges he has taken from Stephen Macedo (43 note #3) and see also *The Practice of Liberal Pluralism* (2005) 24 ff.

[328] *Ibid.*, 49, emphasis added.

equality, diversity and the proper involvement of religions and sexuality in the public sphere. Such hegemonic views are, however, not unusual in Canada or South Africa despite these theoretical arguments against them.

Consider the following passage from a well- known academic and frequent commentator on law in the media in South Africa. He writes as follows:

> [I]f everyone has the right to be different and if we must move away from the idea that heterosexuality forms the normative basis for policy formulation, then the very institutions which valorise a certain manifestation of heterosexuality . . . in our society *must be under attack*. A prime candidate for re-invention or reconstruction must surely be the institutions of "marriage" and the "family," the very institutions which have been deployed to regulate and police intimate relations in our society. These institutions have traditionally been associated with the validation and valorisation of certain kinds of heterosexual relationships and have thus contributed to the marginalisation of those whose sexuality do [sic] not conform to the idealised heterosexual norm. If we were to engage with the [South African] Constitutional Court's equality rhetoric around sexual orientation in a serious manner, it would throw into doubt the constitutional tenability of the continued use of these concepts in their present form *or perhaps in any form*.[329]

As the article argues, the goal for some in this particular movement is to achieve a replacement strategy based on dominance and purging of the old order. This is not in accordance with the passages from the Constitutional Court setting out the meaning of co-existence of spheres in the Constitution (which I shall refer to elsewhere). What is sought here by those who take this line of argument, the one I have termed "ideological convergence" is not co-existence and *modus vivendi* but domination. Thus, we see in the above quotation the "attack" on versions of marriage and the family that the author and his supporters dislike and a corresponding strategy of de-legitimization of the traditional forms of "marriage" and "the family", based on a perception of the Constitutional Court's "equality rhetoric around sexual orientation." As we shall see in the next Chapter, there are those who take this strategy further by trying to de-legitimize religion altogether so as to elevate other rights by comparison. [330]

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[329] Pierre de Vos, "Same-Sex Sexual Desire and the Re-Imagining of the South African Family", (2004) 179 at 187 (emphasis added)

[329] See for stark comparison: Stephen Macedo, *Liberal Virtues* (1990) 265 ff. The sort of approach taken by those that I shall discuss such as de Vos here and others later on, are a very long way from Stephen Macedo's superb description of the categories and nature of those who embody "liberal virtues" (which I shall discuss in later Chapters). Macedo sets out the "live and let live" attitude that must undergird the idea of "social pluralism" (265) and then observes: "Liberal justice requires that we respect the rights of people with whom we disagree strongly over many particular values, allegiances, loyalties and commitments. Differences of race, sex, religion, or ethnic background are all relegated to secondary, sub-political importance by liberal justice" (266). One might well ask what books on "Liberal Virtue" Pierre de Vos and those who think and write like him have been reading and what sort of "liberal principles" they believe themselves to be putting forth?

One other example, this from Canada, may be useful here to show that de Vos' approach, in which he embeds the notion of attack and eradication of institutions such as "marriage" and "the family" by force of law, in the name of his favoured conception of justice, is not an isolated one. In the prestigious Bertha Wilson lecture at the University of Toronto law school in 2002, Robert Wintemute stated as follows:

> As sex, sexual orientation, and gender identity discrimination in religious institutions wither away, the need for an exemption for the religious private sphere will disappear. Although it is unlikely to occur in my lifetime, I look forward to the day when, for example, the first lesbian Pope issues her apology for the sins of the Roman Catholic Church against LGBT (Lesbian, Gay, Bisexual and Transgendered] persons around the world. And I am sure that [former Supreme Court of Canada justice] Bertha Wilson will welcome that day too. [331]

Ignoring the smug confidence, brashness and disrespect such a public pronouncement embodied it is worth noting how strange it is that, in such a setting, a discredited Marxist revolutionary conception such as "withering away" is invoked in relation to the difference of viewpoints between religion and sexual orientation. On the contrary, the things Marx and his followers thought would "wither away" continue and any glance at history would have shown that when it came to religion and communism it was not "the opiate of the masses" that disappeared in smoke, but its adversaries.

Ironically the failure of this "withering away" seems to have found some continuing life (if even just rhetorically) with those who argue for absolutist positions of the sort I am seeking to identify here. Note that part of Wintemute's position is that any need for a "religious *private sphere exemption*" (emphasis added) will also "wither away" in time. His vision therefore is one of "the total state" which has eradicated the distinctions fostered by religion in relation to sexual morality in both the private and public spheres.[332]

Religious Rules Are Not Intended to "Make Sense" to Everyone

Turning back to the earlier discussion of "civil society", we must ask, whether this sort of approach is more suitable to a vanguard party of civic totalists than to civil society based upon a pluralism that

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[331] Robert Wintemute, "Religion vs. Sexual Orientation: A Clash of Human Rights" (2002) 125 at 154. and see Iain T. Benson 'Taking Pluralism and Liberalism Seriously" (2010) 17.

[332] One here would wish to take note of the following: Jean-François Revel, *The Totalitarian Temptation* (1976), Igor Shafarevich, *The Socialist Phenomenon* (1980); Hanna Arendt *The Origins of Totalitarianism* (1973) and Leszek Kolakowski's monumental three volume study *The Main Currents of Marxism* (1978) as well as his "The Idolatry of Politics" in *Modernity on Endless Trial* (1990). All four authors discuss the importance of associational diversity (the family, religion, trade unions etc.) as blocks to the totalitarian machinations of states and movements advocating unification of various forms and total "reform."

acknowledges diversity?[333] Rather than peaceful co-existence, it strives to give no place at all to those who have a different view of sexual conduct for themselves and their communities. It is useful to note that, within religions, those who would align themselves with the LGBT groupings[334] are not singled out for special treatment any more than are heterosexuals. In virtually all religions, and certainly in all conservative traditions, sexual conduct is restricted to the married heterosexual state and sexual acts outside it condemned. All sexual conduct outside of marriage is controversial. Furthermore, married men are not permitted to become priests in the Roman Catholic Tradition - - unless lucky enough to have first been Anglican ministers and then granted permission to do so - - and in the Orthodox Tradition no married man can be a Bishop. In Roman Catholicism masturbation is considered a sin requiring sacramental confession and a wide variety of taboos relate to sexual conduct and such matters as, for example, in some traditions, a woman's monthly cycle. In short, sexual conduct and related physical matters are the subject of many religious rules that act as restrictions on orientation and desire for all people whether male or female, single or married, homosexual or heterosexual.

In all traditions there are sanctions for divorce and adultery and in some for drinking alcohol, breaching dietary laws or watching pornography. These rules do not and are not intended to "make sense" to those outside of the particular traditions that uphold them and it is their very peculiarity to outsiders that ought to and does make us chary about trying to judge such beliefs from outside. I shall discuss this further below.

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[333] Walter Bagehot, "The Metaphysical Basis of Toleration" in *Literary Studies* (1907) an essay written in 1874, discusses "persons of strong opinion" who "wish above all things to propagate their opinion." For such people, in their "eagerness" there is a "great engine – the *State*" and such people "…can hardly understand why they should not make use of this great engine to crush the errors which they hate, and to replace them with the tenets they approve. So long as there are earnest believers in the world, they will always wish to punish opinions even if their judgment tells them it is unwise, and their conscience that it is wrong. They may not gratify their inclination but their inclination will not be the less real" (205). Bagehot notes that we must be wary about "earnest believers" as well as "earnest unbelievers" as they are "unwise" as they would persecute each other "as is evident from their writings and even more so from their conversations" (225). See also, Stephen Macedo on the content of "liberal virtues" and "A live and let live attitude" in *Liberal Virtues* (1990) 265 ff. "The liberal ideal of character is one with 'horizons' broad enough to sympathize with a variety of different ways of life" (267).

[334] Legislation passed recently in the Province of Ontario extends the rubric of "sexual orientation" to the following list: "LGBTTIQQ (lesbian, gay, bisexual, transgendered, transsexual, two-spirited, intersexed, queer and questioning) people. See Bill 13, *The Accepting Schools Act*, final version at http://www.ontla.on.ca/web/bills/bills_detail.do?locale=enandBillID=2549> Royal Assent received, June 19, 2012. If sexual orientation is to be read this broadly (as it clearly is now starting to be in Canada), to what extent could the arguments made by "totalists" fit within the realities of the dogmatic institutions of religion? If "questioning" (from the above list) is sufficient for sexual orientation protections of the type demanded by some then how could religions, or any moral framework, make any distinctions at all in terms of beliefs they deem requisite?

As just mentioned, with narrow exceptions, priests cannot be married or female in the Roman Catholic Church. Following a civic totalist's (rather than a pluralist's) reading of the constitution these excluded people should have a claim under the Constitution. Should the law intervene here as well? If not, why not? Merely to raise these sort of questions shows that the approach is unsound and unworkable. In fact, is there much in the way of doctrine that cannot be connected in some way or other with countermanding claims, some of which fit within the vague language of constitutional protections for equality and non-discrimination? Section 9 of the South African *Constitution*, for example, mentions "belief" alongside "sexual orientation" - - if the court is to intervene internally in these sorts of disputes, where would that end and on what basis would it be anything less than the turning inside out of the religious associations' right to believe what it wishes to?

Often neglected in certain approaches is the fact that "religion" is also an equality right or that "equality" like "sexual orientation" must be addressed contextually. There are different contexts, for example, within which to evaluate clashes between various sorts of claims - - gender, sexual orientation or religion and the claims of conscientiously or religiously opposed persons or organizations who do not agree about the definitions of these general categories.

What Gray says of liberalism applies to legal conceptions of "diversity" and "equality" and I would like us to keep both political liberalism and legal principles in mind as we consider the appropriate nature of religious inclusivity in the public sphere. Canadian and South African jurisprudence tends to favour both a religiously *inclusivist* conception of the public sphere and a plural conception of the public sphere along the lines that Gray urges with reference to *modus vivendi*. Thus, the Constitutional Court in the *Fourie* decision wrote that:

> [T]here are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'. In each case, space has been found for members of communities to depart from a majoritarian norm.[335]

Canadian jurisprudence has also acknowledged the concept of diversity within the public sphere and the risk that rank-ordering would pose to sharing that public space. Thus, in the 1994 decision of

[335] *Minister of Home Affairs v Fourie* ("Fourie") at paras 60-61 per Sachs J. This decision and the question of associational rights in general are discussed later in this thesis in Chapter 6.

Dagenais, then Chief Justice Lamer stated that "When the protected rights of two individuals come into conflict...Charter principles require a balance to be achieved that fully respects the importance of both sets of rights." [336] Similarly, in 2001 in a decision involving whether a Christian University, *Trinity Western*, could maintain a Code of Conduct banning certain forms of sexual and other conduct, Justice Iacobbucci, upheld the conduct clause and stated that: "neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute."[337] Activists of either side would do well to heed this statement but frequently do not do so.

Ideological convergence rejects approaches favouring diversity and wishes to impose its view upon others under the guise of "liberalism" or "equality" designed to receive favour from the audience (or the judges) often using the rhetoric of victimization, minority oppression or exclusion to achieve dominance.

Convergent Thinking Among Elite Groups: The Canadian Law Deans and Trinity Western University

Unfortunately, this sort of approach is not limited to a few activists with strident and illiberal views. Quite recently, near the end of 2012, the Association of Canadian Law Deans (with no apparent dissenting viewpoints) wrote to the Federation of Canadian Law Societies seeking to block the establishment of what would be the first "Christian Law School" in Canada. And what was the reason for their opposition? They do not approve of the approach to sexuality which the private Christian University professes. Not only do they not approve of it, they think it might well be illegal and that the "community covenant" is grounds for refusing to bestow law school status. There is no other Christian law school currently in Canada.

The irony of such an attempt is that it focused on the private Christian University's "covenant" which banned a variety of practices as unbiblical and un-Christian. These include the use of drugs, tobacco and pornography. In addition, students must voluntarily commit to abstinence from "sexual intimacy that violates the sacredness of marriage between a man and a woman."

Despite the fact that, as just set out above, a very similar covenant was found to have passed constitutional muster, at the same university, when the Supreme Court of Canada evaluated it in the *Trinity Western University* decision over a decade ago, the law deans argued that:

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[336] *Dagenais v Canadian Broadcasting Corp*. [1994] 3 SCR 835, at para 72.

[337] *Trinity Western University v British Columbia College of Teachers* [2001] 1 SCR 772 at para 29.

> 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.[338]

Note how this letter falls into what we might call "the typical pattern of civic totalist sexual orientation activist attacks." First, it focuses only on the gay, lesbian or bi-sexual students when, clearly, *heterosexual* sexuality is also proscribed by the covenant. Heterosexual sexuality appears irrelevant to the deans and highlights another aspect of their bias. Second, it fails to make any distinction between sexuality as an inclination or desire and sexual *practices* "out of wedlock" which is the focus of the covenant. For Christians it is possible to "love the sinner but [reject] the sin", but this is a position unacceptable to the deans: differing beliefs about sexual morality are viewed as simply unacceptable.

Third, the deans are of the opinion that their view (and it is singular) ought to be normative to the extent that *no other approach to law may be validly taught alongside their own conception of sexual orthodoxy*. The law deans view their understanding of sexual morality as normative for every other "community" and in doing so display considerable historical, philosophical, political, theological and legal narrowness.

Fourth, they make nothing of the fact that attendance at the private university is voluntary and that the viewpoints expressed in the covenant are perfectly legal to hold in Canada. They wish to, in perfect fulfillment of Charles Taylor's description of the acts of the vanguard party, dominate entirely the provision of legal education in line with their own moral thinking.

In a press commentary, law professor Dwight Newman rightly asked:

> Why the Federation of Law Societies is now responsible for "investigating" trumped up allegations of violations of federal and provincial law is not clear….the law deans' statement sends worrying signals about what they think of Christian institutions operating in the sphere of higher education. [339]

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[338] See the Letter written by Bill Flanagan, President of the Canadian Council of Law Deans, to the Federation of Canadian Law Societies, November 20, 2012 (on file with author). The letter urged the Federation "…to investigate whether TWU's covenant is consistent with federal or provincial law."

[339] Dwight Newman, (2013) "Canadian law deans attack right to religious diversity", *The Vancouver Sun*, 22 January, 2013, A1 (emphasis added).

After pointing out that the United States has several leading law schools, such as Baylor, Brigham Young and Pepperdine, all founded on religious principles and that operate still with conduct lifestyle elements very much like TWU's, Professor Newman comments that these make American legal education "richer for the diversity."

Most worrying though, is Professor Newman's insight that the law dean's statement:

> …. puts all its weight on students who supposedly want to claim the right to enter into a religious community and then to violate the behavioral covenant of that community. *They put no weight on the value of that community.* Taken to their logical conclusions, the law deans' arguments could just as easily prohibit a church itself from having behavioural expectations on its clergy. The law deans stereotype a holistic Christian lifestyle statement into a statement about one issue for one group of people. For that matter, they also ignore the rich and on-going internal dialogue underway in many evangelical Christian contexts about issues of sexuality. In their approach, they manifest an underlying anti-religious bias. Their very hounding of TWU's new law school is itself good reason for TWU to have a law school and to thereby expand the diversity of Canadian legal education.[340]

This thesis has, in the first few Chapters, placed such approaches in historical and philosophical context to argue that they are not "new" or even particularly exceptional when viewed against radical politics and theology across the ages. They are old and relatively common moves towards cultural dominance, while using new languages in aid of contemporary causes. They exhibit contemporary legal ignorance as well. Elite law deans exhibit the extent of contemporary totalistic secularism in the law.

Secularist Convergence: Keeping Religion Out of Politics: The Arguments of Dame Mary Warnock:

Another form of "convergence" seeks to use the "social imaginary" of "the secular" or "the separation of church and state" to explain why religion should be kept out of properly public realms. I need do no more to explain how this form of "convergence" works than to give an overview of a recent work that demonstrates it very well.

Philosopher and noted academic Dame Mary Warnock, in whose name the Commission dealing with Human Fertilization is better known,[341] decries the participation of religious believers in debates about certain issues of the day and has recently published a book setting out her arguments. Close

[340] *Ibid.* See: further on the problems caused by elevating a single conception of "equality" over other rights: David Brown "Reconciling Equality and Other Rights: Paradigm Lost?" (2004) 30 ff.

[341] See The Warnock Committee Report (1984) at< http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1442316/>

analysis of her book provides many excellent examples of a failure to treat religious perspectives fairly and accurately and of what can be termed a "structural convergence".[342]

Warnock's book gives interesting insights into both the pastiche made of religion by certain kinds of "liberal" positions and how contemporary "secularism" operates on legal and political issues of the day. The strategy is one of exclusion and the means used to effect it is the claim that the structure of a "secular" society demands such exclusion. The warrant for exclusion is in the "structure" of the modern state rather than, as we have just seen, the claims of exclusion of "vulnerable" groups.

Warnock believes that religion, while it may be useful for the imagination and to maintain "romance", is "…optional [while] [m]orality and the law are not".[343] She imagines a form of morality that stands free (and must necessarily stand free) from religion. Warnock's view is a particular *belief* about morality and functions exactly like a religious belief but comes from different pre-suppositions.

She argues for the separation of religion from morals not just from politics and law.[344] However, she also observes, somewhat confusingly, that what we "…cannot afford to do is throw out the meaning and purpose of the Ten Commandments, or the Christian reinterpretation of them" since these stories give us a framework "to encapsulate [morality]" [345] . In this schema, religion may be a useful background prop but it should have no public role in arguments regarding contemporary moral debates in politics and legislative formation, because "secular" morals must be free of "religious" taint[346]. This attempted severance of two kinds of reasons - - religious and secular, where only reasoning deemed "secular" is acceptable, has had considerable appeal for certain approaches to law and was central to Rawlsian approaches already discussed above. Some years ago, the majority of the Supreme Court of Canada, endorsed, in its decision dealing with euthanasia, the idea of human life being "sacred " and "inviolable" but "…in the *non-religious sense* described by Ronald Dworkin…"[347] When needed, apparently, "sanctity" like the "dignity of the human person" that is said to undergird human rights, can enter, quietly, stage left, in a solemnly appropriate form of religious garb - - just enough to provide the

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[342] Mary Warnock, *Dishonest to God: Keeping Religion Out of Politics* (2010) 166.

[343] *Ibid.* 159

[344] *Ibid.* 104

[345] *Ibid.* 162

[346] *Ibid.* 104

[347] *Rodriquez v Attorney General of British Columbia* (1993) 107 D L R (4th) 342 at 389 (emphasis added)

necessary *gravitas* so as to provide a concept not encapsulated elsewhere, then, having been yanked from its supporting conceptual framework, asked to politely disappear until called for again. So it is that the fuller religious vision, not to mention associational framework, is banished from full participation in debates and law.

The alternative understanding that religious perspectives remain important to society within the public realm is overlooked. Warnock assumes and argues for what she cannot prove - - namely that there is properly a *public realm of law and politics that religion does not fit within*. She may not, and she clearly does not, *like* or herself *believe*, the arguments that religious colleagues or religious groups may make, but her attempts to say that such arguments are justifiable only if made in a "secular" way are as specious and slightly less ingenious than are John Rawls' attempts to bracket religious reasons out of some supposedly neutral framework of "public reason." While she admits that "…it is often difficult to separate arguments according to whether they are religious or secular…" her real error is that she assumes that such distinctions should carry weight in terms of politics or legislation.

Where Warnock shows her hand is in her views of the nature of the secular in relation to religious employer exemptions. Warnock discusses an Equality Bill "designed to tighten and clarify existing anti-discrimination law" [348] and notes that:

> its most controversial clause was an amendment to the current law, which would have made it clear that, while churches and other religious organisations were exempt from anti-discrimination law *in their appointment of strictly religious officials such as priests and bishops, there was no exemption from prosecution if they discriminated against non-believers or believers in a different religion or against women or homosexuals when examining applications for secular positions such as those of accountants, youth workers, vergers or gardeners.* The current law took for granted that such discrimination would be unlawful, but did not make it explicit, and the churches had been acting on the assumption that exemption from the anti-discrimination law was their right, whatever sort of appointments they made. This amendment, hustled through the House of Commons, was heavily defeated in the House of Lords, on the grounds that it was an assault on freedom of worship, a long-established and hard-won constitutional right. *Now, at last, people of strong religious faith declared their hand, not relying on secular moral arguments, as they had so often done in the past when matters of life and death were debated. Instead they spoke for religion itself, claiming for it a position outside the secular law which requires equal treatment for all citizens.* In debating this case, they were not forced to make embarrassing avowals of personal faith, but could join forces to defend what they held to be the proper position of religion, under the guise of defending freedom of worship.[349]

[348] *Ibid.* 163

[349] *Ibid*. 164 (emphasis added).

Note, here, that Warnock has made a distinction between "religious" and "secular" positions that is defined irrespective of the views or beliefs of the religious associations themselves. This is the typical imposition of a non-religious view of religion. Interestingly, Warnock accepts a notion of "*the* secular law" that is somehow outside the world of the religious exemptions claimed by the religious believers. Where are religious associations in this world? Warnock's answer is that "the law" is the law according to *her own* conception of associations and it is not the view of associational diversity for which the best sort of liberal theorists have argued[350]. It is, in short, the very strand of illiberalism John Gray has rejected as "convergent". This point is made even more clearly in the following statements:

> What was horrible about the debate in the House of Lords was that, under the guise of defending religious freedom, many people simply expressed their deep prejudice against women as bishops or homosexuals as priests. Those who spoke in favour of the Government's proposal rightly saw the Pope's intervention as just such another expression of prejudice, made more intolerable by the fact that English law was none of his business. The religious view prevailed, and rather than lose the whole Bill (since time was running short before the end of Parliament) the Government gave in and dropped the contentious clause. It was not a good day for equality….The danger of a religion, any religion lies in its claim to absolute and immutable moral knowledge which, if justified, would indeed give its adherents a special place instructing others how to behave, perhaps even a right to do so. *But the laws of God, or Natural Laws to which the Pope claims privileged access,* are in fact moral principles which may change over time, may be reinterpreted or given new sense by people of imaginative genius or revolutionary spirit, and in some cases may be flatly rejected. *To regard such principles as the unique possession of people who hold certain metaphysical beliefs is to demean the status in society of people who do not hold such beliefs.* [351]

Warnock is either incapable of or simply refuses to see the *religious objection* to women as bishops or homosexuals as priests *as a religious issue*, one about which reasonable people, for different belief or religious reasons, should be free to disagree. Again, this is a common myopia and another good example of convergence thinking in relation to the structure of society.

She concludes her book by stating that "…morally speaking, believers and unbelievers are equal, and their right to make their voice heard democratically is equal." [352] Yet, it is "the forces of theocracy" meaning religious believers, who really should have no right to involvement in politics with their "deep

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[350] Stephen Macedo, *Liberal Virtues* (1990) 274 observes, for example, that "Liberalism does not…rely upon a strong distinction between public and private morality. "Political" values penetrate and shape the private lives of liberal citizens….In their private affairs, then, liberal citizens ought to adopt a "judicial" attitude toward their own projects, viewing them impersonally and imposing limits on them in the name of the rights of others. Our duty to respect the rights of others is as important in our personal as in our public lives." (274). Warnock's approach is to force her own views on religious associations, ignoring and belittling their distinctions and accusing them of views they do not hold and positions they do not advance.

[351] *Ibid* 164-165 (emphasis added).

[352] *Ibid* 166

prejudices". It is people of imagination like her, and not bound to "religious dogma" who have the unrestricted right to set the moral agenda for everyone else. Like the Canadian law deans, Warnock is blithely unaware of the contradictions in her viewpoint and the extent to which she is exemplifying some of the worst aspects of "civic totalism" under the guise of reasoned expression and high minded objectivity. She, like the law deans, mischaracterizes law, confuses distinctions with discrimination and fails to accord any real respect to divergent viewpoints and, therefore, diversity.

Structural Convergence:

This category is a more elusive one to demonstrate though I shall do so using a very interesting exchange some years ago between a leading American political philosopher, Jean Bethke Elshtain, and the Chief Justice of the Supreme Court of Canada Beverley McLachlin. Second, I shall use a recent book in Canada that, while marred by extremely fuzzy categorization throughout nonetheless calls into question both "tolerance" and "accommodation" since, so the argument goes, they stand as obstacles to something imagined as and called "deep equality": first, however, the exchange with the Canadian Chief Justice.

