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WHEN RIGHTS COLLIDE: LIBERALISM, PLURALISM AND FREEDOM OF RELIGION IN CANADA

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ABSTRACT

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

This paper looks to liberal theory, freedom of religion jurisprudence, and contemporary thinkers for answers to these timely questions. It advocates for a more deferential, accommodating form of liberalism along the principles of *modus vivendi* where individual rights are limited only to the extent that they infringe on the rights of others. By moving away from the vague, all-encompassing language of "Charter values" to John Stuart Mill's harm principle, we create a more pluralistic public sphere that gives reasons for religious minorities and ethnic groups to reciprocate such tolerance and participate actively in civil society. If we relegate such views to the private sphere by imposing a 'rational consensus' on a divided public, we do so at our peril. For it will further fragment the civic fabric of Canadian society into scattered islands of faith communities, leaving all sectors impoverished.

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INTRODUCTION

*Liberalism is not a possible meeting ground for all cultures; it is the political expression of one range of cultures and quite incompatible with other ranges...Liberalism is also a fighting creed*¹ – Charles Taylor

*Here I stand, I can do no other*² – Martin Luther

On the 25th anniversary of Canada's *Charter of Rights and Freedoms* ("Charter"), the entrenchment of individual rights, the strategic litigation that followed and the policy-laden decisions of the Supreme Court have left some groups rejoicing with others shaking their heads (and pulpits). The rights of women,³ gays and lesbians,⁴ official language minorities⁵ and the criminally accused⁶ have arguably been accelerated beyond what reluctant legislatures would have enacted. On the other hand, the *Charter* has largely been a disappointment for a range of sectors like poverty advocates,⁷ law enforcement,⁸ racialized groups⁹ and many religious groups.¹⁰ Religious leaders would have been shocked had they known in 1982 that this liberal rights document would be the catalyst, and in some cases impetus, for extending civil marriage to gays and lesbians, quashing a school board's decision not to license books depicting homosexual relationships, compelling a religious private printer to serve a gay advocacy organization, and striking down legislation that prohibited Sunday trading.

The development of freedom of religion jurisprudence under the *Charter* has left the Canadian state, judiciary, and society at large grappling with some fundamental questions. How do we balance the equality rights of gays and lesbians asserted under s. 15 with the religious freedoms of marriage commissioners protected under s. 2(a)? How can we reconcile temporal and divine sources of authority when the rule of law and the supremacy of God collide? How can a "secular" state encourage religious diversity, pluralism and the "common good"? Such questions depend on how they are framed and how we define and understand liberalism, pluralism, the 'secular' and the rule of law. In a time where the rights of same-sex couples and the freedoms of religious groups have come to a head, and where the influx of immigrants with diverse religions conflict with the laws of the majority, this question of how we live together in disagreement goes to the heart of pluralism, the 'common good' and the modern liberal exercise in Canada.

1 Charles Taylor, "The Politics of Recognition" in Charles Taylor ed., *Philosophical Arguments* (Cambridge: Harvard University Press, 1995) at 249.

2 Martin Luther, Speech to Diet of Worms, 1521.

3 See *R v. Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385; *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, 59 D.L.R. (4th) 321; *R. v. Butler*, [1992] 1 S.C.R. 452, S.C.J. No. 15, but, see contra *Newfoundland Association of Public Employees (NAPE) v. Newfoundland* 2004 SCC 66, [2004] 3 S.C.R. 381; *Law v. Canada*, [1999] 1 S.C.R. 497, 170 D.L.R. (4th) 1; *Hodge v. Canada (Minister of Human Resource Development)*, 2004 SCC 65, 244 D.L.R. (4th) 257.

4 See *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710; *Halpern v. Canada (Attorney General)*, [2003] 225 D.L.R. (4th) 529, O.J. No. 2268; *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] 225 D.L.R. (4th) 472, B.C.J. No. 994; *Brockie v. Ontario (Human Rights Commission)*, [2002] O.J. No. 2375, 222 D.L.R. (4th) 174; *Vriend v. Alberta*, [1998] S.C.J. No. 29, [1998] 1 S.C.R. 493; *Egan v. Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609; *Re Rosenberg et al. v. Attorney General of Canada*, 38 O.R. (3d) 577, 158 D.L.R. (4th) 664.

