GRAPPLING WITH THE RELATIONSHIP BETWEEN RELIGION AND LAW

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KEEPING RELIGIOUS FUNDAMENTALISM UNDER WRAPS: THE CLOTHING CONTROVERSY IN SELECTED EUROPEAN COUNTRIES

Richard W. Bauman and Sarah L.M. Weingarten*

INTRODUCTION

The passage by the French government in March 2004 of a law prohibiting the conspicuous display of religious symbols and the wearing of religious apparel by students enrolled in public schools caused considerable controversy, not only within France, but in other quarters as well, for the law stopped female students affiliated with Islam from wearing religious headscarves. Muslim groups both inside and outside France responded critically. Among the notorious repercussions of this law was the subsequent kidnapping in Iraq of two French journalists.[1] Somewhat less publicized (but equally important) events in the past year have been decisions by European courts arising out of human rights challenges to similar bans – made in Turkey and in the U.K. – that apply to students' attire when attending public schools or universities.[2] In this instance, multicultural values that would encourage students to display their religious commitments are subordinated. They must take second place to several European governments' goal of promoting a strictly secular educational environment.

Such restrictions have been challenged legally. Judicial review of rules regarding clothing must take into account the rights and freedoms contained in the *European Convention on Human Rights*[3] and in particular freedom of religion, enshrined in Article 9 of the *Convention*. The cases discussed below extend our understanding of how courts will interpret the guarantees contained in Article 9. Ultimately, whether a law or regulation is constitutionally valid depends crucially on the specific historical and social context of the European country in question. Courts will examine the circumstances under which the impugned law (and any violation of the right to religious freedom) is justified as necessary. The judges will inquire into the purposes of the law and how it furthers democratic

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1 The kidnapping on 20 August 2004 of Georges Malbrunot of *Le Figaro* and Christian Chesnot of Radio France Internationale was accompanied by threats to kill them if the new law, due to take effect at the beginning of the school term in France, was not repealed. See Elaine Sciolino, "Hostages Urge France to Repeal Its Scarf Ban" *New York Times* (31 August 2004) A8. Although several deadlines were given and the French government refused to meet them, the hostages survived. They were released on 21 December 2004. For a chronology of events, see "Dossiers d'actualité: Libération de Christian Chesnot et Georges Malbrunot en Irak" (France: Ministère des Affaires étrangères, 2004), online: <http://www.diplomatie.gouv.fr/actu/article.asp?ART=44107>.

2 It should be noted that the cases and legislative initiatives that we will be discussing represent only a few recent examples of the manifestation of ongoing and widespread conflict over the proper role of religion, culture, and symbols related thereto in contemporary Europe. There have been other regional court cases dealing with the same or similar issues. For discussion, see, for example, Axel Frhr. von Campenhausen, "The German Headscarf Debate" (2004) 2004 Brigham Young University Law Review 665. For a very interesting discussion of religious and other cultural identities and points of conflict with other European and liberal values in Norway, see Unni Wikan, *Generous Betrayal: Politics of Culture in the New Europe* (Chicago: University of Chicago Press, 2002) [Wikan].

3 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5 [*ECHR*], online: European Court of Human Rights <http://www.echr.coe.int/Convention/webConvenENG.pdf> [*European Convention*].

goals.[4] To this extent, there is no single European standard governing the constitutionality of laws on religious clothing. Whether a law is valid, even though it interferes with religious freedom, depends crucially on the particular conditions present in the country where the law is adopted. The difference in the respective demographics and histories of Turkey, the U.K., and France, in regard to the separation of political life from religious beliefs and institutions, plays out in the materials we examine below.

We propose to look at these recent European developments, to set them against the background of judicial precedents interpreting Article 9, to indicate some of the salient features of the reasoning by courts and legislatures, and to conclude by sifting out some important lessons about the current situation in Europe regarding the relations between states and religions.

ARTICLE 9 OF THE *EUROPEAN CONVENTION*

Recent cases concerning religious attire focus on Article 9 of the *European Convention*.[5] Therefore, it is worth noting at the outset the content of the section and the general approach that courts (in particular the European Court of Human Rights) have taken to its interpretation. Article 9 itself reads as follows:

ARTICLE 9 – FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION

> 1 Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> 2 Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Kokkinakis v. Greece[6] provides the leading discussion of the basis for the section and of its significance. In that case, the European Court of Human Rights (ECHR) stated as follows:

> As enshrined in Article 9 . . . freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.[7]

Based on the language of Article 9, there are several elements that a court must consider in assessing a claim under the section. More specifically, the analytical process of the Court should be as follows, as summarized in the leading

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4 For readers conversant with Canadian constitutional law, it is worthwhile pointing out that, under the structure of Article 9, the court need not emphasize "proportionality" as a separate requirement in the way that a Canadian court would in assessing a potential reasonable limit under s. 1 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. Although proportionality is a consideration that the European Court of Human Rights (ECHR) has taken into account in consideration of Art. 9, and indeed given significant weight, it is not a free-standing requirement and has at times been subsumed into the Court's overall analysis of reasonableness. For discussion of the use of proportionality as an interpretive principle with respect to Article 9, see David Kinley, "Legal Rights and State Responsibilities under the ECHR" in Linda Hancock & Carolyn O'Brien, eds., *Rewriting Rights in Europe* (Aldershot: Ashgate, 2000) 151 at 162.

5 *Supra* note 3

6 *Kokkinakis v. Greece* (1994), 17 E.H.R.R. 397, no. 14307/88, ECHR, 1994, online: European Court of Human Rights <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudocen> [*Kokkinakis*]. It should be noted that the Kokkinakis decision includes several additional concurring and dissenting judgments along with the main judgment; these reflect some divergence of opinion on the proper way to interpret Article 9. We will restrict our discussion to the majority view.

7 *Ibid.* at para. 31.

case of *Şahin v. Turkey*:[8]

> The Court must consider whether the applicant's right under Article 9 was interfered with and, if so, whether such interference was "prescribed by law," pursued a legitimate aim and was "necessary in a democratic society" within the meaning of Article 9 § 2 of the Convention.[9]

In proceeding through these analytical steps, courts are guided by a number of leading decisions. The first step is for the Court to determine whether or not there has been a violation of the rights guaranteed in Article 9(1). Cases dealing with religious attire, among others, have focused particularly on the enumerated right to manifest religion and belief.[10] In *Kokkinakis*, this right was briefly discussed. The ECHR stated that the right to bear witness to one's religion through religious manifestation was a right implied by religious freedom and "bound up with the existence of religious convictions."[11] However, despite the importance accorded freedom to manifest one's religion, it should be noted that Article 9(1) has not been interpreted to cover every action inspired by religious belief, nor does it permit unlimited action based on religious belief in the public sphere.[12]

Besides these general principles, the analysis of whether or not Article 9(1) has been violated tends to be fact-specific. In order to establish the context for recent decisions regarding religious attire, it should be noted that there is authority to the effect that certain limitations on wearing religious dress, and in particular headscarves, constitute a violation of Article 9(1).[13] This approach has been reflected in more recent cases (as will be discussed below), such that generally, much of the analysis in these recent cases dealing with religious attire focuses on potential justification under Article 9(2).

In the case of a violation of rights under Article 9(1), the next step is to determine if the violation is justified under Article 9(2), which requires the violation to be: (a) prescribed by law, (b) in pursuance of a legitimate state objective, and (c) necessary (with respect to enumerated purposes).[14] The general purpose of Article 9(2), per *Kokkinakis*, is to recognize "that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected."[15]

The first requirement under Article 9(2) is that any limitation on the religious rights in Article 9(1) be "prescribed by law." This requirement is discussed in a number of cases, including *Hasan v. Bulgaria*,[16] *Rotaru v. Romania*,[17] and *Şahin*, which reveal a set of key principles. Firstly, per *Rotaru*, "the expression 'in accordance with the law' not only requires that the impugned measure should have some basis in domestic law, but also refers to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects."[18] In other words, the language "prescribed by law" is intended to connote a fair notice requirement, so that the law is sufficiently accessible and

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8 *Şahin v. Turkey,* no. 44774/98, ECHR, 2004, online: European Court of Human Rights <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> [*Şahin*]. This case will be discussed in further detail below.

9 *Ibid.* at para. 67.

10 For discussion of the right to manifest one's religion, see for example: Peter W. Edge, "Current Problems in Article 9 of the European Convention on Human Rights" (1996) Juridical Review 42 at 45.

11 *Supra* note 6 at para. 31.

12 *Şahin*, *supra* note 8 at para. 66.

13 See for a notable example: *Dahlab v. Switzerland*, no. 42393/98, ECHR, 2001, online: European Court of Human Rights <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> [*Dahlab*]; see also *Karaduman v. Turkey*, no. 16278/90, ECHR, 1993, cited in *Şahin*, *ibid.* at para. 98.

14 It is worth noting that this formulation of Art. 9(2) was one of the less broad formulations of those originally considered. Other suggested versions of Art. 9(2) included reference to historical justifications of importance to the state, but the language was ultimately drafted so as to be more consistent with the justification clauses in other articles. See, for discussion and examples of alternative versions of the text, J.E.S. Fawcett, *The Application of the European Convention of Human Rights* (Oxford: Clarendon Press, 1987) at 236-37.

15 *Supra* note 6 at para. 33.

16 *Hasan v. Bulgaria* (2000) 10 B.H.R.C. 646 (Eur. Ct H.R.), online: European Court of Human Rights <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> [*Hasan*]. We will return to this point below.

17 *Rotaru v. Romania,* no. 28341/95, ECHR, 2000-V, online: European Court of Human Rights <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=rotaru&sessionid=281932&skin=hudoc-en> [*Rotaru*].

18 *Ibid.* at para. 52 [citations omitted].

foreseeable to allow affected individuals to regulate their conduct.[19] Article 9(2) requires clear formulation of any discretion encompassed by a given law, reflecting that the language is also designed to protect the rule of law by preventing abuses of rights based on unfettered discretion.[20] Secondly, although the law requires clarity and fair notice, some degree of vagueness may be permissible, in light of the facts that statutory language can be vague and that some laws are necessarily more precise than others.[21] Lastly, the term "law" is fairly broad, including both statutes and common law.[22]

The second requirement under Article 9(2) is that the limitation on religious rights pursues a legitimate state aim. The cases are less helpful in clarifying this requirement, providing little by way of guiding principle. However, it is worth noting that at least one case considers the justification of state aims with reference to the enumerated considerations in Article 9(2) (that is, public health, safety, order, and the protection of the rights of others).[23] This suggests that these considerations may be relevant to the requirement of a legitimate state aim, as well as the requirement of necessity.

The final requirement under Article 9(2) is that the limitation on religious rights be "necessary." The leading case on the necessity requirement appears to be *Dahlab v. Switzerland*,[24] which states:

> Lastly, as to whether the measure was "necessary in a democratic society," the Court reiterates that, according to its settled caselaw, the Contracting States have a certain margin of appreciation in assessing the existence and extent of the need for interference, but this margin is subject to European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court's task is to determine whether the measures taken at national level were justified in principle – that is, whether the reasons adduced to justify them appear "relevant and sufficient" and are proportionate to the legitimate aim pursued. In order to rule on this latter point, the Court must weigh the requirements of the protection of the rights and liberties of others against the conduct of which the applicant stood accused. In exercising its supervisory jurisdiction, the Court must look at the impugned judicial decisions against the background of the case as a whole.[25]

In *Dahlab*, the Court emphasizes the key point, reiterated in other leading cases, that member states are given a limited but significant "margin of appreciation" to determine whether interferences are necessary in light of legitimate state aims.[26] Therefore, in considering necessity, the court is attempting to balance some degree of deference to member states with the ECHR's responsibility to uphold fundamental rights and freedoms.

One final dimension of Article 9(2) should be noted. Interestingly, the language of the section refers only to the freedom to manifest one's religion, not to all of the enumerated rights in Article 9(1).[27] This unique treatment seems to carve out religious expression as a particularly significant area where the state may have greater license to balance competing considerations and justify violations of rights. The controversial issues raised by religious attire have been discussed in two recent cases decided under Article 9.

Şahin v. Turkey

In a decision of 29 June 2004, the ECHR upheld a ban on Turkish university students wearing the *hijab*, the Islamic headscarf.[28] This

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19 *Hasan*, *supra* note 16 at para. 84. See also *Rotaru, supra* note 17 at para. 55.

20 *Hasan*, *ibid.*

21 *Kokkinakis, supra* note 6 at para. 40.

22 *Şahin, supra* note 8 at para. 77. More precisely: "the 'law' is the provision in force as the competent courts have interpreted it."

23 See *e.g., Dahlab*, *supra* note 13 at 8.

24 *Supra* note 13.

25 *Ibid.* at 11 [citations omitted].

26 *Ibid.* at 11-12; *Kokkinakis, supra* note 6 at para. 47.

27 *Kokkinakis, ibid.* at para. 33.

28 *Supra* note 8. It should be noted that the *Şahin* judgment in the ECHR Chamber has been appealed to the Grand Chamber, pursuant to Article 43 of the *European Convention, supra* note 3 and was heard by that body on 18 May 2005. This means

university regulation had been challenged by Leyla Şahin, a medical student at the University of Istanbul, who had worn her headscarf to classes in a desire to show strict adherence to the duties imposed by her faith. In 1998, Şahin was denied admission to an examination because of her apparel. She was later kept out of lectures in the medical school and eventually suspended from the university.[29] She objected to the exclusion as a violation of her rights to religious belief, practice, and observance, guaranteed under both the Constitution of Turkey and Article 9 of the *European Convention*.

The practice of wearing the headscarf – or veils, shrouds, or long clothing that completely obscures the body – is not about fashion, aesthetics, or rustic lack of sophistication. In contemporary Turkey, the meaning of such attire is both religious and political. The covered head stands as a "representation of Islamic chastity, the holy past, and Turkish local culture."[30] Its popularity has surged again in the past two decades in Turkey. Moreover, the matter of headscarves is fraught with political significance. The *hijab* can be a statement against secular and Western values, which in parts of Turkish society are viewed as corrupting. The scarf itself now has a political life of its own, as part of a politics of identity, capable of serving (to use Jean Baudrillard's language) as an independent signifier.[31] Debates over whether women should take refuge behind symbols closely allied with Islam and cover their heads, as arguably dictated by the tenets of that faith,[32] run parallel to the issues of whether Turkish women should share public spaces with men and whether traditional *sharia* law should be restored for the settlement of family disputes. In the words of Marvine Howe, what she calls the "Headscarf War" in Turkey "epitomizes the whole secular-Islamist struggle in this country."[33] Where some commentators characterize the wearing of the headscarf as a sign of subservience (not only to faith, but to patriarchy also), others view it as a mark of self-affirmation that is increasingly adopted by well-educated, forward-looking, working women.[34]

Turkish political struggles over the headscarf and whether it should be prohibited outside of the mosque and private home were intensified by the election in late 1995 of an Islamist political party, Refah, as the leading party in Turkey's parliament.[35] This prompted what Howe calls a "secular backlash," and in 1997 Turkey's first Islamist prime minister was ousted.[36] The apparent religious revival of the early 1990s gave way to a secular revival in the latter part of the decade. The Turkish government reinvigorated its laws against the wearing of headscarves by students and civil servants. Women's groups inside Turkey rallied on occasions where they detected Islamist pressure to repeal those laws.[37] On the other side, public demonstrations were held by large numbers of Islamist supporters to protest the ban on headscarves[38] – especially in light of complaints by university students such as Leyla Şahin.

The European Court of Human Rights vindicated the ban on headscarves. The court in *Şahin* found, first, that the Turkish university regulation constituted an "interference" with the complainant's right to "manifest" her religion through rites or symbols.[39] Moreover, this interference or violation was "prescribed by law" – for even though Ms Şahin ran afoul of a university regulation, this regulation reflected general Turkish law that made it unconstitutional for students to be compelled to cover their necks

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both that the judgment that we are discussing is not considered a final judgment and that the ECHR has yet to make its ultimate decision. The Grand Chamber judgment has not been released. For details, see the ECHR press release, online: European Court of Human Rights, <http://www.echr.coe.int/Eng/Press/2005/May/HearingGrandChamberLeylaSahinvTurkey180505.htm>.

29 Ms. Şahin later transferred to the University of Vienna.

30 Yael Navaro-Yashin, *Faces of the State: Secularism and Public Life in Turkey* (Princeton: Princeton University Press, 2002) at 110, citing Baudrillard.

31 *Ibid.* at 110-11.

32 See *The Koran*, 5th rev. ed., trans. by N. J. Dawood (London: Penguin, 1990, reprinted 2003) at 248, Surah 24: 31, where it is declared "Enjoin believing women to turn their eyes away from temptation and to preserve their chastity; not to display their adornments . . . ; to draw their veils over their bosoms and not to display their finery . . . ."

33 Marvine Howe, *Turkey Today: A Nation Divided over Islam's Revival* (Boulder: Westview Press, 2000) at 102 [Howe].

34 *Ibid.* at 227.

35 *Ibid.* at 228-29.

36 *Ibid.* at 124-47.

37 *Ibid.* at 244-45.

38 *Ibid.* at 280-81.

39 *Supra* note 8 at para. 71.

with a veil or headscarf for religious reasons.[40] But the European Court went on to conclude that the interference was justifiable and therefore that the ban was valid. The goal legitimately pursued by the public authorities in Turkey, in making such bans, was to preserve the principle of secularism in that country's public schools and universities. Secularism was treated by the court as "undoubtedly one of the fundamental principles" of the Turkish state.[41] The court took note that (as in the earlier *Dahlab* decision) the headscarf in Europe, when worn in an educational setting, conveys an anti-secular message: it is a "powerful external symbol" with a "proselytizing effect," which does not belong in a public school or university.[42] Furthermore, the court in *Şahin* questioned whether the Koranic basis for the headscarf was not "hard to reconcile with the principle of gender equality."[43]

The court largely accepted the arguments of the Turkish government about the perceived dangers in allowing students to wear headscarves. The primary fear motivating the ban was that fundamentalist students would exert pressure on other Islamist students to conform to a more orthodox version of the faith. Or the pressure might fall on students who belong to another religion or to no religion at all.[44] Preserving the welfare of students against such "external pressure" – by ensuring the secular nature of public education – is one way to protect freedom of religion.[45] The court went further than this, and also discerned a connection between secularism and democracy in Turkey. The achievements of the Turkish state in promoting secularism "may be regarded as necessary for the protection of the democratic system in Turkey."[46] The court took judicial notice of the fact that "extremist political movements in Turkey" have arisen which seek to impose religious precepts and symbols on the whole society.[47] Finally, the court in *Şahin* justified its decision about the applicability of Article 9(2) on the basis of equality.[48] Women wear the *hijab*. Although Islamist men often wear beards in deference to their religious convictions, the latter are not compelled to the same extent as headscarves for women. Respect for gender equality provides another ground for concluding that the Turkish ban on headscarves was justified as a necessary interference with the rights contained in Article 9(1) of the *European Convention*.

In *Şahin*, the court drew particular attention to Turkey's distinctiveness as a European state. The vast majority of its citizens belong to Islam,[49] and during the reign of the Ottoman Empire both government and religious groups insisted that people dress according to their religious affiliations. The wearing of fezzes and turbans was not only common, but required. Since the overthrow of that empire in 1923 and the subsequent creation of the Turkish Republic, various constitutional changes have entrenched secularism as a fundamental principle of Turkish public life. Thus, for example, a decree of 1925 banned "all forms of religious dress in public schools, except in Koranic classes."[50] The strict separation of religion from politics has been a key feature of the modernization movement in twentieth-century Turkey. That country has increasingly turned its face towards Europe, and as Turkey strives for full membership in the European Union, its presence there will change the face of Europe itself.

That the complaint in *Şahin* was actually taken to the European Court of Human Rights is a bit surprising, since one might suspect that a more promising course for a devout Muslim would be an appeal to religious courts within the faith. Indeed, the European Court responded to the complaint by emphasizing the peculiar history of Turkey, the margin of appreciation that should be accorded to law-makers familiar with local culture and political conditions, and the firmness of

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40 *Ibid.* at paras. 77-81.
41 *Ibid.* at para. 99.
42 *Ibid.* at para. 98.
43 *Ibid.*
44 *Ibid.* at para. 99.
45 *Ibid.* at para. 105.
46 *Ibid.* at para. 106.
47 *Ibid.* at para. 109, see also para. 32.
48 *Ibid.* at paras. 107-11.
49 According to recent statistics, more than 99% of the population of Turkey is Muslim, although the state is officially secular. See: *The Europa World Year Book*, 5th ed., vol. 2 (London: Europa Publications, 2004) at 4244. See also *The World Factbook*, online: Central Intelligence Agency <http://www.cia.gov/cia/publications/factbook/geos/tu.html>.
50 Howe, *supra* note 33 at 103.

Turkey's embrace of secularism. Turkey has rejected the fundamentalist political revolutionary movements that have embroiled countries such as Iran in the past quarter-century. The decision of the European Court in *Şahin* reveals the extent to which Turkey's strategy permits some violations of the right to manifest religious beliefs through potent symbols.

R (on the application of S.B.) v. Governors of Denbigh High School

Another recent decision addressing religious dress in schools and revealing significant points of contrast with *Şahin* is the March 2005 decision of the English Court of Appeal in *R (on the application of SB) v. Governors of Denbigh High School*.[51] The U.K. remains relatively homogeneous with respect to religion. The country is more culturally diverse than ever before, but a Christian majority representing approximately 72% of the population remains.[52] In contrast, Muslims are a clear minority, although at 2.7% of the population, they constitute the second largest religious group.[53] It should be noted that the Muslim community in the U.K. is not uniform; rather, it is divided both along ethnic lines (including Pakistani, Bangladeshi, and Black African Muslims) and by degree of traditionalism or activism (there is an "extremist fringe" but most Muslims are more politically moderate and likely to accept both Islamic and secular values in law).[54]

Also, the U.K. (unlike France or Turkey) does not emphasize secularism in education, but rather, endorses a strong presence of religion in schools. Notably, legislation requires religious education and acts of collective worship in every school, subject to some exceptions, variations between schools, and parents retaining the right to withdraw their children from religious activities.[55] However, the U.K. government also recognizes a need for cultural sensitivity and accommodation in schools and their dress codes, as evidenced in circulars released by the Department for Education and Science.[56]

It was in this context that the English Court of Appeals decided the *Denbigh* case. The claimant, Shabina Begum, attended a community school with a dress code developed in consultation with the community (including Muslim groups) and viewed by the school as essential to its goals (achieving high educational standards and creating an environment conducive to community and learning for a multicultural student body).[57] This dress code permitted, among other options, wearing the *shalwar kameeze* (a form of Islamic dress consisting basically of a tunic and pants), with or without a headscarf.[58] Begum wore the *shalwar kameeze* for two years at school, then decided that it was no longer an adequate form of religious dress and that she should wear the *jilbab* (a form of dress covering the body more completely than the *shalwar kameeze* and obscuring the shape of the body).[59] The school took the position that Begum could not attend school unless she complied with the dress code (which the *jilbab* did not).[60] An impasse was reached, resulting in Begum's absence from school for almost two years and, ultimately, to an application for judicial review in the English courts based on an alleged denial of religious rights guaranteed under Article 9 of the *European*

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51 *R (on the application of SB) v. Governors of Denbigh High School*, [2005] 2 All E.R. 396, 1 F.C.R. 530, [2005] EWCA Civ 199, online: BAILII <http://www.bailii.org/cgi-bin/markup.cgi?doc=ew/cases/EWCA/Civ/2005/199.html&query=%22governors%20of%20denbigh%20high%20school%22> [*Denbigh*].