Law Carving Out a Place "Within itself" for Religion: Chief Justice McLachlin

A most important exchange took place some years ago when, at a conference held at McGill University, Chief Justice Beverley McLachlin Presented a paper on the importance of conscience and religion. In the course of her remarks, the Chief Justice indicated her thinking at that time with respect to the relationship between law and the "religious citizen". Here is how she formulated that relationship:

> The modern religious citizen is caught between two all- encompassing sets of commitments. The law faces the seemingly paradoxical task of asserting its own ultimate authority while carving out a space within itself in which individuals and communities can manifest alternative, and often competing, sets of ultimate commitments.[353]

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

> I wish to call this tension between the rule of law and the claims of religion a "dialectic of normative commitments". *What is good, true and just in religion will not always comport with the law's view* of the matter, nor will society at large always properly

[353] Beverley McLachlin, "Freedom of Religion" in Farrow (ed) *Recognizing Religion* (2004) 12 at 16.

> respect conscientious adherence to alternate authorities and divergent normative, or ethical, commitments. Where this is so, *two comprehensive worldviews* collide. It is at this point that the question of law's treatment of religion becomes truly exigent. The authority of each is internally unassailable. What is more, *both lay some claim to the whole of human experience.* To which system should the subject adhere? How can the rule of law accommodate a worldview and ethos that asserts its own superior authority and unbounded scope? … It is the courts that are most often faced with this clash and charged with managing this dialectic.[354]

Law here is viewed, frankly and openly, as a "comprehensive worldview" capable of competing with and even encompassing religion. Moreover, law is deemed capable of determining not only what is just but what is "good" and "true". It is able to lay claim "to the whole of human experience". Whatever else one can say of this, it elevates law to the status of transcendent determinations and therefore judges to the role of *de facto* clerics.[355] It is starkly at variance with earlier decisions of the court that spoke of its inability to deal with "metaphysical" or "philosophical" matters[356] and with the common law tradition in which liberty, not law, is the primary condition.

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

> As a general statement drawn from the common law, liberty is the basic position in law in Britain. Liberty is not conferred by a legal instrument: it is the normal condition, and infringements on that liberty can exist only as allowed by legislation or case law. Interference with the manifestation of traditional religious belief is therefore something which has to be justified in terms of public order or public good.[357]

On the other hand, and with respect, the Chief Justice's formulation tends towards a monistic or totalistic conception and is quite contrary to that kind of political pluralism referred to by other scholars, such as William Galston, in which there is a vision of "social space" and "spheres

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[354] *Ibid*. 21-22 (emphasis added). Compare this to Alvin Esau "Islands of Exclusivity" (2000) where he rightly recognizes the conflict that can emerge between certain approaches to law and religions as "a clash of normative cultures" (735). Such a view of the encounter is better than viewing religion as "inside" law understood as, itself, a claim to "comprehensive meaning." However, to view law as either "homogenous" or "a culture" is also an error. Law with exemptions contained within it is, to some degree at least, *legally instantiated pluralism*; a wider understanding of this and why it is so, are essential in future.

[355] Mattias Kumm, "Who is Afraid of the Total Constitution?" (2006) 343 reminds us of an inversion that can be imagined between law and politics. This inversion, hinted at by the Chief Justice, between law and religion, would be another aspect of "the total constitution" making it, even more total. Thus, for Kumm; "If in the total state law is conceived as the continuation of politics by other means, under the total constitution politics is conceived as the continuation of law by other means. The constitution serves as a guide and imposes substantive constraints on the resolution of any and every political question." This being so, the joining of law and religion or the placing of religion, *within law*, in the manner proposed by the Chief Justice, would, by logical extension, extend constitutional adjudication to any and every aspect of *religion*. This has not occurred and in so far as the court recognizes its limits in relation to "dogma" (as in *Amselem*) it may seem unlikely to develop in this direction for as long as that distinction (or hesitation) remains. The foundational category error, though, puts religion at risk.

[356] *Tremblay v Daigle* (1989) at 650.

[357] Francis Lyall, "Religious Law and its Application" in Caparros et al. (eds) *Religion in Comparative Law* (2000) 253.

of autonomy" that must resile from claims to be a comprehensive good. On this reading, the Chief Justice's conception of law assumes too much when it views itself as larger than the religious and larger than other conceptions *alongside of which* it must operate, as one of several ordering frameworks within a constitutional democracy recognizing interlocking liberties.[358] This limitation on the role of law was recognized in the response by the University of Chicago's late Jean Bethke Elshtain, who replied:

> Surely, where the rule of law in the West is concerned, there is a great deal about which the law is simply silent: the "King's writ" does not extend to every nook and cranny. Indeed, a great deal of self-governing autonomy and authority is not only permitted but is necessary to a pluralistic, constitutional order characterized by limited government. In other words, the law need not be defined as total and comprehensive in the way the Right Honourable Chief Justice claims.[359]

The way forward for constitutional adjudication in certain cases is to do what John Gray has suggested with respect to liberalism and abandon entirely, or significantly narrow, the notion of the law's role in forcing the approval of certain contested social conceptions with the idea that we shall eventually come to agreement. That view is rather prevalent, sometimes in implicit form, today.

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

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

> the State is in no position to be, nor should it become, the arbiter of religious dogma. Accordingly, courts should avoid judicially interpreting and thus determining, either explicitly or implicitly, the content of a subjective understanding of religious requirement, "obligation", "precept", "commandment", "custom" or "ritual". *Secular judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion.*[360]

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[358] Galston, "Religion and Limits" in Farrow (ed) *Recognizing Religion* (2004) 41-50. He states: "the common good in a pluralist society is not merely the aggregate of individual or group interests, but it is not and must not be a comprehensive good either" (48).

[359] Jean Bethke Elshtain, "A Response to Chief Justice McLachlin" in Farrow, (ed) *Recognizing Religion* (2004) 35 at 36.

[360] *Syndicat Northcrest v Amselem* (2004) at para 50 (emphasis added).

There is a considerable difference between law "carving out within itself" a place for religion and (quoting Paul Kahn) there being "no part of modern life to which law does not extend"[361] (as in the 2002 lecture) and law not wishing to "entangle itself" in the "affairs of religion" (as in *Amselem* in 2004).

In the West today, no religions can claim priority over plural politics, yet in these earlier formulations of the Chief Justice (in her McGill address and the judgment in *Chamberlain*), as well as in the writings of certain academic commentators, law can all too easily claim a comprehensiveness that places it culturally in a position superior to that of religion. In her judgment in *Amselem*, the Chief Justice subscribed to a better formulation of the relationship: the point needs further judicial clarity.

Rejecting Tolerance and/or Accommodation

There can be various ways to express concerns about "toleration" or "tolerance." As with many of the categories that have been examined (for example "liberalism") some are consistent with diversity and disagreement, others are not. Respectful concerns about tolerance are expressed by various authors including Tore Lindholm who rejects "toleration" because "... [it] tends to enervate serious and focused attention to genuine differences of belief by permitting apathy about others and by filtering authentic religious voice out of the public square".[362] He supports this rejection of tolerance by observing as follows:

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[361] McLachlin "Freedom of Religion" in Farrow (ed) *Recognizing Religion* (2004) 14. Note that this over-extension of the nature and role of law in the direction of law becoming itself akin to a religion is the central error made by Ran Hirschl, *Constitutional Theocracy* (2010). Hirschl mentions the exchange between the Chief Justice and Professor Elshtain in his book (at 270 f.n. 66) and repeats, *with no negative comment or concerns,* her view that the challenge "..is fitting one comprehensive doctrine within another and determining the limits of religious expression." Who agrees that law is a "*comprehensive* doctrine" in the first place, apart from Paul Kahn, the Chief Justice herself, and Ran Hirschl? The error of divinizing law is made, in different ways by Paul Kahn, *Political Theology* (2011) and the latter's former student at Yale, Benjamin Berger, who while he superbly explains why law "fails to appreciate religion as culture" comes very close to suggesting that law constitutes both a "community" and a "culture" of its own; see: Benjamin Berger "Law's Religion" in Richard Moon, ed *Law and Religious Pluralism* (2008) 264 at 288.

[362] Tore Lindholm, "Philosophical and Religious Justifications of Freedom of Religion and Belief" in Tore Lindholm, et al *Facilitating Freedom of Religion or Belief: A Deskbook* (2004) 19-61 at 45. M.H. Ogilvie, *Overcoming the Culture of Disbelief* (1995) also expresses concern with "tolerance" and "accommodation" but as a way of reaching towards *modus vivendi* (not her term) not away from it or against it. She states: "..instead of thinking about religions in terms of toleration or accommodation, perhaps it is time to jump into a new psychological attitude and language which respects the exclusive and universal claims of each religion without public criticism, that is, a language acknowledging an equality of voices, including religious voices in public discourse" (22). Her call for a "new psychological attitude" is most interesting and likely critically important but to explore it as it deserves would take us well away from the central foci of the current investigations. On this point, however, again, that of the mentality of those who wish to dominate, the authors referred to in relation to totalitarianism (Revel and Arendt) should be consulted as should Igor Shafarevich, *The Socialist Phenomenon* (1980). The latter's masterful treatment of the psychological dimensions of "chiliastic socialism" viewed anthropologically, historically and psychologically would go some way to explain

> Memories of inter-religious violence, war and persecution have fed modern scepticism and relativism about serious truth claims in religious matters. The darker sides of religious discord have elicited a public culture of disbelief and generated liberal gag rules against religious discourse in the public square. Each of these factors has led to religious commitment being privatized and marginalized. It is plausible to think that these modern developments have thrived all too well under the auspices of public toleration. In essence, a half-hearted expedient, Lockean political toleration does not envision, much less require, that parties differing in religious doctrine and ideological commitment foster and sustain internally well-grounded mutual respect, trust and constructive co-operation among themselves. Politically sustained toleration may then become an ambiguous survival kit for modern religion, keeping the real thing at bay, atrophied because shielded by the filter of toleration from serious public assertion and serious public criticism.[363]

I could not agree entirely with Lindholm's analysis here because it seems to me that while the unwillingness to entertain metaphysical argument, whether religious or not, in the public sphere is a problem; it is not fair to place this at the door of religion. There seems to be a general culture of unwillingness to engage deeper questions related to life and the purpose of life and community, the protection of human life, etc. and one of the reasons given for this is that such matters are best kept private or must be stripped of “religious” perspectives. That reticence, however, is not a difficulty originating with religion nor limited to it.

So Lindholm challenges “tolerance” as being too thin. Interestingly, recent work emanating from Canada challenges “tolerance” (and accommodation) for being too thick and for standing, in fact, as impediments to a new notion, that of "deep equality". This objection to “tolerance” is not because it limits religious richness but the opposite - - because it protects diversity too much and limits homogeneity.

“Deep Equality” or “Deep Diversity”?

The vagueness of what is meant by “deep equality” in the recent collection of essays, *Reasonable Accommodation*, makes it difficult to actually critique what is being proposed. That said, reading between the lines, it seems to suggest that we need to accept deep equality because "it requires an abandonment of language that establishes hierarchies of difference, such as 'tolerance' and 'accommodation'."[364]

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why aggressive terminology such as “attack” and “purge” is used by certain of the advocates who fit the civic totalist description.

[363] *Ibid.* 45

[364] Lori G. Beaman (ed) *Reasonable Accommodation: Managing Religious Diversity* (2012) 213.

One might wonder at the meaning of the conception of "hierarchies of difference" since our rejecting them is implied as is our unqualified endorsement of the analysis of “minority/majority” power relations. Also rejected is the idea that anything should be viewed in terms of “us” and “them”. In the editor’s “Conclusion” we are told:

> *What is really being argued for, then, when we suggest that the content of religions should be opened to fair and public assessment, is an admission that this is already taking place in the courts.* It is therefore important that, in order to achieve deep equality both in the legal processes and in public considerations of religious minorities, the existence of mainstream Christianity as a hegemonic or normative force be acknowledged. We can then begin to develop processes that are fully cognizant of the social and cultural context in which the assessment is being conducted. Related to the recognition of social context, is, of course acknowledgment of power differences and sedimentations, *as well as a willingness to cede or reorder such sedimentations to achieve equality.* This goes to the heart of the shift from accommodation or tolerance to deep equality. We should not, however, completely ignore the “achievements” of accommodation or tolerance but these are “minimum standards” in both public discourse and legal processes which we may celebrate and move on from: …*but they have done all the work they can do, and indeed are now doing harm in a country that needs to move past holding fast to privileges if it is to recognize the promise of equality that is constitutionally guaranteed*. [365]

Note what is assumed but not spelled out in the statement “...the existence of mainstream Christianity as a hegemonic or normative force…” that should be publically “*re-ordered*.” Which kind of “mainstream Christianity”? The existence of this as “hegemonic” or “normative” - - again, *for* whom and recognized *by* whom? And why is being “a normative force” assumed to be negative? Who is to do the “re-ordering” and “assessment” and *by what authority*? The frankly arrogant lack of clarity is baffling, frustrating and unacceptable for a work passing itself off as a scholarly analysis of important issues.

Along the same line are statements such as: "...multiculturalism is often seen as a thorn in the side of those who aspire to a *cohesive, homogeneous society* united by common values"[366] and “[a]ccommodation does not include equality and is a framework that forces parties to a discussion into hierarchical relationship. It is a framework that continues unfair and unjust power relations that impede rather than promote the equality of minority groups.”[367] Who “aspires to a cohesive, homogenous society…”? Most of the theorists and traditions thus far referred to are strongly opposed to such visions of the “cohesive” or “homogenous” unless the conditions for this union are very clearly spelled out.

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[365] *Ibid*, 218-219 (emphasis added). We are invited to accept a “re-ordering” of “the *content* of religions”!

[366] *Ibid* at 214, emphasis added.

[367] *Ibid* 219- 220

Alas, that kind of clarity is not offered by the editor or authors quoted from this recent book and the, frankly, totalitarian assumptions undergirding the framework are astounding.

Further, we are told that "abandoning multiculturalism as a mechanism for creating space for religious minorities is a troubling prospect" and that "negotiating through religious diversity requires more difficult and sustained conversation than we have seen to date on most issues of religious diversity that emerge in the public sphere"[368]. What is meant by “abandoning multiculturalism” and how exactly could that be done even if it were a good idea? Again, we are left to guess but the directions are ominous.

However carefully and sociologically couched in terms of "hierarchies" and "power-relations" and "minority-majority interest", the quest for a homogeneous "deep equality" is far from convincing as is the conception that religious diversity is something to be "managed". This kind of "stance from on high" perspective seemingly outside of the “hierarchies” that are critiqued, is reminiscent of Mary Warnock’s analysis discussed above and the general approach to law exhibited by the Canadian law deans and the Canadian Chief Justice. None give comfort to those who urge for a more humble and respectful positioning of different communities in relation to each other under the aegis of diversity. Abolishing “us/them”, a chimera in any case, has historically come at the expense of respecting differences.

In sum, without actually giving any real clarity to the concept of "deep equality" but raising a long series of rather worrying concepts, the volume’s introduction and conclusion list a litany of concerns so vaguely and confusingly expressed that one begins to lose any sense that there is a coherent idea or set of ideas being expressed in the book at all. The conclusion states that:

> In the first three-quarters of the 20th century tolerance was largely an idea that was invoked to regulate relations between normatively dominant mainstream Christianity and minority Christian groups and Jews. A number of intersecting processes, including increased immigration, post-colonial insights, and the rights revolution, have called into question the validity of notions like tolerance and accommodation as valid governance strategies.[369]

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[368] *Ibid* 215-216. The full extent of the problem of “abandoning multiculturalism”, quite apart from its intrinsic aggression, would have to take into account the fact that various communities have found ways of adapting quite well to it in a Western plural context. See, for example, the account of the Ismaili communities in Canada: Karim H. Karim “At the Interstices of Tradition” in Farhad Daftary (ed), *A Modern History of the Ismailis* (2011) 265-294.

[369] *Ibid* 221

By now it scarce needs noting that we are not told how any of these things have actually "…called into question the validity of tolerance and accommodation" as opposed to raising important questions that require contextualized analysis to work around and within. Nor is the development of notions of tolerance understood within a history going back for several thousand years as it can and needs to be. That is the lens through which tolerance and the nature of human communities and associations needs to be seen - - not the relative keyhole of the "first three-quarters of the 20th century…"[370]

There is one essay in the book, however, that makes some of this vagueness about "deep equality" clear; though that not in a good way. In one essay, the author analyzes "difference" in the context of "sexual diversity and accommodation." Here the language and purpose are clearer and the grounds for concern greater. Heather Shipley, who is a religious studies scholar, is writing on the "legal and social change" that has been occurring "regarding protection against discrimination for homosexuals and the legalization of same-sex marriage…."[371] Dr. Shipley is also Project Manager for the "Religion and Diversity Project" a Social Sciences and Humanities Research Council Major Collaborative Research Initiative at the University of Ottawa. The book on which I am commenting has emerged from this project's work. I mention all this because the conclusion and form of analysis, decrying, in the name of "deep equality," both toleration and accommodation, set the stage for what we shall argue later is the latest in a series of moves that fit rather neatly into the framework of "civic totalism" "equalitarian absolutism" and "illiberalism" at the core of contemporary elite analysis. Such approaches routinely ignore if they do not deride or attack outright, diversity and genuine pluralism particularly in relation to religious diversity. Here is how Shipley concludes her essay and it is illuminating for one of the concerns of this thesis:

> Legal and social change are occurring regarding protection against discrimination for homosexuals and the legalization of same-sex marriage, yet the language surrounding what homosexuality or sexual difference is, or more accurately, what it is not, and the means by which the changes occur *are much more subversively constructed.* The influence of some religious beliefs and religious groups, which become constructed as "the" religious standpoint, have helped maintain mainstream categories of heteronormativity….The necessity to make homosexuality the Other (binary opposite/incompatible) to normative heterosexuality must not be disturbed by an acceptance of the religious homosexual. As a result, homosexuality is posited as

[370] One of the goals of this thesis as shall be seen in Chapter 6, below.

[371] *Ibid* 181 "One of These Things is Not Like the Other" in Lori Beaman (ed) , *Reasonable Accommodation* (2012) 165 – 186.

> contradictory to religiosity such that one cannot be both but only one or the other. As referred to earlier, animosity is often purported (sic) as a rational response to danger. When the hegemonic, heteronormative system faces a challenge, it thus responds by drawing very clear lines in the sand between "us" and "them."[372]

Many things can be said about this form of analysis, such as its suggestion that the opposition viewpoint is "subversively constructed" (thereby attributing dishonesty to those who hold alternative viewpoints to Dr. Shipley) but two are most important. First that it creates a "straw man" argument. Religions do not, as alleged, suggest that one cannot "be both homosexual and religious" - - far from it; most make a distinction between desire/orientation and *conduct* not homosexuality- - understood as homosexual desires - - *per se*. They say, clearly and frequently, that for the homosexual as for the heterosexual, there are moral and religious restrictions on *conduct*; not all desires can or should be acted upon. *That* is what is objected to by many who disagree with same-sex *conduct* rather than orientation or desire. Shipley's approach unfairly mischaracterizes the diversity and nuance of religious positions and, in common with many commentators, skates around the moral distinction at the core of the differences.

Second, Shipley's analysis stigmatizes the view that sexual relations should be between male and females as "heteronormative" and like "homophobia" one that should be resisted by "challenges to the system." Nowhere with respect to sexuality[373] or gender does this volume even attempt to argue for co-existence of alternative viewpoints or suggest that living together with different beliefs might be part of a just legal framework or that differing viewpoints on sexuality are permissible and even laudatory in the quest for better understanding between people about the mysteries of sexuality and our moral rules in relation to it. Hegemonic dominance by Dr. Shipley and her supporters is an assumed and acceptable strategy when it should be anything but.

This level of analysis, ignoring as it does the freedom of association and difference of moral and religious viewpoints *having a right to co-exist in society*, does nothing to challenge the importance of either reasonable accommodation or tolerance as ongoing realities; it just hints darkly that they are passé and need to be replaced. By this strategy it seems to be setting the stage to try and challenge

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[372] *Ibid* 181-182 emphasis added.

[373] The volume contains some more nuanced, clearer and fairer essays on other subjects. These include Natasha Bakht, "Veiled Objections: Facing Public Opposition to the Niqab" ibid. 71 – 108, analysis of debates around wearing of the niquab by Muslim women; and discussing the nature of the test used to analyze claims for religious belief respect, Solange Lefebvre, "Religion in Court, Between an Objective and a Subjective Definition" ibid. 32 – 50. My criticisms are directed at the authors expressly quoted in the main text.

both accommodation and tolerance as *defences* to challenges or rationales for difference. This sets the stage for the erection of a "cohesive" and "homogenous" viewpoint that is, well - - that of Dr. Shipley.

The fact that both tolerance and accommodation are under attack in this recent volume is itself noteworthy since both are used in the law to protect associational difference and, most importantly, religious diversity. But then the volume's sub-title suggests that it is about "*managing* religious diversity." [374] And who manages the managers?

While Shipley recognizes that "...sometimes 'freedom ' will mean the freedom to be orthodox, or to make choices that some or many of us would not make"[375] the overall suggestion that both tolerance and accommodation pose impediments to some greater homogeneity is worrying to say the least and "deep equality" looks very much like a concept to be wary of rather than embraced.

Conclusion: Beyond Convergence and Civic or Legal Totalism

This Chapter has examined various ways in which "convergence" or "civic totalism" arise in relationship to understandings of law and religion. Other issues - -such as the nature of "liberalism"; whether religion should be influencing politics or the nature and scope of law and religion in relation to each other, form the frame within which the current disputes must be viewed.

These approaches are all relevant to how religious associations will be treated by the law and politics. Identifying the general problems of "convergence" and "civic totalism" however, gives us some tools to analyze these moves when they arise in politics, law, religious studies and sociology. Here, an observation by David Novak appropriately sums up what has been discussed:

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[374] The demur comes in the editor's introduction when she states, in a footnote, that "The use of the words "managed" or "governed" are also problematic. Among other things, the implication is that religious diversity requires management or governing in the first place" (fn #1, 11). Having raised the important question the editor says nothing about it. As with many things about this volume, that is unfortunate as it may lead those concerned about "deep equality" to be more suspicious of it than had the concept been explained clearly in relation to the freedom of association and the maintenance of diversity and the meaning of "management" and its limits spelled out. Anthropologist of law, Anne Griffiths "Legal Pluralism" (2012) 45 – 46, expresses concerns about the need to "distinguish rhetoric from reality and ideological assertions from empirical facts." She is particularly concerned that too little attention has been given to the fact that both human rights and culture co-exist in most parts of the world "with a wide variety of legal forms" and the major struggles are "not so much between 'Western Human Rights' and 'Third World cultures' but between different laws and cultures *within* states." This message is completely missed in the recent Canadian volume which throughout raises the clear spectre of convergent fundamentalism and a startling lack of respect for diversity and the freedom to disagree. Canada, while priding itself on its open-ness and respect for pluralism, is showing some recent very worrying examples of illiberalism and anti-religious movements in the higher levels of the legal and scholarly communities and, generally, in the Province of Quebec.

[375] *Ibid,* 216.

> A society dedicated to the protection and enhancements of its participatory cultures surely commands more respect and devotion than does a society established merely to protect and enhance property. *When, however, a civil society no longer respects that communal priority, it inevitably attempts to replace that sacred realm by becoming a sacred realm itself. As such, it attempts to become the highest realm in the lives of its citizens.* In becoming what some have called a "civil religion," civil society usurps the role of historic traditions of faith. It becomes what it was never intended to be, *for the hallmark of a democratic social order is the continuing limitation of its governing range. Without such limitation, any society tends to expand its government indefinitely.* But such limitation cannot come from within; it can only come from what is both outside it and above it. *Today that external and transcendent limitation can be found in the freedom of citizens in a democracy to find their primal identity by being and remaining a part of their traditional communities. This is what has come to be known in democracies as religious liberty.*[376]

To Novak's insight that civil society as civil religion becomes a "sacred realm" itself, we need to add that law becomes the divinity in such a metastasized vision. The antidote to the drug of civic or legal inflation is a re-understanding of what is actually taking place when matters that raise the boundary questions between law, religion and society arise. It is some recent examples of these questions that will be examined in the next Chapter.