5 See *R. v. Beaulac*, [1999] 1 S.C.R. 768, 173 D.L.R. (4th) 193.

6 See *R. v. Feeney*, [1997] 2 S.C.R. 13, 146 D.L.R. (4th) 609; *R v. Stinchcombe*, [1991] 3 S.C.R. 326, [1992] 1 W.W.R. 97; *R. v. Collins*, [1995] 2 S.C.R. 1104, 183 N.R. 285.

7 See *Gosselin v. Quebec (Attorney General)*, 2005 SCC 44, [2005] 2 S.C.R. 286.

8 See *supra* note 6..

9 See *R. v. R.D.S.*, [1997] 3 S.C.R. 484, 151 D.L.R. (4th) 193.

10 See *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710; *Halpern v. Canada (Attorney General)*, [2003] 225 D.L.R. (4th) 529, O.J. No. 2268; *Brockie v. Ontario (Human Rights Commission)*, [2002] O.J. No. 2375, 222 D.L.R. (4th) 174; *Reference Re Same Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698.

In this paper, I will argue that the best way of accommodating different faiths, cultures and worldviews when rights collide is a *modus vivendi* approach, as articulated by John Gray.¹¹ *Modus vivendi* is a more honest, accommodating and genuinely tolerant face of liberalism, which seeks pluralistic, peaceful coexistence as its end goal as opposed to a rational consensus dictated by the judiciary in the name of all-encompassing “Charter values.” Indeed, liberalism itself was borne out of a theory of the common good that was focused on the *individual*, free from interference and imposition by the sovereign, the Church or the state. That said, the judiciary does have a duty to mediate this pluralism by ensuring that the assertion of the rights of one individual does not infringe on the rights of another. In delineating that fine line in the sand, this paper will advocate a return to John Stuart Mill’s harm principle - using individual rights as deliberative markers of harm. In the conflict between claims of same-sex equality and religious freedom – be it in public education, civil marriage or private businesses – the adversarial, winner-take-all litigation model is poorly designed for peaceful coexistence and should be used as a last resort only when individual rights have been infringed. It is the realm of civil society that is better suited for not simply tolerating difference, but understanding and embracing it.

Part I of this paper will canvas the ideas of liberal theorists John Gray, Charles Taylor,¹² and John Stuart Mill.¹³ Part II will examine the freedom of religion jurisprudence in the pre and post-Charter era with respect to Sunday closing laws, residential by-laws, and same-sex equality claims in civil marriage, public education and private businesses. Part III will analyze the Canadian experience of attempting to balance so-called “secular” liberalism and religious freedom, drawing on the writings of Chief Justice Beverly McLachlin,¹⁴ Jean Bethke Elshtain,¹⁵ Iain T. Benson,¹⁶ Bruce MacDougall,¹⁷ and Benjamin Berger.¹⁸ Part IV will look at some contemporary examples in Canada like the tension between same-sex civil marriage and religious marriage commissioners, and present the case for a more inclusive, pluralistic liberalism where Charter rights of religious freedom and equality collide.

PART I: THE CHANGING FACES OF LIBERALISM

Liberalism is one of the most commonly used, yet least understood, concepts in politics and law. Part of the problem lies in its very definition, which varies widely based on different theorists, countries and time periods. This paper does not attempt to explain or reconcile the myriad understandings of liberalism but rather to juxtapose the ideas of certain theorists with contemporary issues in Canada and challenge some of the “liberal” assumptions underlying recent jurisprudence.

11 John Gray is a Professor of European Thought at the London School of Economics. In *Two Faces of Liberalism*, he warns against the “liberal” pursuit of a rational consensus on the best way of life and argues for a *modus vivendi* liberalism with peaceful coexistence as the end goal. For an analysis of John Gray’s *modus vivendi* in the contemporary Canadian context, see Iain T. Benson, “Considering Secularism” in Douglas Farrow ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal: McGill-Queens University Press, 2004) at 83.

12 Charles Taylor is a Professor of Philosophy at McGill University who has written extensively on morality, identity and the cultural and sociological dimensions of liberalism.

13 John Stuart Mill (1806-1873), a British philosopher and political economist, was one of the most influential liberal thinkers of the 19th century and the author of *On Liberty*, which introduces the oft-cited harm principle.