52 Office of National Statistics, "Religion in Britain: Census Shows 72% identify as Christians," online: <http://www.statistics.gov.uk/cci/nugget.asp?id=293> ["Religion in Britain].

53 *Ibid*. It should be noted that Islam is the second largest religious group only when respondents declaring "no religion"/"religion not stated" are excluded; this group (at 23.2% of responses) outnumbers Muslims.

54 Office of National Statistics, "Religion: 7 in 10 identify as White Christian," online: Office of National Statistics <http://www.statistics.gov.uk/CCI/nugget.asp?ID=460&Pos=1&ColRank=1&Rank=326>; John Rex, "Islam in the United Kingdom" in *Islam, Europe's Second Religion: The New Social, Cultural and Political Landscape,* ed. by Shireen T. Hunter (Westport: Center for Strategic and International Studies, 2002) 51 at 58, 60, 73.

55 *School Standards and Framework Act 1998* (U.K.), 1998, c. 31, ss. 69, 70, 71, Schedule 19, 20; *Education Act 2002* (U.K.), 2002, c. 32, ss. 80(1)(a), 101(1)(a); see also *UK: The Official Yearbook of the United Kingdom of Great Britain and Northern Ireland* (London: The Stationery Office, 2001) at 233.

56 *Denbigh, supra* note 51 at paras 21-23.

57 *Ibid*. at paras. 1, 4. Interestingly, the school was roughly 79% Muslim, had been recognized for achievement of ethnic minorities, and emphasized accommodation of minority groups insofar as compatible with providing an environment conducive to living and learning for all students.

58 *Ibid*. at paras. 5-7.

59 *Ibid*. at paras. 8, 14.

60 *Ibid*. at paras. 15-16.

Convention.

At first instance, Begum's application was dismissed, essentially on the basis that the school had merely insisted on adherence to their dress code without discriminating or intending to prevent Begum from attending school.[61] The Court of Appeal unanimously reversed the decision below (in three separate concurring judgments), holding that Begum had indeed been excluded from school based on an unjustifiable violation of Article 9.[62]

An emphasis on procedure was at the heart of all three judgments, reflecting that the Court's main concern was neither with the fact nor the substance of the ban on religious forms of dress, but rather, with a lack of process on the school's part.[63] The Court, per Brooke LJ, found a violation of Article 9(1) relatively easily[64] and proceeded to focus on potential justifications. In considering the elements of Article 9(2) the Court found that the dress code was prescribed by law,[65] but never came to a conclusion on the necessity of the substance of the ban. Instead, the Court held that the necessity of measures dealing with religious rights is context-specific and depends largely on the question of whether or not the school (or other government body) came to its decision in a procedurally correct manner.

Interestingly, the Court established a positive onus on schools (and by analogy, likely other government bodies) to follow a prescribed decision-making process before limiting religious rights. Broadly, this onus has the effect of requiring government bodies to consider a number of factors before a valid limitation on religious rights can be established. These considerations appear to largely mirror the issues that a court would consider in assessing an Article 9 claim and include: religious rights at stake, any potential violations of these rights, and the possible justifications for any violations.[66] As the Court points out, this approach leaves considerable room for schools (and other bodies) to regulate religious attire, provided that they first give due weight to religious rights and properly assess potential justifications for limiting these rights.[67] The approach also leaves some degree of uncertainty, which the Court suggested that the government should remedy by providing schools with additional guidance so that additional litigation using up scarce resources and time of school boards would not be required.[68]

Applying this approach to the facts in *Denbigh*, the Court held that the proper decision-making process was not followed and, therefore, that the school's actions unjustifiably limited the claimant's religious rights. Despite the Court's

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61 *Ibid*. at para 23; see also *R (Begum) v. Headteacher and Governors of Denbigh High School*, [2004] ELR 374, [2004] EWHC 1389 (Admin) (Q.B.), online: BAILII <http://www.bailii.org/ew/cases/EWHC/Admin/2004/1389.html>.

62 *Supra* note 51 at para 78. By way of remedy, the court granted declarations that the school unlawfully excluded the claimant, unlawfully denied her the right to manifest her religion, and unlawfully denied her access to education. There is no indication at this time that the case will proceed to the House of Lords.

63 This provoked criticism by the school, reported in the British press, that they had lost on a "technicality." However, others, including some Muslim groups, took a different position and praised the approach as reflective of common sense. For discussion, see "Schoolgirl wins Muslim gown case" *BBC News, UK Edition* (2 March 2005), online: <http://news.bbc.co.uk/1/hi/england/beds/bucks/herts/4310545.stm>. Another newsworthy aspect of *Denbigh* was the involvement of Cherie Booth Q.C., the prominent barrister married to Prime Minister Tony Blair. Booth represented the claimant Begum in her successful appeal.

64 *Supra* note 51 at para. 49.

65 *Ibid*. at para. 61.

66 *Ibid*. at para. 75; see also para. 81 for additional considerations deemed relevant in this particular case. Specifically, the decision-making process prescribed by the court (at para. 75) was as follows:

> (1) Has the claimant established that she has a relevant Convention right which qualifies for protection under article 9(1)? (2) Subject to any justification that is established under article 9(2), has that Convention right been violated? (3) Was the interference with her Convention right prescribed by law in the convention sense of that expression? (4) Did the interference have a legitimate arm [aim]? (5) What are the considerations that need to be balanced against each other when determining whether the interference was necessary in a democratic society for the purpose of achieving that aim? (6) Was the interference justified under article 9(2)?

It seems that this process must be applied by the decision-maker at the time of the decision, unlike the Canadian constitutional law approach allowing for justification of limitations on rights after the fact.

67 Indeed, the Court states that restrictions on religious freedoms could be justified under the prescribed decision-making process, even if substantively similar to the impugned actions of Denbigh. See *Ibid*. at para. 81 (per Brooke LJ), para. 87 (per Mummery LJ), para. 92 (per Scott Baker LJ).

68 *Ibid*. at para. 82 (per Brooke LJ), para. 89 (per Mummery LJ).

sympathy for schools dealing with complex issues surrounding religion and law and the possibility that the actions of the school were justifiable with reference to the considerations in Article 9, the school was not entitled to resist Begum's claims because "it approached the issues in this case from an entirely wrong direction and did not attribute to the claimant's beliefs the weight they deserved."[69]

It is also worth noting the reasoning of the Court concerning the significant diversity between and among groups all subject to the same rights under the *European Convention*. Firstly, the Court emphasized testimony alluding to divisions within Islam, particularly on the issue of appropriate religious dress.[70] The main concern was that this intra-group diversity could lead to social pressure on some Muslims and conflicts between individual and group rights, suggesting a potential need for measures to counter pressure imposed on more "liberal" Muslims by those taking a more "strict" view.[71] These issues were viewed as important in potential justification of dress codes, and also interestingly raise the possibility that restrictions on religious dress could promote, rather than inhibit, religious freedom of some people.

Secondly, the Court noted significant differences among European countries, including the extent of secularism, demographic considerations (especially the prevalence of Islam), and variations in political context (particularly the pervasiveness of extremist religious movements). The Court stated that context is "all-important,"[72] suggesting that different conceptions of religious rights and, indeed, different limitations on religious rights may be justifiable in different contexts.[73] More specifically, the Court focused on the contrast between Turkey and the U.K., emphasizing that the U.K. is not a secular state and does not face the same political pressures as Turkey.[74]

Generally, the Court's discussion of inter-group and intra-group diversity within Europe makes it clear that any conception of common rights, universally applicable to all people subject to the *European Convention* regardless of context, is significantly complicated, even undermined, by divisions within and between groups.

FRENCH LAW ON RELIGIOUS SYMBOLS IN SCHOOLS

Although the largest part of the French population belongs to the Roman Catholic church, Islam has become more of a presence in the past forty years. According to 2001 statistics, about five million Islamic adherents reside in France, making up roughly 8% of the total population of the country.[75] Islam has displaced Protestantism and Judaism as the largest religious minority in France.

The law adopted by the French government in March 2004 amended the Code of Education to regulate the wearing of religious symbols in the following terms:

> Art. L. 141-5-1. In schools, colleges and public lycées, the wearing of signs or attire by which students conspicuously manifest religious membership is prohibited.[76]

Previous regulations prohibiting religious propaganda, proselytism, and pressures in schools had been adopted in 1989. But they did not go so far as to prohibit outright the wearing of religious

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[69] *Ibid.* at para. 78.

[70] *Ibid.* at paras. 51-57.

[71] The Court placed considerable weight on its choice of terminology used to refer to various groups within Islam, denouncing the term "fundamentalist" because of negative connotations inappropriate in this context and choosing instead to refer to "strict" Muslims (meaning those Muslims who believe the *jilbab* is mandatory dress for Muslim women) and more "liberal" Muslims (meaning those Muslims who consider the *shalwar kameeze* to be adequate religious dress for a Muslim woman). See *Ibid.* at para. 31.

[72] *Ibid.* at para. 72.

[73] *Ibid.* It is worth noting Brooke LJ's statement that "there are clearly potential tensions between the rights and freedoms set out in a Convention agreed to more than 50 years ago between Western European countries which on the whole adhered to Judaeo-Christian traditions, and some of the tenets of the Islamic faith that relate to the position of women in society." Interestingly, Brooke LJ felt compelled to make this point despite the fact that the issue was not addressed in argument.

[74] *Ibid.* at paras. 65-73, especially paras. 72-73.

[75] See *Europa World Book, supra* note 49, vol. I at 1673, 1694.

[76] *Loi n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics,* J.O. no. 65, 17 March 2004 at 5190, online: Legifrance <http://www.legifrance.gouv.fr/WAspad/UnTexteDeJorf?numjo=MENX0400001L> [translated by authors].

symbols. The regulations were loosely framed and they proved difficult to implement. The main complaint was that educational administrators, who were responsible for administering the law, had difficulty interpreting and applying the law in individual instances, which were supposed to be handled on a case-by-case basis. It was almost impossible to draw appropriate lines.

The 2004 law was not enacted in a vacuum. Before prohibiting public school students from wearing conspicuous religious symbols, the French government commissioned an independent study on whether such apparel was compatible with French national values and principles. The independent commission, created in July 2003, was chaired by Bernard Stasi, a former politician who since 1998 had occupied the post of "Mediator of the Republic," or national ombudsman for France. The eighteen other members of this special panel represented a broad array of backgrounds.[77] The Stasi Commission was charged by President Chirac to investigate how the principle of *laïcité* applies in the contexts of employment, provision of public services, and most importantly, French schools. We have left the key word *laïcité* untranslated, for it has connotations different from the word "secularism." In its final report, delivered in December 2003,[78] the Stasi Commission itself recognized that, while the rest of Europe prefers to use "secularization" to denote the process of separating religion from politics, in France the most precise and accurate words for capturing the relevant concept are *laïcité* and its cognates, such as *laïser* and *laïque* (or *laïc*).[79]

The Commission held extensive public consultations. A wide variety of religious, political, philosophical, and social opinion was canvassed during these hearings. The Commission went so far as to hold meetings with students from a number of *lycées* and *collèges* to gain first-hand testimony from students who could be affected by any recommendations that the Commission might make.[80] While the *raison d'être* of the Commission was to respond to public concerns and controversies over the application of *laïcité* in contemporary institutions, its sole focus was not on the wearing of Islamic scarves in French public schools. Behind this well-publicized issue lay broader and more troubling questions: about the integration of immigrants, about rising unemployment levels, about discrimination, and about the presence and influence of (unidentified) political extremists.[81]

The product of the Commission's work was a florid description and elaboration of *laïcité* as the "cornerstone" of the French republic since the Revolution of 1789. It is not a mere incidental feature of French governmental structures, but instead it is (in the Commission's words) "constitutive of our collective history."[82] The principle that the churches shall not interfere in public political life, and that the state has no business regulating religious convictions has traditionally embraced three values. These include: freedom of conscience; the equality of all religions before French law; and state neutrality on matters of religious belief.[83] The political domain should be strictly separated from the religious sphere – the state shall neither require citizens to obey certain beliefs, nor forbid this. To

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77 For profiles of the commission members, see the following comprehensive report: "Le Rapport de la Commission Stasi sur la Laïcité" *Le Monde* (12 December 2003), online: <http://medias.lemonde.fr/medias/pdf_obj/rapport_stasi_111203.pdf>.

78 See France, Commission de reflexion sur l'application du principe de laïcité dans la République, *Rapport au Président de la République* (11 December 2003) [*Stasi Commission Report*], online: La documentation Française <http://www.ladocumentationfrancaise.fr/rapports-publics/034000725/index.shtml> [translated by authors].

79 *Ibid.* at 20.

80 For a list, see *ibid.* at 5.

81 See *ibid.* at 6-7, and especially the Commission's observation at 7 that: "As we ought to be clear: yes, some extremist groups in our country are working to test the Republic's resistance and to pressure some youths to reject France and its values" ["Car il faut être lucides: oui, des groupes extrémistes sont à l'oeuvre dans notre pays pour tester la résistance de la République et pour pousser certains jeunes à rejeter la France et ses valeurs"] [translated by authors]. See also *ibid.* at 44, where the Commission refers to a "permanent guerilla war against *laïcité*." Disquiet about these aspects of French social life were borne out in the recent upheavals, not only in Paris suburbs but in many cities throughout France, where thousands of cars were burned and youths battled police, leading to the national government to take unusual steps in November 2005. First, it declared a state of emergency. Second, it discussed a package of social and economic reforms aimed at alleviating racial discrimination and unemployment. See Mark Landler, "French State of Emergency" *International Herald Tribune* (9 November 2005), online: <http:www.iht.com/articles/2005/11/08/news/france.php>.

82 *Ibid.* at 10.

83 *Ibid.* at 9.

these traditional facets, the Commission added one more value associated with *laïcité*: the value of gender equality, which has become a fundamental value of the French republic in more recent decades. Under the principle of *laïcité*, the government has a duty to protect all children against sexist discrimination that might result from religious bigotry.[84]

The Stasi Commission devoted part of its report to France's obligations in light of Article 9 of the *European Convention*. This section of the report anticipates squarely the analytical guidelines laid down by European courts in determining whether a law that infringes religious freedom is nevertheless justified by arguments of necessity.[85] To a large extent, if the French law is tested in the future by a judicial challenge, the Stasi Commission's rationale for banning religious symbols in schools would form an important background to the government's defence of the law as valid. The Commission's discussion repeatedly emphasizes the need for "tranquillity" or "serenity" in classrooms, if educational goals are to be achieved.[86] Central among these goals is the formation of students into "enlightened citizens."[87] To cultivate the aim of "awakening a critical conscience," sources of conflict or disorder should be removed from the school setting.[88] In the words of the Commission, the state has a duty to protect and insulate students against *la fureur du monde* – the passions of the external world.[89] The Commission concludes by recommending that *laïcité* itself become the subject of civic instruction in the public schools – this could be tied in with a day celebrating Marianne, the ubiquitous national icon of the French republic.[90]

CONCLUSIONS

Recent European developments relating to religious attire worn in an educational setting reveal some significant trends. The interpretation of Article 9 across Europe, whether the decision is made by the ECHR or the court of an individual member state, is highly sensitive to local conditions regarding history, social, and political context; the values of member states; and the particular series of events through which an impugned measure came into being. Although individual choices and rights play an important part in the decisions of legislators and courts, it seems that their primary focus is elsewhere. Courts and legislators work from certain premises about the cultural meaning of religious symbols and the current social and demographic circumstances in the state under consideration. The law-makers and courts do not focus primarily on individual choice or conscience, and indeed, they might not even inquire into the motivations of a particular individual affected by the law.

Therefore, insofar as a theme can be extracted from recent developments, it might well be that of a considered (although by no means unlimited) appreciation of increasing pluralism in Europe and the consequent need to allow states some room to balance values insofar as they can do so in a manner consistent with human rights. At the same time, courts seem to be trying to deal with both positive and negative elements of cultural and religious realities in member states, including practical or symbolic effects of religious attire, suggesting that some appropriate limitations on more harmful elements of certain religions may be justifiable, indeed, commendable, in the continuing attempt to make pluralism work within the scope of an established liberal human rights scheme.

However, the existence of a set of general trends arising from cases and legislative developments does not imply a comprehensive or settled approach to bans on religious attire in Europe. Rather, the debate in this area persists, so that developments thus far reveal at least as many interesting questions as they do answers. How and why do courts use the margin of appreciation as they do in according states varying degrees of latitude to balance religious and other values? To what extent are courts reflecting tolerance of diversity (and particularly of the Islamic fact) in European states? How important is it that these cases have taken place in schools, where students, rather than full political subjects, are involved and where difference of opinion provides the data for

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[84] *Ibid.* at 29, 46.
[85] *Ibid.* at 20-21.
[86] *Ibid.* at 41.
[87] *Ibid.* at 56.
[88] *Ibid.* at 57.
[89] *Ibid.* at 56.
[90] *Ibid.* at 66.

critical judgment? How do these recent debates over headscarves and other religious attire relate to ongoing feminist debates surrounding diversity and gender equality?[91]

One question stands out as particularly important in debates over recent cases and legislation in Europe: what is secularism? This question can be divided into two separate inquiries: what is the meaning of secularism from a descriptive point of view and how is secularism viewed normatively? Neither is easily answered.

From a descriptive standpoint, the only clear answer to be drawn from the debate (in cases, legislation, and the public sphere) is that there is no widely accepted meaning of secularism.[92] Rather, the European understanding of secularism varies both between and within member states. For some, the term connotes values essential to a good society, including: modernity, liberal democracy, equality, a free marketplace of ideas conducive to human flourishing, and an absence of coercion. For others, conversely, the term is associated with stifling of religious beliefs, suppression of diversity, or, indeed, religious oppression. For still others who deny the possibility of creating a political space free of spiritual values, secularism is itself a form of state-endorsed religion or ideal.[93] Further, the cases reveal that secularism carries different meanings in different countries. In Turkey, secularism is understood as instrumental to achieving modernity, as a bulwark against slipping back into feudalism. In France, *laïcité* seems to be understood less instrumentally and more in terms of passion and inherent value; indeed, the principle is completely tied up with national identity and self-conception as well as civic instruction.[94] In the U.K., secularism is neither the reality in society nor a goal of the state. The U.K. (particularly the English court in *Denbigh*) emphasizes values that other states might see as related to secularism such as equality, non-discrimination, procedural fairness, respect for pluralism, and the need for state protection against coercion and extremism. However, England's position appears to be that these values are separate from secularism, and indeed, possible in a non-secular state.

From a normative dimension, the key issue is as follows: how ought secularism to be understood and embodied? One important subsidiary question is whether secularism is itself anti-religious. According to the recent cases that we have examined, it would seem not. In fact the cases suggest the converse, namely that secular ideals and the separation between church and state are meant to preserve religions against political interference as much they are intended to preserve the political sphere from religious intrusion. Judges and legislators in this context are not being anti-religious, but rather, are attempting to protect individuals, religions, and rights alike by reining in fundamentalist varieties of religious belief that seek to impose their precepts or practices in the public sphere – especially in a context where students are vulnerable to pressure, where the state owes students a protective obligation, and where critical capacities of students are supposed to be nurtured. Secularism and secular values are understood as protective of fundamental values, including religion, not opposed to them.

Given that this appears to be the conception of secularism endorsed by European courts, the final question is whether such a conception of secularism is defensible from a liberal point of view. Again, the answer is not easy. In order to appreciate the question, it should be situated within broader debates about the role of religion and multiculturalism. Generally, there are two schools of thought. Each values both core liberal ideals (including rights) and accommodation of cultural and religious difference, but recognizes that it is difficult to achieve both of these at the same time. Therefore, the divergence between the two schools is largely a debate over which values ought to be given paramount importance.

Some theorists advocate widespread acceptance of diversity as a crucially important

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[91] See Burçak Keskin-Kozat, "Entangled in Secular Nationalism, Feminism and Islamism: The Life of Konca Kuris" (2003) 15:2 Cultural Dynamics 183, online: <http:cdy.sagepub.com/cgi/content/refs115/2/183>.

[92] For discussion of the multiplicity of meanings of secularism, even at the time when the term originated, see Peter Gay, *The Party of Humanity: Essays in the French Enlightenment* (New York: Norton & Company, 1959) at 121.

[93] For discussion of the claim that secularism is itself a form of religion, see: Kent Greenawalt, *Does God Belong in Public Schools?* (Princeton: Princeton University Press, 2005) at 81-82.

[94] This is reflected in the *Stasi Commission Report, supra* note 78 at 66.

principle, which implies that secularism and any principles and policies based thereupon ought to be subject to adjustment to accommodate a wide range of cultural, ethnic and religious diversity. From this perspective, it seems that secularism ought to give way to multiculturalism and accommodation, at least to some extent, although it should be noted that theorists differ significantly among themselves as to the preferable degree of accommodation (and conversely, of limitations on accommodation based on context and other, often liberal, values).[95] A subgroup of theorists within this school would likely argue that those European authorities seriously concerned about difficulties in integration of minorities are not going far enough to accommodate the cultural and religious diversity of Muslims, while others might favour contextual justifications for the particular limitations in the way that some European courts have done.[96]

Other theorists argue that a core of liberal, democratic, and egalitarian values are of paramount importance to the good liberal state, so that recognition of difference, while crucially important, should be limited to the extent that it undermines these central political values. In other words, while accommodation to cultural difference is desirable (even necessary), elements of cultures or religions that are oppressive or dangerous ought not to be accepted in the name of multicultural accommodation. From this standpoint, it would seem that the range of approaches to secularism developed in European courts is defensible. For example, the conceptions advanced seem consistent with John Rawls' arguments that pluralism, although a fact of political life, should be limited so as to ensure consistency with basic political values of justice and to avoid fundamentalism inimical to these values.[97] These views also seems to accord with the arguments of Susan Moller Okin that multiculturalism and accommodation of cultural difference may (and indeed should) be limited insofar as this is necessary to prevent the oppression of minority groups.[98] On balance, then, it would seem that the approaches taken by of European courts to secularism are supported significantly, if not to an unqualified extent, by liberal theory.