[376] David Novak, "Human Dignity and the Social Contract" in Farrow (ed), *Recognizing Religion* (2004) 51-68 at 56-57 emphasis added. On the tensions between liberalism, pluralism, religions and "transformative constitutionalism" see the insightful Chapter "Liberalism, Pluralism and Religion" in Ronald Beiner, *Philosophy in a Time of Lost Spirit* (1997) 44-50.

CHAPTER FIVE:

THE CASE OF RELIGIOUS EMPLOYMENT EXEMPTIONS: IS IT POSSIBLE TO DEVELOP A BETTER TEST IN LIGHT OF THE PRINCIPLES SO FAR DISCUSSED?

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Introduction

As we saw in Chapter 4, convergence and "civic totalism" pose threats to diversity in general and to the freedom of religion in particular. This Chapter will consider one area of religious liberty as a test case to see how an area of contemporary law approaches religion through religious associations. I shall examine

the tests in relation to religious employer exemptions. I will show how, in fact, the religious associational perspective, since we are dealing in some cases with religious people *in association*, is given scant regard in how the current legal tests are framed and applied. Both the test itself - -the so-called "core doctrine" analysis- - and how it is applied, *without due regard to the religious nature of the workplace*, are faulty. To make matters worse, even where it is addressed, the religious perspective is not accorded much weight. Where it is accorded some weight it is often on grounds that indicate that the analysis is superficial and fails to take religious diversity seriously. In the course of this Chapter I shall have occasion to review some recent scholarship that show up these deficiencies and will serve to illustrate some of the weaknesses in the jurisprudence and in legal theory.

This recent scholarship in South Africa gives a good opportunity to see how different the perspectives of several leading scholars are with respect to the issue of religious employment exemptions in the workplace and, *how similar they are in failing to give sufficient respect to religious associations*. They also fail, uniformly, to understand properly both the limitations of the state and the limitations of the law. As a result their frameworks provide a good example as to why, from within contemporary liberal approaches to law, the proper respect that should be shown to religious associations is unlikely to be accorded without a significant rethinking about current methodologies.

First, however, I should like to review, briefly, the constitutional framework within which the assessments have to be made before turning to specific cases themselves. My focus here will be recent decisions in Canada and South Africa and scholarship particularly in relation to the South African decision of *Strydom* and the Canadian decision of *Heintz v Christian Horizons.*[377]

[377] *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (2009)("*Strydom*"). *Heinz v Christian Horizons* (2008, 2009) ("*Christian Horizons*"). I do not need to recite the facts of *Strydom* as these are well set out in Patrick Lenta "Taking Diversity Seriously" (2009) 837-839. Shaun de Freitas "Freedom of Association as a Foundational Right" (2012) also discusses the case in favour of the church's right to make the decision to terminate an employee. I agree with Lenta that the decision was correct on the facts but that the approach of the judge incorrect for reasons I discuss below.

The law recognizes the importance to democracy and the formation of consciences and lives of citizens of the freedoms of conscience and religion[378] and related rights of "association" and "equality". Religious associations are free, generally, to have their own conceptions about internal rules on a host of matters (dietary, liturgical, church dogmatics, etc.) including rules governing the conduct of their members. These rules may touch upon sexual matters including such things as marital status. As we shall see, however, like all freedoms, the rights of religious employers and employees are not unlimited. Employees may be limited by the rules of the religious association and the religious employers are free to govern the workplace according to their religious rules within legal limits that should apply generally.

What factors are considered relevant to this assessment shows us much about how the law treats religion - - how, as we have seen, it "imagines" religious associations in relation to the surrounding communities that make up the total culture. This, in turn, shows us to what extent the law, which is to say lawyers, legal academics and the judiciary and members of tribunals, understands the importance of religious associations. In short, what understandings of the key concepts, "religion", "the public", "the secular" and "civil society" and "diversity" etc. as well as the place of debate about

[378] This formulation "conscience and religion" is how the concept is recognized in the "fundamental Freedoms" provisions that include Section 2(a) of the **Canadian** *Charter of Rights and Freedoms* and Section 2(d) "the freedom of association" and may be viewed alongside Section 15 the "equality rights" section which provides that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." All rights and freedoms in the *Charter* are limited by Section 1 which provides that the rights and freedoms set out "are subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The **South African** formulation, in Sections 9 and 15 are somewhat similar with Section 15 under the rubric of the "freedom of Religion Belief and Opinion" recognizing "the right to freedom of conscience, religion, thought, belief and opinion" and Section 9 under the rubric of "equality" which provides in 9(3) that "the state" may not "unfairly discriminate" on grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth" and in 9(4) no "person" may "unfairly discriminate directly or indirectly" on the same grounds. Section 9(5) provides that "Discrimination on one or more grounds listed (above) is unfair unless it is established that the discrimination is fair." Section 18 guarantees "the freedom of association." The general "Limitation of Rights" provision in the *South African Constitution* is Section 36 which provides that" The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including – a) the nature of the right; b) the importance of the purpose of the limitation; c) the nature and extent of the limitation; d) the relation between the limitation and its purpose; and e) less restrictive means to achieve the purpose." Apart from noting that the restriction of discrimination is limited to what is "unfair" suggesting that there can, in fact, be a category of "fair" discrimination. Nothing in my analysis turns on language differences between the Canadian and South African constitutional frameworks. For more on the provisions and their history and the leading cases involving the freedom of religion in a Canadian context see: Iain T. Benson "The Freedom of Conscience and Religion" (2007) 114-163. It is important to note that in both constitutions religion is an equality right as well as a right separately enumerated. The attempt to oppose "religion" to "equality" is, as a result, suspect though little has been made of this in the literature in this area.

"contestable matters" all play into how the analysis is set up and what decisions are seen as possible in the circumstances. [379]

Religious Employer Exemptions as Test Cases for Religious Liberty Respect

We shall see that the law is divided on the approaches to this topic and so are the commentators. As such the religious employer exemption question provides a useful window through which to view some of the principles and imagined concepts I have identified in prior Chapters.

The Supreme Court of Canada, which is far less willing to make supportive statements about the importance of religion to culture than is the Constitutional Court of South Africa, has nonetheless recognized a relationship between the two as follows:

> freedom of religion is a fundamental right and represents a major triumph of our democratic society. The philosophical and political values underpinning Canadian democracy recognize the need to respect the diverse opinions and beliefs that guide the consciences and give direction to the lives of all members of our society. [380]

As we saw in the last Chapter, all theorists agree on the need for limits. It is appropriate and necessary to insist on there being certain rules of general application, such as respect for the rules of natural justice, if religious organizations are to escape being overruled by the civil authorities. Religious organizations are not free to simply do as they please on anything they might claim. Their claim for special treatment is as *religious* organizations and so it is in relation to religion that the exemptions need to be analyzed. They must conform to a certain minimal content of employment and legal rules.[381] Thus the principles of natural justice must apply; so must the distinction between sexual conduct rules (the proscription applies to both heterosexual and homosexual forms of conduct) and rules based upon what we might wish to refer to as a simple orientation or desire.

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[379] Here we recall the discussion governing the nature and impact of Charles Taylor's "social imaginaries" and Robert Cover's "constitutional narratives" above at the close of Chapter 2.

[380] *Congrégation des témoins de Jéhovah de St. Jérome-Lafontaine v Lafontaine (Village)*, (2004), para 64 per LeBel J. dissenting.

[381] In this thesis I shall not deal with questions of "employment status" *per se* though that has been important in relation to such things as clerical roles etc. (where, certain workers in churches have been found not to be "employees" under the meaning of Employment Standards or other labour law legislative provisions, see *Czarny v Ukrainian Episcopal Corp. of Eastern Canada* (1997)). Nor will I examine whether "conflicts of laws" provisions could apply in the analysis of religious organizations. My example assumes the application of human rights frameworks and therefore raises the scope of the exemption to human rights or other comparable state laws. See: for general overviews in relation to religion and employment: Adhar and Leigh, *Religious Freedom in the Liberal State* (2005) Chap. 10 "Employment", 293 – 324 and Chap. 11 "Religious Group Autonomy", 325 – 359. See also, Alvin Esau "Islands of Exclusivity" (2000) 719 – 827.

What religious rules and covenants attach to is conduct not desire. So a religious organization would not be entitled to discipline an employee for the mere fact that the person has disclosed a particular sexual orientation if that person has not acted on this desire in breach of religious rules. A group that wishes to discipline for extra-marital sexual relations, for example, may do so but that group (say a church) must not discipline for the mere desire that a person may evince for another person's husband or wife (to use a parallel heterosexual example). That sort of restriction would seem to be one that can be generalized without damage to most religious bodies. Beyond these general sorts of rules it would be inappropriate for the law to go as long as the organization satisfies the preliminary hurdle of its being religious and the "integrity standard" that I describe in the next Chapter.

An Introductory Caveat about Dignity and Respect: Racism and Sexual Conduct are Different

Since the discussion and much litigation both in Canada and South Africa involves cases touching upon sexual matters and sexual orientation, I shall necessarily have to deal with this in relation to religious beliefs. Before I begin, however, I'd like to make one thing clear. Though the contrary claim is made frequently,[382] it is my view that to disagree with another about beliefs (such as sexual activity) does not entail a rejection of that other's *dignity*. Just as a person need not accept another's religious beliefs but may still accord the religious person respect, so in a similar fashion, I believe that it is possible to reject a person's view of sexuality or views on sexual orientation without rejecting the person. Thus, the analogy to racism (where a person is rejected completely based upon skin colour or ethnicity) is a false analogy. As such I do not accept a supposed analogy between opposing racism and rejecting certain forms of sexual conduct and/or beliefs in relation to them. Here is my explanation for why this is so.

The Appropriate Analogy to Sexual Orientation is Religion Not Race

It should be no more acceptable to force acceptance of one sort of sexual belief (with certain narrow exceptions such as those relating to age or assault which may legitimately be restricted by criminal law) than it is to force acceptance of the beliefs of one sort of religion. It is not so with other categories of belief where we are able to say, for example, "we as a society will not encourage racism and allow it no state benefits or recognition." Simply put, the claims by some that sexual *conduct* choice criticisms are akin to racism are wrong. When the analogy is correctly drawn we can observe that it is permissible to disagree about which *conduct* (religious or sexual) is better or worse for others whether or not they are

[382] See the articles by Pierre de Vos cited in the last Chapter and David Bilchitz cited later in this Chapter.

homosexual or heterosexual. Properly understood such disagreements about my sexual or religious beliefs are not, as with racism, an attack on my fundamental dignity as a person, they are debates about my sexual choices or beliefs (however influenced) - - and sexual morality is something religious discipline and general ethics seem to be concerned with in all cultures.

Confusion on this point (some of it carefully crafted by the rhetoric of litigation and political debate) has led to the situation where certain claimants say, in effect, "if you disagree with my views on sexual conduct you reject my dignity." Substitute the word "religion" for the words "sexual conduct" in the above sentence and you can see the fallacy which seeks to make rejection of certain *sexual conduct choices* akin to racism (which is a wholesale rejection of persons not based upon conduct and about which no debatable moral choice can be made) and rejection of conduct beliefs (religious or sexual) akin to attacks on dignity. Both of these approaches are in error and their conclusions false. Let me explain further.

I may disagree about whether my choice for certain sexual expressions *in conduct* - - such as having sexual relations with a person to whom I am not married, should be considered moral or amoral. My decision may well be deeply influenced by my *sexual orientation* (whether towards heterosexuality or homosexual conduct - - I have an attraction to *this* sort of person, *a woman or a man,* and my sexual drive or "orientation" is what prompts this desire). She/he consents to my overtures or does not. The matter may be complicated by the fact that either I or she or both of us (or neither of us) are married (marriage being important for my or our religious community in terms of the "morality" of the framework for sexual relations for men and women, married or single, same-sex or otherwise attracted *or not*). *So far, the heterosexual is on exactly the same ground as the homosexual with respect to the question of sexual desire, sexual orientation and the community sexual rules*; the matter is never argued (or analyzed) in this way yet it should be.

But these factors - - my orientation, my desires and the wishes of either of the partners to the sexual act, are irrelevant to the fact that my religious community says, and is entitled to say ,that my sexual choices are, or are not, in breach of the community rules. The parallel to homosexual or lesbian

sexual choices is exact.[383] *There is no reason to treat homosexual sexual orientation differently from heterosexual sexual orientation on the matter of associational rules regarding what those associations consider "moral" or "immoral."* All single heterosexuals who have "fornicated" (those who have sexual relations without being married) just as married heterosexuals who have committed "adultery" find themselves on the outside of very long traditions of judgment and exclusion.[384] There are a wide variety of questions of human life about which religious associations (or other associations but I deal only with religious associations here) may make rules. Drugs and diet (including the permissibility or not of alcohol, tobacco or other substances and whether certain meats are acceptable and how they must be prepared etc.), dress (including head coverings, symbols etc.), appropriate conduct for social life (dancing etc.) as well as financial rules (such as rules relating to tithing for example) are all part and parcel of living in communities that have defining views that they decide are religiously relevant and about which they make rules.

Outsiders to these communities may well consider religious practices bizarre. For example, to cite recent cases tried in the courts or covered in the popular press, how could we explain to outsiders that fishing line has to be set out to extend the concept of "private space" so people can leave their homes on the Sabbath?; or a prayer tent erected for prayers during the 10 days of a certain religious festival for an orthodox community;[385] or that a woman in a certain sort of community must have her head covered or her face or her arms or legs or that a man must cover his legs or arms; or that a person must not eat meat on Friday; or that people should not work on a particular day; or that all property in a

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[383] This analysis, of course, only goes to deal with the analogy made between discrimination on the basis of sexual orientation and race. It could be argued that race is like gender (which is also, generally, not chosen - - leaving aside the issue of "sex changes" etc.) and that, therefore, religiously based gendered distinctions are like racism. If this were so then restriction of clerical roles only to males would analogize more closely to racist distinctions. So far I have not seen this argument levelled against any particular religion though Janet Gross Stein of the University of Toronto has written that "Charter values" of equality and non-discrimination should give a right to have relief from the courts for sex based exclusion from full religious participation. I have responded to her arguments elsewhere and will not do so here as my focus is the clearer case of sexual orientation/conduct disagreements within religious organizations. See: Iain Benson "Talking Pluralism and Liberalism Seriously" (2010). Debates about the male or female in relation to religious leadership and doctrine may be a special case requiring internal debate.

[384] And "fornicators" and "adulterers" were the subject of serious punishments that included, not only shunning and exclusion but in some places at certain times physical punishments, humiliation and even death. So on the levels of exclusion, heterosexuals, too, have, and continue to, experience rejection. Again, the Supreme Court of Canada in *Sask v Whatcott* (2013) avoids all this nuanced analysis. One thinks here of the woman caught in the "very act" of adultery who was brought to Jesus and how he indicated both that the "Law of Moses" allowed her to be stoned but that the first stone should be thrown by the one "without sin"; the stones went unthrown and they went away, "starting with the elders" (John 7:53-8:11 NRSV).

[385] See *Rosenburg v Outremont* [2001] Q.J. No. 2858 and Brad Miller, "Religious Intolerance at City Hall" (September 6, 2001) *Lex View* No. 47 http://www.cardus.ca/lexview/article/2309/ and *Syndicat Northcrest v Amselem* [2004] 2 SCR 551 (Can.) and, generally, Shauna Van Praagh "View from the Succah" in Richard Moon, (ed) *Law and Religious Pluralism* (2008) 21-40.

community must be held in common[386]; or that a boy wants to carry a ceremonial dagger sewn inside his school clothes[387]; or that a girl wants to wear a nose-stud as a sign of being a woman[388] etc., but all these are *religious or cultural/religious rules* - - they are not meant to "make sense" outside the community that honours them and yet they must be accommodated and they cover virtually every aspect of life in community.

If this view, above, is rejected, then there is a difficult set of questions that need facing. If I suggest that all sexual rules and gender distinctions should be abolished due to some state norm such as "the equivalency of same-sex and heterosexual conduct" then why wouldn't *every* religious rule of organizations also be subjected to such a "norm" if a person within a religious community is "discriminated against" for not following the rule? If all distinctions are discriminations then there is no good reason why a religious sexual differentiation rule is any different from another exclusionary category based upon religious beliefs.

It is possible to respect a person while disagreeing with his or her choices on any of these matters. It is the same with respect to sexual or religious conduct choices. In fact, with respect to sexual choices, most people, no matter what community they are in, have some limits *somewhere* as to what conduct they think is appropriate and acceptable and what is wrong or, to use older language, "immoral." Some limits may be shared by the wider culture, some will not be. Some attitudes change over time - - particularly in the wider society, some do not.[389] For reasons set out elsewhere the linkage of sexual identity politics with the moral claims of some religions has created a conflict that brings identities into collision over matters that are not empirically provable and yet which have significant implications for the nature of the sub-cultures and therefore civil society to which we belong.[390]

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[386] *Lakeside Colony of Hutterian Brethern v Hofer* [1989] (Can.).

[387] *Multani v Commission scolaire Marguerite –Bourgeoys* [2006] (Can.).

[388] *KwaZulu-Natal MEC for Education v Pillay* (2008) (CC).

[389] One thinks here of the fact that divorce changed from "fault" to "no-fault" or that homosexual acts between consenting adults (to name two areas) have changed over time for the wider culture. They may still constitute, in both cases, "fault" in sub-cultures such as religions which may choose to continue to have rules in relation to them – for example, a divorced Catholic subsequently re-married in a civil ceremony may not be able to teach in a Catholic school (*Caldwell v Stuart* (1984) or a married man or woman may not be allowed to become a priest in some religious traditions despite the fact that in the wider society other people may well not object to these things and think the religious rules "outdated" "prejudicial" "sexist" or simply strange. The moral relevance, or irrelevance, of marriage is another area where religious views may differ.

[390] See elsewhere in this chapter my discussion about the important insights of philosopher Roger Scruton in relation to "sexuality" and "sexual desire." See: Roger Scruton *Sexual Desire* (1986) and Charles Taylor, *A Secular Age* (2007) 499 ff; on the effects of "the sexual revolution" and some of its antecedents in relation to religion and culture.

Even if evidence were to be adduced that showed a genetic pre-disposition towards certain forms of sexual conduct - -imagine that all sexual desire is genetically "programmed" - - with regard to the respect for the rules made by religions would we say that no particularities of group belief were then to be tolerated? Do we assume that a genetic pre-disposition or "orientation" towards a certain kind of sexual act has become an entitlement that must be accepted by those who consider it a "sin" not because of that pre-disposition but to the acting upon it? Why should *genetic predisposition* oust religious associational dogma? If *heterosexual* attraction leading to heterosexual marriage or breach of the rules owing to desire is genetically based then the argument of sexual orientation activists would apply here as well. Despite this nobody is suggesting seriously that all rules relating to religious offices (to take one example) be over-turned by non-discrimination laws on this genetic basis yet the logic of the challenges are the same. What if genetics eventually shows a predictable predisposition to theft?

If heterosexual and homosexual or lesbian *conduct* (free will still having some role to play in relation to choices) is genetically influenced can we imagine law being *that* prescriptive over the diversity of associational beliefs so that it would interfere with religions that still think the conduct religiously unacceptable whatever its cause (nature or nurture)? Some might answer this question: "yes, why not?" but if this is so with respect to *sexual* moral rules in relation to same-sex conduct and religion, why not *all religious moral rules* in relation to sex or gender? To an "outsider" *all the rules*, gender, dietary, monetary and so on may seem strange and discrimination in relation to any of them should have a legal remedy according to the logic of this approach. I do not think that is correct, however, because we do value diversity and do not wish law to apply that uniformly across all associations. The existence of religious or other associational exemptions demonstrates that we believe in diversity about kinds of equality and kinds of "non-discrimination". It is important to think about why this is the case. Many commentators do not attend sufficiently, or at all, to *why we grant associations the right to be exempt from laws of general application in relation to discrimination and equality.*

Why Do We Allow Religious Exemptions in the First Place?

The reason we allow religious exemptions for private associations is that we recognize that there needs to be room for disagreement and alternative opinions about a variety of morally debatable matters. Were it otherwise then, as Pierre de Vos argued above, any differences from the public norm should be

"attacked". [391] In this way, slowly but surely the vague and general norms (such as "equality" or "non-discrimination") could then be used to erase distinctions between religious communities (or others) and the surrounding society. That reason alone suggests that the grounds for applying general norms that apply to "contestable" matters need to be viewed *in terms of associations*. As this is the subject matter of the next Chapter I shall not dwell further on it here.

There is another way of viewing sexual (or other) morality that does not look at genetics at all but at the moral choices all human beings have to make in relation to sexual (or other) conduct. The philosophical and theological depths of the conversations that may be had around the topic of sexual conduct have long histories and are complicated. They turn on deeper notions than simply "desire" or "orientation" (which, as we've seen apply to all people) and, in fact, a proper examination of desire invites us to go deeper in relation to the questions raised by human sexuality, desire, morality and purpose.

A key question is to ask: where is the proper place (or what are the proper places) for these evaluations? Not everyone will start or end their analysis of sexual acceptability or "morality" in the same place. As we saw in the Introduction, law is not the place to proffer definitive answers on matters that are "contestable": where then? The answer is, *civil society*, and, because of that, our associations - - pre-eminent amongst which are *religious* groupings. These diverse groups should be allowed to choose, accept, debate, develop and teach their own moral visions. This is not just for themselves but because it is good for society (the wider world around them) as well. We all benefit from moral debates and difference.

The Moral Philosophy of Desire

In a comprehensive and tightly argued book, philosopher Roger Scruton has attempted just such a philosophical survey of what his sub-title describes as "A Moral Philosophy of the Erotic." He notes that:

[391] David Bilchitz in one of his articles in the recent "Special Issue" of the *South African Journal of Human Rights*, "Why Courts Should Not Sanction Unfair Discrimination in the Private Sphere" (2012), suggests that it is a legitimate part of the courts' role to "…coerce change in the hearts and minds of individuals in religious associations." He expresses a concern that the courts might not be "mindful of their limits" in this regard and that they could "score an own goal through a serious backlash" if they go too far." (314) It would be wiser and better had he focused where legal analysis should focus, *on the justice of the claim* not its risk of "backlash". As I discuss at note 422, below, Dean J.A. Corry has made the important point that injustice is what leads to backlashes or ongoing needs to expand coercion - - not fears of backlash. This kind of failure to address the essential justice of the claims *in terms of diversity and difference* is one of the more worrying aspects of much of the scholarship around this issue. The Supreme Court of Canada's recent decision in *Sask. v Whatcott* (2013) further deepens concerns about shallow analysis and capture by arguments around "dignity" that fail, utterly, to deal with deeper cultural questions. Political correctness seems to have the law by the neck on certain issues - - sexual identity is one of them.

> To begin a philosophical investigation into sexual desire is not easy. Not only is the subject encumbered by a thousand conflicting prejudices; it is also uncertain which method would enable us to broach it. Ought we to be engaged in 'conceptual analysis', sorting out the intricate connections of usage, and the deep connections of meaning, which link such term as 'desire', 'arousal', 'love', 'pleasure'? Or should we be engaged in an exercise of 'phenomenology', trying to give a specification of 'what it is like' that will fit the sexual experiences of those who have them? Or again, should we be attempting to locate and to solve the specific puzzles, in ethics and the philosophy of mind, to which reflection on our sexual experience gives rise? ….I believe it is necessary to do all of those things, and indeed that they are all part of a single philosophical enterprise.[392]

A few pages later, Scruton explains how sexual desire requires an investigation of the nature of the human person and that conflicting choices immediately exist as to how the person is "described" in relation to the ontology of the erotic:

> The crucial concept for any philosophical attempt to provide the basis for human understanding is the concept of the person. It is a well-known thesis of philosophy – expressed in countless idioms and in countless tones of voice – that *human beings may be described in two contrasting (and, for some, conflicting) ways: as organisms obedient to the laws of nature, and as persons, sometimes obedient, sometimes disobedient, to the moral law.* Persons are moral agents; their actions have not only causes, but also reasons. They make decisions for the future, and so have intentions in addition to desires. They do not allow themselves always to be swept along by their impulses, but occasionally resist and subdue them. In everything the moral agent is both active and passive, and stands as a kind of legislator among his own emotions….[393]

Scruton later on in his detailed work, moves on to examine "The Politics of Sex" and in so doing, casts some useful light on both a conservative critique of "liberalism" and the relationship between our conceptions of the sacral, the sexual and the sorts of civil associations within which we choose to live:

> In emphasising the role of the sacred in the ideal polis, I have made a large institutional demand. In particular, *I have implied that sexual integrity will flourish in a society in which religious institutions and customs also flourish and retain their authority. And my discussion has implied much else about the character of civil society in the virtuous polis….The state protects and ratifies the institutions of civil society, by endowing them with legal and moral personality. By casting over all social arrangements the protective mantle of sovereignty and law, it removes the arbitrariness from custom and agreement.* Associations, such as the family, the club, the firm, the government and the state itself, cease to be mere contracts between private people for the purposes of their own and become instead recognisable entities – artificial persons, with rights duties and liabilities, which present an intelligible face to the world and can be understood in personal terms. By associating himself with such collectives the individual expands his own capacity for action, and acquires also an expanded image of himself, as a bearer of functions and roles.[394]

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[392] Roger Scruton, *Sexual Desire: A Moral Philosophy of the Erotic* (1986) 3.