14 The Right Honourable Beverly McLachlin has been the Chief Justice of the Supreme Court of Canada since 1998. In a debate with Jean Bethke Elshtain in October 2002 at the “Pluralism, Religion and Public Policy” conference at McGill University, she described the tension between religion and the rule of law as a “dialectic of normative commitments”.

15 Jean Bethke Elshtain is a Professor of Social and Political Ethics at the University of Chicago Divinity School, and a contributing editor for *The New Republic*.

16 Iain T. Benson is a constitutional lawyer and the Executive Director of the Centre for Cultural Renewal. He has written extensively on the nature of pluralism, religion, the “secular” and “secularism” in Canada and western societies.

17 Bruce MacDougall is a Professor at the University of British Columbia, Faculty of Law, and a leading advocate of same-sex rights.

18 Benjamin Berger is a Professor at the University of Victoria, Faculty of Law, and has written extensively about the cultural dimensions of law, liberalism and pluralism in Canada.

Liberalism's common features include the high valuation of individual reason, liberty and agency, with an understanding of law as a tool to limit the state's interference in the lives of the individual.¹⁹ Liberalism seeks to respect *individual* moral thought, free from moral or epistemological claims of "truth." However, where these commonly-held views diverge is in the *interpretation* of tolerance, universal values, and the growing challenge of cultural pluralism. In this paper, I will attempt to illustrate how the "liberal" judicial treatment of civic or *Charter* values has moved us away from the classical liberal tenets of individual autonomy and negative liberty into the imposition of a societal consensus of the "common good" as defined by the Supreme Court of Canada (the "SCC").

In *Two Faces of Liberalism*, John Gray presents two contradictory principles that lie at the heart of liberal tolerance. He summarizes these conflicting faces of liberalism as follows:

In one, toleration is justified as a means to truth. In this view toleration is an instrument of rational consensus, and a diversity of ways of life is endured in the faith that it is destined to disappear. In the other, toleration is valued as a condition of peace, and divergent ways of living are welcomed as marks of diversity.²⁰

In the first view, "rational consensus" liberalism is rooted in the enlightenment project of a universal civilization. From this perspective, "liberal toleration is the pursuit of an ideal form of life."²¹ This is the language of universal values or human rights, which has greatly impacted international law in the last fifty years. In Canada, these are articulated as "*Charter* values" or "civic values" like security, dignity and autonomy. According to Gray, this liberalism of a universal regime is supported by such theorists as John Locke, Immanuel Kant, and in more recent times, John Rawls and F.A. Hayek. Arguably, Ronald Dworkin, one of the chief proponents of Rawls' conception of liberalism, should also be included on this list.

In the second view, *modus vivendi* liberalism is rooted in the peaceful coexistence of warring communities and different ways of life. *Modus vivendi* embodies an older current of liberal thought about toleration in expressing the belief that there are many forms of life in which humans can thrive.²² The aim here is not for convergence or the "good life", but rather to reconcile individuals and ways of life honouring conflicting values to a life in common.²³ According to Gray, theorists like Thomas Hobbes, David Hume, Isaiah Berlin and Michael Oakeshott have expressed this liberalism of peaceful coexistence.

As I will explain in greater detail in Part III, this *modus vivendi* approach is particularly salient in the Canadian context, not only because of the influx of immigrants with diverse faith backgrounds, but because of Canada's "neutral but supportive" position with respect to religious groups. This complex reality is ill served by the false dichotomies of church vs. state, religious vs. secular, the rule of law vs. the supremacy of God and public vs. private religious expression. Far from being mutually exclusive, the accommodation and encouragement of diverse faiths in a pluralistic public sphere can actually strengthen civil society and the social fabric of Canada. Relegating religious views to the private sphere creates the illusion of a secular society where equality reigns supreme. In reality, it will only serve to further isolate, alienate and fragment religious groups in the dark corners of Canada's mosques, churches, synagogues and temples, far removed from public scrutiny, accountability and a common space to live *together* in disagreement.

19 Benjamin Berger, "The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State" (2002) 17 Can. J.L. & Soc. 39.

20 John Gray, *Two Faces of Liberalism* (New York: The New Press, 2000) at 105.

21 *Ibid.* at 2.