Those developments in European law discussed above illustrate how courts, legislatures, religious bodies, and public opinion have contributed to a lively debate that, although focussed on regulations regarding students, resonates far beyond school precincts. To a large degree, though the debate is about symbols, the underlying tensions arise from troubling, underlying social conditions. In this new Europe, confronted by serious difficulties in integrating of new minorities, legislators and policy-makers must interpret both their own constitutional duties, and also the constitutional limitations on their powers. The controversy in some countries over manifesting one's religious beliefs, especially in a way that fundamentally challenges national values or aspirations – i.e., that could be viewed as going so far as to undermine those values – has prompted legislators to draw lines that might

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[95] For a leading liberal theory of multiculturalism, see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995). Kymlicka deals specifically with religious symbols and attire at 114-15, 177. He argues that recognition of symbols and attire could be beneficial as they promote inclusion, but also seems at times to be sympathetic to dress codes. Based on his comments in this work, it is not clear entirely what position Kymlicka would take on recent bans in Europe, although it is clear that, on his account, recognition of cultural difference should be accepted only insofar as compatible with core liberal values (this argument is summarized at 126).

[96] For a range of views on these sorts of questions, see the responses in Part 2 of Joshua Cohen, Matthew Howard & Martha C. Nussbaum, eds., *Is Multiculturalism Bad for Women? Susan Moller Okin with Respondents* (Princeton: Princeton University Press, 1999) at 27-105 [Okin]. There is some discussion of headscarves specifically in some of the enclosed essays: see Bhiku Parekh's "A Varied Moral World" in Okin 69 at 71, 73 (which would seem to be consistent with opposition to bans on headscarves) and Will Kymlicka's "Liberal Complacencies" 31. These two essays reflect the considerable contrast between theorists all grappling with the concept of multiculturalism: Kymlicka situates multiculturalism within a liberal framework (and sees this as beneficial), whereas Parekh argues that liberal values are, at least, not self-evident, and indeed that it may be another form of fundamentalism to impose liberal values on cultural minorities.

[97] See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993); and "*Commonweal* Interview with John Rawls" in Samuel Freeman, ed., *John Rawls: Collected Papers,* (Cambridge: Harvard University Press, 1999) 616. In the latter piece, Rawls provides more recent commentary on his treatment of religion and the state. Interestingly, he denies the claim that he is really arguing for secularism, instead, reiterating his main argument that any religious doctrine can appropriately be introduced into political liberalism, provided that it is consistent with core values of political justice and supported by public reasons.

[98] See Okin, *supra* note 96. For another critique of multiculturalism that seems sympathetic to Okin's point of view, see Wikan, *supra* note 2 at 146, 156.

surprise observers used to Canada's multicultural climate. After more than two centuries of experience with philosophical movements of Enlightenment, the relations between state and religion in Europe remain complex, checkered, and uneasy.

Richard W. Bauman
Professor
Faculty of Law, University of Alberta
Chair, Centre for Constitutional Studies
Management Board
rbauman@law.ualberta.ca

Sarah L.M. Weingarten
Third-Year LL.B. student
University of Alberta

UNDERSTANDING LAW AND RELIGION AS CULTURE: MAKING ROOM FOR MEANING IN THE PUBLIC SPHERE

Benjamin L. Berger*

INTRODUCTION

The relationship between law and religion in contemporary civil society has been a topic of increasing social interest and importance in Canada in the past many years. We have seen the practices and commitments of religious groups and individuals become highly salient on many issues of public policy, including the nature of the institution of marriage, the content of public education, and the uses of public space, to name just a few. As the vehicle for this discussion, I want to ask a straightforward question: When we listen to our public discourse, what is the story that we hear about the relationship between law and religion? How does this topic tend to be spoken about in law and politics – what is our *idiom* around this issue – and does this story serve us well? Though straightforward, this question has gone all but unanswered in our political and academic discussions. We take for granted our approach to speaking about – and, therefore, our way of thinking about – the relationship between law and religion. In my view, this is most unfortunate because this taken-for-grantedness is the source of our failure to properly understand the critically important relationship between law and religion.

So how do we normally speak about the relationship between law and religion? Think back to the newspaper articles, radio shows, and court decisions that have addressed this newly invigorated relationship in Canada. Upon reflection, what you might notice is that almost everyone – and particularly politicians and the courts – speak in a very particular and amazingly stable idiom. The story tends to go like this: when law and religion meet in contemporary society, the task is simply for the law to accommodate, tolerate, or make space for the particular religious-cultural claim among the variety of such cultural claims in this highly pluralistic Canadian society. This account holds that, in a polity in which constitutionalism and legal liberalism have become so entrenched, the primary means by which this task can be achieved is by properly defining and balancing the rights in issue.

Two features of this story deserve remark. First, note that this idiom treats law and religion as fundamentally different phenomena. Whereas religion is a culture, law sits above it, seeking to integrate religious claims among the many cultural claims that it oversees. I will later challenge this notion. Second, note that the main message of this story is a fundamentally hopeful one: that the goal of accommodation and appropriate balancing *can* be achieved. On this account, properly defining rights or making space for religion is not necessarily an easy task, but one that simply requires attention and effort to achieve. In this way, the story that most of us tell and hear about the relationship between law and religion places enormous faith in law's ability to resolve the cultural claims, and resulting tensions, that it encounters. Law – constitutional law in particular – will do the job if one just keeps working at it. In short, this understanding of the problem assumes the existence of a solution.

The main problem with this story – the problem that pushes me to seek a more satisfying alternative – is that it is not true to our historical or

* This piece is a lightly edited version of a public lecture delivered on 5 November 2004 in Edmonton, Alberta, as part of *Conversations on Mars Hill: Lecture Series on the Intersection of Religion and Civil Life*. The lecture was based on the author's ongoing doctoral dissertation project.

contemporary experience of the relationship between law and religion. The various tensions that we feel in Canada today are not new to the scene. They are tensions that have been sustained and pronounced over the history of this country and, indeed, of the two European nations upon which this country is partly built. Yet over all this time – this long opportunity to come to terms with the relationship and to "fine tune" the law – the issue has not abated or been resolved. New issues of public policy arise and the dilemma reappears, as exigent and seemingly intractable as before. It is not a satisfying account of the way that we see law and religion work. The story is a comforting and simple one, but one that does not ring true.

THE INFORMING VIEW OF LAW

The underlying problem with the way that we currently approach the interaction of law and religion lies in the implicit conception of law upon which this current understanding is founded. In this story, the meeting taking place is between law as something given and standing above the fray of culture, on the one hand, and a cultural claim called religion, on the other. The law is tasked with making room or space within it for the culture; law is called upon to accommodate or tolerate cultures – to adjust in a way that harmonizes the competing cultural views for which it is responsible. The unspoken understanding of law in this story is of the law as a functional adjunct to a properly working state and, essentially, a mechanism for maintaining social stability and implementing government aims.[1] On this view, law is an instrument, albeit a particularly impressive one. Law is seen as endlessly malleable and perfectly adaptive. The vision is one of the law being able to create a coherent social system. Whatever difficult cultural claims are made within a society, law can meet the challenge by adapting to properly accommodate or make space for these claims. Thus, where there is a clash of rights, let us say a clash between freedom of religion and the right to equality or freedom to associate, coherence is a tenable possibility; all turns on the *law as instrument* making the right fine-tuning adjustment.

It is apparent how this vision of law supports the conventional story that we tell about law and religion. Constitutional law is simply a given system of social ordering – an instrument – as opposed to religion, which is a culture. The law is not intrinsically committed to any particular goods or social ends and, as such, nothing should stand in the way of this instrument adapting to accommodate culture. The problem, to the extent that one exists, is simply one of finding the right configuration for the system so that it can make space within itself for this particular cultural commitment.[2]

THE CLAIM: LAW AS CULTURE

As I have said, however, the flaw in this view is that it does not supply a satisfying account of our experience of the interaction of law and religion. Law has struggled mightily, but it has never been able to resolve its tensions with religion. Far from the law functionally tolerating or accommodating this culture within its over-arching structure, law and religion have been locked in a durable tension. Why? My argument is that this descriptive failure is a product of the fact that the vision of law implicit in the conventional account of the relationship between law and

[1] This embedded conception of law bears striking similarity to what one scholar has called the "folk model" of law. See Sally Falk Moore, *Law as Process: An Anthropological Approach* (London and Boston: Routledge & K. Paul, 1978) at 1-2. Moore uses the following description from a 1971 handbook for law students as emblematic of this folk model: "'The Law' in the broad sense of our whole legal system with its instructions, rules, procedures, remedies, etc. is society's attempt, through government, to control human behaviour and prevent anarchy, violence, oppression and injustice by providing and enforcing orderly, rational, fair and workable alternatives to the indiscriminate use of force by individuals or groups in advancing or protecting their interests and resolving their controversies. 'Law' seeks to achieve both social order and individual protection, freedom and justice" (at 2).

[2] Manifestations of this view of the relationship between law and religion can be found both in Canadian jurisprudence (see e.g., *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772, 2001 SCC 31, online: CanLII <http://www.canlii.org/ca/cas/scc/2001/2001scc31.html>; *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86, online: CanLII: <http://www.canlii.org/ca/cas/scc/2002/2002scc86.html>) and in the scholarly literature (see *e.g.*, James R. Beattie, Jr., "Taking Liberalism and Religious Liberty Seriously: Shifting Our Notion of Toleration from Locke to Mill" (2004) 43:2 Catholic Lawyer 367; Iain T. Benson, "Notes Towards a (Re)definition of the 'Secular'" (2000) 33:3 University of British Columbia Law Review 519; and Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54:1 University of Toronto Faculty of Law Review 1).

religion is flawed: the problem is with how we think of the law. What is needed is a revision of our conception of the respective natures of law and religion. I want to suggest that, on an important axis, law and religion share a critical similarity: they are both cultures.

It would be fair to demand by now a definition of what I mean when I use the term "culture." Indeed, this is an important point of understanding. I take the term "culture" to refer to an interpretive horizon, composed of sets of symbols and categories of thought, out of which meaning can be given to experience.[3] It is a system of background understandings that inform, and the process by which we generate, our interpretations of our world. When, through the law, we examine our experiences and the events that take place in our world, we do so within an already-meaningful context. This meaningful and meaning-giving context is a culture. It comprises the context and process of understanding, as well as the resulting expressions. Culture is both a text and the language out of which the text is constituted.

The claim that law is a culture is not an intuitive one. I will spend some time supporting my claim of law as culture, but in the meantime, and with this definition of culture in mind, consider the implications for our topic of understanding law as culture.

If Canadian constitutional law is not simply a given mechanism for social ordering but is a worldview, a system of symbols and beliefs that supplies a framework of meaning, then what we are seeing in the interaction between law and religion is not a challenge of accommodation or systemic fine-tuning, but a meeting of meaning-laden cultures. Most importantly, if this is true, then the law, as a culture, is not infinitely malleable, tolerant, and accommodating. Like all cultures, it has meanings that cannot be compromised. As in all cultures, in law there are certain nonnegotiable beliefs and structures of understanding. Thus, there is the fact of incommensurability: the reality that there are points at which law and religion cannot come together – points at which, as cultures, law and religion must differ and conflict[4] – and, therefore, points at which law and religion are not capable of being harmonized.

Consequently, the idiom must change from one appropriate to the folk model of law – "making room" and "making space" – to one appropriate to meaning-giving cultures – one of a clash of cultural systems. "Resolution" is not a realistic goal. What are in play are ways of being and understanding. So long as there are different meaning systems – different cultures – tensions will be a reality. The story that we tell about the relationship between law and religion must change.

DEFENDING LAW AS CULTURE

This kind of thesis would be unremarkable if we were talking about two phenomena more readily understood as cultures. Take, for example, Jewish and Buddhist cultures. It would not surprise you if I were to point out that people living within these two cultures are living within two very different systems of understanding their world, and two very different frameworks of meaning. Nor would it surprise you if I were to claim that though there might be many points at which Buddhism and Judaism can speak to one another, there are also points at which the systems of meaning and worldviews will irreconcilably differ.

[3] In the larger project that forms the basis for this piece, I derive this conception of "culture" from an analysis of the term's treatment in two academic traditions, interpretive anthropology and philosophical hermeneutics. In the former discipline, central works include Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973); Clifford Geertz, *Available Light: Anthropological Reflections on Philosophical Topics* (Princeton and Oxford: Princeton University Press, 2000); Mary Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (London and New York: Routledge, 2002); James Clifford, *The Predicament of Culture* (Cambridge: Harvard University Press, 1988); and John L. Comaroff & Jean Comaroff, *Ethnography and the Historical Imagination* (Boulder: Westview Press, 1992). In the field of hermeneutics, I pay most attention to the thought of Wilhelm Dilthey, but consider as well the development of Dilthey's insights in Gadamer's work. See Wilhelm Dilthey, *Meaning in History: W. Dilthey's Thoughts on History and Society*, ed. by H. P. Rickman (London: George Allen & Unwin Ltd., 1961); Wilhelm Dilthey, *The Formation of the Historical World in the Human Sciences*, vol. III (Princeton and Oxford: Princeton University Press, 2002); and Hans-Georg Gadamer, *Truth and Method*, 2d ed., revised and trans. by Joel Weinsheimer and Donald G. Marshall (New York: Crossroad, 1989).

[4] Naturally, these cultures will differ in their shape and claims. The point is not that religion and law, as cultures, are the same; rather, as cultures, they make claims about the meaning of experience and *where these claims come into contact*, we are faced with the possibility of incommensurability.

The reason that this thesis is more challenging in the context of thinking about law and religion is that we do not normally think of law as a system of meaning, or a set of symbols, that help to supply understanding about our worlds. My claim, however, is that law – and, for our purposes, Canadian constitutional rule of law in particular – is precisely this.

I want to suggest that meaning-giving conceptions of things like space, time, authority, value, and the subject are embedded within the law. These conceptions afford meaning to the events that take place within and before the law. Canadian constitutional rule of law provides a very particular way of understanding and interpreting the meaning of experience and the significance of the events in our lives. Owing to this interpretive role and meaning-giving function, law is not an instrument brought to bear upon cultures; rather, it is itself a cultural system.[5]

Allow me to explain in more detail. My claim is more than just that law and religion can "believe in" or value different things, though this is certainly true.[6] My claim is much more foundational and fundamental. Consider something as basic as conceptions of time and space. In comparative studies, there is wide acceptance of the thesis that religious cultures divide both time and space along the axis of the sacred and the profane.[7] We view this kind of conception as immediately and obviously cultural. But what of law? Surely law contains no such created symbols to divide up time and space – no particular or readily identifiable conceptions of these dimensions of human experience.

In fact, the Canadian rule of law has very particular conceptions of both time and space. Space is relevant in the law to the extent and degree that one can exercise authority over that space.[8] Thus, whereas space in religion is divided as between the sacred and the profane, the metaphor – the symbol – for law's organization of space is the notion of jurisdiction. So instead of understanding space in terms of the sacred and the profane, the law understands space in jurisdictional terms, terms that relate to international borders, the political and geographical borders within the nation-state, and even the border between private and public space.[9]

Time, too, has a particular meaning in the law. Just as time has particular dimensions of significance in religious cultures – the world is normally founded in some mythic past and bounded by an eschatological time, or a sense of purposeful eternity – so does law. By contrast, law's conception of time is far more accretative or accumulative. The idea of precedent, of the presence of all past decisions in the present and as guiding for the future, is its own conception of time.[10]

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5 See generally Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago and London: University of Chicago Press, 1999); and Naomi Mezey, "Law as Culture" in Austin Sarat & Jonathan Simon eds., *Cultural Analysis, Cultural Studies, and the Law: Moving Beyond Legal Realism* (Durham, N.C. and London: Duke University Press, 2003) 37.

6 Indeed, the Canadian constitutional rule of law is deeply committed to the values and goods of liberalism. See Stephen Holmes, *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: University of Chicago Press, 1995); Allan C. Hutchinson & Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38:3 University of Toronto Law Journal 278; Benjamin L. Berger, "Using the Charter to Cure Health Care: Panacaea or Placebo?" (2003) 8:1 Review of Constitutional Studies 20. I accept Taylor's characterization of liberalism as, itself, "a fighting creed" Charles Taylor, "The Politics of Recognition" in *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1995) 225 at 249). In its appeal to constitutional and *Charter* values, the Supreme Court of Canada's jurisprudence confirms that the Canadian constitutional rule of law is committed to certain normative ends and visions of the good. See *e.g. Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, online: CanLII <http://www.canlii.org/ca/cas/scc/1998/1998scc63.html>; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, online: CanLII <http://www.canlii.org/ca/cas/scc/1985/1985scc15.html>; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 at 1169, online: CanLII <http://www.canlii.org/ca/cas/scc/1995/1995scc67.html>.

7 See *e.g.*, Mircea Eliade, *The Sacred and the Profane; The Nature of Religion*, trans. by Willard R. Trask (New York: Harcourt, Brace & World, Inc., 1959).

8 For two works in the field of critical legal geography that explore the relationship between geography and the legal imagination, see Nicholas Blomley, *Law, Space and the Geographies of Power* (New York: Guilford Press, 1994) and Wesley Pue, "Wrestling with Law: (Geographical) Specificity v. (Legal) Abstraction" (1990) 11 Urban Geography 566.

9 See *e.g.*, Russell Hogg, "Law's Other Spaces" (2002) 6 Law Text Culture 29 at 32 ("Law *has* a geography within, as well as beyond, the boundaries of nation states, even if one of its characteristic qualities has been to deny it").

10 See Martin Krygier, "Law as Tradition" (1986) 5 Law and Philosophy 237 at 245 ("the past of law . . . is not simply part of its history; it is an authoritative part of the present"); and Paul W. Kahn, *The Reign of Law:* Marbury v. Madison *and the Construction of America* (New Haven and London: Yale University Press, 1997) at 21 ("In the present moment of law, we are always looking backward to determine how the future is to be ordered"). For the centrality of tradition to the rule of law, see also Anthony T. Kronman, "Precedent and Tradition"

The same sort of point can be made about conceptions of authority. Whereas in religious culture, authority tends to come through institutional or textual sources grounded in some transcendental soil, a central component of law's notion of authority is the legitimate representation of the citizenry. To be sure, such representation requires reflection of current political will.[11] What law's authority also depends upon, however, is that the law reflect the essential commitments and history of the country.[12] Similarly, just as religions might have a particular concern for the subject – perhaps in the "essential" or "eternal" aspect of the person – law too has a conception of subjectivity. Under the rule of law, the individual is relevantly divided into a public and private aspect[13] and the law is primarily concerned with the human as a political actor – as citizen.

The point of all of this is to show that, like religion, law consists in a rich system of understandings and symbols that inform how the world is interpreted and what meanings are derived from experience. It is in this way that law and religion share a fundamental similarity – both are cultural systems.

(1990) 99:5 Yale Law Journal 1029.

11 See Robert C. Post, "Democratic Constitutionalism and Cultural Heterogeneity" (2000) 25:2 Australian Journal of Legal Philosophy 185 at 186 ("Democratic states embody the value of collective self-governance, which requires that citizens come to accept their own 'authorship' of state actions and choices, or at least of the deliberative procedures through which the state reaches its decisions"). Korsgaard makes a similar argument in an article otherwise about the nature of individual agency: "A state is not merely a group of citizens living on a shared territory. We have a state only where these citizens have constituted themselves into a single agent. They have, that is, adopted a way of resolving conflicts, making decisions, interacting with other states, and planning together for an ongoing future." Christine M. Korsgaard, "Personal Identity and the Unity of Agency: A Kantian Response to Parfit" (1989) 18:2 Philosophy and Public Affairs 101 at 114.

12 For this notion of constitutional legal authority as stemming in part from the authority of "ethos," see Robert Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, Mass: Harvard University Press, 1995) at 35ff. See also Hanna Fenichel Pitkin, "The Idea of a Constitution" (1987) 37:2 Journal of Legal Education 167 at 169 ("how we are able to constitute ourselves is profoundly tied to how we are already constituted by our own distinctive history. Thus there is a sense, after all, in which our constitution is sacred and demands our respectful acknowledgement. If we mistake who we are, our efforts at constitutive action will fail").

13 See *e.g.*, Patricia Hughes, "The Intersection of Public and Private under the *Charter*" (2003) 52 University of New Brunswick Law Journal 201.

AN EXAMPLE

Allow me now to offer a concrete example drawn from a forgotten corner of our public history. In this example you will see the way in which, rather than being a question of accommodation or "making space," the basic and incommensurable frameworks out of which meaning is constructed in law and religion, respectively, are the true source of the tension between the Canadian rule of law and religion.

In the fall of 1875, an election was approaching in the County of Charlevoix, Quebec. The Conservative party candidate was the Honourable Mr. Hector Louis Langevin and his Liberal opponent was Mr. Pierre-Alexis Tremblay. The Liberal party of the day took the position that there should be a sharp division between the Catholic Church and the state. Opposed to this notion and concerned with this election, the bishops of the ecclesiastical province responsible for the county circulated a pastoral letter on 22 September 1875, in which the following claim was made:

> Men bent upon deceiving you, Our Dearly Beloved Brethren, incessantly repeat that religion has nothing to do with politics; that no attention should be paid to religious principles in the discussion of public affairs; that the clergy has duties to fulfill, but in the Church and the sacristy; and that in politics the people should practice moral independence!
>
> Monstrous errors, O.D.B.B., and woe to the country wherein they should take root! By excluding the clergy, they exclude the Church, and by throwing the Church aside they deprive themselves of all the salutary and immutable principles she contains, God, morals, justice, truth; and when they have destroyed everything else, nothing is left them but force to rely upon![14]

Provoked to action by this dispatch, the curés of Charlevoix appealed to the political and

14 *Brassard et al. v. Langevin,* [1877] 1 S.C.R. 145 at 153 [*Brassard*].

spiritual consciences of their congregations. They reminded their parishioners "that you shall have to render to God an account of the vote you will cast this week,"[15] and warned them to "be careful never to taste the fruit of the tree Catholic Liberal."[16]

The Conservative candidate, Mr. Langevin, was elected in the early months of 1876. However, his opponent, Mr. Tremblay, and a group of concerned citizens commenced a legal challenge to the validity of the election based upon the influence exerted by the clergy. On 28 February 1877, the Supreme Court of Canada unanimously annulled Mr. Langevin's election to the House of Commons. Justice Ritchie found that this case was not in any way about religion. Rather, the rule of law established a clear principle with which all could agree – the freedom of elections – and the court was bound to annul this election. In reaching this conclusion, Mr. Justice Ritchie declared that "the combined effects of the bishop's pastoral and the denunciations of the clergy so permeated the county as to make it impossible for me to say that there was a free election."[17] "The law of the land is supreme," Justice Ritchie argued, "and we recognize no authority as superior or equal to it. Such ever has been and is, and I hope will ever continue to be, a principle of our Constitution."[18] The law – the Constitution – would not permit this election result to stand. In effect, the election was void owing to undue spiritual influence.