[393] *Ibid*. 10. Of course, another less elevated manner of viewing the person is simply apart from any assessment of morality - - that however is illusory and trivial; what is unanalyzed in an "avoidance" account does not go away or cease to exist simply because it is not addressed.

[394] *Ibid*. 355-356, emphasis added.

It would be idle to read the above passages and not ask two questions: 1) do sexual integrity and sexual morality matter to a society?; and, 2) why do some approaches try to avoid these first two questions about the morality of sexuality? Put differently, what kinds of civil associations discuss the nature of the person and the relationship between the sacral, the sexual and the moral most rigorously and with most impact to the society around them? The answer can *only* be "religious institutions and associations." Perhaps this is part of the deeper logic of attacks on religion by certain sexual activists? The state has a formal role of regulation but it must not interfere with what it has no competence over -- namely the "moral content" of these associations - - chief amongst them, religions. Scruton continues:

> No civil society can persist in stable form, unless these collective entities become institutions, with personality, agency and the capacity to survive their present membership, and to acquire a history and an identity of their own. One of the principal functions of the state is to provide the legal and political framework within which that transaction can occur. And in doing so, the state is inevitably selective, providing protection for some institutions (for example the family), and removing it from others (for example, from the private army)….*Liberalism is the natural philosophy of the 'desacralized' world.* (…) *People are expanded and set free by associations, precisely because associations transcend their capacities 'to agree on terms'.* And the two most important of all human associations – the family which nurtures us, and the state which governs us from birth to death- are not, and could not be, founded in a social contract.
>
> One should not be surprised, therefore, if at every important juncture in civil association – every point at which a decision of *membership* has to be made – we find, not just associations, but also institutions. *People worship and pray together, but through the institution of the church or mosque;* they compete and play, but through clubs and local societies; they learn and teach, but through educational institutions which exert the widest possible influence over those who attend them. [395]

These long quotations are necessary because here one sees into a world of analysis completely missing from what shall be seen in the stripped down "rights" arguments that dominate most cultural discussions and the work of the scholars whose arguments I turn next to examine in this Chapter. Scruton examines with philosophical depth one approach to "the erotic" and then places voluntary associations and civil society itself around such conceptions so that the moral approach to sexuality is itself constitutive, or partly constitutive, of the kind of civil society that will result and how people *are free to choose different memberships around different visions*. This is relevant for the law but that

[395] Ibid. emphasis added. The Supreme Court of Canada in its recent decision in *Saskatchewan v Whatcott* (2013), dealing with hate-speech laws, delivered after a year and a half of waiting, just as this thesis was being finalized, failed to take seriously the question of the relevance to citizen comment about "gay sex" (*conduct)* in relation to *orientation* or desire. The court so far is avoiding this difficult ground but, *as it is key to understanding the morally different viewpoints* between and within communities, such a stance is not sustainable in the long run. I declare an interest as I was co-counsel for the respondent Whatcott before the Supreme Court of Canada. In its judgment the Court avoided the deeper questions before them, questions that, sooner or later cannot properly be elided. See: on the tendency of contemporary courts to "elide" important questions in relation to (a related moral debate) same-sex marriage; Monte Stewart, articles on "Eliding" (2006) and (2007).

relevance needs to be established and that I shall attempt to do in what follows (if it is not already apparent from what has gone before).

This approach, seeing community as a *moral project* and not just what falls out during the day-to-day functioning of otherwise unrelated individuals, is, at the widest point, congruent with various religious approaches to sexuality. It is not consistent with an amoral or entirely individualistic conception of sexuality. It is a world removed from "I am entitled to do it because I want to and I want to because that is what I desire and I desire it because that is how I am made." The two kinds of reasoning about sexuality are utterly different not just slightly different and they undergird the debates that only on the surface appear to be about "equality" and "non-discrimination" and "dignity." All these are much deeper *moral* questions.

The point here is not to attempt to settle the dispute between these protagonists and very different moral (or amoral) visions but, rather, and crucially, *to note that the two world views are irreconcilable.* They are, in the language of the discussion, incommensurable. As such they can be lived individually or relationally or communally but they cannot be "solved" and one side ought not to (though they do) stigmatize the other as, for example, homophobic. The question is: can there be room for them both to co-exist? That depends entirely upon the nature of the claims of each side and the vision of diversity operative in a society. As we have seen, the more realistic threat to associational freedom today comes not from religion itself (certainly in the West) but from those who now challenge its paradigms. It is not religion that seeks to become "established" (to use the American conception) but certain forms of activist beliefs - - what Graham Good calls "the new sectarians" or Patrick Lenta "egalitarian absolutists." Of course, John Gray would call these sorts of positions, more simply, illiberal. But it is not religions (or at least mainstream ones) that seek to "attack" gays and lesbians the way, for example, Pierre de Vos wishes to "attack" the religious viewpoints with which he does not agree; David Bilchitz wishes to use law to "coerce change in hearts and minds."[396] The terms are telling: neither *attack* nor *coercion* are liberal virtues though both seem to be part of the arsenal of civic totalists.

We should pay careful attention to Scruton's linkage of the analysis of the nature of the person and the importance of civil society to that person linked with the importance of the idea of the sacred to the society within which laws are created and recognized. Some of this linkage is in relation to

[396] de Vos, see Chapter 4 above; Bilchitz (2012) "Why Courts Should Not Sanction" 314. On the role that socialization and institutionalization play in relation to sexuality see: Berger and Luckman, *The Social Construction of Reality* (1967) 182 – 183: "…socialization inevitably involves…biological…frustration…[I]n the dialectic between nature and the socially constructed world the human organism itself is transformed. In this same dialectic man produces reality and thereby produces himself."

convictions about the nature of divine law itself. This suggests that the removal of organized sacred space within a certain kind of liberalism would have serious consequences upon how we view matters central to identity such as; sexuality and religion, the sacred, traditions, the person and civil society itself: if, that is, we care about deeper thought in relation to the philosophy of sex and community.

Some Current Approaches of Law to Deeper Moral and Philosophical Questions of the Day: Are they Respectful?

This brings us to a core question which suggests that the approach to religious associations seen through the eyes of judges, without adjustment for the nature of religions and the role they play culturally, may no longer be sustainable. If it can be sustained, in the sense that it can continue, then it is certainly unwise.

There is no discussion about what might be the limits (moral or otherwise) to their *own* conceptions of sexuality or what count as acceptable and unacceptable "desires" and actions. Some activists, as we have seen, suggest that any opposition to their claims amount to "homophobia" or "heterosexism" which is the sexual equivalent to racism in their schemas. Even when their arguments are criticized as not comporting with a richer conception of associational diversity and liberalism (as by Stu Woolman in one version of his arguments), the supposed defenders of diversity feel the need to use terms such as "homophobia" or "deplorable" to indicate that the religious viewpoints are ones with which they strongly disagree. "Live and let live" seems a very long way away from the approach taken by these "friends" of diversity who, in reality, do not respect other viewpoints than their own. [397]

There is no recognition that it might be perfectly acceptable to reject as morally valid a multitude of sexual practices - - heterosexual as well as otherwise. Woolman and Lenta, apparently

[397] Stu Woolman (2009) "On the Fragility of Associational Life" "…as *morally repugnant* as I think their [the church's] beliefs and practices to be" (283, 293)) and "the beliefs and practices of [the church] that are *anathema* to many of us" (305, emphasis added); Patrick Lenta "Taking Diversity Seriously" (2009) at 831 the religious positions may be allowed under the Constitution but "...*on their own deplorable terms*" (emphasis added). Why "morally repugnant" and "deplorable"? Why not just different? These scholars should imagine the criticism turned around and imagine how they would respond to it. Bilchitz ""Should Religious Associations be Allowed to Discriminate" takes the analysis to an even loftier height when he claims that "….allowing discrimination to continue unabated in religious communities may ultimately undermine efforts to create a wider political community founded upon equality and that values diversity" (240) and "...if we wish to move away from this ugly past, *religious associations cannot simply be left alone to discriminate at will*" (245, emphasis added). His article also speaks of: "…religious associations [being] *required to embody an ethos* that respects the equal dignity of all citizens" (248, emphasis added). Finally, his article refers to "private religious domains" that can be "at odds with *the* political morality of the state" (219, emphasis added). Here the state is deemed to have *a singular political morality on matters of sexual conduct* that, he argues, should be normative for every citizen and their private associations. Bilchitz, and others, call their positions "liberal" when they are anything but; these are, in fact, textbook examples of what Galston describes as "civic totalism" see Chapter 4 above.

supporting diversity, seem incapable of doing so without feeling it necessary to indicate their strong disagreement with the viewpoints of "the other." The fact that there can be a moral basis for human sexuality different from their "liberal" accounts, is simply avoided in any serious way and its relevance to associations ignored or glossed over. No attempt is made to examine the term "homophobia" to see what it might mean, what precise conducts it excludes and criticizes and whether its application might be, on the facts, overbroad and culturally corrosive or problematical.[398]

Why Law Needs to Affirm the Scope for Disagreement and Diversity

A free society permits a wide variety of choices about some sorts of beliefs but not about others. Religion, gender roles and sexual conduct are matters about which people are free to offer, within certain broad limits, publicly contestable and publically financially assisted viewpoints – racism is not so treated. Groups dedicated to racialist presuppositions may exist, but their claim to any state support, such as funding or tax benefits, can be denied legitimately as against a shared public interest. But we are talking racialist here not groups that disagree about sexual conduct however much that is dressed up to appear as an "equality" attack on a "vulnerable minority" akin to attacks on race.

The rhetoric of equality, victimhood and minority status have laid the ground work for the totalist use of law and the theories of law at the moment seem readily adaptable to this use. That doesn't, however, mean that laws should stay in this strange configuration where the confusion of meanings is used to mask the zealotry of those who know best what others should and, in fact, must think and will coerce and attack them to change by force of law's violence.

Patrick Lenta deplores the religious beliefs that animated the church in *Strydom*. He believes that Basson J. came to the correct decision because on the facts of the case the organist was not informed of the rule against homosexual activity before working at the Church. I agree with Lenta on

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[398] The American Press has recently revised its influential Style Book ("the journalist's bible") to delete the term "homophobia." The reason for this, according to AP Deputy Standards editor Dave Minthorn is that the term is "…off the mark. It's ascribing a mental disability to someone, and suggests a knowledge that we don't have. It seems inaccurate…We want to be precise and accurate and neutral in our phrasing." http://www.queerty.com/ap-drops-homophobia-islamaphobia-from-style-book-20121127/#ixzz2K2OgigbU This obvious point about the term's vagueness (lumping together nuanced rejection of certain sexual practices with "hatred of a person") has proved useful to blur the very distinctions that are essential if one is to distinguish between situations where conduct in breach of a religious rule (to take one example) is relevant or not. Ascribing a pejorative term to *any* distinctions made that involve sexuality is part of the strategy of de-legitimization of those very distinctions. See, also, William Galston, *The Practice of Liberal Pluralism* (2005) 4, who reminds liberals (and others) that "[t]olerance rightly understood means the principled refusal to use coercive state power to impose one's views on others, and therefore a commitment to moral competition through recruitment and persuasion alone." "Disrespect", for Galston, on the other hand, is '…the use of coercive state power to silence and repress dissenters" (5). We need to pay attention to those who support and advocate the "coercion" of others with whom they disagree.

this point. I strongly dissent, however, from his rather cavalier assessment that what should be done by way of remedy is to remove the Church's tax status. This can in many cases lead to the destruction of charitable projects such as most religions are. [399]

Though line-drawing will from time to time be necessary at least with respect to advocacy of different kinds of marriage and therefore different views of sexuality, diversity has generally been tolerated though as the ever lengthening litigations in this area show, the ability for divergent viewpoints to co-exist is increasingly in doubt.

Is It Fair to Treat Religion Solely in Terms of Past Misdeeds?

David Bilchitz has argued that religions should not be accorded as much respect as the quest for sexual orientation advancement owing to religions' historic track record. Arguing that present rights ought to be down-graded because of the errors of some within a category in the past is a novel approach to constitutional interpretation. It is also, with respect, wrong in principle and in reason. Bilchitz admits that some religious people were noble in the struggle. This, however, does not, according to him, shake the suspicion that he suggests should attach to religion since it has harbored bad actors and actions in the past and continues to in the present because many people do not share his views on sexual conduct.

How would such a line of argument respond to a charge that, for example, sexual orientation rights or claims should receive less weight because some gays have been pedophiles and pedophilia is abhorrent? There are those, too many, who argue like this and attempt to smear all homosexuals with just such allegations. Bilchitz uses the Catholic Church's struggles with abuse cases as an example of

[399] See Iain Benson (1998) "An Uncharitable Threat" detailing how removal of tax status can, in fact, lead to the practical eradication of a religious organization. Woolman's suggestion of financial damages for compensation in (and only in) cases of improper warning or discriminatory application of the employment rule, is a better solution that gets the message across to the organization, protects the principle of fair notice and, at the same time, provides compensation to the employee negatively affected. Lenta's suggestion "Taking Diversity Seriously" (2009) 858 that removal of tax exemption (or similar penalty) is appropriate in the circumstances of *Strydom* or similar cases, is draconian and would destroy the religious associational project for everyone in any case where foundation grants (usually limited to charities) are essential. A classic case of "cutting off your nose to spite your face." Woolman (2009) is correct to identify this problem, the removal of tax exemptions or charitable status, as casting "…the same black magic" on associations as direct attacks would (304). He is also correct to note that Lenta really only "flirts with taking association seriously" (297) as Lenta (2012) "The Right of Religious Associations" himself is correct to identify David Bilchitz as an "equal opportunity absolutist" whose focus on "equality" "blinds him" to the equal importance of religious and associational liberty" (256-257). None of these scholars, however, appears to understand, and they certainly do not articulate, why religious associational diversity matters to society or why the claims of sexual acceptance Bilchitz is seeking simply hides behind the rhetoric of equality and non-discrimination. The distinctions being made by the church in *Strydom* and the employer in *Christian Horizons* (the Canadian case) are not, properly understood, "*unfair* discriminations" at all within the meaning of the law. They are *distinctions*, but allowable ones, given the religious world-views of the employers and the voluntary nature of the employment relationships. I point out, again, that I agree with the result in *Strydom* because of the failure to give the employee proper advance notice of the "rules" - - see the "integrity hurdle" below. The church in *Strydom* would not satisfy the first hurdle - - that of "integrity" of rule and application.

why religion should not be respected - - well, what of the undeniable abuses both within the Catholic Church and outside it, by homosexual men who happen to prefer sexual acts with children as their sexual orientation? The logic of his argument (since many religions rejected apartheid and people died fighting it who did so from their religious beliefs) is the same sort of argument and equally offensive. *Of course* not all gays are pedophiles and of course all religious people did not and do not support apartheid or "gay bashing" but the tenor of arguments of this sort, or those that blur dangerously close to categorical *ad hominem* attacks, are not useful and cause, in fact, a great deal of harm. A sense of security in ones' own community is important to well-being and peace of mind: respect is not necessarily agreement.

If the 20th century showed anything, it was that the capacity to treat other human beings abominably and to commit great crimes and even genocide against them, often in the name of some or other utopian project, is not a property restricted to *religious* communities – as the killing fields of the atheistic Khmer Rouge, the millions liquidated in Gulags or Chinese marches or planned famines, and many other horrors done, and still done around the world, grimly attest.

Against the killing machines Isaiah Berlin, in commenting on "The Decline of Utopian Ideas in the West" offers another kind of "machine", a liberal sermon that he notes is not, "…*prima facie*, a wildly exciting programme" and consists of "recommending machinery":

> … designed to prevent people from doing each other too much harm, giving each human group sufficient room to realise its own idiosyncratic, unique, particular ends without too much interference with the ends of others, [this] is not a passionate battle-cry to inspire men to sacrifice and martyrdom and heroic feats. Yet if it were adopted, it might prevent mutual destruction, and, in the end preserve the world. Immanuel Kant, a man very remote from irrationalism, once observed that 'Out of the crooked timber of humanity no straight thing was ever made.' And for that reason no perfect solution is, not merely in practice, but in principle, possible in human affairs, and any determined attempt to produce it is likely to lead to suffering, disillusionment and failure.[400]

Keeping constantly before ones' eyes the vision of humanity as "crooked timber" seems to be a faculty greatly assisted by religious insights about human imperfectability and adopting a machinery of respectful disagreement seems far superior to developing a legal juggernaut. The concept of "original sin", however much that sort of theological concept seems foreign to our debates about social ordering, seems to have been a key part of democratic theory in the West and, as Berlin argues, remains relevant to our sense of how we engage "the other" and ourselves. The essence of disrespect is judgmentalism.

[400] Isaiah Berlin, *The Crooked Timber of Humanity* (1990) 47 -48.

As the Constitutional Court recognized in the "pillar" passage quoted above, if religions can play an important role in helping form the citizens' insights about "right and wrong" and law is undoubtedly concerned with *that*, then how law protects or discourages religions is a matter of great significance and sexual debates ought not to be dressed up as debates over equality "dignity" and discrimination - - after all, those on all sides of the issue have the same rights to "equality" and to "dignity" themselves. This is the central point missed by Lenta, Woolman and Bilchitz and the many on and off the bench who argue like them. *Genuine* discrimination against citizens (whatever their sexual or religious orientations) or their groups requires legal remedies but in order to be *just claims* proper attention to context is crucial.

There Should Not Be Only One Public View of Legally Contestable Matters: Equality Must Be Understood Associationally

The state (as law and politics) exists, at least in part, to maximize diverse ways of living (within certain limits) rather than to enforce conformity. Mediating institutions such as the family, community associations of all sorts, and religions as we have seen, must be allowed to exist in a wide variety of forms. The idea of a singular "state" with "a" set of views, on legally contestable matters, that must govern on all topics is an abstraction and an inaccurate one. Both the temptation to ever extend the state for this and that purpose, as with the temptation to reduce the diversity of beliefs that must exist *within the state*, must be carefully guarded against.

It is important to recognize that associational diversity (and public diversity as well) requires various viewpoints to co-exist. This is, in fact, the law in both Canada and South Africa and is made clear with respect to "equality" in the following passage from Justice Albie Sachs formerly of the Constitutional Court of South Africa:

> [E]quality should not be confused with uniformity; in fact, uniformity can be the enemy of equality. Equality means equal concern and respect across difference. *It does not presuppose the elimination or suppression of difference.* Respect for human rights requires the affirmation of self, not the denial of self. *Equality therefore does not imply a levelling or homogenisation of behaviour but an acknowledgment and acceptance of difference*. [401]

Canadian and South African jurisprudence tends to favour both a religiously *inclusivist* and plural conception of the public sphere along the lines that we saw various authors urging in the last Chapter. Thus, the Constitutional Court in the *Fourie* decision wrote that:

[401] *National Coalition for Gay and Lesbian Equality v Minister of Justice* (1998) 1517, 1574–1575 (Sachs J). (emphasis added).

> [T]here are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. *Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the 'right to be different'.* In each case, space has been found for members of communities to depart from a majoritarian norm.[402]

As John Kekes has noted, in a pluralistic society the obligations of the state are to guarantee those goods which enable citizens to pursue good lives, *in a pluralistic society*. The state can and should take an active role "much more extensive than liberals would find acceptable" [403] but it would not, as Bilchitz believes it should, give one substantive value "overriding status." Thus, the equality claims of sexual orientation claimants and their concerns about non-discrimination do not constitute, as Bilchitz claims, a "presumption in favour of equality". [404] The reason for such a rejection is the protection of "the plurality of values taken as a whole" and the fact that *religion is also an equality right* so should not be trumped in the manner proposed. [405]

Divided Jurisprudence: How Should the Courts Approach Religious Employment Exemption?

There is a generalized failure in law as it is currently being applied to see the sort of religious environment as relevant to the assessment of the rights, religious and associational, within them. At the moment there are two strands of interpretation:

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[402] *Minister of Home Affairs v Fourie* at paras 60-61 per Sachs J (emphasis added). This decision and the question of associational rights in general have been addressed previously.

[403] John Kekes, *The Morality of Pluralism* (1993) 214-216.

[404] David Bilchitz "Should Religious Associations Be Allowed to Discriminate?" (2011) 219 at 244 "…[b]oth the historical context and normative arguments strongly support a presumption in favour of equality and against allowing unfair discrimination in private associations of all kinds….No exemptions, in general, should be provided to religious associations from its provisions." Note how the term "equality" which includes religion, is changed on this reading to provide a trump to one category *within* equality (sexual orientation) and note, too, how the term "unfair" is assumed without argument to apply to differences about sexual morality (though as already pointed out sexual *morality* is never mentioned). In his admirably comprehensive rejoinder, Patrick Lenta (2012) "The Right of Religious Associations to Discriminate" (231) notes that Bilchitz reflects a form of "rationalist liberalism", albeit an extreme form of "equal opportunity absolutism" (256) which "blinds him to the equal importance of religious and associational liberty" (257). Bilchitz only sees the associational rights of "minorities" within religious associations. This is most interesting because robust recognition of the rights of minorities *inside* associations would tend to dissolve associations from within if successfully asserted against majority viewpoints. Bilchitz, not perhaps surprisingly, seems in support of such dissolution because he sees only the aspects that challenge or attack provide. The approach for which I argue would sustain associations over time, not dissolve them; but then, I support the approach of those whose goals include the formation of strong arguments in favour of diversity, pluralism and respect, not domination for one viewpoint or the coercion of those with whom I happen to disagree (see, notes # 391 and 397, above). Along with William Galston, *Public Matters* (2005) 173, I consider this respect a key component of "political decency" and those who lack it have yet to learn appropriate civic virtues, manners and respect.

[405] John Kekes, ibid. 216.

1. **Job-parsing or "doctrinal core"**: Here an analysis is made of the kind of job duties performed by an employee to determine whether these are close to the "doctrinal core" of the work place in question, and whether the employee is a "key" member of the religious project so defined. In this approach typically what occurs is an assessment of whether the position of the employee in question is one that involves a pastoral role or proselytising or teaching. If these are involved, then the protection of religious exemption is likely to be accorded; if not, then it is not accorded;

2. **Ethos or "organic" approach:** Here the evaluation is not based on the job duties *per se*, (the "job parsing" or "doctrinal core" approach as above), but on the nature of the organization or the workplace itself. In this approach, which I have termed a "permeated ethos" or has been called elsewhere an "organic" approach, what one examines is whether or not the organization is one in which religious practice permeates the organization. If there is permeation then it is unnecessary to examine specific job duties.

3. It is important to note that in either case, a failure to point out the requirement to the employee ahead of time can be fatal to the successful claim for exemption by the religious employer. Thus, in *Parks v Christian Horizons* [406] a "marital status" dismissal (due to an extra-marital relationship) was not upheld by a Human Rights Tribunal on the grounds that the employment contract did not include a provision imposing an "Evangelical life-style requirement." The same employer, however, failed about a decade later in another case despite having put in just such a requirement - - on the ground this time that the employee in question was not involved in teaching or proselytizing - - her job simply involving being a carer in a group home.[407]

An example of the first approach, *job-parsing*, is the early decision of Professor W.S. Tarnopolsky (who later became a judge and was a noted authority on human rights) sitting as a Board of Inquiry under the *Ontario Human Rights Code* in the case of *Bonnie Gore* v *The Ottawa Roman Catholic Separate School Board* (unreported Dec. 7, 1971). In that case, the Board refused to hire a non-Catholic

[406] (1991) 16 CHRR D/40.