22 *Ibid.* at 5.

23 *Ibid.* at 6-7.

As a deeply multicultural society built on immigrants of a diversity of ethnic backgrounds, how we understand liberalism in Canada has profound impacts on citizenship, religion and the rule of law. Writing from the Canadian experience, Charles Taylor is critical of the purported neutrality and comprehensiveness of liberal claims, arguing that “[l]iberalism is not a possible meeting ground for all cultures; it is the political expression of one range of cultures, and quite incompatible with other ranges...[l]iberalism is also a fighting creed.”²⁴ Taylor suggests that people are always acting and finding meaning in a normative context. Therefore, what is considered as the “good” in a liberal polity reflects a certain cultural reality and is poorly designed to meet the challenge of contemporary cultural pluralism. Taylor’s view of a liberal society is “one that is trying to realize in the highest degree certain goods or principles or right.”²⁵ However, the concept of the good life is deeply value-laden and in a society that is getting more multicultural by the day, Taylor advocates for ethically richer notions of liberalism to meet the demands of such diversity.

It is precisely this claim of comprehensiveness, recently espoused by Chief Justice McLachlin with respect to the constitutional rule of law,²⁶ which jars against individual freedom, religious faith, and the submission of devout adherents to an entirely different worldview that cannot simply be relegated to the private sphere. However, if we see liberalism for what it really is – one of many ideological frameworks based in a specific cultural context with its accompanying normative assumptions – we can begin to enlarge the debate and the public sphere to better accommodate religious and cultural groups. Once again, the goal here should not be societal consensus with the SCC as the vehicle for “secular” liberalism, but an expansive pluralism that is limited only by Mill’s harm principle.

Much guidance can be found in John Stuart Mill’s *On Liberty*, one of the foundational texts on liberalism that remains highly influential in any rights discourse. Mill was primarily concerned by the exercise of power by society over an individual. He is credited as the first to articulate the harm principle in order to delineate the limitations on the rights and freedoms of the state in respect to individuals, and of individuals in respect to each other:

The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-preservation. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.²⁷

Mill believed that the individual was sovereign over his own body and mind and he should not be compelled to do what is considered wise, right or moral in the eyes of others. This idea that the rights and freedoms of an individual or group only extend until they infringe on the rights of others has been fundamental to contemporary liberal societies and the rights revolution in Canada. Only by critically examining the historical treatment of liberalism in the writings of theorists like Mill, Gray and Taylor, can we fully understand, and indeed challenge, the values underlying freedom of religion jurisprudence outlined in Part II. As I will explain in greater detail in Part IV, by moving away from the vague language of *Charter* values to Mill’s harm principle, we follow a more honest conception of liberalism that searches for a way of living together in disagreement to better accommodate competing rights in the public sphere.

24 Taylor, *supra* note 1 at 249.

25 *Ibid.* at 257-8.

26 McLachlin C.J.C. described the rule of law as making “total claims upon the self” in Douglas Farrow ed., *Recognizing Religion in a Secular Society: Essays in Pluralism Religion, and Public Policy* (Montreal: McGill-Queens University Press, 2004) at 16 (“Recognizing Religion”).

27 John Stuart Mill, *On Liberty* (New York: Doubleday, Doran and Company, Inc., 1935) at 310.

PART II: FREEDOM OF RELIGION JURISPRUDENCE IN CANADA

To fully understand Canada's "neutral yet supportive" approach to religious groups, a historical analysis of the statutory, constitutional and common law protections of religious freedoms is necessary. With the religious conflicts of the Old World still fresh in the minds of colonial powers, Canada's early history was marked by a robust protection for Protestants and Catholics. The roots of these protections can be traced back to the Articles of Capitulation for Quebec (1759) and Montreal (1760), which granted the inhabitants of the cities "the free exercise of the Roman religion."²⁸ The Treaty of Paris (1763), which put an end to imperial wars in Canada, clearly affirmed the rights of Roman Catholics in Quebec. This was further articulated in the *Quebec Act* (1774), which expanded religious freedom by replacing the oath of allegiance's reference to the Protestant faith, guaranteeing the free exercise of the Roman Catholic faith (more protection than was given to Catholics in England!) and empowering the Crown to support the Protestant religion and clergy. And although the *British North America Act* (1867) had no specific freedom of religion provision, s. 93 did entrench the protection of minority Roman Catholic and Protestant schools in Ontario and Quebec.