One view of this late nineteenth-century case is that it merely reflects an early phase in the development of the Canadian rule of law, in which the place of religion within the legal structure had not yet been settled. The country had only been established a decade earlier, and the constitutional compromise was marked by a much more complex legal status for religion than a clear separation of church and state. From this perspective, the tensions at play in *Brassard v. Langevin* would simply have to await a "right accommodation" of religion into the rule of law or a perfected understanding of pluralism and secularism.

In my view, this interpretation is only sustainable if, in favour of the most general characterization of the issues, one glosses over the particular claims made by the competing positions – that of the religious, on the one hand, and the rule of law, on the other. The openness of language characteristic of this period gives us access to rhetoric that discloses a much deeper divide at play in this case. The claims at stake here go beyond questions of accommodation or secularism. With due attention to the commitments disclosed in both sets of arguments, the picture is one of a clash of foundational ways of giving meaning to experience, in this case the experience of a political election.

Consider the building-blocks that form each position. The pastoral letter and sermons admit of no ambiguity about their source of authority: legitimacy and authority flows in an unbroken chain from God, through the Pope and the Church, and is finally vested in the pastor. This authority is transcendental and, therefore, claimed to be supreme to any earthly institution. A clear concept of time is also at play in the sermons and letter: first, in that the Church's authority is timelessly old[19] and, second, in that the implications of this event ripple into the afterlife (and, indeed, into eternity).[20] There is also a conception of the subject implicit in all of the religious rhetoric: the election is significant to the extent that it impacts upon the eternal soul of the voter, which is the aspect of the self at play in this drama. Furthermore, the pastoral letter and sermons assert the utter indivisibility of the religious and political self and, with it, the public and private aspects of subjectivity. Even notions of space are engendered by this debate, with the binding-ness of God's authority existing quite apart from any territorial conception; rather, the only "jurisdictions" engaged here are the profane – this world – and the sacred – the transcendent world invoked through myths and appeals to the afterlife.

The legal response discloses equally defined and influential positions on each of these topics. In

15 *Ibid*. at 164.
16 *Ibid*. at 161.
17 *Ibid*. at 229-30.
18 *Ibid*. at 221.

19 "[T]he forms of civil society vary with times and places; the Church was born on Calvary of the blood of a God, from His lips She has directly received her immutable constitution." *Brassard*, *supra* note at 153, citing excerpts from the pastoral letter of the Bishop of the Ecclesiastic Province, 22 September, 1875.
20 "[O]ne day God shall ask you to give an account of it before His formidable tribunal." *Ibid.* at 160, citing *Analysis of a Sermon by Mr. Sirois, Priest and Curé of St. Paul's Bay*.

contrast to the transcendental authority and legitimacy structure of religion, authority from the perspective of the rule of law rests with the Sovereign and the Constitution. It was on this basis that Justice Ritchie was able to characterize the problem before the Court as a question of statutory civil rights "pure and simple."[21] The concept of time governing the response from the rule of law is, on one level, the electoral structure, but, more deeply, the "time" of law. Time is marked by legal events such as the *Treaty of Paris* and the *Dominion Controverted Elections Act* and, in this sense, lacks the eschatological prospectivity that characterizes the religious view. Under the rule of law, subjectivity is centred not on the notion of the soul, but on the concept of the citizen.[22] Of critical importance in treating the subject, then, is the unencumbered exercise of rights and worldly equality,[23] not the ultimate fate of the divine breath within the person. As this decision shows, under the rule of law, space is carved up into jurisdictions, which bound power and affect the rights and obligations of the subject.[24]

The basic concepts that inform the two perspectives at stake in this case are manifestly at odds with one another. Given its conceptual commitments, the Church could only view this election and the clergy's involvement in it as a question of spiritual conscience and divine will. From the perspective of the rule of law, the question is wholly one of rights and duties in the context of a legal event, and could not be otherwise. The sources of authority are incommensurable and the very conceptions of what is essential about the human subjects involved diverge; indeed, time and space have vastly different contours in each. Furthermore, subtending all of these differences are foundational normative commitments. There is no point of meeting, no space for negotiation, on this terrain. For one view to yield to the other would involve the sacrifice of a constituent element of their meaning-giving frameworks. *Brassard* shows a conflict of worldviews, a clash of cultures.

CONCLUSION: THE CHALLENGES

I began this piece by describing a failing in our conventional idiom used to describe the relationship between law and religion. Instead, I have suggested that we must reconceive of the Canadian constitutional rule of law as itself a culture and, therefore, must re-imagine the relationship between law and religion as the interaction of two cultural systems. However, viewing the problem in this way poses certain significant challenges.

First, "understanding" becomes critically important. Like any clash or meeting of cultures, there is no way of living together until there is some mutual understanding. This is the aim of my account of the interaction between law and religion: understanding the claims of law and those of religion in a more complex and nuanced way through a language of contrast and commonality.[25] Once these claims are cast in terms that give due regard to the fullness of the worldviews out of which both religion and the constitutional rule of law are operating, the challenge is to find points – and I believe there to be many – across which constructive conversations can take place. Understanding the interaction of law and religion in a manner that avoids reductionism offers an opportunity to identify both aspects of the meaning-giving frameworks that may be drawn together and harmonized in public life.

Second, however, we must recognize that, given the fundamental level at which this tension develops – at the level of meaning – there are points of incommensurability, points of irresolvable difference between law and religion. Exposing the full richness of the cultures of

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21 *Ibid.* at 215.

22 "Clergymen, I say, are citizens, and have all the freedom and liberty that can possibly belong to laymen, but no other or greater." *Ibid.* at 222.

23 "There is no man in this Dominion so great as to be above the law, and none so humble as to be beneath its notice." *Ibid.* at 220.

24 "So long as a man, whether clerical or lay, lives under the Queen's protection in the Queen's dominion, he must obey the laws of the land, and if he infringes them he is amenable to the legal tribunals of the country — the Queen's Courts of Justice." *Ibid.* at 220.

25 See Benjamin L. Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State" (2002) 17:1 Canadian Journal of Law and Society 39, discussing the use in liberal secular society, properly understood, of Charles Taylor's notion of a "language of perspicuous contrast." See also Charles Taylor, "Understanding and Ethnocentricity" in *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press, 1985) 116 at 125-26.

religion and the Canadian constitutional rule of law will not only reveal points of potential harmonization and convergence. It is inevitable that such an account will also expose elements of each that are uncompromisingly inconsistent with those of the other. Then the challenge is to reason in a principled manner about what to do in such situations. When the culture of the rule of law and a religious culture lock in such a moment of incommensurability, the exigencies of having a functioning public life demand that something be done. In such situations we have to decide among interpretations of the world; one meaning or the other must prevail.

We cannot discuss it at any length here, but it is my view that, subject to developing a process for better mutual understanding, it is the public sphere, the culture of Canadian constitutionalism, that must prevail at these points of profound tension. I fully acknowledge that once we have discussed the similar natures of law and religion, once we have confirmed a kind of equivalency as between the two, this assertion might be hard to accept. If both religion and the constitutional rule of law are simply ways of giving meaning to the world based on a set of symbols and categories of thought, what warrants the privileging of one culture over another? My sense is that the answer lies in the exigency – the urgency – of having some means of living together and, relatedly, in the concept of the secular.[26] In a pluralistic society, some sense of the common good must prevail over provincialism. Effectively, the answer must always relate to the importance of public life and of having a civic culture.

Our immediate task, however, is to develop a helpful and satisfying account of what is at play in the interaction of law and religion. That is the goal of this piece. It is only with such an account in hand that we can begin to make sense of this pressing issue of public policy.

Benjamin L. Berger
Assistant Professor
Faculty of Law, University of Victoria
bberger@uvic.ca

[26] See Berger, *ibid.*, providing a definition of the secular and critiquing the conception offered in Benson, *supra* note 2.

THE CHRISTIAN RIGHT, THE FEDERAL COURTS, AND THE CONSTITUTION IN THE UNITED STATES

Judith A. Garber*

INTRODUCTION

> There's more than one way to skin a cat, and there's more than one way to take a black robe off the bench. – Tony Perkins, President, Family Research Council[1]

> We set up the courts. We can unset the courts. We have the power of the purse. – Representative Tom DeLay, then-Majority Leader, United States House of Representatives[2]

Twenty-five years have passed since the newly formed Moral Majority helped put Ronald Reagan in the White House and a Republican majority in the United States Senate. The Moral Majority was one organization (and its founder, the Reverend Jerry Falwell, one figure) at the centre of an emerging evangelical Protestant social movement. This movement was galvanized by two aims: defeating the Equal Rights Amendment,[3] which Congress submitted to the states for consideration in 1972, and contesting the U.S. Supreme Court's 1973 *Roe v. Wade*[4] ruling, which recognized a constitutional right to abortion. In the early 1980s, "New Christian Right" was an accurate description of the first widespread public engagement of evangelicals in half a century.

The current Christian Right[5] is built upon its 1970s precursor, but it has moved well beyond it to become a more radical movement in both style and substance. A centrepiece of this radicalism is a concerted, unabashed effort to make American courts – most obviously, but certainly not exclusively, the federal appellate courts – into conservative Christian adjuncts to the electoral, legislative, and administrative processes. Three elements comprise this effort: 1) attacks on judicial independence and authority carried out by means of electoral, legislative, and cultural

* The author thanks Janna Promislow and Naomi Schmold for their helpful comments on earlier drafts of this article.

1 Quoted in Peter Wallsten, "2 Evangelicals Want to Strip Courts' Funds" *Los Angeles Times* (22 April 2005).

2 Quoted in *ibid.*

3 H.R. J. Res. 208 (92nd Congress, 2nd sess.). The proposed constitutional amendment read: "Equality of rights shall not be denied or abridged by the United States or by any State on account of sex."

4 410 U.S. 113 (1973), online, LII <http://supct.law.cornell.edu/supct/html/historics/USSC_CR_0410_0113_ZS.html>.

5 John C. Green argues:

> Although no name is perfect, "Christian right" is preferable to the more common term, "religious right," which properly refers to a possible alliance of traditionalists from all religious groups, including evangelicals, conservative mainline Protestants, traditionalist Catholics, Orthodox Jews, and so forth. . . . Although there is evidence for this broader "religious right," most of the action has been and is with the narrower Christian right. A wide range of conservative denominations are visible as opponents of same-sex marriage, but Green's observation remains useful.

The Christian Right at the Millennium (Washington: The American Jewish Committee, April 2001), online: <http://www.ajc.org/InTheMedia/PublicationsPrint.asp?did=139> [Green]

What evangelical Protestants themselves wish to be called is an issue of some controversy. According to Green, "the term 'Christian right' has, indeed, been shed by the group it's meant to describe. Why? Partly because liberals . . . have finally managed to attach extremist associations to the phrase. . . . The new favored term is 'the pro-family movement. . . .'" Quoted in Timothy Noah, "Red-State PC: Why You Can't Call Them 'the Christian Right'" *Slate* (8 November 2004), online: <http://slate.com/toolbar.aspx?action=print&id=2109370>. The term "Christianist," an evident, critical reappropriation of "Islamist," which has been frequently used in the West since September 11, 2001, to refer to Islamic theocrats, had been circulating on the Internet; it was placed into the mainstream by Hendrik Hertzberg in a commentary on Congressional efforts to displace judicial authority in the Terri Schiavo case. See "Matters of Life" *The New Yorker* (4 April 2005) at 33-34.

politics; 2) an expectation of control over who is appointed to the Supreme Court and lower federal courts; and 3) a reliance on constitutional litigation as a primary method of social change.

As I will discuss, elections are the bedrock of the Christian Right's effort to shape the judiciary, and governance generally, in its image; nevertheless, the combination of majoritarian and countermajoritarian tactics also marks the Christian Right approach to the courts as genuinely radical. Thus, the remarks by Tony Perkins and Tom DeLay at the beginning of this article, which followed Terri Schiavo's deeply politicized death in Florida in March 2005, and which typify one form of attack on the courts, are part of what is actually a complicated approach to the courts. They must be examined alongside Christian Right organizations' intense interest in the two Supreme Court seats that became vacant in the summer of 2005 *and* an ongoing legal mobilization strategy that is as serious and creative as the movement's interventions in democratic politics.

THE TIES THAT BIND "CHRISTIAN" AND "RIGHT"

> One of my goals in life is to give the Republican Party courage. – Dr. Rick Scarborough, President, Vision America[6]
>
> I don't know of a single business group involved in the judicial nominees. Nada, none, zip. – R. Bruce Josten, Executive Vice President, U.S. Chamber of Commerce[7]

Evangelical Protestants retreated into a "defensive separatism" in the 1920s, following the loss of major cultural and political battles over the teaching of evolution and Prohibition.[8] Upon its return to public engagement, Christian conservatism very quickly re-established itself as a prominent feature of the American political landscape, as prominent as the progressive (Black, feminist, anti-war, etc.) social movements that became powerful in the electoral and legislative arenas in the 1960s. Today, groups such as Focus on the Family, the Christian Coalition of America, and Concerned Women for America are becoming as recognizable as political advocates as the venerable American Civil Liberties Union (ACLU), National Association for the Advancement of Colored People (NAACP), and Planned Parenthood Federation of America. In short, it is taken for granted that evangelical Protestants in the U.S. are politically attentive and mobilized, and that the Republican Party cultivates access to their support, resources, savvy, and daring.

During the presidency of George W. Bush, however, and most clearly since his re-election in 2004 along with a larger Republican majority in Congress, the alliance between conservative politics and conservative Christianity has once again become new. The movement that I refer to as the Christian Right has never remained static. It has survived scandals within flagship organizations (one of which led to the demise of the Moral Majority in 1989), learned from embarrassing defeats (most notably, the persistent popularity of Bill Clinton despite his sexual improprieties and impeachment), welcomed the support of Catholic Church on a number of high-profile issues (such as embryonic stem cell research), and proliferated its institutional bases both inside and outside of democratic processes.

Ultimately, the goal of the Christian Right is a seamless integration of religious, political, and

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6 Quoted in Shailagh Murray, "Filibuster Fray Lifts Profile of Minister: Scarborough Has Network and Allies" *Washington Post* (8 May 2005) A01, online: <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/07/AR02005050701266.html>. Only six months after the 2004 election, Scarborough claimed already to have recruited several thousand members to his multidenominational "Patriot Pastors" political network, with the aim of influencing the 2006 elections. Information about Scarborough's (interlinked) organizations can also be found on the websites of Vision America <http://www.vision.america.us> and the Judeo-Christian Council for Constitutional Restoration <http://www.stopactivistjudges.org>.

7 Quoted in Jonathan Weisman & Jeffrey H. Birnbaum, "Business Groups Tire of GOP Focus on Social Issues" *Washington Post* (24 May 2005) A01, online: <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/23/AR2005052301938.html>.

8 Dennis R. Hoover & Kevin R. den Dulk, "Christian Conservatives Go to Court: Religion and Legal Mobilization in the United States and Canada" (2004) 25:1 International Political Science Review 9 at 24. Also see Clyde Wilcox, *Onward Christian Soldiers? The Religious Right in American Politics* (Boulder, CO: Westview Press, 1996) at 30-34 [Wilcox]; and Green , *supra* note 5.

legal institutions achieved through elected officials, appointed officials, and actors in civil society who share a religiously conservative worldview. The movement's anchor issues are opposition to reproductive rights, the right to die, and gay and lesbian rights, and support for manifold forms public religious expression. However, the concerns of Christian Right groups implicate the universe of American constitutional law. Constitutional provisions on the conservative Christian agenda include: all of the First Amendment expressive and religious liberties; the Second Amendment "right to bear arms"; personal privacy rights grounded in the Fourth Amendment; criminal process rights contained in the Fifth, Sixth, and Eighth Amendments, especially concerning death penalty cases; the Fifth Amendment provision regarding the "taking" of private property; the architecture of federalism embedded in the Tenth and Eleventh Amendments; and the Fourteenth Amendment Equal Protection Clause. What is the constitutional promised land for social conservatives is thus a state of siege for libertarians and progressives, who warn that attacks on judicial independence, courts' jurisdiction, and the rule of law itself are the underpinnings of an American theocracy.[9]

The institutional relationships between "Christian" and "Right" are complex and strong. Some critics of American politics would point to elite connections. For example, the National Policy Council, a secretive organization started in 1981 "as an umbrella organization of right-wing leaders who would gather regularly to plot strategy, share ideas and fund causes and candidates," has as members and supporters ultraconservative luminaries in the religious, political, military, business, and media worlds.[10] To appreciate the radicalism of the stance towards courts and the law within the Christian Right, however, one must look beyond groups with only hundreds of (albeit powerful) members. The belief that the judiciary should and can be made to reflect a certain set of values has its origins in the elections of the past quarter-century. More specifically, it has grown out of the brilliant electoral strategies honed by a complex of Republican politicians, Republican party organizations (at the national, state, and county levels), Christian organizations, and popular church leaders. Among the most important figures in the implementation and spread of these strategies have been the professional consultants who bring the same types of communications and constituency-building skills to church pastors with national aspirations as to political candidates.[11] The movement has excelled at candidate recruitment and training, whether for partisan or nonpartisan offices, and including positions in all branches and all levels of government. Informally, it has made activists out of political amateurs who become energized by the types of concerns articulated within the conservative Christian milieu.

Early on, evangelicals entered politics mostly through local school board elections, and their successes in that arena, though inconsistent, have been publicized widely in the media and mobilized against intensely by liberal and moderate opponents.[12] But Americans fill more than 513,000 public offices through elections. It is significant that religious conservatives have organized to contest the spectrum of the 494,000 local elected offices,[13] given the impact of those positions on day-to-day governance.

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[9] Didi Herman, "The Gay Agenda is the Devil's Agenda: The Christian Right's Vision and the Role of the State" Craig A. Rimmerman, Kenneth D. Wald, & Clyde Wilcox, eds., *The Politics of Gay Rights* (Chicago: University of Chicago Press, 2000) 139. Also see the Theocracy Watch website, online: <http://www.theocracywatch.org>.

[10] Jeremy Leaming & Rob Boston, "Behind Closed Doors" *Church & State* (October 2004), online: American United for the Separation of Church and State <http://www.au.org/site/News2?page=NewsArticle&id=6949&abbr=cs_>.

[11] See, for example, Jonathan Mahler, "The Soul of the New Exurb" *New York Times Magazine* (27 March 2005) 30.

[12] Control of school boards by candidates affiliated with the Christian Right is not only a small-town or Bible Belt phenomenon, as one might suppose. In 1993, angered by the introduction of a multicultural curriculum, the Christian Coalition and other groups succeeded in removing the head of the New York City public school system and won elections for control of a large number of the city's school districts. Wilcox, *supra* note 8 at 82. The shifting balance of control on the Kansas State Board of Education since 1999, fought largely over the teaching of evolution, has received national and international attention. Also see Melissa M. Deckman, *School Board Battles: The Christian Right in Local Politics* (Washington: Georgetown University Press, 2004).

[13] U.S. Department of Commerce, Bureau of the Census, *1992 Census of Governments: Popularly Elected Officials* (Washington: U.S. Government Printing Office, June 1995) at 1, online: <http://www.census.gov/prod/2/gov/gc/gc92_1_2.pdf>.

It is even more crucial that these activists have not limited their electoral ambitions to school boards, county commissions, or small-town mayorships. The grassroots organizing that is required to win lower-profile elections – and to control Republican Party organizations – has proven to be a solid foundation for higher-level campaigns. This advantage was evident when Republicans won control of both houses of Congress in 1994 and became impossible to ignore with the 2000 Presidential election.[14] Candidates who vaunt their conservative Christian values and associations have increasingly won governorships and other powerful statewide positions such as attorney general, secretary of education, and secretary of state (the latter, frequently the official who controls election administration). So many seats in the U.S. House of Representatives and the Senate are occupied by religious conservatives that, based on their votes in 2003, fully thirty-nine of the fifty-one Senate Republicans (plus one Democrat) earned scores of more than 95 percent from three major Christian Right organizations; 136 of 229 House Republicans received scores of at least 90 percent.[15] Electoral activity over time, then, has seen the actions and discourses of Republican politicians converging with the agendas of religious denominations and organizations in various areas of public policy – social and cultural policy most obviously, but also science, economic, national security, and foreign policy.

The movement towards shared policy goals between church (or temple, mosque, or synagogue) and state demands examination, in part because it is occurring in a national context where government's ability to take the side of – to "endorse" – religion is *constitutionally* quite narrow.[16] With the First Amendment's Establishment Clause less open to interpretation, the Rehnquist Court expressed its sympathies with religious expression by expanding the scope of the Exercise Clause and Free Speech Clause.[17] This shift owes much to intensive legal activity by certain Christian Right organizations, as I discuss below.

But the radicalism of the current situation also lies in the normalization of public officials mixing their faith with their jobs, *in practice*. Thus, it may remain contentious and newsworthy but it is no longer surprising that Texas Governor Rick Perry went to a Fort Worth Christian school to sign a law restricting abortions for minors[18] or that an Ohio county sheriff's "official letterhead . . . reads, 'With God, all things are possible.'"[19] Neither does it seem particularly strange that the Majority Leader of the U.S. Senate, Bill Frist, used the "Justice Sunday" event sponsored by Focus on the Family and the Family Research Council at a Baptist "megachurch" in Louisville, Kentucky, to rally support for appellate court nominees that Senate Democrats had been blocking as extremist. Frist's taped message was

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[14] Prior to the 2000 election, some in the Christian Right were in a "'post-impeachment funk,'" in the words of a movement founder, Paul Weyrich. Some on the left believed the entrance of the Christian Right into the Republican nomination battle might split the party. Harry Jaffe, "Backward, Christian Soldiers" *Salon* (10 April 1999), online: Salon.com <http://www.salon.com/news/feature/1999/04/09/christianright>. That both sides underestimated the resilience and influence of religious conservatives is due in part to the transformation of the "compassionate conservative" candidate George W. Bush into President Bush, who, rendered more powerful overall by the "war on terrorism," has governed with deference to the power of the Christian Right electorally as well as in Congress.

[15] Scores are the average of scorecards issued by the Family Research Council, Eagle Forum, and Christian Coalition. Glenn Scherer, "The Godly Must Be Crazy: Christian-Right Views are Swaying Politicians and Threatening the Environment" *Grist Magazine* (27 October 2005), online: </2004/10/27/scherer-christian>.