[407] *Heintz v Christian Horizons* (2008) (Ont. H.R. Trib.); overturned in part (2010) (Ont. Div Ct.). I declare an interest as I was counsel for the Assembly of Catholic Bishops of Ontario who intervened on the partly successful appeal.

as a secretary for clerical duties in school administration. Tarnopolsky, later quoted in the important education decision of *Caldwell,* with which it may be usefully contrasted, stated, at p. 619, that:

> I think it would be reasonable for the Separate School Board to refuse to hire a secretary who is hostile to the Catholic faith or to the aims of the Separate School system, regardless of her religious upbringing, but I cannot see how a secretary can be expected to provide an example for the children. This is surely the responsibility of the teachers, and the religious aspect is the responsibility of the ecclesiastics as well as most of the teachers. The secretary performs secretarial and clerical functions (and only for half a day), under directions from, and subject to supervision by, the Principal. Requiring that she be a Roman Catholic is not, in my opinion, a "reasonable occupational qualification" within the meaning of section 4(4) (b) of the *Ontario Human Rights Code* [now s. 24 and comparable to Section 13 of the *B.C. Code*].

In *Gore*, Tarnopolsky, analyzed the reasons for the requirement that a secretary be Catholic and concluded that two areas of job functions, namely answering inquiries from parents, and the compilation of records, questionnaires and surveys did not require a Catholic secretary. The third reason given was "maintaining a Catholic atmosphere". Tarnopolsky had no difficulty concluding that the requirement was imposed in good faith, thus meeting the subjective aspect of the test under section 24 but he rejected this reason. His reasons on the point are very thin. He failed to accord any real weight to the claim that from the religious point of view the project of religious education *overall* is what is at issue and all the workers share the religious commitment (as we see in *Schroen*, below). The *Schroen* and *Caldwell* decisions provide a rationale that better accords with respecting the nature of religious associations.

In *Schroen* v *Steinbach Bible College,* a Manitoba Human Rights Board of Adjudication decision, the overall religious nature of the College - - its *esprit de corps* -- was significant. The *Gore* decision failed to deal adequately with what might be properly described as a "permeated ethos" (or *esprit de corps)* aspect but this was taken into account in *Schroen*. We can see a better approach than "job parsing" in the tribunal's conclusion that:

> The special nature of the College, and both the external and internal forces that the students would be subject to, which would impinge on their consciousness, *should not be jeopardized in the close, tight, focused and interactive community that exists at SBC.* Considering the unique role of an accounting clerk at SBC and that the unique culture of SBC including its philosophy, mission, faith, beliefs, ethics and the acceptance and observance of the Statement of Faith are reasonable and necessary to assure achievement of the religious objects of the College, it is my view that the *Etobicoke* test has been met. As a result, and under the circumstances of this case, the requirement that the accounting clerk be of the Mennonite faith to work at SBC constitutes a bona fide and reasonable requirement or qualification for that employment or occupation at SBC. [408]

[408] *Schroen v Steinbach Bible College* (1999) 35 C.H.R.R. D/1, (D.R. Knight, Q.C. Board of Adjudication, July 26, 1999) para 61 (emphasis added).

The words in the *Schroen* case are apt. In that instance concern about the faith of the accounting clerk could be justified on the basis that she was a person who would not fit "into the interwoven dynamics of job and faith that permeated the entire school". Similar words could be used to describe the ideal religious organization or church. If a religious organization departs significantly from the ideal, however, it is to be doubted that a tribunal would support discrimination on the basis of religious faith. The more "non-religious" (a term to be preferred to the word "secular") the organization is, in its overall orientation and practical approach, the more likely a tribunal will be to find that discrimination is not justifiable to satisfy a religious rationale.

These decisions, separated by time and geography, but not by principle, provide the pillars within which we can see how differently a particular religious organization could be viewed by a reviewing court or tribunal. In my opinion, the approach that is most consistent with the jurisprudence of respect and diversity is that in *Schroen* and it is to be preferred to the approaches seen in *Gore, Christian Horizons or Strydom. Schroen* with its greater respect for overall religious purpose and evaluation of a shared ethos and "culture", its empathic and synoptic consideration, is most consistent with the best understanding of the public nature of *religious associations* and yet, as seen in *Christian Horizons* and *Strydom*, recent decisions have gone the way of "job parsing." This has diminished the respect for religious associations as a whole, subjecting non-educational projects to a test suitable only in an educational setting.[409]

These two approaches show several things, but the most important of which is that *respect for the religious nature of an association is not always understood well outside of the religion.* There is a risk that all religious projects are viewed stereotypically, as of the same sort, when in fact they are anything but. There may well be religious projects (charities and so on) in which the employees *do not*

[409] See, for an example of the inappropriate application of an educational test in a non-educational setting, *Ontario Human Rights Commission et al. v Christian Horizons* (2010) 267 – 298 (Ont Div Ct) (May, 2010) (decision overturning, in part, a Human Rights Tribunal Decision and held that the religious exemption provision of the Ontario *Human Rights Code* should apply to religions that do not restrict their work to their adherents). In *Caldwell*, Catholic teaching *was at issue* because the case involved a teacher in a Catholic school. The application of "teaching" and "proselytizing" in other settings, such as we see in *Christian Horizons* (a group home for developmentally challenged adults), was, with respect, erroneous and asked the wrong question. This is often the case where a "core doctrine" approach is taken then jobs are somehow "correlated" to that "core." The question should not have been whether the employee in question was teaching Christianity since the purpose of the home was not *Christian education per se* but *caring.* In this the provision of caring within a Christian ethos was uppermost for the employer and the particular Christian ethos was a strict protestant one that excluded a variety of behaviours including same-sex sexual conduct (with which the employee had originally agreed when she signed the contract). Had the case been appealed further it was open to argue that in *Christian Horizons*, the wrong test was applied or that what was applied acted so as to minimize the relevance of religion in other settings. Unfortunately, *Christian Horizons* was not appealed further so the Ontario Divisional Courts' approach stands unless distinguished in other cases.

necessarily share in the religious nature of the work. In others, shared religiosity is evident amongst all of the employees in an organization who may take part in such things as (to name a few): prayer or shared devotionals; religiously oriented retreats; a role in worship or leading bible studies; or who may take a share in the religious formation of other employees. Such organizations are, clearly, themselves involved in a wider conception of the practice of religion in the manner in which they have structured the work environment. Therefore it would seem peculiar *not to recognize the functional differences* between this kind of religious employment and one in which such indicia are absent. Failure to make this distinction between projects that are "religious all the way down", in which it would be relevant for each and every employee to share the religion and be held to that requirement, and those that are not and where it is not or is less appropriate, seems to be a major gap in the jurisprudence not to mention the logic of diversity. *Respect for difference and the nature of religious practice as communal rather than simply individualistic require finer tailoring of the legal tests.*

The importance of the shared group experience relating to identity of both the constitutional freedoms of religion and association is noted by then Chief Justice Langa in the seminal *Pillay* decision on the freedom of religion in South Africa in these words:

> By including religion in section 31, the Constitution makes plain that when a group of people share a religious belief, that group may also share associative practices that have meaning for the individuals within that religious group…In the case of associative practices, an individual is drawing meaning and identity from the shared or common practices of a group. The basis for these practices may be a shared religion, a shared language or a shared history. *Associative practices, which may well be related to shared religious beliefs, are treated differently by the Constitution because of their associative, not personal character.*[410]

In the case of the religious employer, therefore, it is the identity of the religious employees and their group beliefs in co-operation that provides the rationale for protecting religious freedom in group practice. To focus, as some commentators do, on individual rights pertaining to other religious beliefs, gender equality (as one form of equality) or sexual orientation of individuals *over against* the interests of others within a religious ethos permeated setting is an error. Failure to attend to the identity concerns of religious employers and their religious employees, in relation to their group identity, is an attack on the nature of religious and associational liberties themselves. Advocating attention to one half of the issues might be clever (or even successful) legal strategy but it does not make for the just application of constitutional freedoms in a democracy. The identity aspect of religious believers and

[410] *MEC for Education, KZN and Others v Pillay* et al. (2008) at para 145 (emphasis added).

their groups and how deeply constitutive such identities are, has been noted by various authors. It has been well described by Richard Moon as follows:

> Religious belief lies at the core of the individual's world view. It orients the individual in the world, shapes his or her perception of the social and natural orders, and provides a moral framework for his or her actions. Moreover, religious belief ties the individual to a community of believers and is often the essential or defining association in her or his life. The individual believer participates in a shared system of practices and values that may, in some cases, be described as "a way of life". If religion is an aspect of the individual's identity, then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when its marginalizes her or his religious community in some way, it is not simply rejecting the individuals views and values, it is denying her or his equal worth.[411]

It is not clear whether the application of an overall ethos or "organic" approach (as in *Schroen*) would succeed in future. In the meantime, however, religious employers need to be particularly careful to "turn their minds" to as strong a connection as they can develop between religious rules and particular jobs in the organization recognizing that, post *Christian Horizons*, any religious rules in relation to sexual orientation outside of education and proselytizing are likely to be challenged.

To a large extent religious groups have traditionally relied heavily on a common understanding of employment expectations concerning conformity with the religious faith in personal behaviour. These understandings may not be common anymore. Employer`s rights, even in a religious setting, are limited by principles of fairness and consistency. Expectations should be clear and express and so should the consequences of failure to meet these expectations. The expectations should be communicated to applicants at the time of interview for hiring or engagement (with or without remuneration) and should be reinforced from time to time throughout employment or engagement and should be expressly linked in each aspect of the employment relationship from job advertisement onwards.

Assuming that an employee had notice of the religious requirements of an organization, the practical outworking of the ethos (shared devotionals and an express religious set of commitments) should be something that can be relied upon in dismissal cases in a religious employer setting. In relation to employment rules in a religious context and what scope should be given to religious rule-making, the jurisprudence in both Canada and South Africa is in formative stages. The approach taken in

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[411] Richard Moon, "Freedom of Religion under the *Charter of Rights:* The Limits of State Neutrality", (2012) 497-549 at 507. Thomas Banchoff in his "Introduction" to *Democracy and the New Religious Pluralism* (2007) 4 also notes this connection to dignity but, rightly, extends its recognition to the relevance of the group. He writes: "[b]ecause it involves beliefs and practices suffused with ultimate meaning, religion is a deep-seated marker of collective identity." Eric Voegelin, *Order and History* (1961)10, 504-505 observes how the experience of conversion defines a community as qualitatively different from all other societies "that have not taken the leap" as well as how the theo-political stands in relation to "redemption from the false gods of empire."

the *Strydom* decision is in its early days and I argue that *Strydom*, like the Canadian decision, *Heinz*, takes one branch, the wrong one, in deciding to "parse job functions" to see if they partake sufficiently of the religious mission of the organization. I deal further with this as "the Integrity hurdle" below.

Overall, I agree more with Stu Woolman in his published work than with Patrick Lenta - - since Lenta seems not to be troubled with the idea of job functions being the measure of what rules can be enforced and does not deal with the ethos or culture of the organization. He also would, as I've noted, allow the draconian punishment of removing charitable status or tax exempt status from "offending" religious employers. But such a move cripples charities and would usually drive them out of existence.

When all jobs (from gardener, to janitor to desk clerks to pastoral staff and even volunteers or contract employees) are described as part of, for example, "furthering the Gospel of Jesus Christ in the world" (to quote from one national evangelical group in Canada) and an objective evaluation of the nature of the organization discloses the kind of shared religiosity referred to above, then different standards should apply than simply an external evaluation of job duties in relation to what an adjudicator or judge deems to be "core" to the operation.

Where, for example, all employees and volunteers and contractors are expected to and do sign a Code of Conduct clearly telling them what the religious expectations are in the job *in terms of the overall organizational ethos and their role within it*, then such an organization should be treated differently for the reasons set out above from those that do not have such an overall religious purpose and identity.

What about the Non-Organic or Non-Ethos Shared Religious Employer?

We must note, however, that not all religious organizations function organically. When a religious organization does *not* have a permeated religious ethos it would make sense to draw distinctions in relation to whether an employee shares the religious work that the organization requires. Where there is a common code of conduct required of all employees, however, and/or a permeated ethos it should not be for the court or tribunal to attempt to "get behind it" any more than it is appropriate for them to go beyond a mere "sincerity test" in relation to religious belief for individual persons such as we see has become the approach in cases such as *Pillay* in South Africa and *Amselem*[412] and *Multani* [413]in Canada.

[412] *Syndicat Northcrest vAmselem*, (2004) 551.

[413] *Multani v Commission scolaire Marguerite-Bourgeoys,* (2006) 256.

The general test for bona fide occupational requirements, therefore, must gradually be changed legislatively or by interpretation to take into account the particular nature of religious organizations and the importance of the religious *esprit de corps* that forms an aspect of the religious nature of religious projects and groups understood organically.

In a church or civic organization with a particular, or what I have called in this thesis a "permeated" ethos character, once the ethos is not one that is, itself against public morals (such as racism would be) and criticisms about varieties of sexual conduct beliefs are not of this sort, latitude should be given to the association to have its own philanthropic, educational or religious (to use the language typical to human rights legislations) purposes respected and the onus on others to challenge it.

Religion is an Equality Category and Religions May View Equality Differently

Equality, like discrimination, is logically context specific. Despite this, those who argue under the rubric of "equality", such as David Bilchitz, often fail to note that there are different conceptions of equality, gender roles and, indeed beliefs which operate, and should, through all sorts of associations in free societies. Just as we are all free to reject a variety of religious beliefs, so we are free (or should be) to reject a variety of other sorts of beliefs about, for example, politics, clothing practices, dietary rules and sexual practices that we and our groups consider acceptable or unacceptable. While sexual acts may or may not be considered sacred, no one view of them qualifies within the narrow category of things about which society will tolerate no disagreement. To argue otherwise is to elevate sexual choices above all other kinds of things about which reasonable people may disagree. It is to turn what should be private (or shared in associational) views of contested practices into single viewpoints binding on everyone. Typically the analysis of sexual orientation advancement ignores that what is at the root of "gayness" is precisely a contested (by some) view of sexuality. I note in passing that another common error is to fail to mention religion as one of the enumerated rights in the South African Constitution alongside "sexual orientation" and "belief." David Bilchitz, for example, makes no attempt to recognize that there can be different conclusions drawn about sexual morality and only analyzes the question of sexual conduct disagreement as if it is a barrier to be torn down rather than a reality with which to live. There is no "super right" for sexual orientation as much as some might wish there were and law favours a robust maintenance of diversity, not its truncation as suggested by civic totalist argumentation.

Conclusion on Religious Employer Exemption Cases as Illustrative of Failure to Take Diversity Seriously

Reading the various scholars mentioned in this Chapter (or the Canadian law deans, all referred to in Chapter four in the discussion of "Convergence and Civic Totalism") one cannot escape the conclusion that they simply ignore the sort of equality called for in the passages referred to from the Constitutional court. They continue to argue for a more or less illiberal form of forced "convergence" in the direction of their favoured viewpoints riding roughshod over associational diversity in the process. While they refer to themselves as "liberal" their approaches do not conform with the kind of liberalism argued for by theorists such as Gray, Galston or Taylor or by the judges of the Constitutional Court of South Africa. Interestingly, those who have written in response to Bilchitz, such as Lenta and Woolman, while they disagree with Bilchitz' conclusions in various ways, largely agree with his concerns about "homophobia" and suggest that those religious groups who express certain viewpoints should be subjected to penalties for so doing. In taking this position these writers do not take diversity seriously nor do they attend adequately or at all to the significance of moral debate to culture. They seem to analyze the freedoms of association and religion but they do not actually do so. They adopt a "core function" approach to job duties in the religious employer context that, as I have shown, treats religious difference superficially and moral difference not at all. Why a new approach is called for I have already explained, what that sort of approach should look like I shall examine in the next Chapter.

CHAPTER SIX:

TWO PROPOSALS TO ENCOURAGE AND PROTECT ASSOCIATIONAL DIVERSITY

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1. SEEING THROUGH "THE ASSOCIATIONAL LENS": WHAT USE OF THE *OCULUS* WOULD PROVIDE; AND
2. WHY THE LAW SHOULD DEVELOP A PRESUMPTION IN FAVOUR OF RELIGIOUS ASSOCIATIONAL DIVERSITY

Introduction

In the previous Chapter we saw how religious employer exemption cases have taken basically two different approaches but that the grounds for the "organic" or "permeated ethos" line has been less followed and hasn't been argued for at all in terms of *the critical role religions play to culture*. Too often the structural aspects of what I have attempted to demonstrate in this thesis have simply been overlooked. Thus, the different nature and capacities of law in relation to religion and of the state in

relation to associations have been largely if not entirely avoided. This might well be due, as some commentators have suggested, to the "liberal" blind spots in commentators and the judiciary.[414]

Usually, the state has been seen to have an unchallenged directive role and this, often, said to be in favour of an undifferentiated conception of "equality" or "non-discrimination" rather than seeing these in light of the nature of a diverse society and the specific context of a religious association. Canadian scholar Alvin Esau has noted that what is at issue is "a clash of normative cultures" and that:

> The clash cannot be reconciled by the typical approach of finding some way to accommodate each interest as much as possible, by opening up some jobs for those with contrary qualifications or lifestyles, for example, while still upholding religious qualifications for other jobs. *When you are dealing with a religion that is normatively exclusive and insular, you have a choice to make. You either uphold the right of the group to exercise their religion as they understand it, or you uphold the right of the individual to gain access to an employment opportunity by forcing the religious institution to accommodate people of different religions.* I doubt, however, that the marginal gain in creating equal employment opportunities is the real motive for those who would deny an exemption to religious employers, or deny to them a BFOR to hire only co-religionists. *It is more likely that many people simply find that the norms of exclusion utilized by some religious groups are just plain offensive to their liberal sensibilities*.[415]

While self-defined "liberal" academics or judges have been quick to distance themselves from the "abhorrent","homophobic", "morally repugnant" views that to them may constitute the need to describe religious views on homosexual and lesbian conduct by the distinctly religious category of "anathema", they have been far less able to imagine the issues of moral difference with anything like sensitivity to the religious community. Alvin Esau has a challenge for such "liberals" - - it is to develop a richer set of liberal sensibilities that do actually accomplish what they profess. He asks such liberals to consider "…are we so sure of our moral superiority that we can use the violence of the law to coerce religious groups into conformity with our inclusivist views? Is our society so illiberal that it cannot accommodate groups which generate a diversity of normative practices?" [416]

He goes on to ask "…[a]t what point do we have the moral confidence to justify limiting liberty through law, or do we just base law on the values of the groups that happen to have the most power

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[414] Amongst academic writing in this area, I am aware of only Alvin Esau who has consistently argued for an "organic" approach to understanding religious associations - -perhaps in part because of his personal involvement in the *Schroen* case discussed in the last chapter. See: Alvin Esau "Islands of Exclusivity" (2000) 719 at 726 where the author places himself in the shoes of a sensitive commentator not imposing his own views on the religion but asking, as it were, from the perspective of the association: "[w]hat if the religious employer expects that the workplace itself should be a community of faith, where people work and witness together?" In South Africa, Shaun de Freitas has endorsed Esau's approach. See Shaun de Freitas, "Freedom of Association" (2012). Other commentators referred to above, simply ignore alternative approaches.

[415] *Ibid*. 735-736 (emphasis added).

[416] *Ibid* 736

and popularity?...[and he concludes that]...[w]e need multiple sources of meaning if genuine pluralism is to be achieved in the face of the totalizing forces of the State and popular culture. "[417]

As we saw in Chapter 4, amongst these "totalizing forces" one has to count the "secularized elites" within the higher levels of the legal profession, certain of whom do not respectfully consider and have empathy for viewpoints other than their own in this area. The proof of such a genuine respect for other viewpoints will be (when one sees it as one does in Esau) respect not only in the language but in the marshalling of legal authorities and the forms of analysis used. I have endeavored in this thesis to accord those who disagree with religious diversity or seek to minimize it, the courtesy of portraying their viewpoints accurately. It is not always so, alas, for others.[418] Civic totalism is based, at least in part, on a generalized lack of respect for others.

The culture of contemporary law is visible not only in the "blind to the importance of associational diversity" scholarship reviewed in the last Chapter but in the law deans' letter, the Chief Justice's conception of law in relation to religion and the other source materials in Chapter 4. It is all a pretty dreadful scene and yet typical for "civic totalist" or "liberal monistic" viewpoints which seek force

[417] *Ibid*.

[418] One of the worrying developments of much of the uncivil discourse related to the highly contentious matters (such as abortion, women's rights, issues related to sexual orientation, and religion, etc.) relates to some of the scholarship in these areas. For example, accuracy in the use of quotations, the delay or suppression of the publication of articles and mischaracterization of the arguments attributed to ones' "opponents." In such a world where articles are suppressed or distorted, affidavits are falsely sworn and so on and scholarship seems to place rhetoric above reality and politics above principle, we have reason to pay particular attention to the manipulation of the academic and judicial environment. See: Gerard Bradley "In the Case of Martha Nussbaum" (1994) which discusses allegations of misstatement, misrepresentation and deliberate falsehood in relation to "advocacy scholarship" in these hotly contested areas. The underlying psychology at work in *deception* is interesting and needs further reflection. Eric Voegelin, *Science, Politics and Gnosticism* (1968) 99-114, has commented on a psychological avoidance of key aspects of "the constitution of being with its origin in divine, transcendent being" and attempts to replace these within the "immanent" as central components of the gnosticism that undergirds "ersatz religion" and, in particular, its abandonment of humility and wilful ignorance of key dimensions of the earlier insights. The result is not domination of being but what he refers to as "a fantasy satisfaction" (107). Fantasy or not, mis-stating reality or suppressing alternative viewpoints, betrays the integrity of scholarship and is sadly all too present in these somewhat overheated public debates. It forms, so it seems, part of the arsenal of "civic totalists" and would line up with Charles Taylor's insights about these "totalistic" modalities as emerging from the same sort of "vanguard party" politics that emerged from Marxist-Leninism. If Voegelin and others who have observed the development of "carceral visions" in relation to advocacy such as that detailed in Graham Good's *Humanism Betrayed* (2001) are correct, then judges, who are in the business of deciding important issues, should take this question of "advocacy scholarship" into account as a relevant cultural aspect of what is before them and the "general public" of scholars in terms of what can be taken as trustworthy and reliable.

not persuasion and domination not peaceful co-existence.[419] Can this be changed and, if so, how? What possibilities exist for religious groups to gain a hearing for their views on a more respectful footing than they get from the unremittingly hostile critics around them? I now offer two suggestions for improvements in current law dealing with religious associations; 1) the ***oculus***; and 2) The creation and use of a legal presumption in favour of religious associational diversity - -the **diversity presumption** for short.

The Use of the *Oculus*: *Seeing* the "Organic" or "Permeated Ethos" Approach to Religious Employer Exemption Cases

As argued, an approach to the religious employer exemption tests could be improved so as to be more sensitive to the core content of religious liberty by paying more attention to the nature of religious organizations themselves. Such an approach would provide a better stream of jurisprudence than that offered by job-parsing or "doctrinal core" approaches such as seen in *Strydom* (2009) or *Christian Horizons* (2008, 2009*)* and discussed above. The adoption of what I have called a "permeated ethos" test that recognizes the organic nature of religious organizations, by treating them with respect to their nature, serves better to protect what we have seen as the importance to culture itself of thriving religious associations.

The creation, as suggested in the last Chapter, of more sensitive tests for certain kinds of cases such as I have argued in relation to religious employment exemptions, is one way forward; are there others? I believe there are. In this Chapter I would like to offer two suggestions for improvements in the current law when dealing with religious associations.