The mid-20th century witnessed a dark chapter in Canada's history for religious groups like the Doukhobors in British Columbia²⁹ and Jehovah's Witnesses in Quebec under Premier Maurice Duplessis. In a series of events beginning in the 1930s up until the Quiet Revolution of the 1960s, the challenges faced by Jehovah's Witnesses at the hands of Quebec police, municipalities and provincial governments were indicative of Canada's early history of religious freedom. The cases that followed illustrated the need for a constitutional remedy to limit the powers of the state.

In *Saumur v. City of Quebec*,³⁰ a Jehovah's Witness challenged the validity of a by-law of the City of Quebec forbidding distribution of any book, pamphlet, booklet, circular or tract without permission from the Chief of Police. The SCC overturned the decisions at the trial and appellate levels by ruling that the by-law did not extend so as to prohibit Jehovah's Witnesses from distributing their writings. Rand J. established religious freedom as a "principle of fundamental character" and stated the following:

Freedom of speech, religion and the inviolability of the person, are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order.³¹

Thus, religion is interpreted as being much more than mere choice, but rather a fundamental aspect of identity, community and self-expression. This expansive view of religion stands in stark contrast to later *Charter* decisions like *Brockie* (before being overturned on this point by the Ontario Divisional Court) and *Chamberlain* which would restrict religion to the private sphere or to the realm of belief and not action whenever it conflicts with *Charter* values. I would argue that this view of the comprehensiveness of religious adherence better serves the current debate over conflicting rights which has tended to reduce religious beliefs to one of many rational choices that must be measured against, and limited by, *Charter* values.

28 Art. VI of the Articles of Capitulation of Quebec, in Shortt and Doughty, *Documents Relating to the Constitutional History of Canada, 1759-1791*, 6, cited in B. McLachlin, "Freedom of Religion and the Rule of Law: A Canadian Perspective," in *Recognizing Religion*, *supra* note 26 at 12.

29 See John McLaren, "The Doukhobor Belief in Individual Faith and Conscience and the Demands of the Secular State" in John McLaren & Harold Coward, eds., *Religious Conscience, the State and the Law* (New York: State University of New York Press, 1999).

30 *Saumur v. City of Quebec*, 4 D.L.R. 641, [1953] 2 S.C.R. 299 [*Saumur* cited to D.L.R.].

31 *Ibid.* at 670.

A landmark constitutional case involving religious freedom is *Roncarelli v. Duplessis*.³² The plaintiff Roncarelli, a Montreal restaurant owner, had his liquor license cancelled at the instigation of Premier Maurice Duplessis after he had acted as bailman for a number of Jehovah's Witnesses charged with violating municipal by-laws prohibiting the distribution of religious literature. Rand J, in his oft-cited reasons for the majority judgement, ruled that Duplessis had exceeded his official powers and the unwritten constitutional principle of the rule of law meant no public official was above the law.

As a result of *Saumur* and *Roncarelli v. Duplessis*, the SCC had given implicit constitutional status to freedom of religion, limited only by rational laws of general application. These early cases reflected a more pluralistic liberalism by limiting Duplessis' vision of the "common good" in favour of common institutions that promoted the peaceful coexistence of Jehovah's Witnesses and the Catholic majority in Quebec's public sphere. They also underlined a tension between religious freedom and the laws of the majority that is still playing itself out today. As we will see, the *Charter* jurisprudence has been far from clear, though the recent SCC decisions in *Amselem*³³ and *Multani*³⁴ appear to be returning to a more expansive interpretation of religious freedom with a duty of reasonable accommodation.