[16] The "endorsement" test for determining whether a particular religious expression or display "makes religion relevant, in reality or public perception, to status in the political community" was first offered by Justice Sandra Day O'Connor in concurrence in *Lynch v. Donnelly*, (1984) 465 U.S. at 692, online: <http://supct.law.cornell.edu/supct/html/historics/USSC_CR_0465_0668_ZS.html> (permitting the display of a crèche by the city). It has been determinative in many Establishment Clause cases, including most recently *McCreary County v. American Civil Liberties Union of Kentucky*, (2005) 545 U.S. ___ [03-1693], online: LII <http://straylight.law.cornell.edu/supct/html/03-1693.ZS.html> (forbidding the display of the Ten Commandments in two county courthouses), though not *Van Orden v. Perry*, (2005) 545 U.S. ___ [No. 03-1500], online: LII <http://straylight.law.cornell.edu/supct/html/03-1500.ZS.html> (permitting a monument inscribed with the Ten Commandments on the Texas capitol grounds). With Justice O'Connor's replacement on the Court by Samuel Alito, this test may well become defunct.

[17] The First Amendment begins: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech. . . ."

[18] The bill-signing was orchestrated via "an e-mail message sent to religious groups" and was initially intended to be filmed for use in Perry's 2006 reelection campaign. Ralph Blumenthal, "Texas Governor Draws Criticism for a Bill-Signing Event at an Evangelical School" *New York Times* (6 June 2005) A12.

[19] James Dao, "Movement in the Pews Tries to Jolt Ohio" *New York Times* (27 March 2005) 14.

reportedly "broadcast to several hundred churches by satellite, thousands of people over the Internet and 61 million households over Christian radio and television stations" (while in the same city, "[a]bout 1,200 liberal Christians gathered at a rally at a Presbyterian church . . . to protest what one speaker, the left-leaning evangelical Jim Wallis, called 'a declaration of religious war' and 'an attempt to hijack religion'").[20] Conservative institutions now share messengers and messages as a matter of course, as they share the media that publicize these actors and ideas.

THE 2004 ELECTIONS

> They just make more Republicans. – Jennifer Palmieri, Communications Director, Kerry-Edwards Ohio[21]
>
> [W]e're the ones who can gear up people around the country. The engine has been idling since the election, and all we have to do is rev it up again. – Tony Perkins, President, Family Research Council[22]

The 2004 elections revealed the connections between popular, representative politics – influencing nominations, campaigning, and lobbying – and the potential force of the Christian Right in shaping the judiciary. In the presidential election, Ohio and the several other competitive "swing" states served as laboratories for twenty-first-century versions of electioneering that were pioneered by conservative Christian and Republican campaign consultants in the crucial 1970s-1980s period. Throughout the Bush-Kerry contest, Republicans exploited their "sleek and flexible arsenal of the most effective weapons in contemporary politics: high-impact TV ads, precision polling, laser-guided direct mail."[23] They created "a stunning turnout" by identifying unmobilized "white, conservative and religious voters" through "a volunteer network using local party organizations, union rolls, gun clubs and churches."[24] A figure generated by conservatives (and cited by progressives) is the 4 million "Christian fundamentalists, evangelicals or Pentecostals [who] did not vote in 2000," a group Republicans targeted in completing the construction of their electoral base in 2004.[25] It is no coincidence that Republicans located so many new voters in the new "exurbs" of metropolitan areas, or precisely where evangelical, often theologically untraditional megachurches are sprouting. Megachurch ministers, many of whom came of age during the heyday of the New Christian Right, helped recruit voters who, according to the Bush-Cheney campaign's liaison to social conservatives "said they were motivated first and foremost by their values.'"[26] The longstanding practice, begun by the Moral Majority, of the mass distribution of voter guides in churches prior to elections – according to the mainstream media, the Christian Coalition alone distributed 30 million guides in 2004[27] – now seems a necessary but insufficient mode of electoral influence.

These electoral strategies have manifold implications for the American judiciary. First, and most straightforwardly, by squeezing votes out of the Electoral College, Christian conservatives

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[20] David D. Kirkpatrick, "Frist Seeks Christian Support to Stop Filibusters" *New York Times* (25 April 2005) A14.

[21] Quoted in Matt Bai, "Who Lost Ohio?" *New York Times Magazine* (21 November 21) 66 at 74 [Bai, "Ohio"].

[22] Quoted in Alan Cooperman, "Evangelical Groups Plan Aggressive Drive for Nominee: Campaign Seeks Solid Conservative" *Washington Post* (4 July 2005) A06, online: <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/03/AR2005070300908. html>.

[23] Matt Bai, "The Multilevel Marketing of the President" *New York Times Magazine* (25 April 25) 42 at 46 [Bai, "Multilevel Marketing"].

[24] See Bai, "Ohio," *supra* note 21 at 74.

[25] John Nichols, "Karl Rove's Legal Tricks," *The Nation* (22 July 2002), online: <http://www.thenation.com/doc.mhtml?i=20020722&s=nichols>. And see Candi Cushman, "Remember Florida" *Citizen*, online: Family.org <http://www.family.org/cforum/citizenman/coverstory/a0032633.cfm>

[26] Gary Marx, quoted in Mahler, *supra* note 11 at 37. Bai also notes the benefits for Republicans in creating, in deindustrialized states, "a political machine for the new economy" out of the "fast-growing, conservative communities . . . rising almost monthly out of fields and farmlands." See Bai, "Multilevel Marketing," *supra* note 23 at 45. The relationship between the Republican Party's economic and social policies is explored throughout Thomas Frank, *What's the Matter with Kansas? How Conservatives Won the Heart of America* (New York: Metropolitan Books, 2004).

[27] The accuracy of data about (paper) voter guides is uncertain – for instance, the Christian Coalition of America's figure of 70 million guides distributed in 2000 was repeated endlessly without interrogation. The organization's press release containing that figure can be found online: <http://www.cc.org/content.cfm?id=60>. The 2004 guide – in actuality, numerous localized voter guides, plus national guides in English and in Spanish – was accessible on the Christian Coalition's website, online: <http://www.cc.org/voterguides.cfm>.

were re-electing the Christian conservative who appoints federal judges, the Attorney General, other top Justice Department officials, and federal prosecutors. They were, moreover, empowering the Bush Administration to continue to use these appointments to satisfy the most socially conservative wing of the Republican Party. Bush's first-term Attorney General, John Ashcroft, had a lengthy career in Missouri electoral politics (as Governor and U.S. Senator) along with longstanding, very public participation in Christian Right organizations. It was predictable that Bush's judicial appointees would not be "pragmatic," as they were when he was the governor of Texas,[28] but that they would fulfill an ideological mandate to rid the federal bench of "liberal activists." On the Republican agenda for the second term in the White House was bringing several Court of Appeals candidates before the Senate for votes, candidates whose nominations Democrats had blocked and threatened to filibuster because of their very conservative judicial records and/or their extracurricular activities regarding abortion rights, race, and other fraught social issues.

Second, these new voters were solidifying Republican control of the House and the Senate. Perhaps more to the point, they were intensifying as well as transforming the nature of Congressional conservatism. Republicans entering Congress since the watershed 1994 election tend to be more ideological than more senior members. Many moderate Republicans have retired, and some have been defeated in primary elections or lost their seats as the fixed number of House seats have followed the shift of the U.S. population southward and westward. Hence, the great majority of Congressional Republicans vote precisely as key Christian Right groups would have them vote. A major victory for Republicans enabled by the 2004 election was the Senate approval of four conservative Christian nominees to the Court of Appeals (two of them to the influential District of Columbia Circuit Court). A May 2005 deal that secured votes on those judges was negotiated by a bipartisan group of fourteen moderate senators. The deal exchanged a promise by the seven Democrats to "filibuster future judicial nominees only under 'extraordinary' circumstances" for the seven Republicans' agreement "to support no changes in Senate rules that would alter the filibuster rule" (in a way that would facilitate ending filibusters).

In the short term, the gloomy reaction on the left – Nan Aron, President of the Alliance for Justice, was "'very disappointed with the decision to move these extremist nominees one step closer to confirmation'"[29] – has proven far more warranted than the Christian Right's anger at what Focus on the Family President James Dobson called a "'complete bailout and betrayal.'"[30] To wit: The top item on the Christian Coalition's agenda for Congress in 2005 was a lengthy call to action on "stopping filibusters on President Bush's judicial nominations."[31] For 2006, "getting votes to confirm President Bush's judicial nominations"dropped to sixth place and is merely a declaration that the organization "will strongly support President Bush's nominee to the Supreme Court, Judge Samuel A. Alito, other future Supreme Court nominees, and nominees to the U.S. Circuit Court of Appeals."[32]

Judicial appointments generate massive media coverage, as well as political capital for members of Congress and interest groups in all ideological camps. Far less attention has been paid to how Congress's legislative agenda may operationalize the general threats against the judiciary that have been issued in such uncensored language and from so many influential conservatives. Vikram Amar contends that, compared with conservatives in the

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[28] Lois Romano, "Pragmatism Drove Bush in Texas Judicial Choices" *Washington Post* (8 July 2005) A04, online: <http://www.washingtonpost.com/wp-dyn/content/article/2005/07/07/AR2005070702177.html>.

[29] Carl Hulse, "Bipartisan Agreement in Senate Averts a Showdown on Judges," *New York Times* (24 May 2005) A1. Sixty votes are needed to end a filibuster; fifty-one votes would be needed to change that rule. Thus, in a Senate with fifty-five Republicans and forty-five Democrats (including an independent), the size of the group would prevent both filibusters and rules changes, if the signatories respect the deal.

[30] Dan Balz, "For GOP, Deeper Fissures and a Looming Power Struggle" *Washington Post* (25 May 2005) A11, online: <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/24/AR2005052401475.html>.

[31] Christian Coalition of America, *Christian Coalition of America's Agenda for the 109th Congress (2005)* [Christian Coalition, *Agenda 2005*]. (The 2006 agenda replaced the 2005 agenda on the Christian Coalition's website in late 2005.)

[32] *Christian Coalition of America's Agenda for the 109th Congress, Second Session (2006)* [Christian Coalition, *Agenda 2006*], online: <http://www.cc.org/issues.cfm>.

1960s who advocated the impeachment of Chief Justice Earl Warren (because of Warren Court rulings mandating desegregation, the end of school prayer, and due process protections for the accused, etc.), today's "politicians criticizing the court 'seem to be more reckless. The House and increasingly the Senate don't just vent and say stuff – they also go through the motions and try to pass legislation.'"[33] Remaking the federal bench by appointing social conservatives is proving more feasible than impeaching judges for being too "activist" (or for not acting, as in the Terri Schiavo case) or effecting broad-scale jurisdiction-stripping. However, the 2004 election emboldened social conservatives in and out of Congress to continue to whittle away at judicial authority. Of the fifteen-point Christian Coalition 2005 agenda for Congress,[34] seven items were direct attacks on the judiciary or Supreme Court rulings. These included three items urging passage of bills or resolutions narrowing the jurisdiction of federal courts,[35] one supporting the Marriage Protection Amendment that would excise same-sex marriage from federal court jurisdiction,[36] and three supporting bills (on abortion and church-state separation) that would surely violate the Constitution, at least as interpreted by the then-Rehnquist Court.

Finally, the election of 2004 was critical for the courts because it demonstrated, in a more convincing way than ever before, the ability of the Christian Right to transfer electoral strategies from campaigns for office to the realm of direct democracy (*i.e.*, referenda and voter initiatives at the state and local levels). A sophisticated plan to coordinate the placement of constitutional amendments prohibiting same-sex marriage on the ballots in eleven states resulted in eleven state constitutions amended with overwhelming voter support. Added to the five states where voters had previously approved equivalent amendments, the initiative and referendum process represents a significant source of law that, firstly, was written by the Christian Right and, secondly, is substantively immune from state judicial interference. Like other legislation and constitutional amendments supported (mandatory minimum sentences, charter schools) or opposed (gun controls, campaign financing regulations) by the Christian Right, these ballot measures represent a conscious strategy for mobilizing against judicial authority, and elite authority generally.[37]

Political scientists have analyzed the effect of same-sex marriage measures upon the outcome of the Bush-Kerry election in the states where both were on the ballot. Studies conclude that the influence was marginal, although the actual effect on the outcome in states where Bush's margin of victory was very close – *i.e.*, Ohio – is unknown.[38] Nevertheless, there are reasons beyond the fact of the ballot measures themselves to respect the power of this majoritarian strategy. As it has been transferred from elections for state legislators and mayors to referenda and initiatives, so is it adaptable to other purposes that further the goal of reducing the independence of the American judiciary. Judges are fully 5 percent of the elected

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[33] Quoted in Farhad Manjoo, "Here Comes the Scalias" *Slate* (11 April 2005), online: <http://www.salon.com/news/feature/2005/04/11/judges/ index_np.html [Manjoo].

[34] Christian Coalition, *Agenda 2005*, *supra* note 31.

[35] These are the: Constitution Restoration Act of 2005 (H.R. 1070/S. 520), limiting various aspects of federal court jurisdiction and subjecting to impeachment and removal judges who violate the imitations, online: Thomas <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s.520:>; Pledge Protection Act of 2005 (H.R. 2389/S. 1046), restricting federal court authority over cases about the Pledge of Allegiance, online: Thomas <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:s.1046:>; and a House Resolution regarding the use of foreign law in court rulings (H. Res. 97), online: Thomas <http://thomas.loc.gov/cgi-bin/bdquery/ z?d109:h.res.97:>. For Amar, the jurisdiction-stripping legislation reflects "'the absolute lack of sophistication in the way the House of Representatives seems to discuss the courts.'" Quoted in Manjoo, *supra* note 33.

[36] S. J. Res. 1/H. J. Res. 29, online: Thomas <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:sj1:>. The House has passed the Marriage Protection Amendment (which Senate Democrats filibustered), but not by the two-thirds majority that constitutional amendments require. In addition, the Marriage Protection Act of 2005 (H.R. 1100), online: Thomas <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:h1100:>, would deny federal courts all jurisdiction over constitutional interpretation of the 1996 Defense of Marriage Act, P.L. 104-199 (1 U.S.C. § 7 and 28 U.S.C. § 1738C), online: U.S. Government Printing Office <http://frwebgate.access.gpo.gov/cgi-bin/ getdoc.cgi?dbname=104_cong_public_laws&docid=f:publ199.104>.

[37] Richard J. Ellis, *Democratic Delusions: The Initiative Process in America* (Lawrence: University Press of Kansas, 2002).

[38] Gregory B. Lewis, "Same-Sex Marriage and the 2004 Presidential Election" (2005) 38:2 PS: Political Science and Politics 195; and D. Sunshine Hillygus & Todd G. Shields, "Moral Issues and Voter Decision Making in the 2004 Presidential Election" (2005) 38:2 PS: Political Science and Politics 201.

officials in the U.S., and almost all judges must stand for some form of popular election.[39] Although studies show that judicial elections are heavily dominated by the advertising and campaign contributions of business, labour, and lawyers, state supreme court elections are increasingly affected by the familiar politics of culture and religion. The climate of state judicial elections in 2002 and 2004 bore the imprint of *Republican Party of Minnesota v. White*.[40] In that case, the U.S. Supreme Court ruled unconstitutional the Minnesota Supreme Court's "announce clause" barring judicial candidates from publicly taking a position on issues that might come before the court. Now, judicial candidates (most evidently in the South) are volunteering, or being pressured by interest groups to reveal, their positions on reproductive rights, the death penalty, school vouchers, and similar concerns of the Christian Right.[41] Moreover, the kind of mass politics that direct democracy entails, unlike political contests organized through political parties or within local geographic units, serves as a useful model for large-scale, expensive media campaigns and grassroots organizing around judicial appointments.[42]

CONTROLLING THE SUPREME COURT

> For President Bush, social conservatives and the senators they helped elect, the moment of truth has arrived. – Dr. Richard Land, President, Ethics and Religious Liberty Commission, Southern Baptist Convention[43]

> We were supposed to be meeting on the nomination of Harriet Miers. – Senator Richard Durbin, United States Senate Judiciary Committee[44]

Supreme Court appointments reveal interesting variations within the Christian Right. In some circles, legislatively subjugating the judiciary to the popularly elected branches may be a principled position; often, it is an instrumental goal in a particular case or area of law. Elsewhere within the Christian Right, however, litigation is actually the chosen method for institutionalizing values, as I will show. Despite these differences, the movement is unified in expecting to wield veto power over insufficiently conservative prospective nominees, an expectation that has deepened with Republican control of both the White House and Congress. In the judicial wars, the optimal outcome is ensuring the selection of "judges that never waver"[45] in ruling to uphold preferred religious norms *and* the desired outcomes of interbranch and intergovernmental conflicts. Therefore, it is logical for religious conservative groups to "support efforts that would both radicalize the courts as well as reduce their authority."[46]

The retirement in July 2005 of the Supreme Court's most influential member, Justice Sandra O'Connor, and the September death of Chief Justice William Rehnquist unleashed a feeding frenzy by interest groups and members of the Senate. While the efforts to frame the discourse around the nomination and ultimately to determine its outcome took place on the left and right, the first Republican appointment to the Court since 1991 revealed that conservatives who demand impeachment and jurisdiction-stripping will nonetheless devote considerable resources to controlling who sits on the Supreme Court. An imbalance in the mobilization possibilities of the Christian Right compared with its (secular and religious) opponents only amplifies the strength of its dual majoritarian/countermajoritarian strategy with regard to the courts.

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39 Committee for Economic Development, *Justice for Hire: Improving Judicial Selection* (New York: Committee for Economic Development, 2002) at 1, online: <http://www.ced.org/docs/reports/report_judicial.pdf>.

40 536 U.S. 765 (2002), online: LII <http://supct.law.cornell.edu/supct/html/01-521.ZS.html> [*White*].

41 See Deborah Goldberg et al., *The New Politics of Judicial Elections 2004* (Washington: Justice at Stake Campaign, 2005), online: <http://www.justiceatstake.org/files/NewPoliticsReport2004.pdf> at 28-33; and Lawrence Baum, "Judicial Elections and Judicial Independence: The Voter's Perspective" (2003) 64 Ohio State Law Journal 13, online: Moritz College of Law <http://moritzlaw.osu.edu/lawjournal/issues/volume64/number1/baum.pdf>.

42 See Cooperman, *supra* note 22.

43 Quoted in Robin Toner, "After a Brief Shock, Advocates on All Sides Quickly Mobilize" *New York Times* (2 July 2005) A1.

44 Quoted in Marcia Davis, "The Unsmoked Signal of Victory on Alito" *Washington Post* (25 January 2006) C01, online: <www.washingtonpost.com/wp-dyn/content/article/2006/01/24/AR2006012401846.html>.

45 Manjoo, *supra* note 33.

46 *Ibid.*

The postmodern evangelical equivalent of the phone tree – exhortations to supporters communicated through a web of organizational Internet sites, satellite radio and television stations, and broadcasts to churches – supplemented with direct mailings to homes and media punditry, went into action the moment Justice O'Connor's retirement was announced and with each hospitalization of Chief Justice Rehnquist.[47] The movement has anticipated a mobilization by the feminist and liberal groups[48] who defeated Robert Bork's nomination by Ronald Reagan in 1987, who organized against Clarence Thomas in 1991, and who are guaranteed to try to weaken any candidate known to question the legitimacy of *Roe v. Wade*.[49] In its own rejoinder to the expected liberal response, a Justice Sunday II rally, in Nashville in August 2005, and a Justice Sunday III rally, in Philadelphia in January 2006, were organized to coincide with the Senate confirmation hearings of John Roberts and Samuel Alito. Each successive rally after the original Justice Sunday drew less mainstream media attention; however, it is the simulcasts, rebroadcasts on Christian networks, free audio and video downloads, and DVDs for purchase that highlight the seemingly boundless strategic and resource advantages of the Christian Right in this arena.[50]

It also makes political sense that the Christian Right's invocation of majoritarianism is inconsistent. The majoritarian impulse on the religious right wing of the Republican Party manifests itself both as a deference to elected representatives and a desire to control their participation in the appointment process. It appears as a demand that the voice of tens of millions of evangelical Christians be listened to when justices are chosen, but at the same time as an intolerance of uncertainty-inducing discourse within the nomination process (let alone in the actual act of judging). Hence, Senate Republican and Christian Right leaders rejected Democrats' demands to be consulted during the process of identifying Justice O'Connor's replacement. The idea of a "consensus" nominee to replace Justice O'Connor – *i.e.*, a conservative who could elicit something like consensus within the Senate Judiciary Committee and then attract majorities on a Court that has frequently been divided 5-4 – was categorically rejected by religious conservative groups. Jay Sekulow, who is Chief Counsel of the American Center for Law and Justice (ACLJ) and perhaps the most powerful Christian Right litigator in the United States, efficiently dismissed the possibility of consensus, issuing a press release stating, "'In this case, 'consensus' would mean compromise."[51]

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47 See Cooperman, *supra* note 22.

48 Some of the more visible groups and coalitions entering the political fray over the Supreme Court vacancy are: People for the American Way, NARAL-Pro Choice America, NAACP Legal Defense and Educational Fund, Americans United for the Separation of Church and State, Human Rights Campaign, Leadership Conference on Civil Rights, National Women's Law Center, and National Partnership for Women and Families, and National Organization for Women.

49 *Supra* note 3. Other cases – all decided by 5-4 or 6-3 votes with Justice O'Connor in the majority – that would be sacrosanct for liberal groups include: *Atkins v. Virginia*, 536 U.S. 394 (2002), online: LII <http://www.law.cornell.edu/supct/html/00-8452.ZS.html> (forbidding the execution of mentally retarded individuals); *Grutter v. Bollinger*, 539 U.S. 306 (2003), online: LII <http://www.law.cornell.edu/supct/html/02-241.ZS.html> (permitting the promotion of diversity as one consideration in law school admissions); *Lawrence v. Texas*, 539 U.S. 558 (2003), online: LII <http://www.law.cornell.edu/supct/html/02-102.ZS.html> (invalidating, on due process grounds, laws criminalizing homosexual sodomy); *Lee v. Weisman*, 505 U.S. 577 (1992), online: LII <http://www.law.cornell.edu/supct/html/90-1014.ZS.html> (disallowing a benediction at a public high school graduation ceremony); and *Stenberg v. Carhart*, 530 U.S. 914 (2000), online: LII <http://www.law.cornell.edu/supct/html/99-830.ZS.html> (striking down Nebraska's criminalization of the methods used most commonly in second- and third-trimester abortions).