Use of the *Oculus*: Seeing Through the Associational Lens

The first suggestions for improvement in the law is the development of an approach I would like to call "seeing through the associational lens" or "the use of the *oculus*" or simply "*the oculus*" for short. This involves a task of awareness of the other by the trier of fact or politicians or those in the media and legal scholars. This means developing an approach to associations that begins by affirming difference and shows empathy with the viewpoints of others. This does not mean agreeing with the viewpoints of

[419] See, for an interesting exposition within Islamic thought of the opposition between genuine persuasion and bigotry and oppression, Abdelaziz Berghout "Nursi's Vision for a New Universal Culture of Dialogue" in Ibrahim Abu-Rabi' *Spiritual Dimensions* (2008) 231 at 244 ff; for the importance of open dialogue within the Catholic tradition in relation to the nature of personalism in the writing of Karol Wojtyła/ Pope John Paul II, see: Kenneth L. Schmitz, *At the Centre of the Human Drama* (1993) 112 ff; David Bentley Hart, *The Beauty of the Infinite* (2003) 413 ff relates "Christian rhetoric" to beauty, peace and the sacrifice of Christ. His book offers extraordinary depth to the discussion of language, meaning and community.

others. There are seeds of this sort of sensitivity, already, in our case law when we choose not to delve inside the viewpoints of religious believers because the law has no competence in dealing with dogma or in the nature of the inquiry not being invasive (such as the "sincerity" test in cases for religious accommodation).[420] There are strong passages of support for "co-existent spheres" in some of the case law - - particularly in South Africa, as well as a reticence in both jurisdictions to getting the courts embroiled in religious dogma.[421]

But such passages and the frameworks they depend upon will have to survive against the over-inflated rhetoric of a supposedly "transformative constitution" that effects the outcomes of a few in the name of the "vulnerable" and "minorities" but will, one imagines, come to resemble the sorts of arguments reviewed above in Chapter 4 in relation to "deep equality."

The Need for "Deep Diversity" as a Check on "Deep Equality"

What is needed to argue against the "black magic" (to take that phrase from Stu Woolman) of "deep equality" is, in fact, "deep diversity" or "deep accommodation" in which these important aspects are not submerged by "homogeneity by any other name".

I would like to suggest another reason than institutional competence for the adjustment of vision that gives a favourable place to "diversity." Rather than a negative ("we cannot deal with dogma") I would suggest a positive message ("we ought to value diversity as a positive *good*") so that there is recognition of trying to see the world through the eyes or *oculus* of another. We cannot live in other communities than those we live in; what we *can* do, however, is to imagine life through other people's eyes and come to offer respect for their vision, their difference and their way of seeing. Threats to dignity are not only experienced by members of minorities particularly when an aggressive viewpoint is being asserted by secularized elites on behalf of minorities. The issue is not actually minority of majority status but fairness of treatment for all.

Such an approach would, it is submitted , if used generally in the law, offer a sense of "being heard" and "being valued " to groups (whether minority or majority is not the issue) that may well have reason to fear that they are being brought under someone else's "comprehensive vision" – a vision they do not share.

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[420] Here one thinks, again, of the Canadian decisions of *Amselem* (2004) or *Multani* (2006) and the South African decision of *Pillay* (2008) rather than the woeful later decisions of the Canadian Supreme Court in *Alberta v. Hutterian Brethern* (2009), *S.L and J.D.* (the *Drummondville Parents'*) (2012) and *Saskatchewan v. Whatcott* (2013).

[421] In South Africa, *Taylor v Kurtstag* (2005) and, in Canada, *Amselem* (2004).

Here the politics of identity and group rights often collide with those of different identities and memberships. Those who take a "new sectarian" approach wish, as have most sectarians, to proselytize and make converts, which is their right except for one thing: the janissaries seek to do this through force of legal imposition, not through the free exchange of ideas and democratic proposition. They wish to force others into their way of being by use of law and in spite of associational diversity and the principles of accommodation that can and should nurture it. Such coercion, however, cannot work socially as it produces resentment and needs further coercion to prop it up.[422] What use of the *oculus* offers is the "negative capability"[423] of identifying with the other or a "synoptic vision"[424] capable of viewing problems from as many different angles as possible and continuing to co-exist with *dis*agreement.

There are very real effects to being ignored or having ones' viewpoint (as we've seen in previous sections) characterized by pejorative terminology that ignores the relevance of distinctions that, when understood (or at least engaged with if not accepted) go some way to showing that those who hold to such distinctions are not disrespectful racists or worse. This brings me to the second suggestion for adjustments in the law.

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[422] J.A. Corry, *The Power of the Law* (1971) 39 "One consideration, above all others, must be made clear. What has been won by coercion is always insecure unless it can go on being defended by coercion. *Only those who are sure they can win in a contest of naked power, and are prepared to be utterly ruthless, can afford to resort to coercion*" (emphasis added).

[423] I take the use of Keats' poetic concept "negative capability" from Paul Horwitz in *The Agnostic Age*, xxii, where he offers it as a general approach to constitutional law. This viewpoint, according to Keats, involved the artist's ability to remain "capable of being in uncertainties, Mysteries [and] doubts" -- it is, therefore, a species of humility. Václav Havel, Stephen Macedo and William Galston have argued for the importance of humility for politics and law: see: *The Art of the Impossible* (1997), *Liberal Virtues* (1990) and *Liberal Purposes* (1991) respectively.

[424] This was the approach to philosophical questions developed by the philosopher Alfred Hoernlé, *Race and Reason* (1943)xxii, xxx; Hoernlé became the first director of the Institute for Race Relations in South Africa and finished his illustrious career as a philosophy professor at the University of the Witwatersrand (having lived and taught in Germany, the U.K. and at Harvard). The "synoptic" approach he advocated to deal with controverted matters involved seeing any problem from as many different perspectives as possible and trying to consider the point of view of everyone concerned before coming to a decision in relation to it. For example: "any attempt, therefore, at a solution to the multi-race problem which is based upon the exclusive pre-occupation with the point of view, or the interests, of other groups for the sake of advantage to the favoured group, is clean contrary to the whole spirit of synoptic philosophy." The application of this to conflicts with respect to religious employment exemptions is clear. The solution, once all aspects have been considered, is to use the *oculus* and the diversity presumption; "favoured group" analysis, of the sort I have singled out for criticism in this thesis, is out *tout court*.

A Rebuttable Presumption in Favour of Religious Autonomy and Diversity

The law is no stranger to the crafting of different approaches to solve identified problems. The use of presumptions in law is common.[425] I have argued that the long history leading up to many contemporary disputes discloses an ongoing threat to the good of diversity posed by convergence illiberalism masquerading as genuine liberalism. It has also argued that liberalism itself, at least in relation to the Rawlsian conception of "public reason" and some supposed "neutrality" of "originating positions," is no longer tenable as a comprehensive theory for reasons already set out above. Something else is needed to provide greater protection to religious associations.

One possible method of the law changing would be through the use of the legal technique of a *presumption.* Like various presumptions it could be rebuttable.[426] The details of both the presumption and what matters could be raised to rebut it would obviously alter with respect to context, but a few suggestions can, perhaps, be made at this juncture.

We live in a time when our presumptions often do not line up with our narratives or imaginaries (as we saw in Chapter 2) or, and this is important, our lack of presumptions interfere with the realization of our narratives and imaginaries. I think both are at work with the appalling lack of sensitive engagement with religious liberty in our time. The law is using legal claymores when, more frequently, scalpels are required - - something more subtle and thoughtful. The failure to view the religious

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[425] J.A. Corry, note 422 above, notes that the law has "a presumption in favour of individual freedom" (at 43). And Francis Lyall, note 357, above, wrote of a presumption in favour of freedom. A presumption in favour of associational liberty and diversity would be of the same sort. Failure to employ the "oculus perspective" leads to a theoretical blindspot. The fact is that *all comprehensive visions miss the affirmation of diversity and that is their error*. See, for an example of this, Ronald Beiner's critique of Rawls in *Civil Religion* (2011) 298-300.

[426] Lorenzo Zucca, *Constitutional Dilemmas* (2008), 168-170 notes that it is possible to establish a "rebuttable presumption in favour of free speech" (168). I found Zucca's conclusions to his useful book were too stark. Zucca has a tendency, when asking what the conflict is, to miss some important nuances. Thus, in asking "what is the conflict?" he can tend to see it as between this fundamental right *and society* instead of with another fundamental legal right. Yet "society's view" is too abstract since that viewpoint must be made up of many interests and none of them capturable precisely by the general term. Society's interest must surely be in harmony between conflicting fundamental legal rights claimants rather than some abstraction between one rights holder and "the views of the state." A rebuttable presumption in favour of associational diversity goes some way to put the onus on those who would deny diversity rather than those who assert "society's view" of this or that vague (usually "equality" or "non-discrimination") interest. Zucca has noted that: "…[a] rebuttable presumption will depend on the legal culture, and the social practices of the context in which the conflict occurs. Its entrenchment in a norm will call for the definition of the conditions under which the presumption can be reversed. I think it possible to establish a qualified and contextualized, priority….in a liberal, pluralistic society, the challenge of any given conception of harmony is regarded as a necessary feature of any evolving community. And that is probably the very core of liberty and its paradox" (170). I agree with these comments and Zucca's approach. Note, too, his interesting (but incomplete on the natue of "secular") exchange of academic articles with András Sájo, which I criticize in Iain T. Benson, "Can there be Legimate Pluralism" in Mary Ann Glendon and Hans Zacher (eds) *Universal Rights in an Age of Diversity* (2012) 261, fn #10.

exemption tests in light of the "organic" nature of *some* religious organizations would be just such an example of myopia.

Scholar and jurist Michael McConnell has proposed what he terms a "modified test" to avoid the evil of "enforced religious uniformity." His test neatly relates to what I have set out above. McConnell proposes the following test:

1. A law or policy is unconstitutional if its purpose or likely effect is to increase religious uniformity either by inhibiting the religious practice of the person or group challenging the law (free-exercise clause) or by forcing or inducing a contrary religious practice (establishment clause);

2. A law or policy is unconstitutional if its enforcement interferes with the independence of a religious body in matters of religious significance to that body;

3. Violation of either of these principles will be permitted only if it is the least restrictive means for (a) protecting the private right of others, or (b) ensuring that the benefits and burdens of public life are equitably shared.[427]

Much is hidden in the presence and absence of our presumptions - - they are kinds of hidden meanings and languages. To take an example just given, above, portmanteau terms such as "equality", "non-discrimination" or "liberal" without clear definitions *within the context of application* lead to a remarkably vague and fuzzy discourse. When coupled with even broader language such as "transformative constitutionalism" and this is juxtaposed with claims of "vulnerability" and "exclusion" (or perhaps "minority/majority" or "hierarchies of power" or "us/them") and the ubiquitous "power" linked to "dignity" it is small wonder that confusions abound. In the light of the paucity of rigorous philosophical and moral teaching about politics, theology and philosophy in general and in legal education - - in relation to the meanings of culture and the person—the problems are evident.

First, the presumption could be called *"a presumption in favour of the diversity of religious association"* and it would co-exist alongside a presumption in favour of religious integrity. The use of the term "integrity" in this formulation does not focus on the truth or falsehood of the association's

[427] Michael McConnell "Taking Religious Freedom Seriously" in Terry Eastland (ed) , *Religious Liberty in the Supreme Court* (1993) 506. McConnell points out that the use of such a test would establish a conception of religious freedom that is "not a freedom of submergence and invisibility" but of "boisterous expression and celebration."

propositions but, rather, the need to recognize *that associations may be expected to function differently on the basis of their beliefs* and that this diversity is to be expected and is welcomed.

We already have well-established in the law the "sincerity principle" with respect to individual religious claimants -- this presumption in favour of associational "diversity" and "integrity" would be the *associational dimension* of the same approach. Just as an individual must show a certain minimal capacity for "sincerity" in relation to a religious recognition claim, so would an association have to show a comparative "integrity" of function in order to satisfy the presumption for associational integrity or associational diversity. This is a low hurdle but an important one.

It is necessary to recognize, as we have seen, that law can be, in a sense, "tempted" beyond its proper jurisdiction. We also need to see, ironically, that law, in this case, needs to be invited to see beyond its current limitations in how it treats religious associations. This circle can be squared. The remedy can take the form of a proper appreciation and articulation of jurisdictional limitations given the nature of religious associations themselves.[428]

As we saw in the two quotations that, in Chapter one, I identified as the "pillars of the architecture of this thesis", the law has been able to recognize, however inconsistently or however dimly, that it has limitations with respect to such things as "religion", "metaphysics" and "philosophy". The law has, as well, been able to recognize the importance that other associations, particularly religious associations, play in precisely those areas. The solution, therefore, *recognizing the strengths and weaknesses of disciplines and associations*, is relatively simple, though its implementation may be rather more complex.

What is needed in this next phase of jurisprudential development is a reconfiguration based upon the re-understanding or re-imagining of law in relation to alternative frameworks. Law needs to let religion do its job. Religions, on the other hand, need to let the law do its job. The symbiotic

[428] Such an articulation will be in the nature of explaining a new legal paradigm. See: Thomas S. Kuhn, *The Structure of Scientific Revolutions* (1970) 43. The "Goods of Religion" discussed, above in chapters 2 and 3 of this thesis are unlikely to be claimable in the same manner, or to the same extent, by other kinds of associations due to their different natures and the roles they play culturally. Important though other associations are (such as fraternal organizations or sports clubs to name two at random) strong arguments can be made that the *diversity presumption* is not so pressing in these areas and that the nature of the rebuttal necessary in the circumstances would be different as a result. The kinds of specific tests necessary to make the *oculus* and the *diversity presumption* operative at law, however, will need to be developed contextually and I can only, as I have done, sketch the parameters generally here.

relationship will be made easier once the law starts to speak in encouraging ways about religion -- such as we saw in the very unusual yet critically important judgment of Albie Sachs in *Christian Education*.[429]

How Associations Satisfy the "Integrity" Hurdle

An example of this "low hurdle" that is both acceptable and minimally intrusive[430] would be to require an association to show the following before the onus shifts to those challenging the exercise of the presumption:

1. That the association has **a form of doctrinal beliefs** that it expects all members (and volunteers and employees) to live up to;

2. That members of the association **are informed about** these doctrinal beliefs in a clear an unambiguous fashion at the time of membership (prior to employment, start of volunteering, etc.);

3. That the practices in relation to these beliefs **have been consistently followed** by the association over time (so that there is no unfairness with respect to application of the principles -- here discrimination principles from elsewhere would apply); [431]

These are an outline of the kinds of questions and requirements that would be necessary for the exercise of the presumption. The key here, is that it requires an alternative way of viewing religious associations through the use of the *oculus* and a corresponding establishment of a presumption. This would have several benefits:

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[429] *Christian Education* (2000); see also his recognition of co-existent "spheres" in the *Fourie* (2006) decision. The Canadian Courts, as mentioned, have lagged far behind this vision and this articulation.

[430] See the issue in *Syndicat Northcrest v Amselem* (2004) where the Supreme Court of Canada rightly recognized that courts should be careful not to become "entangled in the affairs of religion" (para 50).

[431] Pierre de Vos (whom I have criticized elsewhere) makes some important points in "On Freedom of Religion and the Gay Music Teacher" *Constitutionally Speaking* [online: see Bibliography to this thesis under "Articles"] (2008) (cited by Lenta "The Right of Religious Associations" (2012) 243). In this, de Vos points out that a Catholic Church could not discriminate with respect to the hiring of an organist or any other non- ministerial position, on the basis of the sex of the candidate. Here alone, the doctrinal distinctions with respect to gender may need to be investigated, but only in a cursory manner. The questions of gender with respect to Jewish, Muslim or Christian doctrinal tenets could only be used with respect to whether there is a "integrity" to the doctrinal position. That means asking: does the religion have a consistent practice *in this association* of a doctrinal recognition of a necessarily gendered doctrinal leadership pool? Thus, it would not be open to religious employers to refuse to hire a woman for a position *where no doctrinal significance is attached to the gender distinction*. Sexual matter restrictions, however, (marriage, adultery, fornication, same-sex conduct) etc. would still continue to have applicability for religious determinations if the particular "denomination" in question could show they mattered "religiously" to the denomination and that the other requirements (notice, fair application of the rule etc.) could be met. See, also Christopher Wolfe "Free Exercise" in Gerard V. Bradley (ed), *Challenges to Religious Liberty* (2012) 93 at 108.

In the first place, it would go some way to counter John Gray's insight regarding the contemporary liberal tendency to "render fundamental rights into unconditional and over-riding" rights (think of Bilchitz and de Vos here). For when rights are rendered in this manner "the upshot of any procedure for adjudicating fundamental rights is bound to be victory for one side and defeat for the other". [432]

Second, the use of the presumption would go some way to protecting difference within associational diversity and reduce the numbers of "victory for one side/defeat for the other" scenarios. Functional pluralism and diversity would be the goal and result.[433]

Some will argue, undoubtedly,[434] that a test of this sort will make the courts too passive and associations too independent. To this sort of argument in another context but applicable here, Mary Ann Glendon has noted:

> The more deferential judicial posture leaves wider scope for democratic processes of bargaining, education, and persuasion to operate. It gives state and local governments more leeway to be "laboratories" where a variety of innovative approaches to vexing social problems (open-air drug markets, child care, drunk driving) can be tested on a limited basis, and their successes or failures assessed like muscles long unused , atrophied political processes will move awkwardly at first; they will need exercise before they become healthy and strong. [435]

How can the Diversity Presumption be Rebutted?

William Galston reminds us that a liberal democracy has a burden of proof when it seeks to restrict matters such as, for Galston, "expressive liberty" but here, for us, "the associational diversity

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[432] John Gray, quoted in David Brown (2006) "Reconciling Equality" 6.

[433] Rafael Palomino "Religion and Neutrality" (2011) 657 notes, following the German model, that "benevolent neutrality" of the state could apply to "ideological organizations" as well as religious ones since furthering diversity is the rationale for the presumptive exclusions. This makes particular sense where, as in South Africa, the term "culture" is found with the term "religion" in the Constitutional document. Again, it is not my place, here, to flesh out further how the tests would apply as the necessary nuances will be best developed in relation to specific facts in context.

[434] This is so particularly for those of the hard-core and anti-associational diversity "transformative constitutionalism" camps.

[435] Mary Ann Glendon, *Rights Talk* (1991) 181. Independent associations allow the right of "exit." One area of concern at the margins could be where children are involved since they do not, clearly, have the same capacity to "exit" as adults. Here "best interests of the child" tests (well known to the law in other areas) would apply. See, generally, on this test for minors in a religious context (related to the Jehovah's Witnesses), Lori G. Beaman, *Defining Harm* (2008). See also, Alvin Esau, "Living by Different Law" in Richard Moon (ed), *Religious Pluralism in Canada* (2010)110-139, 130. See, also, Kent Greenawalt, "Coercion and Religious Exercise" in Gerard V. Bradley (ed), *Challenges to Religious Liberty* (2012) 49-70 at 54 on the courts ability to build "free exercise" protections into how tort law (coercion) is developed and generally on coercion in relation to religions.

presumption".[436] What might these limits be? Galston lists a few that I have adapted in what follows by indicating in square brackets how the reasoning applies to the rebuttal of the diversity presumption:

1. The social space [religious association] within which the differing visions of the good [different belief expressions] are pursued must be organized and sustained through the exercise of [overlapping associational] and public power; the rules constituting this space will inevitably limit in some respects the ability of individuals and groups to act as they see fit [both with respect to state legal norms such as natural justice and for the state with respect to general norms that vary from context to context [such as "equality" or "non-discrimination"];

2. There are some core evils of the human condition that states have the right (indeed the duty) to prevent; to do this they may rightly restrict the actions of individuals and groups. These must not be framed around matters generally considered by associations as "legally contestable" (such as the nature of marriage or the legitimacy of dietary, dress or sexual conduct restrictions);

3. The state cannot sustain a free social space if its very existence is jeopardized by internal or external threats, and within broad limits it may do what is necessary to defend itself against destruction, even if self-defense restricts valuable liberties of individuals and groups. A free society [or religious group] is not a suicide pact.[437]

I believe these can apply, with the changes noted, to both the *diversity and the integrity presumptions* thereby taking into consideration associational diversity in relation to the common good.

Conclusion Regarding the Rebuttable Presumptions

Overall, the keynote to the operation of the presumption and the rebuttals is that what is being sought is a plural religious perspective.[438] In this regard, Joseph Raz has noted the importance of alternative ways of framing conceptions alongside such things as "non-discrimination". He observes:

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[436] William Galston, *Public Matters* (2005) 129 reminds us that we must acknowledge : "…that there are multiple sources of authority within shared social space and that the relation among them is not straightforwardly hierarchical…there is a presumption in favour of the free exercise of this kind of purpose activity (which I call "expressive liberty")." A further approach and set of examples of norms "for balancing free exercise and the common good" has been assembled by Christopher Wolfe, "Free Exercise, Religious Conscience and the Common Good" in Gerard V. Bradley (ed), *Challenges to Religious Liberty* (2012) 93 – 110 at 107 -109; On the role of government to try and accommodate sincere beliefs to the greatest extent possible; see, Richard Moon, in Ontario Human Rights Commission, "*Diversity*", Summer (2012) 43.

[437] Galston, *Ibid*. at 129. For examples of norms in relation to religious exemptions and the common good and the importance of cultivating a spirit of "mutual forbearance" in relation to religious associations, see, Christopher Wolfe, "Free Exercise, Religious Conscience and the Common Good" in Gerard V. Bradley (ed) , *Challenges to Religious Liberty* (2012) 93 at 107-110. Wolfe takes the term "forbearance" from another scholar, Mark Tushnet, and its use accords with my general approach.

[438] This has been said by one commentator, Diane F. Orentlicher, in Amy Gutman (ed), *Human Rights as Politics and Idolatry* (2001) 156 to "..enhance the type of cross-cultural dialogue that operates as a check against absolutism….to

> Liberal multiculturalism, as I call it, as a normative principle, affirms that, in the circumstances of contemporary industrialist or post-industrialist societies, *a political attitude of fostering and encouraging the prosperity, cultural and material, of cultural groups within a society, and respecting their identity, is justified by considerations of freedom and human dignity. These considerations call on governments to take action which goes beyond that required by policies of toleration and non-discrimination. While incorporating policies of non-discrimination, liberal multiculturalism transcends the individualistic approach which they tend to incorporate and recognizes the importance of unimpeded membership in a respected and flourishing cultural group for individual well-being.*
>
> This doctrine has far-reaching ramifications. It calls on us to reconceive society, changing its self-image. *We should learn to think of our societies as consisting not of a majority and minorities, but of a plurality of cultural groups.* Naturally such developments take a long period to come to fruition, and they cannot be secured through government action alone, as they require a widespread change in attitude.[439]

What is interesting here is that this approach or "doctrine" is aimed at politics but it is evident that for this to work, law would be implicated as well. In this case, however, I am suggesting law as the natural locus for such a presumption. Particularly significant is Raz' recognition that a general principle such as "non-discrimination", to which we might add "equality" or "minority/majority", in order for them not to bog down in individualism (my terms) need the cultural encouragement that groups and associations can provide. He has also recognized that the process of organic change is a long one.

As William Galston has said, with respect to liberal policies and religion:

> In some *measure*, religion and liberal policies need each other. Religion can undergird key liberal values and practices; liberal politics can protect – and substantially accommodate – the free exercise of religion. But this relationship of mutual support dissolves if the respective proponents lose touch with what unites them. *Pushed to the limit, the juridical principles and practices of a liberal society tend inevitably to corrode moralities that rest either on traditional forms of social organization or on the stern requirements of revealed religion …. liberal theorists (and activists) who deny the very existence of legitimate public involvement in matters such as family stability, moral education , and religion are unwittingly undermining the values and institutions they seek to support.*[440]

With this insight about the inter-dependence of religion and "liberal policies" I end this Chapter setting us up for a conclusion in which I shall endeavor to bring together the wide and yet interconnected themes of this thesis. I am well aware that what I have proposed here, and will argue for further in the conclusion that follows, constitutes a somewhat revolutionary shift in legal thinking

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paraphrase Ignatieff, human rights cannot go truly global unless it goes deeply local. Only when this happens can the idea of human rights achieve its radically transformative aims" (157). Here, it is interesting to note that, unlike in the undifferentiated claims of those who focus merely on legal "transformation" Ignatieff's vision is to temper such a goal with the reality of the "local." The "local" is the associational and subsidiary dimensions of culture respectful of the associational right to have and to hold different beliefs.