The Scope and Content of Religious Freedom in the Charter Era

After the disappointing jurisprudence following the enactment of the Canadian Bill of Rights,³⁵ the *Charter* articulated Pierre Elliott Trudeau's vision for a constitutionally entrenched individual rights document to unite the country, limit state power and provide the legal protections for a flourishing multicultural society. Following on from the practices of many countries (and in keeping with international human rights doctrine), Canada entrenched a rights document with explicit protections for freedom of religion in a number of places. Religious freedom is upheld in s. 2(a), as well as s. 15 which prohibits discrimination based on religious grounds. Even the *Charter* preamble itself evokes religious doctrine in establishing that "Canada is founded upon principles that recognize the supremacy of God and the rule of law."³⁶

Although certain commentators and judges have dismissed the supremacy of God as a "dead letter...that can only be resurrected by the Supreme Court of Canada",³⁷ its conjunctive inclusion alongside the rule of law speaks to its continuing relevance in our "secular" state, as has been argued by Iain T. Benson.³⁸ Other commentators have also criticized the "dead letter" approach as failing to give proper weight to the history, purpose and relevance of the *Charter's* preamble.³⁹ According to Bruce Ryder,⁴⁰ the supremacy of God is best understood as a reminder

32 *Roncarelli v. Duplessis*, [1959] S.C.R. 1921, C.C.S. No. 857 [*Roncarelli* cited to S.C.R.]

33 *Syndicat Northcrest v. Amselem*. [2004] 2 S.C.R. 551, 241 D.L.R. (4th) 1 [*Amselem* cited to S.C.R.].

34 *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 264 D.L.R. (4th) 577 [*Multani* cited to S.C.R.]

35 Despite the enactment of expansive rights provisions including freedom of religion, the Canadian Bill of Rights was severely limited by its lack of constitutional status (it was merely an Act of Parliament that could be repealed) and application to federal laws only.

36 Preamble, *Canadian Charter of Rights and Freedoms*. The preamble's inclusion was accomplished by an amendment to the Charter, as proposed by Liberal Member of Parliament Roch Pinard, and seconded by the then Minister of Justice, Jean Chrétien, on 23 April 1981. See Anne F. Bayefsky, *Canada's Constitution Act 1982 and Amendments: A Documentary History*, vol. 2 (Toronto: McGraw-Hill Ryerson, 1989) at 816.

37 *R. v. Sharpe*, [1999] B.C.J. No.1555 at ss.78 to 80, per Southin J.A. Academics Peter Hogg, Dale Gibson and Bruce MacDougall have also disregarded the constitutional significance to the 'supremacy of God' in the preamble.

38 See Iain T. Benson, "Considering Secularism" in *Recognizing Religion*, *supra* note 63 at 83-98.

39 See David Brown, "Freedom from or Freedom for?: Religion as a Case Study in Defining the Content of Charter Rights" (2000) 33 U.B.C.L. Rev. 551, Jonathon W. Penney & Robert J. Danay, "The Embarrassing Preamble? Understanding the 'Supremacy of God' and the Charter" (2006) 39 U.B.C. L. Rev. 287, Iain T. Benson, "The Freedom of Conscience and Religion in Canada: Challenges and Opportunities," (2007) 21 Emory Int'l L. Rev. 151, and Lorne Sossin, "The 'Supremacy of God,' Human Dignity and the Charter of Rights and Freedoms" (2003) 52 U.N.B. L.J. 227.

40 Bruce Ryder is an Associate Professor at the Osgoode Hall Law School and the Director for the Centre for Public Law and Public Policy.

of the state's role in not just respecting the autonomy of faith communities, but also in nurturing and supporting them in an even-handed manner.⁴¹ Following along this line, Gonthier J., writing for Bastarache J. and himself in the *Chamberlain* dissent, referred to the preamble as having interpretive weight for a more religiously inclusive conception of the "secular" when he notes that "the preamble to the *Charter* itself establishes that "...Canada is founded upon principles that recognize the supremacy of God and the rule of law."⁴²

The scope and content of s. 2(a) was first articulated in *Big M. Drug Mart*, a leading authority on freedom of religion in Canada. The respondent grocery store, Big M Drug Mart, challenged the Federal *Lord's Day Act*⁴³ that prohibited retailers from carrying on business on a Sunday. The SCC held that since the purpose of the *Lord's Day Act* was to compel religious observance of a sectarian Christian ideal, it violated the religious freedom of non-Christian Canadians under s. 2(a) and was not saved by s. 1. In his reasons, Dickson C.J. expressed the core of religious freedom as follows:

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.⁴⁴

Dickson's language of extending religious freedom only to the point that "such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own"⁴⁵ relies heavily on Mill's harm principle. He continues along Mill's path in writing that freedom of religion is limited to protect "public safety, order, health or morals or the fundamental rights and freedoms of others."⁴⁶ In the Court's analysis, such freedom to manifest one's beliefs free from coercion or constraint is grounded in the inherent dignity and rights of the human person. This concept of "dignity" and the way in which it comes to be interpreted and applied has proven to be a critical question in the evolution of freedom of religion jurisprudence in Canada, most notably in balancing s. 2(a) religious freedoms against s. 15 equality rights of same-sex couples.