50 See David D. Kirkpatrick, "Conservative Gathering is Mostly Quiet on Nominee" *New York Times* (15 August 2005) A15; and the Justice Sunday website, online: Family Research Council <www.justicesunday.com>. Although the liberal People for the American Way, headed by Ralph Neas, may have "generated 600,000 faxes and e-mails to the Senate" against the confirmation of Justice Samuel Alito ("PFAW Hails Strong Tally Against Alito" (31 January 2006) online, <http://www.pfaw.org/pfaw/general/default.aspx?oid=20393>), membership organizations – even well-known and well-funded ones – cannot maintain a readiness for nationwide mobilization as can groups whose political goals are closed linked to their members' daily activities and lifestyles (including prayer and church-going) and sources of information. These latter groups are exemplified by the Christian Coalition's Judicial Task Force (online: <http://www.cc.org/taskforce.cfm>) and the Christian Broadcasting Network's Operation Supreme Court Freedom (online: <http://www.cbn.com/special/supremecourt/prayerpledge.asp>).

51 Quoted in Carl Hulse & Richard W. Stevenson, "Senators Advise Bush on Picking a Nominee" *New York Time* (13 July 2005) A1.

The story of the Bush nominations – of John Roberts (initially nominated to fill O'Connor's seat but soon after to become Chief Justice), of Harriet Miers, and of Samuel Alito – has a clear moral. For the Christian Right, the ideological credentials of appellate court nominees must be *guaranteed*. The Roberts and Alito nominations were celebrated and defended against attacks from Democrats, whereas the Miers nomination was fatally undermined, because Miers did not have a judicial track record to provide an absolute guarantee of her support for an originalist, socially conservative interpretation of the U.S. Constitution.

Thus, Concerned Women for America (CWA) issued a press release in which its president, Wendy Williams, noted that:

> "Harriet Miers has shown respect for Christian values by attending an Evangelical church. But her professional and civic life leaves us questioning whether she chooses to reflect and advance the views of the group she's with at the moment. Though she attends an Evangelical church known for its pro-life position, during the same time period she advanced radical feminists and organizations that promote agendas that undermine respect for life and family. . . ."[52]

CWA Chief Counsel Jan LaRue, a star Christian Right litigator who "sp[oke] in favor of Chief Justice John Roberts . . . and f[ound] every opportunity to defend Alito,"[53] elaborated:

> "We desire role models who have a strong record of promoting and advancing constitutional principles. Miss Miers' record, as reflected in her speeches, is of promoting a leftist agenda that relies upon the courts to impose their views. . . ."[54]

This need for guarantees is reflected in the work of the Judicial Confirmation Network, a "team of conservative grass-roots organizers, public relations specialists and legal strategists" who worked for months to ensure the success of any of a list of "18 potential nominees" Bush might pick for the Court – "like-minded jurists who could reorient the federal courts toward a . . . much less expansive view of [the Constitution's] application to individual rights and federal power."[55] Roberts and Alito were among these candidates[56] who hold certifiable religious conservative credentials; evidently, Miers was not.

LITIGATION

> The court is their last bastion. That's why the left is so frantic. They can't win democratic elections, they cannot get their agenda through democratic means, so what they are left with is judicial tyranny. . . . – James Bopp, Jr., General Counsel, James Madison Center for Free Speech[57]

> The Promise Scholarship program practices the plainest form of religious discrimination. – *[Solicitor] General Theodore B. Olson on Behalf of the United States as Amicus Curiae Supporting the Respondent*[58]

Joshua Davey lost his lawsuit against the State of Washington, which revoked his college scholarship because of his major in pastoral theology.[59] Subsequently, he left college for Harvard Law School.[60] Davey symbolizes an intriguing dimension of the transformation of the New Christian Right into the current Christian Right, the embrace

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52 Quoted in "CWA Calls for Miers' Withdrawal" (26 October 2005), online: Concerns Women for America <http://www.cwfa.org/articles/ 9259/MEDIA/misc/index.htm> [CWA].

53 Marcia Davis, "Expert Witness" *Washington Post* (9 January 2006) C01, online: <http://www.washingtonpost.com/ wp-dyn/content/article/2006/01/08/AR2006010801256. html>.

54 Quoted in CWA, *supra* note 52.

55 David D. Kirkpatrick, "In Alito, G.O.P. Reaps Harvest Planted in '82" *New York Times* (30 January 2006) A1.

56 *Ibid*.

57 Quoted in Thomas B. Edsall & Michael A. Fletcher, "For Liberals, High Stakes at High Court: Another Defeat Could Tarnish Credibility as Advocacy Force" *Washington Post* (11 July 2005) A01, online: <http://www.washingtonpost.com/wp-dyn/content/articles/ 2005/07/10/AR2005071000923.html>.

58 *Gary Locke et al. v. Joshua Davey*, No. 02-1315, transcript of oral argument (2 December 2003) at 48, online: Supreme Court of the United States <http://www.supremecourtus.gov/ oral_arguments/argument_transcripts/02-1315.pdf>.

59 *Locke v. Davey*, 540 U.S. 712 (2004), online: LII <http://www.law.cornell.edu/supct/html/02-1315.ZS.html> [*Davey*].

60 See Joshua Davey, "Faith in the Law" *Education Next* (Summer 2004), online: <http://www.educationnext.org/20043/84.html>.

of litigation as a mechanism for effecting social change. Around the time of *Roe*, existing evangelical Protestant organizations began creating "litigation spin-offs,"[61] a trend that accelerated in through the 1980s and especially the 1990s. Christian Right legal organizations participate as *amicus curiae*, as sponsors of test cases, or as actual litigants in virtually every constitutional case falling within in huge areas of law.

Such a high level of activity, and one that is increasing rapidly, is possible because "evangelical attorneys began to see lawyering as a distinctively religious vocation."[62] Relatedly, the growth in Christian Right political advocacy has been accompanied by the construction of a large legal edifice. It consists of public interest law organizations[63] such as the ACLJ, Alliance Defense Fund, Liberty Counsel, and Home School Legal Defense Association, as well as private law firms and evangelical law schools.

In addition to the overtly Christian legal structure, the influence of the Federalist Society should not be overlooked. This well-known conservative legal think tank,[64] which was founded in 1982 by lawyers within government, universities, and on the bench, is more obviously libertarian than religious; nevertheless, it has served as a strong institutional and political connection between the established conservative legal community and an evangelical legal community that was new and peripheral until fairly recently. The Federalist Society has a Pro Bono Center whose stated "mission is to match lawyers . . .with opportunities for pro bono service in the cause of individual liberty, traditional values, limited government and the rule of law."[65]

The Christian Right litigation strategy follows the decades-old American model of liberal constitutional *challenges to* oppressive state actions like racial discrimination, sex discrimination, church-state intermingling, and censorship. A great deal of the constitutional activity of Christian Right organizations resembles *Davey* in that it embodies this traditional public interest advocacy model. Some cases involve defending a state-sanctioned status quo – an easy example is siding with a public school district that has a settled practice of reciting the Pledge of Allegiance (containing the phrase "one nation, under God") in its classrooms.[66]

However, the Christian Right has also turned conventional social movement litigation strategy on its head by *partnerships with* state actors as agents of legal change. Recent examples of this strategy are Congress's passage of the Partial Birth Abortion Act Ban of 2003[67](after the Supreme Court struck down a similar state statute in 2000[68]) and, infamously, then-Alabama Supreme Court Chief Justice Roy Moore's installation of a granite Ten Commandments monument in his courthouse. Such actions serve a number of ends, including fuelling populist, evangelical furor against "activist" judges; undermining the legitimacy of even the longest-standing constitutional guarantees of individual liberty, such as the Establishment Clause; paving the way for revising the law in more winnable future cases; and positioning their legal opponents as outside the

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61 Hoover & Den Dulk, *supra* note 8 at 21.

62 *Ibid*. at 25.

63 Hans J. Hacker, "Defending the Faithful: Conservative Christian Litigation in American Politics," in *The Interest Group Connection: Electioneering, Lobbying, and Policymaking in Washington*, Paul S. Herrnson, Ronald G. Shaiko & Clyde Wilcox, eds. (Washington: CQ Press, 2005) 365 at 368-71. For lists of Christian conservative litigation organizations in the U.S. and Canada, see Hoover & Den Dulk, *supra* note 8 at 29; also see "Religious Liberty Law Firms," online: David Limbaugh.com <http://www.davidlimbaugh.com/religiousliberty.htm>.

64 The Federalist Society for Law and Public Policy Studies describes itself as:

> a group of conservatives and libertarians dedicated to reforming the current legal order. We are committed to the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be.

"Our Background," online: <http://www.fed-soc.org/ourbackground.htm>.

65 "Mission Statement," online: Federalist Society Pro Bono Center <https://www.probonocenter.org/home.aspx>.

66 *Elk Grove School District v. Newdow*, (2004) 54 U.S. 1 (2004), online: LII <http://www.law.cornell.edu/supct/html/02-1624.ZS.html>. The Supreme Court dismissed the First Amendment challenge to Pledge on procedural grounds.

67 P.L. 108-105 (18 U.S.C. § 1531), online: U.S. Government Printing Office <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_public_laws&docid=f:publ105.108>.

68 *Stenberg, supra* note 49.

American – *i.e.*, Christian (or Judeo-Christian) – mainstream.

The many cases in which religious groups are challenging government actions as denials of First Amendment expressive freedoms also demonstrate a radical approach to constitutional litigation. One religion's "free exercise" is another's "establishment of religion" – hence, the lengthy history of challenges by Atheists and Jews to school prayers. Because the reverse is also true, it has been common practice within the Christian Right legal community to challenge denials of religious groups access to public schools, public spaces, and publicly-funded services as Establishment Clause violations and, most recently, as First Amendment free speech violations. The greatest number of victories by the Christian Right have been in situations where the Rehnquist Court interpreted the right to evangelize in airports, engage in after-hours Bible study in public schools, use government-issued tuition vouchers to attend religious schools, or exclude gays and lesbians from group membership as necessary to preventing discrimination. Local land use regulations that do or could possibly affect houses of worship are a growing area of concern for Christian litigators.[69] This litigation strategy involves the representation of devout Protestants, Catholics, and others[70] as oppressed *minorities* deserving the protection of the law, "rather than a majority asserting its will."[71]

CONCLUSION

> On paper, the judge looked like a model citizen – a 57-year-old Roman Catholic, a registered Republican and a former banking lawyer. But . . . voters never got a chance to ask him about his judicial philosophy. So they were in for a rude surprise when . . . [he] struck down California's voter-approved Defense of Marriage Act. . . . – Candi Cushman, Associate Editor, *Citizen*[72]

> They may be zealots, but they're very smart, well-organized and well-funded. – Professor Frank Ravitch, Michigan State University College of Law[73]

Ultimately, the *legal* element of Christian Right *political* advocacy can be characterized as radical because of its combination of powerful majoritarian and countermajoritarian strategies for influencing who interprets the Constitution and how they interpret it. It is true that the mix of electoral, grassroots, and legal tactics – including, it must be noted, the role of religion in advancing social change – resembles the strategies used successfully by liberals in the 1950s and 1960s. However, there are several significant differences between then and now, and between the political power of the predominant social movements of each era. As I have shown, religious conservatives insist on receiving guarantees of the broad ideologies and interpretive stances of appellate judges. Where Supreme Court appointments are at stake, a Republican President and Republican Congressional leaders will take instruction from Christian Right leaders and followers. Government officials launch attacks on judges and courts that question, often explicitly, judicial independence and the rule of law. Finally, the Christian Right has at its disposal a sophisticated communications network that can reach tens of millions of followers both during and between elections.

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69 See David D. Kirkpatrick, "Ruling on Property Seizure Rallies Christian Groups" *New York Times* (11 July 2005) A13; Jay Sekulow, "Protecting Your Property Rights" (1 August 2005), online: ACLJ <http://www.aclj.org/News/Read.aspx?ID=1778>.

70 See Jim Brown, "Texas High School Agrees to Stop Banning Muslim Students' Prayers" *Agape Press* (31 January 2006), online: <http://headlines.agapepress.org/archive/1/312006d.asp>.

71 Hacker, *supra* note 55 at 366. The logic and application of this strategy, as well as numerous relevant cases, are examined at length in Steven P. Brown, *Trumping Religion: The New Christian Right, the Free Speech Clause, and the Courts* (Tuscaloosa: University of Alabama Press, 2002). Also see Kavan Peterson & Mark K. Matthews, "Evangelical Law Firm at Front of Culture War" (20 June 2005), online: Stateline.org <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=38432> [Peterson & Matthews].

72 Candi Cushman, "Bad Behavior" *Citizen* (June 2005), online: Family.org <http://family.org/cforum/fosi/government/courts/state/a0036435.cfm>. The judge in question is San Francisco County Superior Court Judge Richard Kramer.

73 Quoted in Peterson & Matthews, *supra* note 70.

Liberals are certainly not without legal wherewithal: The ACLU, for instance, "handles nearly 6,000 civil rights-related lawsuits per year" and "is reported to have a $100 annual budget."[74] But the ACLU is not remaking the federal and state courts in its image; it is not shifting the interpretation of the First Amendment to redefine permissible public religious expression, nor of a protected minority. *Roe v. Wade*, decided a generation ago, was the zenith of the Court's protection of reproductive rights. The perceived assault on traditional marriage against which religious conservatives vote and litigate is based on actual events, but movement towards same-sex marriage rights is tiny and tenuous. On the whole, then, at this historical moment in the United States, the Christian Right approach to judges, courts, and the law can only be seen as a success.[75]

Judith A. Garber
Department of Political Science
University of Alberta
Executive Director, Centre for
Constitutional Studies
jgarber@law.ualberta.ca

[74] *Ibid.*

[75] In May 1995, National Public Radio aired a five-part series, Christianity and the Public Square," by reporter Margaret Bradley Haggerty, that addressed many of the issues discussed in this article. The broadcasts are available online: <http://www.npr.org/templates/story/story.php?storyId=4631923>.

RELIGIOUS DISCOURSE IN THE PUBLIC SQUARE

David Blaikie and Diana Ginn

INTRODUCTION

Full, open, and civilized discourse among citizens is fundamental to the life of a liberal democracy. It seems trite to assert that no discourse should be prohibited or excluded simply because it is grounded in religious faith or employs religious beliefs to justify a particular position.[1] Yet there are those who contend that it is improper for citizens to use religious arguments when debating or deciding issues in the public square,[2] that metaphorical arena where issues of public policy are discussed and contested. In this article we challenge this position, examining the various arguments that are put forward for keeping public discourse secular, arguments that when citizens explicitly ground their social and political views in their religious beliefs, this is divisive, exclusionary, and ultimately antithetical to the liberal democratic state. We maintain that none of these arguments are persuasive.[3]

[1] We realize that we cannot do full justice in an article of this length to the issues that we raise here. We see this article as allowing us to provide an introduction to and overview of the topic and to organize our thoughts around some of the key points. We will then explore these issues in greater depth, as is warranted by their complexity, in our future work. The focus of our article is not simply "the bases on which citizens rely in making political choices but also the bases on which citizens may and should rely in justifying political choices." Michael J. Perry, *Love and Power: The Role of Religion and Morality in American Politics* (New York: Oxford University Press, 1991) at 17 [Perry, *Love and Power*]. Our references in this article are primarily to Christianity or, some-times, the combined Judeo-Christian tradition. There are two reasons for this focus. First, where we refer to religious influences on the development of the Western legal tradition, it is accurate to focus on the Judeo-Christian tradition as the religious tradition that has most heavily influenced that development. We would suggest that much the same relationship exists between the Judeo-Christian tradition and the Western legal system as Northrup Frye suggested exists between the Bible and Western literature. In *Words With Power* (Markham: Penguin Books Canada Ltd., 1990) [Frye, *Words*]. Frye builds on ideas initially developed in *The Great Code: The Bible and Literature* (Toronto: Academic Press, 1982), arguing (*Words*, *ibid.* at xi) that "the structure of the Bible, as revealed by its narrative and imagery" has shaped the "conventions and genres of Western literature." Of course, it is quite possible that future legal developments will reflect the growing religious pluralism of Canada. Second, where we give examples to elaborate on a particular point, these relate primarily (although not exclusively) to Christianity because we are writing out of our own experiences and backgrounds. This is the only religious tradition in which we have worshipped and about which we feel knowledgeable enough to comment in any depth. However, we do not want to be misunderstood as making arguments only about religious discourse based on Christian beliefs. It is our position that spirituality continues to be of importance for many individuals today; that for many such individuals, their religious beliefs undergird their political views; and that explicit references to those beliefs is an appropriate part of public discourse. This position applies to all religions, not just Christianity. As the homogeneity of Canada's religious landscape is leavened by immigrants bringing deep religious roots in a variety of different faith traditions, it seems likely that the religious reasons relied on in public debates will more and more reflect this diversity.

[2] Our discussion draws primarily on American writings on this topic, and in particular Robert Audi & Nicholas Wolterstorff, *Religion in the Public Square* (New York: Rowman & Littlefield, 1997) [Audi & Wolterstorff].

[3] There was a time in Western society when religion played a far more overt role in shaping public policy and law than is the case today. Duncan Forrester suggests that "in the past a theological approach, or at least an explicitly theological dimension to the discussion, was almost universal in western political thought . . . . The political significance of theology was almost universally assumed." *Christian Justice and Public Policy* (Cambridge: Cambridge University Press, 1997) at 10. In the world of medieval Europe, for instance, it was thought natural and inevitable that Christian theology would mould secular as well as ecclesiastic law, both in terms of how law itself was conceptualized and in the specific content of the law. While the political significance of theology is no longer universally assumed, the law in Canada today still bears the imprint of that earlier time. In *Law and Revolution: The Formation of the Western Legal Tradition*, Harold J. Berman makes a convincing argument that the "basic institutions, concepts, and values of Western legal systems have their sources in religious rituals, liturgies, and doctrines of the eleventh and twelfth centuries" (Cambridge: Harvard University Press, 1983) at 165 [Berman, *Law and Revolution*]. According to Berman, reforms initiated by the Roman Catholic Church in medieval Europe that are still foundational to our legal system include: the introduction of rational trial procedures to replace magical mechanical modes of proof by ordeals of fire and water, by battles of champions, and by ritual oaths; the insistence upon consent as the foundation of marriage and upon wrongful intent as the basis of crime and the development of equity to protect the poor and the helpless against the rich and the powerful and to enforce relations of

Religion continues to be important to a significant number of Canadians. In the 2001 census, 16 percent of the population declared themselves as having no religion.[4] This means that over 80 percent of Canadians consider themselves to have some religious beliefs, whether this means an affiliation to an established faith tradition or simply a sense of the spirituality inherent in life. Various observers of today's culture argue that many Canadians are in fact deeply interested in spiritual matters.[5]

We would argue that, for many religious believers, their faith (whatever that faith may be) is the lens through which they view any issue of significance, including legal issues, and that there are no convincing reasons to characterize religious-based arguments as an illegitimate form of public discourse. It may be that explicit identification of one's religious views as the source for one's social values is less frequent today in the Western world (at least in part, perhaps, because such discourse has been delegitimized by some modern theorists). It nevertheless seems logical and in fact inevitable that, as long as religious beliefs persist,[6] some individuals will want to make religious-based arguments on matters of law and public policy.

This should not be surprising, given the nature of religion and of law. Both involve a belief that there are right ways and wrong ways of living in community with others. Both involve some vision of what a "just society" or the "Kingdom of God" should look like – even if there is intense disagreement within a society or within a religion as to the content of this vision. Therefore, for many people of faith, discerning the religious dimension in questions of law and public policy is a vital part of determining their response to those questions. In fact, for anyone who sincerely believes that religious faith involves a journey toward understanding and acting upon God's will, how could the insights gained throughout that journey *not* affect one's views on many issues of legal and constitutional significance? And why, if engaged in public deliberation on or justification of those views, would one *not* articulate those insights?[7] As Richard Moon notes:

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trust and confidence. See Harold J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Atlanta: Scholars Press, 1993) at 4. Other, less progressive examples can also be found. For instance, in the past, the restricted legal status of women within marriage and the exclusion of women from public life were no doubt influenced in part by the dominant Christian theology of the day. We would note tangentially here that a knowledge of (even if not necessarily a belief in) the basic tenets of Judaism and Christianity will provide insight into the historical development of Canada's laws. Presumably a knowledge of other religions would contribute to an understanding of other legal traditions. Thus, it seems likely that studying the basic tenets of Hinduism might well be relevant to understanding how law developed in India; understanding Confucianism might well illuminate one's understanding of law in China, at least until the time of the Chinese Revolution.

4 Statistics Canada, "Population by Religion, by Provinces and Territories," 2001 Census, online: <http://www.statcan.ca/english/Pgdb/demo30a.htm>. There were significant regional variations, from a mere 2.5 percent of Newfoundlanders reporting themselves as being of no religion to 35 percent and 37 percent in British Columbia and Yukon, respectively.

5 In his most recent book, *Restless Gods: The Renaissance of Religion in Canada* (Toronto: Stoddart Publishing Co., 2002), sociologist Reginald Bibby states, "It's time we said it: when it came to predicting the future of religion generally and Christianity specifically, Karl Marx, Emile Durkheim, and Sigmund Freud were wrong. Societies and individuals have not ceased to have a need for religion." Quoted in Jim Coggins, "No Longer Interested?" online: Encounter <http://www.encountergod.com/20/interested.html>. In 1999, George Gallup stated: "There is a searching for spirituality and a hunger for God such as we have not seen in 65 years of scientific polling." Quoted in Dr. Ian Ritchie, "Spirituality on the March," online: <http://www3.sympatico.ca/ian.ritchie/Secularization.htm>.

6 Karen Armstrong suggests:

> [H]uman beings are spiritual animals. Indeed, there is a case for arguing that *Homo sapiens* is also *Homo religiosus*. Men and women started to worship gods as soon as they became recognisably human; they created religions at the same time as they created works of art. This was not simply because they wanted to propitiate powerful forces but these early faiths expressed the wonder and mystery that seems always to have been an essential component of the human experience of this beautiful yet terrifying world. Like art, religion has been an attempt to find meaning and value in life, despite the suffering that flesh is heir to. Like any other human activity, religion can be abused but it seems to have been something that we have always done. It was not tacked on to a primordially secular nature by manipulative kings and priests but was natural to humanity.

A History of God (London: Heinemann, 1993) at 3.

7 Issues that religious believers might see as particularly affected by their faith include: same-sex marriage (*e.g.*, *Halpern v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 529 (Ont. CA), online: CanLII <http://canlii.org/on/cas/onca/2003/2003onca10102.html>); assisted suicide (*e.g.*, *Rodriguez v. British Columbia (Attorney General),* [1993] 3 S.C.R. 519, online: CanLII <http://www.canlii.org/ca/cas/scc/1993/1993scc101.html>); abortion (*e.g.*, *R. v. Morgentaler*, [1988] 1 S.C.R. 30, online: CanLII <http://www.canlii.org/ca/cas/scc/1988/1988scc2.html>); new genetic technologies (*e.g.*, *Harvard*

> While we may seek to minimize direct religious conflict and confrontation in public life, we must also recognize that religious commitment has implications for how adherents should live their lives in the larger community and for the kind of society they should work to create.[8]

Yet, the legitimacy of religious-based discourse in the public square is far from universally accepted by academic writers, and so we move to the main focus of this article: responding to arguments that would exclude such discourse from public policy discussion and decision-making. Before we do so, however, we pause to point out that we are not arguing that religious-based discourse will always move us in the direction of justice and compassion.[9] Nor would we think it persuasive for those who would exclude religious-based arguments from public discussion to seek to justify their position by maintaining that the influence of religion on society has been or will be consistently negative.