[439] Joseph Raz, *Ethics in the Public Domain* (1994) 189 (emphasis added).

[440] William A. Galston, *Liberal Purposes* (1991) 279.

relating to central notions in contemporary constitutional law. It marks, however, the evolution of what may well, in time, come to be understood as a necessary and somewhat overdue revolution.

CHAPTER SEVEN:
CONCLUSION

Chapter Themes:

1. There is no Singular Comprehensive Framework Solution for Conflicts Involving Associations and Religious Liberty 168
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A Closing Reflection: "Law *as* Religion" Encounters History, Religions, Pluralism and Secularism 181

How We Imagine Law and Religions: The (*Re*)Entry of Law *as* Religion 181

The aim of this Chapter is to draw together the themes generated by the analysis in prior Chapters. What, then, is the conclusion to the perennially irresolvable question of the reconciliation of competing rights claims involving the freedom of religion?

Several conclusions can be drawn:

1. There is no Singular Comprehensive Framework Solution for Conflicts Involving Associations and Religious Liberty

There is no singular, comprehensive solution. This thesis has suggested an improvement to the manner in which many of the leading theories approach the question of the state, law and religious associations. This new form of argument or emphasis will go some way to encouraging a genuine respect for diversity and alternative ways of viewing key problems in societies by inculcating identity in and through robust associational life. Rawls, and theorists like him, fail because they do not seek to accommodate diversity, so much as bleach out those dimensions of associational life they find awkward by suggesting a form of

"public reason" that is not reasonable to those who have other arguments. Rawls' approach will no longer do. That approach, while undoubtedly influential and an attempt to frame a theory of justice to which all can subscribe, does not accord sufficient respect for difference or the public nature of actions based on beliefs.[441]

2. **There is a Need to Reject a Singular Conception of Reconciliation or Convergence**

Not only is there no singular framework, there is no singular "reconciliation" if, by reconciliation, we anticipate complete agreement. Here we note the temptation towards what John Gray has identified as an "illiberal" set of viewpoints that seek convergence and assume a "withering away" of disagreement on key matters. To refute this idea, I have endorsed those authors and legal approaches that recognize the importance of pluralism and diversity and the establishment of a *modus vivendi* rather than any one comprehensive approach. This is more developed in theoretical works than in court judgments, with the most developed judicial pronouncements on "co-existent spheres" being in the judgments of Albie Sachs. To advance this approach more broadly, I have suggested use of the *oculus* and the legal presumption to further diversity in associational life and encourage the priority of associational life over the state. Associations, like citizens, do not exist for the state but the state exists for them. The law should keep this priority in mind, particularly at a time when it seems to be getting the priority the other way around.[442]

3. **Equality and Non-Discrimination Should be Viewed Through the Associational Lens**

Attentiveness to the need to maintain diversity and difference leads us to view broad concepts such as "equality" and "non-discrimination" in ways that are more conducive to the first two points above. For some time, the law has had it backwards, and generalized conceptions such as "equality" have been dropped upon associations like a solvent. As we can see in the case of religious employment, greater sensitivity to the nature of religious associations is needed to accord them the respect they are due, given the important role they play in cultures. Forcing religious associations to meet tests in court completely unrelated to but cutting deeply into their religious natures is not respectful of the rights of

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[441] In addition to the criticism of Amartya Sen, *The Idea of Justice* (2009) reviewed in Chapter 1 two other significant descriptions of the positive and negative aspects of Rawls' work, in addition to those discussed in Footnotes 136 and 261, above, have been offered by: David Novak, *Covenantal Rights* (2000) at 20 ff.; Richard John Neuhaus, *The Naked Public Square* (2nd ed . 1986) 257 ff.

[442] A strong example of this was seen in Chapter 5 in the exchange between Chief Justice McLachlin and Jean Bethke Elshtain in McLachlin, *Recognizing Religion* (2004) 12-40. That Hirschl, *Constitutional Theocracy* (2010) 77 and fn 270, refers to this claim by the Chief Justice *without negative comment but as an accurate statement of the role of law as a "comprehensive set of claims"*, shows us why "constitutional theocracy" should be rejected as an acceptable goal for a society that respects religious associational diversity and an appropriate jurisdictional distinction between "church and state."

religion or association, nor the principles of multiculturalism or "culture" which religion serves to enhance. Sometimes, in fact, the perspectives they seek to preserve are not at all unique to any one religion but are, in fact, shared across the spectrum. This has been seen in the phenomena of "inter-faith" coalitions intervening in court where they deem their interests, though different in particulars, common in general. These coalitions have intervened in litigation involving issues such as the rights of immigrants, same-sex marriage, employment rules, abortion and euthanasia. In addition, a large number of religions were able to come together around what they regarded as a core set of principles: the *South African Charter of Religious Rights and Freedoms* was the result.[443]

Law can indeed "attack" or try to weaken religions and it can certainly do them harm. What it cannot do is eradicate the religious spirit. It is hoped that the argument made within this thesis, and the different approach suggested for a legal test and the use of a presumption, will find many different points of application in all areas of the law. Certainly the "organic" approach or "permeated ethos" approach in appropriate cases involving religious employer exemptions may go some way to restore respect for the ways in which religious associations view controversial questions of the day, and provide strong reasons why religious perspectives need to be accorded more weight than they are currently getting.

4. It is Inappropriate to Divinize the Civic Sphere or the Constitution

The quest to establish civil religion or to make an idol out of human rights or the constitution is doomed to failure for several reasons. Here, shortly stated, are three:

1. **Religious associations are joined** (or have a significant voluntary dimension) whereas, usually, citizens do not join a state in the same way. The boundaries of the state are much more formal and difficult to change;

2. **Religions maintain allegiance through binding by affection**; the state and the law do this in different ways. Related to this, religions seek to share their faith in their project with others. The law and the state do not do this to the same degree, nor should they; and

[443] See Iain T. Benson, "*South African Charter of Religious Rights and Freedoms*" (2011) "Appendix" 130 -134 (attached as an "Appendix" to the Bibliography of this thesis as well). At the time of this writing (February 2013), the *Charter* has not yet been passed into law in South Africa but discussions are continuing with government officials with a view to its eventual passage into law. Section 9.1 provides that "Every religious institution has the right to institutional freedom of religion" and sub-Section (c) reads: [and] *in accordance with the principles of tolerance, fairness, openness and accountability to regulate its own internal affairs, including organizational structures and procedures, the ordination, conditions of service, discipline and dismissal of office-bearers and members, the appointment, conditions of employment and dismissal of employees and volunteers, and membership requirements.*

3. **Religious associations are genuine communities with their own rules based on transcendental commitments – the law functions differently**. While there may be similarities in that both have rich symbolic languages, there are important distinctions between law and its "community" of lawyers, judges and academics and those who live in religious communities. First, the law is there for everyone and must be administered impartially between all sub-communities that make up the wider culture and its common symbols should give fair access to all, not membership to some. Religious symbolism and life does not operate this way. Superficial similarities between a "sacred text" and the authority of law, or the idea of legal judges as "high priests", should not be over-extended to draw a parallel between religion and law.[444]

Ran Hirschl, whose work on "Constititutional Theocracy" I discussed in Chapter 1, is correct to refer, throughout his insightful book, to the "high priests of the civil religion in Johannesburg" (187); "the high priests of constitutionalism" (citing, particularly, South Africa and Canada as examples, 203); "today's philosopher king judges" (240); and in his reference to "the religion-like nature of the constitutional scripture" (249). He is, however, too sanguine about the idea of constitutional theocracy.

Another temptation is to urge citizens to embrace the return to *a* political theology or *a* civil religion or *a* constitutional theocracy. In each case, these singularities will be oppressive of the diversity of belief and opinion that associational life alone provides. What is needed for the claims of those who support civil religion or a "global civil religion" is not a civil religion at all, but an approach to the appropriate delineation and furtherance of religion within the civil and global settings. The law should be in the business of superintending, to the minimum degree, the conflicts that extend beyond what is acceptable between the communities. There are limits to religion and what an association may wish to do, as there are for all areas of human endeavour. The articulation of the limit, however, must recognize the limitations of law itself, something that law has been rather weak at doing.[445]

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[444] Ran Hirschl, *Constitutional Theocracy* (2010); the sort of error committed , in a different way by Paul Kahn in *Political Theology* (2011) and the latter's former student at Yale, Benjamin Berger, who, while he superbly explains why law "fails to appreciate religion as culture" comes very close to suggesting that law constitutes both a "community" and a "culture" of its own; see: Benjamin Berger, "Law's Religion" in Richard Moon, *Law and Religious Pluralism* (2008) 264 at 288.

[445] See Francis Lyall, "Religious Law and its Application by Civil and Religious Jurisdictions in Great Britain" in, Ernest Caparros, (ed .), *Religion in Comparative Law*, (2000) 253; Michael J. Perry, *The Political Morality of Liberal Democracy* (2010) 75. I refer to Lyall above at footnote 358.

5. We Need to Re-understand Transformative Constitutionalism

What this says about "transformative constitutionalism"[446] is that ambitions towards reformation of society will have to take different forms with foci in different places than the current focus on rights-based litigation. It will, ideally, gradually shift the focus from litigation as a means of forced outcomes to what will likely be genuinely consensual but perhaps, in some ways, slower forms of social development. Focusing on debate and associational change through politics will have obvious benefits as well as what will be perceived by some as drawbacks to their ambitions. The advancement of minorities and equality will continue but the focus will change direction and face, rather than the court-rooms, the more appropriate chambers of change – legislative chambers and associational meetings and the usual repertoire of active political frameworks. The emphasis will no longer be on legal challenges and outcomes where the advancement of particular agendas rather than associational diversity is presumed to be the important principle. The focus will be, increasingly, on political and civic discourse and debate seeking to change the minds of those in different associations towards larger conceptions of shared-goods. Also, and this is key, the search for justice, when it is in the courts (as it will sometimes rightly be) will involve the use of presumptions such as the one suggested with a view to preserving and encouraging diversity within appropriate legal limitations.

6. We Need to Understand Richer Meanings of Civic, Religious and Legal Pluralism and Civic Virtues

As I have argued throughout and, particularly, in Chapter 1, it was noted, as early as Augustine, that we need richer conceptions of civic virtues and, now, pluralism, both civil and religious.[447] Although "multiculturalism" is the term preferred in the Canadian Constitution, (see, in particular, Section 27 of the *Canadian Charter of Rights and Freedoms*) "culture" is the term of choice in the *South African Bill of*

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[446] As I have commented in various chapters, as with other terms such as "liberalism", "pluralism", "equality" and so forth, the concept of "transformative constitutionalism" is multi-valent and so a variety of interpretations are possible. Not all will be subject to the claim I make about "law as religion" which I will discuss below. See, generally, on multi-valence, Owen Barfield, *Speaker's Meaning* (1984) and Malise Ruthven, *Fundamentalism* (2007) 5ff see Chapter 1, note #5.

[447] A very useful definition of "pluralism" is given by John Courtney Murray, *We Hold These Truths* (1960) x as follows: "..the coexistence within one political community of groups who hold divergent and incompatible views with regard to the religious questions - - those ultimate questions that concern the nature and destiny of man within a universe that stands under the reign of God. *Pluralism therefore implies disagreement and dissension within the community. But it also implies a community within which there must be agreement and consensus.* There is no small political problem here" (emphasis added). See, also: John Kekes, *The Morality of Pluralism* (1993) 199-217, where, at 216 the statement is made that: "…pluralism would restrict the state's advocacy of substantive values by the prohibition of any substantive value being given an overriding status and by specifying one decisive consideration that would defeat the claim of any substantive value…the state's advocacy of particular substantive values is restricted to particular circumstances and specific conflicts." In the same way, as I have argued, part of that context for evaluation should take into account the plural necessity of associational diversity – weaken that and the grounds for pluralism itself are diminished if not eradicated entirely.

Rights (Sections 30 and 31). A constitutional framework that recognizes culture or religion and linguistic communities is one that, at some level, needs to endorse multiculturalism and pluralism. But what does pluralism mean?

Here, as we saw earlier with respect to "liberalism", there would seem to be a variety of meanings and possible interpretations. Some tend towards greater understanding of associational diversity and robustness, and others leave that sort of question undeveloped. A most helpful recent study in this area parallels the discussion by Ferrari and others, analyzing civil religion. The twin problems of monism, with its convergent homogeneity, and individualism, with its tendencies towards social fragmention, require us to delve into the nature of "civic virtues". Virtues, which can be shared by all citizens irrespective of their religious community membership or life-stances, have been recognized as important.[448]

The rich literature regarding "virtue" needs to be discussed in relation to legal principles. Another new concept on the horizon, "integral" or "holistic pluralism", also offers helpful insights in relation to the various meanings of "pluralism".

Fred Dallmayr, for example, seeks to overcome the extremes of either radical fragmentation or monistic unification by a quest for an understanding of mutual relatedness and engagement.[449] Important for this thesis and its conclusion is Dallmayr's insight into the development of "integral pluralism":

> One might say that, whereas in traditional monism (as well as dualism) the unifying structure is imposed from the top down, the linked quality of integral pluralism emerges from the bottom up - in a way that can never be fully predicted or exhaustively mapped [450]

A pluralistic universe of the sort Dallmayr envisions and one that I share "is more like a federal republic then an empire or a kingdom"[451]. Again, quoting William Connolly, Dallmayr draws on the

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[448] The term "life-stance" I took from Tore Lindholm and discussed in Chapter 2, above. It is helpful in being maximally inclusive of all citizens. The call, by some, for the establishment of "global civil religion" referred to by Sylvio Ferrari "Civil Religions" (2010) 759 should be rejected on the same basis, discussed above, for the rejection of "civil religion" itself. The "answer" to "fragmentation" (which can all too easily be a way of negatively describing "difference") is a search for principles of *civic virtue* spoken in a language that can commend adherence from the different traditions. As Ferrari rightly notes, citing Ernst Bökenförde, (and this insight is important where too much is claimed for the "transformative constitution") "…constitutional texts cannot create values, thus it is unfair to expect that they can give citizens a feeling of belonging and solidarity. This is the weak point of the notion of "constitutional patriotism" (763).

[449] Fred Dallmayr, *Integral Pluralism* (2010) 9.

[450] *Ibid* at 9.

[451] Here Dallmayr is quoting William James at 9.

ethical and political implications of mutual connectedness and engagement, and quotes Connolly when he writes: "pluralism, particularly of the multi-dimensional, embedded variety supported here, requires a set of civic virtues – in fact, pluralist virtues – to sustain itself".[452] What this means is the search for a "public ethos" that "solicits the act of cultivation of pluralist virtues by each faith [or group] and a negotiation of a positive ethos of engagement between them."[453] Dallmayr invokes the importance of forbearance and a "presumed generosity in a larger ethos of pluralism".[454] The essence here is co-operation, not domination.

7. We Need to Identify Some Religious Obstacles in the way of a More Integral Pluralism

Dallmayr criticizes religion for erecting three obstacles in the way of integral pluralism:

1. **The recruitment of religion for strictly worldly purposes**, that is, its enlistment in the pursuit of power, wealth and domination – possibly hegemonic or imperial domination (the "politicization of religion");

2. **The retreat of religious faith into a purely inward or "private" disposition**, shunning all involvement in social affairs – this is the opposite of no. 1 and may be referred to as the "privatization of religion"; and

3. **A quasi-Manichean division between good and evil, religious and non-religious motives –** in the sense that an ethical or religious disposition is narrowly confined to private life, while politics, especially international politics, is viewed as being entirely in the grip of immoral power politics.[455]

To get beyond these obstacles, Dallmayr calls for ethical engagement and "lateral embroilment". This involves the work of "dialogue and interrogation" very similar to the approach of Alasdair McIntyre. Dallmayr draws upon a wide variety of influences in order to describe this new approach to pluralism and holism. He cites writers as diverse as Merleau-Ponty, Mahat Mehndi and Hindu and Sikh philosophers from the Indian traditions such as Daya Krishna. The diversity of traditions, however, adds to the multicultural applicability of the insights regarding integral pluralism. The following insight is

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[452] *Ibid* at 11

[453] *Ibid*.

[454] *Ibid.*

[455] *Ibid* at 18, see also, Alasdair MacIntyre's article on tradition and community, "The Idea of an Educated Public" in Graham Haydon (ed), *Education and Values* (1987).

important and completely accords with the historical, philosophical, theological and juridical directions argued for so far in this thesis:

> Clearly, religious and ethical teachings are bound to impact contemporary politics - not with the aim of solidifying a monistic power structure but with the intent of promoting human self-rule and responsible democratic agency, an agency that remains open to the demands (and plural interpretations) of ethics and religion. Differently phrased, the task of religion and ethics in our time is not to buttress but to contest or critique sovereign political power; for this reason, their locus of activity is mainly on the level of "civil society" or the "public sphere" rather than that of government.[456]

Here, indicating that the project of integral pluralism is not utopian, is the author's recognition that "...unified harmony is bound to be accompanied by tension, disharmony, and struggle, a fact that is one of the hallmarks of integral pluralism."[457]

The vision that Dallmyr develops of a pluralistic society committed to dialogue and engagement, fully cognisant of the ongoing reality of disagreement and conflict, is one that clearly rejects, *and calls for legal response in rejecting,* movements towards monistic domination. It is that monistic domination, although phrased in the common but ambiguous language of "furthering equality" or "improving dignity" or rejecting “discrimination” or pursuing “transformative constitutionalism” that needs close scrutiny. *When methods are proposed, that in each case fail to respect difference and diversity, these lofty goals are no longer useful to a just application of the law.* They must be, in each case, understood and worked through in full recognition of the *oculus* and the *diversity presumption*.

Use of the *oculus* and the diversity presumption will go some way to serve as antidotes to an increasingly strident set of intersecting movements that have used the law, and view using law, as a means of "attacking" associations of citizens with whom they disagree. This is a usurpation of law and needs to be identified and counteracted. This will be difficult to do because its plausibility is so deeply entrenched in legal and pre-legal education and the winsome language of “transformation”, framed without sufficient attention to appropriate forms of civic ordering (meaning associational contexts).[458]

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[456] *Ibid* at 19

[457] *Ibid.* at 20

[458] As Mattias Kumm “The Idea of Socratic Contestation” (2007) 144 has noted, law has now shifted from interpretation to justification while recognizing a “general right to liberty” and a “general right to equality.” In this setting, legal precedents no longer matter in the way they once did due to the use of the proportionality test, and *justification* is now the frame. That being the case (and I do not disagree with his assessment) what clearer example could we have of law “rendering religion” (to use Benjamin Berger’s phrase) and failing to recognize it or respect it than the application of such broad language of “discrimination” without any attention to or respect for, as we have seen, the highly nuanced, historical and philosophically rich positions of the religions in relation to such issues as sexual morality?

Secularization, the theory that society will ineluctably move away from religions and religion will lose public relevance, has been recognized as an erroneous theory by those who study the cultural presence of religion. However, according to Peter Berger, a leading sociologist in this area, secularization does continue to have validity for a sub-set of society in the West, and that has relevance to this thesis. Secularization is alive and well, it turns out, in the elites, particularly those that control the media and the higher echelons of the law. Berger observes:

> There exists an international subculture composed of people with western-type higher education, especially in the humanity and social sciences, that is indeed secularized. This subculture is the principle "carrier" of progressive, enlightened beliefs and values. While its members are relatively thin on the ground, they are very influential, as *they control the institutions that provide the "official" definitions of reality, notably the educational system, the media of mass communication and the higher reaches of the legal system.*[459]

A renewal of federalism that recognizes, with respect, human diversity through diverse associational life, is what is needed to counteract monistic domination of the sort we are currently seeing in certain strands of constitutional theory. Such a tendency is not new, as can be seen in the classic essay on the benefits of diverse associations: Lord Acton's *Essays on Liberty*.

Acton compared and contrasted what he referred to as "two views of nationality" which he said "corresponded to the French and English systems". In the French system "nationality is founded on the perpetual supremacy of the collective will...to which every other influence must defer, and against which no obligation enjoys authority, and all resistance is tyrannical".[460]

This approach overruled the rights and wishes of the citizen and "absorbed their diverse interests in a fictitious unity".[461] Of this sort of system, Acton observed:

> Whenever a single definite object is made the supreme end of the State, be it the advantage of a class, the safety or the power of the country, the greatest happiness of the greatest number, or the support of any speculative idea, the State becomes for the time inevitably absolute. Liberty alone demands for its realization the limitation of the public authority, for liberty is the only object which benefits all alike, and provokes no sincere opposition. In supporting the claims of national unity, governments must be subverted in whose title there is no flaw, and whose policy is beneficent and equitable,

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[459] Berger, Peter L. *The De-Secularization of the World* (1999) 34 (emphasis added). Such presence within the forces that give the most present cultural *descriptions* (education and media) and *decisions* (politics and law) goes some way to explain the dominance of the wide-scale belief in "secularization" despite not only the lack of an empirical base to support it but greater empirical proof for its *opposite* – the truth that religions are more significant world-wide not less. See, on the empirical claims for the goods of religion, Brian J. Grim "Religious Freedom: Good for What Ails Us?" (2008).

[460] Acton, *Essays on Liberty* (1907) 288.

[461] *Ibid*.

> and subjects must be compelled to transfer their allegiance to an authority for which they have no attachment, and which may be practically a foreign domination.[462]

What Acton refers to as "the theory of unity" views the nation as a source of despotism and revolution; on the other hand, the theory of liberty (which opposes the theory of unity) regards the nation as a bulwark of self-government and the foremost limit "to the excessive power of the State".[463] For Acton, it was "the tendencies of centralization, of corruption, and of absolutism" which could be effectively opposed by "the influence of a divided patriotism".[464]

Acton noted that the idea of diversity was similar to the effects of the independence of the Church in a state. Such independence, according to Acton:

> Provides against the servility which flourishes under the shadow of a single authority, by balancing interests, *multiplying associations*, and giving to the subject the restraint and support of a combined opinion...*Liberty provokes diversity, and diversity preserves liberty by supplying the means of organization*. All those portions of law which govern the relations of men with each other, and regulate social life, are the varying result of national custom and the creation of private society... *This diversity in the same State is a firm barrier against the intrusion of the government beyond the political sphere which is common to all into the social department which escapes legislation and is ruled by spontaneous laws... That intolerance of social freedom which is natural to absolutism is sure to find a corrective in the national diversities, which no other force could so efficiently provide.* The co-existence of several nations under the same State is a test, as well as the best security of its freedom. It is also one of the chief instruments of civilization; and, as such, it is in the natural and providential order, and indicates a state of greater advancement than the national unity which is the ideal of modern liberalism.[465]

Acton's recognition that the independence of the Church from the state was a kind of mirror image of the independence of associations from government more generally, provides a strong argument in favour of diversity – that it opposes the potential for absolutism within the state or any "speculative idea that dominates other ideas within the State." Acton has also, it would seem, provided another theoretical framework for the rejection of a homogeneous conception of "equality" or "non-discrimination" of the sort we have seen with respect to the religious employer exemption cases and that I have criticized from various directions throughout this thesis.

In Chapter 3, discussing the various “goods of religion” I quoted one of the leading historians of religion and culture of another generation, Christopher Dawson. In one of his earlier books, *Progress*

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[462] *Ibid* at 288-289

[463] *Ibid* at 289

[464] *Ibid*.

[465] *Ibid at* 289-290 (emphasis added)

and Religion, written about a century ago and generally considered his most important work, he noted the tension between immanent and transcendent law, referred to as "material" and "spiritual". Dawson's insights are remarkably prescient and useful in relation to our situation today. He wrote:

> We have come to take it for granted that the unifying force in society is material interest, and that spiritual conviction is a source of strife and division. Modern civilization has pushed religion and the spiritual elements in culture out of the main stream of its development, so that they have lost touch with social life and have become sectarianized and impoverished. But at the same time this has led to the impoverishment of our whole culture.... It has borne fruit in that "plebeianism of the European spirit" which Nietzsche regarded as the necessary consequence of the disappearance of the spiritual power…[466]

This accords with what we have seen others conclude about our contemporary cultural condition. The exclusion of religion and "the spiritual element" from culture is not a lasting or permanent or, in fact, healthy condition. As Dawson argues:

> *This, however, is but a temporary phenomenon; it can never be the normal condition of humanity. For, as we have seen, the vital and creative power behind every culture is a spiritual one.* In proportion, as the spiritual element recovers its natural position at the centre of our culture, it will necessarily become the mainspring of our whole social activity. *This does not, however, mean that the material and spiritual aspects of life must become fused in a single political order which would have all the power and rigidity of a theocratic state. Since a culture is essentially a spiritual community, it transcends the economic and political orders. It finds its appropriate organ not in a state, but in a Church, that is to say a society which is the embodiment of a purely spiritual tradition and which rests, not on material power, but on the free adhesion of the individual mind.*[467]

The vision of religions existing with the political and legal orders, neither absorbing nor being absorbed by them,[468] is consistent with that of the "co-existent" spheres and different capacities for which I have argued. Needless to say, this plural vision is *inconsistent* with the monistic visions and arguments of the new sectarians. Our choice, then, is what tradition of law we understand or imagine ourselves to exist - - one favours, as Acton and Dawson have argued, liberty and freedom and the other does not.

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[466] Christopher Dawson, *Progress and Religion* (1938) 261 – 262.

[467] *Ibid.* 262 (emphasis added).

[468] David Novak, *Covenantal Rights* (2000) in his very detailed study of how "rights" might be re-understood within the covenantal conceptions of Judaism, argues that what is needed is to search for a perspective larger than either that of communitarian or liberal theorists because both of them are "only seeing parts of a bigger picture" (3). Importantly, Novak notes that a person is never just part of one community of which he or she is a part but "…participates in a plurality of communities, the relation of which should be pictured as a series of partially overlapping circles not a series of wholly concentric circles" (5).

8. The Need for "Deep Diversity"

The problem is the failure to view diversity "all the way down", so that general ideas such as equality and non-discrimination are seen *in terms of diversity* (by recognition of and use of the *oculus* and the presumption) rather than assuming that diversity must be subordinated to the general terms.[469] We need to get our priorities straight. This requires the re-awakening of the imagination so that newer constitutional narratives can be designed and appropriate political and legal approaches devised. At the moment our theories are out of step with our practices and we are, overall, not doing well in devising means to protect religious diversity against convergent claims.

We have seen that the law is capable of changing if it has the imaginative capacity to do so and can escape capture from alternative visions that oppose diversity (while they may be claiming to support it). To exercise this capacity, however, the law must "see" that there is a problem to be overcome so that it may provide a remedy. Law has, indeed, failed to see religion as culture[470] and stands close to erecting itself in place of sub-cultures it can neither comprehend nor justly replace.

It is hoped that the argument presented in this thesis, viewed against the long background of human history as well as more contemporary examples, will point towards the need to take more seriously the rights of religious persons and their associations. What is needed is a clearer recognition of both the goods of religion and the limits to the state and the law, overcoming not, as Stephen Carter has misleadingly termed it, "a culture of *disbelief*",[471] but a legal culture of *beliefs* that are currently too often unseen and unrecognized by those who hold them. Seeing these beliefs for what they are, unclothed of rhetoric that all too often goes unchallenged, a more appropriate balance may be "imagined" and the law and its tests adjusted accordingly. That, at least, is the hope.[472]

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[469] In fact, the logic of the position I have termed "totalistic" would be to remove steadily those aspects of the law that provide continued place for difference. It is for this reason that we see, in certain kinds of scholarship, calls to "attack" or "purge" particular conceptions of, say, "gender discrimination" or "sexual orientation." The recent work of some Canadian scholars, as we have seen, confirms this tendency. Now we are beginning to see more open recognition that "tolerance", "multi-culturalism" and "accommodation" are obstacles in the way of "deep equality" see: Lori G. Beaman (ed), *Reasonable Accommodation* (2012) 213, 214 – discussed in Chapter 4, above. Deep *diversity* is the antidote to the illiberal monistic tendencies that appear within conceptions of "deep equality."

[470] Benjamin Berger "Law's Religion" in Richard Moon (ed), *Law and Religious Pluralism in Canada* (2008) 288 "…there is a fundamental, though eminently explicable, shortfall at the core of liberal legal discourse about religious liberties. Religion is not only what law imagines it to be, law is blind to critical aspects of religion as culture."

[471] Stephen L. Carter, *The Culture of Disbelief* (1993); See also, David Schneiderman, "Associational Rights" in R. Moon (ed), *Law and Religious Pluralism* (2008) 65.

[472] Such a hope is not unrealistic when one considers the strides that are currently being made with respect to the search for a *via media* between what one writer has referred to as "smugly arrogant secularism" and "religious reflection which

If this thesis contributes in some ways to seeing the current tensions in a new light and offers persuasive arguments for re-imagining and re-formulating law in relation to competing rights claims involving the freedom of religion, then it will have achieved a large part of its purpose.

When the law serves better the human communities within which it is situated and does so by recognizing, *but not creating* diversity, it is performing its role properly within a constitutional order that cherishes freedoms of religion and association. Law can be about justice if it can recognize that it does not have *the* principal role of "creating a just society",[473] but must stand back to let the arguments about justice be made by others better suited to its complexity and metaphysical richness.

This kind of framework, recognized by law and by civil associations, particularly religions, is one that allows for the freedom from domination by over-arching singular visions, whether animated by law *or* religion. The maintenance, to the greatest extent possible, of the many and varied conceptions of human flourishing within the state and respect for that variety within associations, together, will build a richer meaning of "the common good". Such a reconfiguration is the best antidote to individualism. We all live under the rule of law, but, one hopes, not under law's thumb.

Though this point has been made by many authors and from a variety of disciplines, it is nicely captured by Jürgen Habermas who has noted the importance of religious voices in the political public sphere, in a way that would apply to the legal sphere, and adds an important caution about their truncation:

> For functional reasons, we should not over-hastily reduce the polyphonic complexity of public voices, either. For the liberal state has an interest in unleashing religious voices in the political public sphere, and in the political participation of religious organizations as well. It must not discourage religious persons and communities from also expressing themselves politically as such, for it cannot know whether secular society would not otherwise cut itself off from key resources for the creation of meaning and identity…*Religious traditions have a special power to articulate moral intuitions, especially with regard to vulnerable forms of communal life. In the event of the*

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forgets the decisive role of reason". See: Olav Hovdelien "Post-secular Consensus?" (2011) 115 discussing the 2004 dialogue between leading European atheist philosopher Jürgen Habermas and Joseph Cardinal Ratzinger before the latter became Pope.

[473] Claims that the South African, or any constitution, is "transformative" seem to be a ubiquitous starting block out of which certain approaches are always ready to sprint. However worthy "transformation" is as a rallying cry or general goal (to improve the state of affairs of everyone in society) it can never justify itself as *just* if the methods unleashed run rough shod over the respect that needs to be accorded for associational differences and religious and cultural freedom. See: David Bilchitz and Alistair Williams, "Religion and the Public Sphere" (2012), Karl Klare "Legal Culture and Transformative Constitutionalism" (1998) and Theunis Roux "Transformative Constitutionalism" (2009). A Canadian law dean of a different era (some might say, different world) J.A. Corry, in his Massey Lectures, *The Power of Law* (1971), which I have referred to above on several occasions, has cautioned that the Canadian constitution (he wrote in 1971 and the Canadian constitution was re-patriated in 1982) "…is not designed for rushing through the stratosphere to the new Utopia" (53); neither are the current constitutions of South Africa or Canada.

> *corresponding political debates, this potential makes religious speech a serious candidate to transporting possible truth contents, which can then be translated from the vocabulary of a particular religious community into a generally accessible language.* [474]

Contestation is both inevitable and to be welcomed in a free and democratic society where there are overlapping or co-existent public spheres. The other viewpoint tends towards there being only one public sphere, one public norm and one public conception; that is not the case. We have seen how susceptible constitutional claims are to being co-opted by civic totalists who exhibit scant regard for divergence and diversity and use the "rhetoric" of equality to affect cultural homogeneity. We have also seen how constitutional narratives can change and be changed. Part of the difficulty is that terms that require contextual analysis in order to find their meaning *in context* are at risk of having any context stripped from them.

A Closing Reflection: "Law *as* Religion" Encounters History, Religions, Pluralism and Secularism

I began this thesis with an Introduction that was written, at least in part, on Robben Island off Cape Town. It is fitting that it concludes with a gaze out of a panoramic window from the top of a hotel in Istanbul. Culturally and geographically the two places are very far apart yet in some ways what one can think about them in relation to the themes of this thesis is how similar they are.

The imposing and curious form of the Hagia Sophia (Ayasofya) created in the 5th century during the reign of the Emperor Justinian the Great (who re-codified Roman law in his famous *Institutes*) once served as a Christian Basilica, replacing one of Constantine's from the third century. The third century Basilica was, itself, on the site of a previous pagan temple that went back centuries before the Christian ruins. After the capture of Constantinople in the 15th century by the Muslims, the Hagia Sophia became a mosque under the rule of successive sultans until the Turkish republican secularism of the 20th century, turned it into what it is today: a museum. Thus, secularism comes to occupy what was for millennia a place of worship and sells tickets to history; it is but a pale reflection of the lived religions that continue to exist today throughout the city of Istanbul and the world.

How We Imagine Law and Religions: The (*Re*)Entry of Law *as* Religion

What can we learn from history, philosophy and religions about this transition in and around the Hagia Sophia? I think there are three main lessons:

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[474] Jürgen Habermas, "Religion in the Public Square" (2006) 1 – 25 at 10 (emphasis added).

First, we have seen how religion had to understand the state in relation to its own claims and demarcate what was God's and what was properly Caesar's. That took several centuries and is an ongoing challenge. [475]

Second, we have seen how the law in relation to religion has had to adjust itself to the religious conditions of the ages around it.

Third, we see, but too little and poorly, how law can be understood *as* religion but that is not its only or best self-understanding and it is, as I discussed in Chapter 1, a very clear example of a hidden meaning and one that is coming to dominate in our time.

We have seen how, like the Hagia Sophia, contemporary approaches to law and religion are on offer in a variety of possible imaginaries. We tell ourselves stories about our laws and there are various kinds of stories that we tell. There are three main ways we imagine and speak about law and religion:

1. We may think and speak about how law can dominate religion or be more powerful than religion – such is the story of secularism; *this is **law over religions**.*
2. We may think and speak about how law and religion can cooperate with religion; this is law on an equal footing with religion; *this is **law in harmonic co-existence with religions**.*
3. We may think and speak about law as subordinate to what religions say is the law; *this is **law under religions**.*

The contemporary phase, however, is one in which the first three categories: law as secularism over religion; law in harmonious co-operation with religion; and law under religion are transitioning to a new phase involving a fourth category.

Here we have a merger of powers as we once saw with the early Christian faith. This is **law *as* religion**. In our period of history we may call this phase – ***law as "transformation."***

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[475] The famous formulation, actually a test from *religious* leaders,"render unto Caesar what is Caesar's and unto God what is God's" comes from Mark 12:17 and is the response Jesus gives to the question of authority of the state in relation to God and the question of state taxes. The understanding of this relationship developed over time and as I discussed in Chapters 2 and 3 is understood differently from one religion to the next and depending on what historical period is being analyzed. Within religions, too, there are differing understandings of beliefs and dogma in relation to the claims of law and state. The tensions around authority, "who says?" and "by what authority?" questions within and surrounding religious communities, are the form that law takes "inside" religions; external tensions in relation to similar questions overlap and these boundaries need to be constantly negotiated. Even the movements from one period to another take things with them, often in evanescent or paradoxical forms: see Jean Seznac. *The Survival of the Pagan Gods* (1953) 322 and, C.N. Cochrane, *Christianity and Classical Culture* (1944, 1972) 513 ff.

This fourth category has some interesting features. In the first place, law as transformation differs from "law over religion" because it must hide its theocratic dimensions in the rhetoric of diversity and equality – difference and sameness. Yet this shift must be understood emphatically as ***law in the implicit form of a kind of religion*** with the many implications this can raise.

Such a domination of religion by law proceeds *in the guise of transformation* and *can* only be tolerated if law accomplishes this domination under the guise of neutrality or the acceptable rhetoric of transformation. As I have shown, above, and at the core of the acceptable language, are terms such as "equality" and "non-discrimination." Wide categories such as "diversity" and "dignity" can be used as long as they are not taken back to religious conceptions.[476] The strict separation of church and state, rather than their appropriate *co-operation*, keeps religion tethered while secularists can, like highly spirited children, prod it with sticks.

Law under transformational dominance is staffed and driven by the zealotry of secularists within the frameworks of secularism, though they are often unaware of the religious dimensions of their endeavours. The term zealotry is apt because of its religious connotations in this understanding.

The preceding Chapters, therefore, have shown that law's gradual understanding of itself and religion's understanding of law have developed over time but have ended in the paradoxical situation in which, as religion was learning to de-couple itself from ruling the state (theocracy), certain movements were only too happy to claim the defining power of law and legislation for their own beliefs. In this re-divinization of law by other names what was sacrificed on the altar of choice was genuine diversity.

Thus with respect to the handling of religious employer exemption cases, we have seen that how we understand the nature or the integrity of religion helps us to formulate a law that can respond to that nature or one that over-rides it. Where law is respectful of diversity, then it can accord with pluralism by refusing to narrow the options that allow religious diversity. Where, on the other hand, the law dominates, then religious pluralism actually poses a threat to the control of religion by law. Law as transformation, however, usurps religion by arguing for an essentially religious transformation of society. Using general terms to bring about its own homogeneity rather than to affirm diversity, "equality" and "non-discrimination" are used to narrow the scope of religious operations. This is why what are core tasks in the religious employer exemption cases must be analyzed in terms quite foreign

[476] Recall, Ronald Dworkin's "sanctity of life in the *non-religious* sense" referred to by the Supreme Court of Canada in the *Rodriquez* decision; and Roger Scruton, *Sexual Desire* (1986) *"*[l]iberalism is the natural philosophy of the 'desacralized' world" (cited at note # 390 above).

to the religious community's understanding of itself. The nature of religion is defined by those who seek to "attack" it and "coerce" its members to believe other than they do.

Law that tells stories to itself about its own omni-competence is not encouraging of pluralism and diversity. Law, on the other hand, which understands itself *in terms of diversity rather than transformation or of transformation achieved appropriately through respect for diversity*, is perhaps the only form of law which can offer religions security of respect and itself an increasing clarity of definition.

As we saw, above, in Chapter 4, dealing with convergence, various attempts by activists in our contemporary period, envision and adopt and advocate an approach to law that is totalistic. Pluralistic approaches to associational diversity offer an antidote to such usages of law and it is that approach which has been put forward in this thesis.

The struggle, therefore, is not between "church" and "state", any longer, even if it once was,[477] but between a wide variety of contested conceptions of meaning and faith, both religious and non-religious. Whether the "new sectarians" can learn co-existence and whether the religions can deepen their understandings remains to be seen. What will be needed is for the new movements – "secularist" or "pluralist" – to learn how to temper their enthusiasms and their dominant goals for the purpose of peaceful co-existence, not domination.

Traditions such as Christianity and Islam have had millennia to learn the necessary lessons and have done so with mixed success – they are still learning. They have, however, vast treasure-troves of experience upon which to draw, in addition to their holy books and interpretative frameworks, so as to understand themselves via à vis the newcomers. There is talk of turning the Hagia Sophia in Istanbul back into a place of worship, and some Muslims of the Said Nursi school [478] are quietly suggesting that it be opened again as a place of worship, but this time for use by *both* Muslims and Christians. Is it too much to hope that one day, this ancient building, might become a site of shared, active, worship by the *three* great Abrahamic religions? To accomplish this, however, it will have to deal with a new complexity: religions and law in their current constitutional formulation now have, in addition to secularism, *pluralism and transformational legal ambitions* with which to contend.

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[477] Rémi Brague, *The Law of God* (2007) 257 casts doubt on whether the "separation of Church and State" ever took place because there was no unity in the first place.

[478] Bediuzzam Said Nursi (1878-1960) is an increasingly influential figure within Turkish Islam (and he has growing influence elsewhere). His writings are widely studied and he was an advocate of religious or "grounded" pluralism that rejected both secularism and theocracy. See: Ian S. Markham et al., *An Introduction to Said Nursi* (2011) at 51 ff.

Law itself, subject to the twin temptations of convergence and domination, has to learn whose side it is on in the struggle between competing visions, and whether it is capable of remaining a referee and developing rules that keep the game, as it were, flowing. To do this it will have to avoid the temptation of becoming theocratic itself – it will have to avoid law as the wrong sort of transformation.

Religions, on the other hand, must learn *or re-learn* how to situate themselves between law, other religions and pluralism. Part of the challenge will be to see whether religions and the law, in our contemporary period, can begin to properly imagine their limitations in relation to the nature and benefits of the religions themselves. Law seems to have more learning to do under the power of the wrong kind of transformative constitutionalism, a certain current of which has, as I have demonstrated, already taken us rather far off course.

In this task -– a *course correction* of sorts – use of the *oculus* and the diversity presumption should go some way to correcting the various astigmatisms that so afflict our age and have led to our utopian myopia.

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March, 2013 (revised with corrections prior to final electronic version, September 2013)

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SOUTH AFRICAN CHARTER OF RELIGIOUS RIGHTS

AND FREEDOMS

(English)

PREAMBLE

1. WHEREAS human beings have inherent dignity, and a capacity and need to believe and organize their beliefs in accordance with their foundational documents, tenets of faith or traditions; and

2. WHEREAS this capacity and need determine their lives and are worthy of protection; and

3. WHEREAS religious belief embraces all of life, including the state, and the constitutional recognition and protection of the right to freedom of religion is an important mechanism for the equitable regulation of the relationship between the state and religious institutions; and

4. WHEREAS religious institutions are entitled to enjoy recognition, protection and co-operation in a constitutional state as institutions that function with jurisdictional independence; and

5. WHEREAS it is recognized that rights impose the corresponding duty on everyone in society to respect the rights of others; and

6. WHEREAS the state through its governing institutions has the responsibility to govern justly, constructively and impartially in the interest of everybody in society; and

7. WHEREAS religious belief may deepen our understanding of justice, love, compassion, cultural diversity, democracy, human dignity, equality, freedom, rights and obligations, as well as our understanding of the importance of community and relationships in our lives and in society, and may therefore contribute to the common good; and

8. WHEREAS the recognition and effective protection of the rights of religious communities and institutions will contribute to a spirit of mutual respect and tolerance among the people of South Africa,

NOW THEREFORE the following South African Charter of Religious Rights and Freedoms is hereby enacted:

1. Every person has the right to believe according to their own religious or philosophical beliefs or convictions (hereinafter convictions), and to choose which faith, worldview, religion, or religious institution to subscribe to, affiliate with or belong to.

2. No person may be forced to believe, what to believe or what not to believe, or to act against their convictions.

2.1. Every person has the right to change their faith, religion, convictions or religious institution, or to form a new religious community or religious institution.

2.2. Every person has the right to have their convictions reasonably accommodated.

2.3. Every person has the right on the ground of their convictions to refuse

(a) to perform certain duties, or to participate or indirectly to assist in, certain activities, such as of a military or educational nature, or

(b) to deliver, or to refer for, certain services, including medical or related (including pharmaceutical) services or procedures.

2.4. Every person has the right to have their convictions taken into account in receiving or withholding medical treatment.

2.5. No person may be subjected to any form of force or indoctrination that may destroy, change or compromise their religion, beliefs or worldview.

3. Every person has the right to the impartiality and protection of the state in respect of religion.

3.1. The state must create a positive and safe environment for the exercise of religious freedom, but may not promote, favour or prejudice a particular faith, religion or conviction, and may not indoctrinate anyone in respect of religion. In approving a plan for the development of land, the state must consider religious needs.

3.2. No person may be unfairly discriminated against on the ground of their faith, religion, or religious affiliation.

4. Subject to the duty of reasonable accommodation and the need to provide essential services, every person has the right to the private or public, and individual or joint, observance or exercise of their convictions, which may include but are not limited to reading and discussion of

sacred texts, confession, proclamation, worship, prayer, witness, arrangements, attire, appearance, diet, customs, rituals and pilgrimages, and the observance of religious and other sacred days of rest, festivals and ceremonies.

4.1. Every person has the right to private access to sacred places and burial sites relevant to their convictions. Such access, and the preservation of such places and sites, must be regulated within the law and with due regard for property rights.

4.2. Every person has the right to associate with others, and to form, join and maintain religious and other associations, institutions and denominations, organise religious meetings and other collective activities, and establish and maintain places of religious practice, the sanctity of which shall be respected.

4.3. Every person has the right to communicate within the country and internationally with individuals and institutions, and to travel, visit, meet and enter into relationships or association with them.

4.4. Every person has the right to conduct single-faith religious observances, expression and activities in state or state-aided institutions, as long as such observances, expression and activities follow rules made by the appropriate public authorities, are conducted on an equitable basis, and attendance at them is free and voluntary.

5. Every person has the right to maintain traditions and systems of religious personal, matrimonial and family law that are consistent with the Constitution. Legislation that is consistent with the Constitution may be made to recognize marriages concluded under any tradition, or a system of religious, personal or family law, or to recognize systems of personal and family law under any tradition, or adhered to by persons professing a particular religion.

6. Every person has the right to freedom of expression in respect of religion.

6.1. Every person has the right

(a) to make public statements and participate in public debate on religious grounds,

(b) to produce, publish and disseminate religious publications and other religious material, and

(c) to conduct scholarly research and related activities in accordance with their convictions.

6.2. Every person has the right to share their convictions with another consenting person.

6.3. Every religious institution has the right to have access to public media which access must be regulated fairly.

6.4. Every person has the right to religious dignity, which includes not to be victimized, ridiculed or slandered on the ground of their faith, religion, convictions or religious activities. No person may advocate hatred that is based on religion, and that constitutes incitement to violence or to cause physical harm.

7. Every person has the right to be educated or to educate their children, or have them educated, in accordance with their religious or philosophical convictions.

7.1. The state, including any public school, has the duty to respect this right and to inform and consult with parents on these matters. Parents may withdraw their children from school activities or programs inconsistent with their religious or philosophical convictions.

7.2. Every educational institution may adopt a particular religious or other ethos, as long as it is observed in an equitable, free, voluntary and non-discriminatory way, and with due regard to the rights of minorities.

7.3. Every private educational institution established on the basis of a particular religion, philosophy or faith may impart its religious or other convictions to all children enrolled in that institution, and may refuse to promote, teach or practice any religious or other conviction other than its own. Children enrolled in that institution (or their parents) who do not subscribe to the religious or other convictions practiced in that institution waive their right to insist not to participate in the religious activities of the institution.

8. Every person has the right to receive and provide religious education, training and instruction. The state may subsidize such education, training and instruction.

9. Every religious institution has the right to institutional freedom of religion.

9.1. Every religious institution has the right

(a) to determine its own confessions, doctrines and ordinances,

(b) to decide for itself in all matters regarding its doctrines and ordinances, and

(c) in accordance with the principles of tolerance, fairness, openness and accountability to regulate its own internal affairs, including organizational structures and procedures, the ordination, conditions of service, discipline and dismissal of office-bearers and members, the appointment, conditions of employment and dismissal of employees and volunteers, and membership requirements.

9.2. Every religious institution is recognized and protected as an institution that has authority over its own affairs, and towards which the state, through its governing institutions, is responsible for just, constructive and impartial government in the interest of everybody.

9.3. The state, including the judiciary, must respect the authority of every religious institution over its own affairs, and may not regulate or prescribe matters of doctrine and ordinances.

9.4. The confidentiality of the internal affairs and communications of a religious institution must be respected. The privileged nature of any religious communication that has been made with an expectation of confidentiality must be respected insofar as the interest of justice permits.

9.5. Every religious institution is subject to the law of the land A religious institution must be able to justify any non-observance of a law resulting from the exercise of the rights in this Charter.

10. The state may allow tax, charitable and other benefits to any religious institution that qualifies as a juristic person.

11. Every person has the right, for religious purposes and in furthering their objectives, to solicit, receive, manage, allocate and spend voluntary financial and other forms of support and contributions. The confidentiality of such support and contributions must be respected.

12. Every person has the right on religious or other grounds, and in accordance with their ethos, and irrespective of whether they receive state-aid, and of whether they serve persons with different convictions, to conduct relief, upliftment, social justice, developmental, charity and welfare work in the community, establish, maintain and contribute to charity and welfare associations, and solicit, manage, distribute and spend funds for this purpose.

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