THE LEGITIMACY OF RELIGIOUS DISCOURSE IN THE PUBLIC SQUARE

We suggested above that as long as religious beliefs persist, some individuals will want to make religious-based arguments on matters of law and public policy. This being the case, are there valid reasons for keeping such discourse out of the public square? As we examine the various arguments that have been put forth for keeping public policy discussion secular,[10] it is our view

College v. Canada (Commissioner of Patents), [2002] 4 S.C.R. 45, 2002 SCC76, online: CanLII <http://www.canlii.org/ca/cas/scc/2002/2002scc76.html>); the prohibition on discrimination in human rights or constitutional law, as well as legal exceptions to that prohibition; the extent to which our system of taxation should redistribute resources; whether the criminal law should be aimed at retribution or rehabilitation; and how the secular law should apply to the ordering of relationships within a religious community or between that community and others in society. This last issue encompasses a wide variety of questions. For instance, do human rights law, labour law, and administrative law apply to the hiring, terms of employment, or dismissal of clergy? See, *e.g.*,, *McCaw v. United Church of Canada* (1991), 4 O.R. 3d 481 (CA). Can a religious school impose religious-based requirements on students or teachers? See, *e.g.*, *Vriend v. Alberta*, [1998] 1 S.C.R. 493, online: CanLII <http://www.canlii.org/ca/cas/scc/1998/1998scc30.html>; and *Trinity Western University v. British Columbia College of Teachers,* [2001] 1 S.C.R. 772, 2001 SCC31, online: CanLII <http://canlii.org/ca/cas/scc/2001/2001scc31.html> [*Trinity Western*]. Can a school, whether public or with religious affiliations, refuse, on religious grounds, to use certain texts as teaching materials or to have those texts in the school library? See, *e.g.*, *Chamberlain v. Surrey School District No. 36,* [2002] 4 S.C.R. 710, 2002 SCC 86, online: CanLII <http://www.org/ca/cas/scc/2002/2002scc86.html> [*Chamberlain*]. What happens when child welfare law conflicts with a religious community's views on raising children? Can parents refuse life-saving medical treatment for their child if the treatment is prohibited by their religious beliefs? See, *e.g.*, *R.B. v. C.A.S. of Metropolitan Toronto,* [1995] 1 S.C.R. 315, online: CanLII <http://www.canlii.org/ca/cas/scc/1995/1995scc7. html>. How does the law respond if, on separation or divorce, parents are in disagreement as to the religious education of their children? See, generally, on these issues, M.H. Ogilvie, *Religious Institutions and the Law in Canada*, 2d ed. (Toronto: Irwin Law, 2003). On any one of these issues, and myriad others, it would be difficult for people of faith to arrive at a conclusion without reference to their religious beliefs.

[8] Richard Moon, "Liberty, Neutrality and Inclusion: Religious Freedom Under the Canadian Charter of Rights and Freedoms" 41 Brandeis Law Journal 563 at 573 [Moon].

[9] Thus, we would not join with Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54 University of Toronto Faculty Law Review 1 [Horwitz], arguing that "religion is an intrinsic good" (at 55) or that "as an intuitive proposition it [the idea that religion is intrinsically good] is both clear and compelling. Even those who lack religious faith can understand the ineffable and invaluable quality of religious commitment" (at 56). We do not take this position for at least two reasons. First, Horwitz's assumption that this proposition is compelling seems doubtful; it is unlikely that those who have consciously discarded the religious beliefs in which they were raised (and not replaced these with another set of religious beliefs) would find arguments about the intrinsic good of religion to be compelling. Second, Horwitz's assumption seems insufficiently nuanced to deal with the variations among and complexities of the beliefs (and ensuing behaviours) that could be labeled "religious."

[10] While we respond in this paper to arguments advanced by secular thinkers as to why religion should be kept private and why the public square should be kept secular, it is only fair to note that some religious believers would also argue that religion and politics do not mix; that spirituality means keeping one's eye firmly on the life to come or on one's inner consciousness, rather than on the realities of everyday life. The fact that some believers may wish to limit their engagement with or withdraw from public life does not, however, end the discussion, since this is far from a universal characteristic of those with religious beliefs. There will always be those whose faith calls them into action in this world. The prophetic role of faith has strong roots in the Jewish and Christian traditions. It embodies an understanding of the "Kingdom of God" as something to be worked for here on earth, rather than simply anticipated either after death or at the end of the world. Clearly too, a quest for social justice has strong roots in Islam. It seems likely that other faith communities also encompass a sense of the transformative role of religion in civil society. Perry suggests that: "Partly in consequence of mutually transformative ecumenical encounter and dialogue with one or more of the semitic religions, Indic spiritualities–in particular, Hinduism and Buddhism–are retrieving from their margins their prophetic resources." Perry, *Love and Power*, *supra* note 1 at 81 [footnotes omitted].

that, these arguments, whether taken separately or in combination with each other, are simply not convincing.[11]

Arguments for keeping religious discussion separate from public policy discussions are founded on beliefs about the nature of a secular state or, more specifically, the nature of liberal democracy.[12] Wolterstorff describes the liberal position: "[C]itizens (and officials) *are not* to base their decisions and/or debates concerning political issues on their religious convictions."[13] Of course, no one proposes that religious argument by citizens in the public square should be illegal.[14] The thrust of the liberal position is that people of faith should voluntarily abstain from basing their public policy decisions on religious grounds or from making religiously based arguments. This is much the position of Robert Audi, who argues that "[a]s advocates for laws and public policies . . . and especially for those that are coercive, virtuous citizens will seek grounds of a kind that any rational adult citizen can endorse as sufficient for the purpose."[15] John Rawls argues for the exclusion of religious or other comprehensive philosophies in favour of what he calls "public reason" in discussing and deciding "constitutional issues" and "matters of basic justice."[16] Richard Rorty sounds a note of urgency, stating that "[c]ontemporary liberal philosophers think that we shall not be able to keep a democratic political community going unless the religious believers remain willing to trade privatization for a guarantee of religious liberty."[17]

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[11] Those in favour of constraints on religious discourse in the public square include: Robert Audi, *Religious Commitment and Secular Reason* (New York: Cambridge University Press, 2000); Robert Audi, "The Place of Religious Argument in a Free and Democratic Society" (1993) 30 San Diego Law Review 677; Kent Greenawalt, *Religious Convictions and Political Choice* (New York: Oxford University Press, 1988) [Greenawalt, *Religious Convictions*]; Kent Greenawalt, "Grounds for Political Judgment: The Status of Personal Experience and the Autonomy and Generality of Principles of Restraint" (1993) 30 San Diego Law Review 647 [Greenawalt, "Grounds for Political Judgment"]; William P. Marshall, "The Other Side of Religion" (1993) 44 Hastings Law Journal 843; Suzanna Sherry, "The Sleep of Reason" (1996) 84 Georgetown Law Journal 453; and John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) [Rawls]. Those arguing against limits include: Larry Alexander, "Liberalism, Religion and the Unity of Epistemology" (1993) 30 San Diego Law Review 763 [Alexander]; Jonathan Chaplin, "Beyond Liberal Restraint: Defending Religiously-Based Arguments in Law and Public Policy" (2000) 33 University of British Columbia Law Review 617 [Chaplin]; Frederick M. Gedicks, "Public Life and Hostility to Religion" (1992) 78 Virginia Law Review 671; Frederick M. Gedicks, "The Religious, the Secular, and the Antithetical" (1991) 20 Capital University Law Review 113 [Gedicks]; David Hollenbach, "Contexts of the Political Role of Religion: Civil Society and Culture" (1993) 30 San Diego Law Review 877; Michael W. McConnell, "Five Reasons to Reject the Claim That Religious Arguments Should Be Excluded from Democratic Deliberation" (1999) Utah Law Review 639; Perry, *Love and Power*, *supra* note 1; Michael J. Perry, "Religious Morality and Political Choice: Further Thoughts – and Second Thoughts – On Love and Power" (1993) 30 San Diego Law Review 703; Steven Shiffrin, "Propter Honoris Respectum: Religion and Democracy" (1999) 74 Notre Dame Law Review 1631; and Michael Walzer, "Drawing the Line: Religion and Politics" (1999) Utah Law Review 619. For an interesting debate on the issue, see Audi & Wolterstorff, *supra* note 2.

[12] Arguably, the wide acceptance of these arguments may also in some instances reflect lack of knowledge about religion, which according to David Tracy, "is the single subject about which many intellectuals can feel free to be ignorant. Often abetted by the churches, they need not study religion, for 'everybody' already knows what religion is: It is a private consumer product that some people seem to need. Its former social role was poisonous. Its present privatization is harmless enough to wish it well from a civilized distance." Quoted in Perry, *Love and Power*, *ibid.* at 67.

[13] Audi & Wolterstorff, *supra* note 2 at 73. When referring to the "liberal position" we are referring to what Michael J. Sandel describes as:

> a version of liberalism prominent in the moral and legal and political philosophy of the day. . . . Its core thesis can be stated as follows: society, being composed of a plurality of persons, each with his own aims, interests, and conceptions of the good, is best arranged when it is governed by principles that do not *themselves* presuppose any particular conception of the good; what justifies these regulative principles above all is not that they maximize the social welfare or otherwise promote the good, but rather that they conform to the concept of *right*, a moral category given prior to the good and independent of it.

Liberalism and the Limits of Justice, 2d ed. (Cambridge: Cambridge University Press, 1998) at 1 [emphasis in original].

[14] As Jonathan Chaplin suggests, "liberal democracies rarely, if ever, impose explicit constitutional or legal restraints on employing [religious-based] arguments." Therefore, Chaplin focuses on the "moral and political legitimacy" accorded to different kinds of arguments. *Supra* note 11 at 618.

[15] Audi & Wolterstorff, *supra* note 2 at 17. We would suggest that the reference to coercive laws and policies does not limit Audi's position greatly, since in the final analysis, all law would seem to contain a coercive element. On Audi's and Rawls' descriptions of the virtuous citizen, Wolterstorff makes the rather caustic response: "No matter what principles of justice a particular political theorist may propose, the reasonable thing for her to expect, given any plausible understanding whatsoever of 'reasonable and rational,' is *not* that all reasonable and rational citizens would accept those principles, but rather that *not all* of them would do so. It would be utterly *unreasonable* for her to expect all of them to accept them." Audi & Wolterstorff, *supra* note 2 at 99 [emphasis in original].

[16] Rawls, *supra* note 11 at 223-30.

[17] Richard Rorty, *Philosophy and Social Hope* (London: Penguin Books, 1999) at 170-71 [Rorty]. Paul Horwitz, *supra* note 9 at 27-28, sees Rorty's comments revealing "a defensiveness about the future of the liberal project itself and the future of the state

The liberal positions on this issue differ in various ways.[18] Some argue for constraints on all religious argument in the public square;[19] others, like Rawls, would restrict religious argument only when it is used to advocate or decide certain fundamental matters. Still others would permit religious argument, but only if the speaker is willing and able to make the same point using non-religious argument.[20] Some argue for the exclusion of religious arguments only; others for all arguments grounded in comprehensive philosophies. What unites these positions is a common belief that religious reasons should not be relied upon when political issues are being decided in a liberal democracy.[21]

Proponents of exclusion argue that to allow religious argument in the public square is divisive or potentially divisive, and also in some way unfair or disrespectful to those who do not share the religious belief. These reasons are unpersuasive. It also appears that the liberal position is committed to an Enlightenment epistemology that has been largely discredited in the modern and postmodern world. In addition, public reason as conceived by Rawls and others does not generate sufficient principles to resolve public policy debates. An appeal to fundamental presuppositions usually grounded in some religious or comprehensive belief seems inevitable.

ARGUMENTS FOR EXCLUSION BASED ON ALLEGED DIVISIVENESS

One argument for excluding religious argument is that it is divisive.[22] The issue of whether religion is a beneficial or corrosive force in society is much debated, and it will not likely ever be resolved. The debate turns as much on the historical facts as it does on one's views about religion. A fair conclusion is that religion's impact has been at times divisive, at times beneficial, at times neutral.

There are those who would argue that public policy must be protected from religious influence because religious beliefs are inherently irrational or repressive and would lead inevitably to irrational or repressive laws. Thus, Duncan B. Forrester suggests that "[t]here is a widespread and deep-seated conviction in the modern western academy that religion is either a trivial or a malign factor in political life."[23] Certainly it is not difficult to find numerous examples, whether historical or present-day, where religion has been used as an excuse for violence and oppression or where religious institutions have supported, or at least not actively resisted, violent and oppressive regimes or policies. Others, though, would make the opposite argument. Thus, Harold J. Berman suggests that religion has influenced the law "in the direction of greater humanity,"[24] and John von Heyking argues that "[r]eligion helps liberal

. . . betray[ing] a view that beliefs and concepts that cannot be understood in a rational manner represent threats both to reason and to its offspring, liberal democracy."

18 Audi & Wolterstorff, *supra* note 2 at 72 and following.

19 Jonathan Chaplin labels this position as "classical secular liberalism," and describes it as follows: "[R]eligiously-based arguments, while legally permitted, are incompatible with the requirements of a liberal democratic political morality; virtuous citizenship implies accepting the exclusion of religion from the public square and relying only on arguments which, supposedly, are equally accessible to all citizens – variously termed 'public,' 'secular,' 'common,' 'reasonable,' or 'rational.' In a religiously pluralistic culture, such arguments by definition cannot be religiously-based." Chaplin, s*upra* note 11 at 626.

20 Chaplin (*ibid.* at 626-27) refers to this as the "inclusive" secular view. Under this view, "religiously-based arguments may quite freely be used to support proposals regarding law or public policy" but "only on the condition that, in addition to whatever religiously-based arguments they [religious believers] may wish to advance, they must *also* advance (or stand ready to advance) arguments which do not in any way depend on religious belief. It is these non-religious arguments which turn out to carry the necessary public legitimacy in governing debate and especially decision; religiously-based arguments play, at best, a supporting public role" [emphasis in original].

21 Audi & Wolterstorff, *supra* note 2 at 75.

22 See, for example, William P. Marshall, "The Other Side of Religion" (1993) 44 Hastings Law Journal 843.

23 Forrester, *supra* note 3 at 26. This conviction is sometimes used as a basis for arguing that religious- based discourse should be excluded from the public square. This contention requires a response at two levels. First, it hardly seems acceptable to de-legitimize a particular kind of public debate simply because it might be used by those whose politics we disagree with. Second, the underlying premise cannot be sustained. This becomes very clear if we move from theory to how people actually debate social issues. When we do so the role of religious belief on both sides of many contentious issues becomes obvious. No religion is internally homogenous and in Canada religious pluralism is increased by the presence of a number of different faith traditions.

24 Berman, *Law and Revolution*, *supra* note 3 at 168.

democracy at its weakest point by elevating it from its characteristic vices."[25]

The plethora of examples on both sides of this argument underscores the fact that even if we were all agreed on a definition of the just society, there could never be agreement as to whether the influence of religion has consistently moved us closer to, or farther from, attaining that goal. Surely, this should hardly be surprising. Within any religion there will be significant divergence as to what God's will is and how this should be translated into societal relationships. Given the spectrum of religious beliefs, there will be individuals of faith making religious-based arguments on both sides of almost any issue. Thus, for example, while it is accurate to point to the religious inspiration behind the American abolitionist and civil rights movements,[26] at the same points in history there were church-goers who viewed slavery or segregation as reflecting God's ordering of the universe.

Moreover, an important distinction can often be drawn between a religious institution and individual voices within it. Thus, in evaluating the response of the church to, for instance, the Holocaust, do we look at individuals such as Dietrich Bonhoeffer, or at the stance of the Catholic and Lutheran churches as institutions in Nazi Germany? Do we look at the words and actions of Archbishop Desmond Tutu, or of the Christian Reformed Church in apartheid South Africa? Do we consider the work of Latin American Archbishop Oscar Romero, or the more conservative Roman Catholicism prevalent in Latin America? Nor can it be assumed that the church as institution will always take a more conservative stance than individuals within the institution. The policy of the United Church of Canada on gay and lesbian ordination and on same-sex marriages is far less traditional than the views of at least some of those in the pews. No religion is monolithic, and religion is far too varied and complex to allow for any simplistic generalizations about how faith and politics will interact.

It is arbitrary and unprincipled to exclude religious argument because of its divisiveness. What beliefs are not potentially or actually divisive? It has become something of a stock argument to note the carnage of past religious wars and to use that history as proof of religion's danger to a modern liberal democracy. In the twentieth century, however, non-religious belief systems, often hostile to religion, such as Marxism, Communism, and Nazism led to the deaths of hundreds of millions of people in countless wars and acts of genocide. One of the many lessons of the past century is that beliefs of any kind have the potential to create discord.

Almost any public policy issue, regardless of the terms on which it is discussed and debated, can give rise to conflicts. Taxation, Aboriginal rights, the decriminalization of drugs, Québec independence, gun registration, etc., have each caused social friction and sometimes violence. Furthermore, this dissension can occur even when those on opposite sides do not make any explicit references to comprehensive value systems. Consider a hypothetical example: You and I may both believe in helping the less fortunate in society, and each of us may ground our belief in a non-comprehensive philosophy. But there is ample room for serious disagreement between us on how to help the poor. Suppose that you support a *laissez-faire*, market-driven, corporate agenda; I favour interventionist economic strategies that closely regulate and constrain corporate policies and also tax the rich heavily. My position flows from a belief, supported by historical and sociological studies, about the relationship between poverty and business corporations in North America. Yours is grounded in a devotion to a particular reading of Adam Smith and his modern disciples, such as Milton Friedman. Neither of us makes any arguments grounded in religious belief; indeed, we do not intend an appeal to any comprehensive philosophies whatsoever. Each supports our position with arguments we consider empirical, reasoned, and scientific. Nevertheless, this sort of disagreement

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[25] John von Heyking, "The Harmonization of Heaven and Earth?: Religion, Politics, and Law in Canada" (2000) 33 University of British Columbia Law Review 663 at 673. Similarly, Horwitz (*supra* note 9 at 55) argues for a recognition of the "intrinsic value of religion." Our position would probably be more akin to Karen Armstrong's, who points out that religion has often been "cruel and coercive," yet "[a]t its best (and only at its best) religion had helped people to cultivate an appreciation of the holiness of humanity." *The Battle for God* (London: Harper Collins Publishers, 2000) at 199-201.

[26] Audi & Wolterstorff, *supra* note 2 at 80.

and argument has been exceptionally divisive in the rich, Western world and has often led to violence in the past few decades. One only has to recall the violence at the Québec Summit of the Americas in April 2001 to realize that positions of any kind, strongly held, can lead to division and sometimes civil unrest.[27]

Even if someone takes a position explicitly based on religious beliefs, this does not necessarily make it more divisive than arguments based on other comprehensive philosophies. If an individual makes an argument about a particular law or public policy, and links that argument to his or her religious beliefs, some listeners will agree with the public policy stance but not with the religious reasoning; others will disagree with the speaker's position on that particular issue but see the references to religion as valid; a third group will agree with both aspects; and a fourth group will reject everything the speaker says. Does this make the reference to religion exclusionary or divisive? It is difficult to think of secular arguments, buttressed with reference to a particular secular ideology, that would not meet the same four-fold response. As Jonathan Chaplin has pointed out, perspectives grounded in secular philosophies do not enjoy anything close to universal support and are frequently at odds with each other on significant public policy issues.[28]

If certain sorts of arguments are going to be excluded because they are divisive, it appears that the public square will be bereft of almost any argument and debate, save for the most banal exchange of narrow platitudes. The liberal position assumes an ideal society of citizens who share common political principles of sufficient richness and complexity to address the thorny public policy issues of the day. Unfortunately, someone relying solely on public reasons cannot resolve even the most basic policy debate. Assume agreement on Rawls' two fundamental liberal principles of legitimacy.[29] For example, suppose agreement on the principle of legitimacy that the government should treat all persons as free and equal. How does that principle resolve an issue such as the distribution of resources within society, given the various ways that wealth can be distributed? Kent Greenawalt discusses the various approaches that could be used:

> Among the most familiar are the Marxist formula, "From each according to his abilities, to each according to his needs," the utilitarian principle of maximizing average or total welfare, and the suggestion of Rawls that distribution should be equal except as inequality will increase goods for representative members of the least advantaged economic group. In different respects each of these views treats all citizens as equal. For Marx, each's needs count equally; for the utilitarian, each's capacity for happiness (or some surrogate) counts equally in the search for maximum overall welfare; for Rawls, each's entitlement to resources in a fundamental sense is equal and inequalities are allowed only if everyone is made better off.
>
> A choice among these and other distributive approaches will depend on some initial premise about proper notions of human equality and upon complex judgments about human nature and actual or potential social relations.[30]

Rawls' principles of legitimacy must be informed at every turn by other more fundamental assumptions about reality. This is another reason why religious and other comprehensive

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[27] Violent chaos broke out in Québec City when protesters representing environmental, labour, and human rights organizations clashed with police while protesting the free trade talks being held by representatives of numerous countries of the Americas. The protesters opposed the Free Trade Area of the Americas because of a belief that it would hurt the poor. See for instance, "Summit of the Americas," online: *The Globe and Mail* <http://www.theglobeandmail.com/serials/summit2001/>.

[28] Chaplin, *supra* note 11 at 640.

[29] Rawls' two principles of justice are: Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value. Social and economic inequalities are to satisfy two conditions: first, they are to be attached to positions and offices open to all under conditions of fair equality of opportunity, and second, they are to be to the greatest benefit of the least advantaged members of society. *Supra* note 11 at 5-6.

[30] Greenawalt, *Religious Convictions, supra* note 11 at 174 [footnotes omitted]; see also, Audi & Wolterstorff, *supra* note 2 at 103.

philosophies should not be, indeed cannot be, excluded from public discourse. They are often relevant (and sometimes necessary) for the resolution of many issues of concern in a liberal democracy.

Unless we believe that all arguments about what is right or wrong in a particular situation are either completely arbitrary or completely motivated by self-interest, then we have to accept that when people talk about various policy options as good or bad, they are measuring the options against a larger sense of right and wrong – in other words, against some sort of theory of justice, however incompletely expressed. Even those who reject all religious beliefs would be hard pressed to articulate a vision of justice without reference to some underlying set of beliefs – whether humanism, feminism, Marxism, liberalism, conservatism, or libertarianism – that are also based on ultimately unverifiable assumptions, in the same way as religious beliefs.

The liberal position inevitably must espouse the truth of certain propositions, such as the equality of all people or the fundamental value of human freedom. A religious person might espouse the importance of worshipping God. To argue for the truth of these propositions both parties must assert non-empirical presuppositions, beliefs about the nature of reality. Even those who claim to disavow underlying foundational beliefs still seem to have fairly clear ideas about what kind of society we should be trying to create – a concept of the good that seems to be based on faith assumptions about how we should and should not treat our fellow human beings. As Moon argues, "At root, public debate and decision-making is about issues of fundamental value. Moreover, as many others have pointed out, so-called secular values have a religious pedigree, and a transcendent or faith-based character."[31]

ARGUMENTS FOR EXCLUSION BASED ON ALLEGED UNFAIRNESS

Religious arguments are sometimes said to be unfair because they are inaccessible to those who do not hold the religious belief.[32] Thus, Richard Rorty claims that "[t]he main reason religion needs to be privatized is that, in political discussion with those outside the relevant religious community, it is a conversation-stopper."[33] But is this really the case? Suppose someone argues in favour of protecting the environment because, according to the Book of Genesis, humanity is responsible for safeguarding God's creation, the earth. This is an argument from authority. Leaving aside the fact that these sorts of arguments are unlikely to be persuasive to someone who does not accept the authority of the Bible, or this particular interpretation of it, why is it unfair to someone who does not share the same religious belief or any religious belief at all? Is it inaccessible to that person, and if so in what sense?

It does not seem to be inaccessible, even to someone who does not accept the Bible as authority. The appeal to the authority of Scripture is no different than an appeal to any authority, religious or otherwise. It is an assertion that the source of the knowledge is, in and of itself, grounds for accepting the argument, or at least grounds for giving it serious consideration. Arguments from authority are well-known rhetorical strategies, common in discussion and debate.

Is the appeal to religious belief inaccessible in the sense that it is incomprehensible? For someone who has not read the first few chapters of Genesis, the meaning of the argument may be unknown but is surely not unknowable or incomprehensible. The Bible is available for reading and study to anyone, as are the Koran and other religious texts. The person making the argument could be asked to explain its meaning in non-religious language. Non-believers can be as knowledgeable about religious arguments as believers, and often are. Someone who is unfamiliar with arguments grounded in supply-side economic theory, put forward by an economist who believes in that particular theory, is in the same position as someone who is met with the argument that humanity is the God-appointed steward of the

[31] *Supra* note 8 at 573.

[32] See *e.g.*, Kent Greenawalt, "Grounds for Political Judgment," *supra* note 11; and Abner S. Greene, "Is Religion Special?" (1994) University of Illinois Law Review 535.

[33] Rorty, *supra* note 17 at 171.

earth. Each will, if they so choose, need to gain a better understanding of the argument by familiarizing themselves with the appropriate texts or by asking questions.

Are religious arguments incomprehensible in the sense that a non-believer cannot understand the basis for the belief – *e.g.*, faith in God or faith in a religious text? While it may be true that there is a sort of psychological separation or divide between a believer and a non-believer (the believer has faith in the particular thing or person, the non-believer does not), anyone can understand the nature of faith in some sense because everyone (or seemingly everyone) has at least at one time or another had faith in someone or something. The non-believer can therefore come to an understanding of a believer's faith by analogy.[34] If, therefore, the substance of the belief is not inaccessible (*e.g.*, humanity as stewards of God's world) and the faith basis of the belief is accessible by analogy, it is hard to countenance the argument that religious argument is inaccessible to the non-believer.[35]

Even if religious arguments are in some way inaccessible, it does not follow that they should therefore be excluded from the public square. There is always the possibility that the person who finds the religious argument inaccessible will find a means of access or understanding, or if not, will simply give the argument no weight, thereby eliciting and requiring alternative arguments. Such is the nature of debate and discourse, even debates where religious arguments are excluded.

ARGUMENTS FOR EXCLUSION BASED ON ALLEGED DISRESPECT

Is it disrespectful to support a political decision for reasons that not all citizens accept as appropriate? A Buddhist, for example, might support a particular environmental policy because her religious teachings tell her that all life is sacred. Is the Buddhist being disrespectful to those who do not share and perhaps cannot comprehend the basis for her political decision? A central claim of the liberal position is that citizens should not, out of respect for every citizen's freedom and equality, rely on reasons for their decisions they could not expect these fellow citizens to endorse. If the environmental policy is given the force of law by the state, then some citizens are subject to the coercive power of the state for reasons they find unacceptable.[36] Is this disrespectful?

One response to this argument is to ask what the ethic of respect requires.[37] It is certainly not self-evident that a citizen in such a situation has been treated disrespectfully. Nor is it self-evident that a liberal democracy requires that citizens respect other citizens in this way. The liberal position assumes a definition of respect that is contested. By contrast, why should we not begin with the assumption that it is disrespectful to ask the Buddhist to justify her decision on grounds acceptable to all citizens? Why privilege the idea of public reasons? Wolterstorff wonders whether appropriate respect is being paid in the following situation:

> Suppose that you offer to me reasons derived from your comprehensive standpoint; and that I, fully persuaded of the moral impropriety of such behaviour by the advocates of the liberal position, brush your remarks aside with the comment that in offering me such reasons, you are not paying due respect to my status as free and equal. Only if you

[34] The classic definition of faith in the Christian New Testament is found at Hebrews 11:1, where faith is described as "the confidant assurance that what we hope for is going to happen." Mark R. Norton, ed., *Holy Bible, New Living Translation* (Wheaton, IL: Tyndale House, 1996).

[35] In fact, we would suggest that, even for those who do not themselves subscribe to religious beliefs, a recognition of the religious aspects of many social issues would seem to be necessary for those involved with politics or the law. By way of example, consider a case where parents have made a decision to refuse conventional medical treatment for their ill child, and that decision is being challenged by the state. Suppose the parents reject the premises underlying conventional Western medicine and are wholehearted disciples of some alternative approach to treatment. While it is certainly not necessary for the lawyers and the judge involved in the case (or for those crafting a legislative response to such a case) to embrace the same philosophy of treatment, it seems obvious that they will be better able to represent the parents, respond to the parents' arguments, decide the case, or draft effective legislation if they have some understanding of (even if not agreement with) the premises on which the parents based their decision.

[36] Rawls, *supra* note 11 at 217-18.

[37] Audi & Wolterstorff, *supra* note 2 at 109.

> offer me reasons derived from the independent source [public reasons] will you be paying me due respect. To offer me such reasons is to demean me; I will not listen.[38]

Is the adherent of the liberal position being respectful here? The ethic of respect may require that I listen to others in their particularity, and permit them to make political decisions that are supported by their particular beliefs, rather than requiring them to appeal to public reason.[39]

A second response is to question the assertion that political decisions are not legitimate when based on religious or other comprehensive beliefs. Many, perhaps most, citizens in a liberal democracy hold that political legitimacy is satisfied when, after a full and fair debate that was open to all citizens, a majority of citizens vote in favour of a policy or in favour of a government that develops a particular policy.[40] This procedure forms the bedrock of liberal democracies and to most citizens is considered reasonable and fair.[41] It is a way of making political decisions that accommodates and reflects the plural and multifaceted nature of the citizenry in Western democracies. It accords also with the very nature of discussion and debate, which inevitably involves a clash of opposing and divergent points of view. Differences in political discussions, like debate of any kind, usually turn not on a disagreement over facts or the logic of an argument, but on fundamental disagreement about basic assumptions. Once the disputants have determined that neither has committed an error of logic and each has a clear apprehension of the facts, the debate must inevitably turn to basic assumptions if one side is to prevail in persuasion over the other. No one in this day and age should ever expect to find widespread agreement over basic assumptions. Pleas to limit arguments to those with which any reasonable person could agree assume the possibility of finding universally held positions and fail to recognize that the very concept of reasonableness is contested.

ARGUMENTS FOR EXCLUSION RELATED TO CONSTITUTIONAL CONCERNS

Another argument against the use of religious arguments to justify political decisions takes a constitutional form. It is two-pronged. It is said that the use of religious reasons to support public policy is contrary to freedom from religion, and, further, that religious arguments that become law represent the "establishment" of religion within the state.[42]

Moon summarizes the relevant constitutional protection under the *Canadian Charter of Rights and Freedoms*:

> The Canadian Charter of Rights and Freedoms guarantees to all persons "freedom of conscience and religion." The Charter, however, does not include any obvious equivalent to the Establishment Clause of the First Amendment of the United States Bill of Rights. According to the Canadian courts, s. 2(a), the freedom of religion provision in the Charter, protects the individual from "coercion in matters of conscience." It prohibits the state from either restricting or compelling religious practice. But it does not necessarily preclude state support for religion. State support for the practices or institutions of a particular

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38 *Ibid*. at 110.

39 *Ibid*. at 111.

40 Wolterstorff suggests that only three sorts of constraints are needed for citizens engaged in public policy debates. All arguments in the public square should be made with civility and respect; all arguments must be conducted in accordance with the rule of law; and arguments should be made to further the goal of social and political justice, not out of self-interest or personal gain. *Ibid*. at 112, 113.

41 The one fairly recent addition to this conception of democracy is the recognition that decision making by majority vote may be unfair to groups in society who, because of historic and continuing marginalization, run the risk of rarely having their views, particularly on those issues most related to their marginalization, reflected by the majority. This recognition has led to the development of certain protections through human rights legislation and the *Charter*. This does not, however, negate the underlying premise that on any particular issue, some within the state will not agree with the position taken by the majority and yet if that position has been crystallized into law, they are just as subject to the coercive power of the state as anyone else.

42 For a discussion of the s. 2(a) jurisprudence, see Horwitz, *supra* note 9. He argues (at 6) that "the proper approach of the courts and the state to religion should be both supportive and accommodating."

> religion will breach s. 2(a) only if it coerces some members of the community, and interferes with their ability to practice their faith or compels them to practice the favoured religion.[43]

The *Charter* may render unconstitutional laws that adopt religious symbols as symbols of the state, mandate prayer in schools, interfere with the practice of religion, or prohibit certain activities for a primarily religious reason.[44] Certainly, as Moon concludes, "[t]he State should remain neutral on the issue of what is the true faith. It should not prefer one religion over another."[45] This is very different, however, from the question of whether commitment to liberal democracy requires one to eschew religious-based arguments on matters of public policy.

Is it contrary to the *Charter* guarantee of "freedom of conscience and religion" for a citizen to base decisions concerning public policy on religious grounds? Clearly, the answer on this question is no. There is no legal or constitutional constraint on the reasons she uses to justify her decisions. There are, of course, constraints on how one may express that religious reasoning. In *Ross v. New Brunswick School District No. 15*,[46] the Supreme Court of Canada held that the freedom of an individual to express her religious beliefs is not unlimited "and is restricted by the right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others."[47] The Court concluded that "[i]n relation to freedom of religion, any religious belief that denigrates and defames the religious beliefs of others erodes the very basis of the guarantee in s. 2(a) – a basis that guarantees that every individual is free to hold and to manifest the beliefs dictated by one's conscience."[48] Thus, while we argue that public reliance upon religious reasoning should be recognized as legitimate, we also acknowledge (and in fact support) the constitutional constraint that beliefs or values – whether religious or otherwise – are not to be expressed in ways that diminish others' freedom of belief or that denigrate the essential humanity of others.

ARGUMENTS FOR EXCLUSION BASED ON EPISTEMOLOGICAL GROUNDS

It appears that the real weight of constitutional, philosophical, and other arguments for excluding religious-based arguments rests on epistemological grounds – on the assumption that a coherent and relevant distinction can be made between the secular world and the religious world. Thus, the liberal position assumes that it is possible for a citizen to be "free from religion," for religion and faith to operate in the private realm, and for reason or "non-religious values" to hold sway in the secular, public world. On this view of the world, any incursion into the public square of religious reasons or law based on religious values is impermissible and inappropriate.

While it is certainly possible to be free not to practice religion and to create a public space free of religious symbols and practices (and the *Charter* protects those rights), it is not possible for the secular realm to be free of metaphysical beliefs, some of which are religious. As Benson explains:

> The term "secular" has come to mean a realm that is neutral or, more precisely, "religion-free." Implicit in this religion-free neutrality is the notion that the secular is a realm of facts distinct from the realm of faith. This understanding,

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43 *Supra* note 8 at 563

44 See, for example, *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, online: CanLII <http://www.canlii.org/ca/cas/scc/1985/1985scc15.html> [*Big M*], regarding Sunday closing legislation. Yet, it should be noted that, in striking down a law that required stores to remain closed on Sunday, the Supreme Court of Canada considered the impact of such laws not only on those who hold no religious beliefs but also on those whose religions have as their holy day a day other than Sunday. As Benjamin Berger suggests, this indicates that "the Court [was] plainly motivated by a pluralist vision of secularism" – a vision that did not relegate religion to the sidelines. "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State" (2002) 17 Canadian Journal of Law & Society 39 at 56. For another critical reading of *Big M*, see Horwitz, *supra* note 9.

45 Moon, *supra* note 8 at 573.

46 [1996] 1 S.C.R. 825, online: CanLII <http://www.canlii.org/ca/cas/scc/1996/1996scc35.html> [*Ross*].

47 *Ross*, *ibid.* at para. 72.

48 *Ibid.* at para. 94. For a discussion of this issue, see David M. Brown, "Freedom From or Freedom For: Religion as a Case Study in Defining the Content of Charter Rights" (2000) 33 University of British Columbia Law Review 551 at 599.

> however, is in error. . . . States cannot be neutral towards metaphysical claims. Their very inaction towards certain claims operates as an affirmation of others. This realization of the faith-based nature of all decisions will be important as the courts seek to give meaning to terms such as secular in statutes written some time ago.[49]

On this issue, it is relevant to consider a recent decision of the Supreme Court of Canada, *Chamberlain v. Surrey School District No. 36*.[50] *Chamberlain* involved judicial review of a decision of a school board to prohibit three books on same-sex parenting from being used in the classroom. This prohibition was clearly based on the religious beliefs of the school board members. The relevant legislation[51] required school boards to act in a "secular" and "non-sectarian" fashion. The majority of the Supreme Court of Canada found the school board's decision unreasonable and remanded the issue of whether the books should be approved to the board. The Court noted that in light of the legislation, "the school board must consider the interests of all its constituents and not permit itself to act as the proxy of a particular religious view held by some members of the community, even if that group holds the majority of seats on the board."[52] However, the Court was very clear that:

> [t]he Act's insistence on strict secularism does not mean that religious concerns have no place in the deliberations and decisions of the Board. Board members are entitled, and indeed required, to bring the views of the parents and communities they represent to the deliberation process. Because religion plays an important role in the life of many communities, these views will often be motivated by religious concerns. Religion is an integral aspect of people's lives, and cannot be left at the boardroom door. What secularism does rule out, however, is any attempt to use the religious views of one part of the community to exclude from consideration the values of other members of the community. A requirement of secularism implies that, although the Board is indeed free to address the religious concerns of parents, it must be sure to do so in a manner that gives equal recognition and respect to other members of the community.[53]

This statement suggests that the Supreme Court of Canada is developing a nuanced understanding of the concept of "secular," which legitimates, but does not privilege, arguments based on religious belief.

In another recent case, *Trinity Western University v. British Columbia College of Teachers,*[54] the Supreme Court of Canada recognized that religious values are interwoven in the fabric of Canadian society, and it implicitly rejected a simplistic separation or division of the secular and the religious. *Trinity Western* involved judicial review of a decision of the B.C. College of Teachers. The College had refused Trinity Western University certification for its teacher education program because students were required to sign a "community standards" document agreeing to refrain from various "un-Biblical" behaviours, including homosexuality. In the course of its discussion, the majority of the Supreme Court of Canada commented: "The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected."[55]

It is useful to situate this discussion in the broader historical and philosophical context. The period of the Enlightenment exposed and exacerbated a developing rift between science and religion. "The fundamental axiom of

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[49] Iain T. Benson, "Notes Towards a (Re)definition of the 'Secular'" (2000) 33 University of British Columbia Law Review 519 at 520. On this issue of the definition of the term secular and its relationship to religious belief, see also Chaplin, *supra* note 11; von Heyking, *supra* note 25; and Berger, *supra* note 44.

[50] *Chamberlain*, *supra* note 7.

[51] *School Act*, R.S.B.C. 1996 c. 412, as amended, s. 76.

[52] *Chamberlain*, *supra* note 7 at para. 27.

[53] *Ibid.* at para. 19. For a discussion of the approach taken by the lower courts in *Chamberlain*, see Berger, *supra* note 44. See also Brown, *supra* note 48.

[54] *Trinity Western*, *supra* note 7.

[55] *Ibid.* at para. 33.

Enlightenment thought was that the world could be understood through the objective application of reason and science once the distorting influence of religious ideologies was overcome."[56] Over the years, the secular became the domain of reason and objective truth, publicly verifiable; religion was relegated to the margins of individual belief, either unprovable or untrue.

A critical assumption of the liberal position on the issue of religious discourse in the public square is that a form of human reason exists that enjoys a different epistemological basis – a superior grounding in truth – than religious belief, which therefore justifies the exclusion of religious argument from the public square. Rawls' position is typical of the liberal position because he appears to rely on a conception of human reason in the Lockean Enlightenment sense, a reason that somehow transcends human experience and that, functioning properly, will lead to agreement and consensus on fundamental matters.[57] The liberal epistemology is at odds with the postmodern perspective, which, as described by Richard Tarnas, reflects an "appreciation of the multidimensional nature of reality, the many-sidedness of the human spirit and the multivalent, symbolically mediated nature of human knowledge and experience."[58]

In *Chamberlain*, the Supreme Court of Canada appeared to recognize that almost all arguments that are made for or against a particular public policy are likely to be rooted in a larger complex of values and beliefs. Elaine Pagels notes, for example, that divergent conceptions about the proper role of the state can often be traced to different assumptions about human nature.[59] These assumptions may inform our religious discourse (God made humanity good according to the creation myth in the Book of Genesis; or conversely, humanity is flawed, according to a different interpretation of the same text). Or these fundamental assumptions may inform other forms of discourse, such as political philosophy (followers of Rousseau see natural human goodness corrupted by society; other traditions following philosophers such as Hobbes advocate societal structure to constrain human impulses, which they believe tend to disorder and chaos when unfettered).[60]

A fundamental assumption about human nature (or whether there is such a thing as human nature) is beyond conclusive empirical proof. We may hold these sorts of beliefs or assumptions for a variety of reasons: our psychological makeup; what our parents taught us; what we learned in church, synagogue, mosque, or temple; our unique life experience; etc. Nevertheless, these assumptions affect how each of us understands and explains the world; these beliefs inform what we call human reason. These beliefs and assumptions are interwoven both into the fabric of the individual citizen and the fabric of Canadian society. The Supreme Court of Canada noted in *Trinity Western* that the diversity of Canadian society is "partly reflected" in its religious organizations. We would add also in its citizens who hold religious beliefs. It has always has been impossible to separate religious belief and secular reason, because "our common human reason is always a programmed human reason; what we come to believe by the use of our reason (whatever Rawls might have in mind by that) is a

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[56] Frederick Gedicks, "The Religious, the Secular and the Antithetical." *Supra* note 11 at 127.

[57] As Larry Alexander writes: "The liberal's rejection of religious-based policies suggests some sort of epistemological divide or discontinuity between what we can claim justifiably to know secularly so to speak, and what we can claim justifiably to know religiously, the latter being an inferior form of knowledge for purposes of public policy." *Supra* note 11 at 774. The liberal position would appear to reflect what Perry (*Love and Power*, *supra* note 1 at 57) describes as the "correspondence" theory of rationality, according to which the truth of a statement or belief can be ascertained by determining how closely it corresponds to "unmediated reality." *Supra* note 1 at 57. In rejecting this approach, Hilary Putnam has stated, "If one must use metaphorical language, then let the metaphor be this: the mind and the world jointly make up the mind and the world," quoted in Perry, *ibid.* at 59. See also Audi & Wolterstorff (*supra* note 2 at 96 and following) for a short critique of Rawls on this point.

[58] Richard Tarnas, *The Passion of the Western Mind: Understanding the Ideas That Have Shaped Our World View* (New York: Ballantine Books, 1991) at 407.

[59] See the transcript of Bill Moyers' interview with Pagels in Bill Moyers, *A World of Ideas* (New York: Doubleday, 1989) at 377.

[60] Jean-Jacques Rousseau, *The Social Contract*, ed. by Susan Dunn (New Haven: Yale University Press, 2002); and Thomas Hobbes, *Leviathan* (Oxford: B. Blackwell, 1946). Also see R.S. Peters' article on Rousseau in Paul Edwards, ed., *Encyclopedia of Philosophy*, Vol. 7 (New York: Macmillan Publishing & The Free Press, 1972) 218; Ronald Grimsley's article on Hobbes in *ibid.*, Vol. 4, 30; and Michael Levin, "Social Contract" in Philip P. Weiner, ed., *Dictionary of the Hisotry of Ideas*, Vol. 4 (New York: Charles Scribner & Sons, 1973) 251.

function, in part, of what we already believe. And we differ in our belief – differ in particular, now, in our comprehensive perspectives."[61]

CONCLUSION

The modern Western liberal democracy thrives on a diversity of ideas and vigorous debate. We agree with Veit Bader that rather than prohibiting certain sources of public discourse "we should try to tell the 'whole truth' as we see it on whatever topic and whenever it makes sense, accept that others do the same on an equal footing, tell it in understandable language, and discuss it in a civilized way."[62]

The "whole truth" for many citizens cannot be told without an appeal to their religious beliefs. This is hardly surprising, given that the fundamental values of the Western legal tradition are firmly rooted in religious doctrines of past centuries. And, of course, the fact that many, if not most, citizens in Canada and the West are still committed in various ways to a religion makes it inevitable that these beliefs would inform their social and political discussions. Issues such as same-sex marriage and the right to die have, for many people, important religious dimensions. Anyone who wants to fully participate in a discussion of these issues must therefore understand this religious dimension. Rather than try to exclude religious argument from the public square, we should welcome a rich diversity of ideas from a multitude of different perspectives.

David Blaikie
Assistant Professor
Faculty of Law, Dalhousie University
david.blaikie@dal.ca

Diana Ginn
Associate Professor and
Associate Dean, Academic
Faculty of Law, Dalhousie University
d.ginn@dal.ca

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[61] Audi & Wolterstorff, *supra* note 2 at 98.

[62] Veit Bader, "Religious Pluralism: Secularism or Priority for Democracy?" (1999) Political Theory 597 at 618.