Two other important precedents that flow from *Big M Drug Mart* should also be noted. First, Chief Justice Dickson refused to limit s. 2(a) to the content of the freedom as it stood in 1982 or in the *Canadian Bill of Rights*. In doing so, he opened the door to broad judicial discretion as to the content of s. 2(a) that could evolve over time. Any limitations on the scope of s. 2(a) would have to take place under the s. 1 override clause. Second, the formal equality rule that overlooks personal differences in applying equal treatment was rejected in favour of substantive or "true" equality as it relates to religious freedom. Chief Justice Dickson ruled that "[t]he equality necessary to support religious freedom does not require identical treatment of all religions. In fact, the interests of true equality may well require differentiation in treatment."⁴⁷

41 Bruce Ryder, "State Neutrality and Freedom of Conscience and Religion" (2005) 29 S.C.L.R. (2d) at 176.

42 *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 at para. 137, [2002] 4 S.C.R. 710.

43 *Lords Day Act*, R.S.C. 1970, c. L-13.

44 *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at para. 94, 18 D.L.R. (4th) 421 [*Big M Drug Mart* cited to S.C.R.].

45 *Ibid.* at para. 123.

46 *Ibid.* at para. 95.

47 *Ibid.* at para. 362.

Thus, each individual case will be concerned with the *impact* of the law on different religious groups, which may require differential treatment and a highly contextual analysis.

One year later, Chief Justice Dickson considered a similar question in *Edwards Books*,⁴⁸ a case which challenged the constitutionality of a Sunday-closing law in Ontario. Four Ontario retailers were charged with failing to ensure that no goods were sold on a Sunday contrary to the *Retail Business Holidays Act*.⁴⁹ An exemption existed under s. 3(4) of the Act which allowed stores to open on Sunday if they had been closed on Saturday, with no more than seven employees working and less than 5,000 square feet of retail space to serve the public.

Writing for the majority, Dickson C.J. upheld the Act and its partial exemption as a reasonable limit on freedom of religion under s. 1. In distinguishing *Big M Drug Mart*, Dickson characterized the purpose of the Act as being non-religious, invoking the need for a common day of rest for purely secular reasons. *Edwards Books* shows greater deference to legislatures in emphasizing the reasonableness of the state's objective (giving people a day of rest) over the infringement itself. After having rejected the distinction between belief and action in *Big M Drug Mart*, Dickson also rejected the previously-held distinction between direct and indirect burdens on freedom of religion: "all coercive burdens on religious practice, be they direct or indirect, intentional or unintentional, foreseeable or unforeseeable, are potentially within the ambit of s. 2(a)."⁵⁰ By constitutionally prohibiting indirect burdens that effectively degrade the ability to practice one's religion, *Edwards Books* affirmed *Big M Drug Mart's* broad interpretation of freedom of religion, subject only to the infliction of harm, or the infringement on the rights of others.

Another important chapter in the freedom of religion story is the recent case of *Syndicat Northcrest v. Amselem*.⁵¹ Although it did not deal with same-sex equality claims, the comprehensive legal test and broad interpretation of religious freedom will undoubtedly influence the balancing exercise when such rights collide in the future. The appellants, Orthodox Jews who co-owned units in luxury buildings in Montreal, set up *succahs* on their balconies to fulfill the biblically mandated obligation to dwell in temporary huts during the annual 9-day Jewish festival of *Succot*. They challenged the by-laws in the declaration of co-ownership which prohibited decorations, alterations and constructions on the balconies. In a 5-4 decision, the majority held that the burdens placed upon the appellants constituted a non-trivial interference and thus an infringement of their s. 2(a) rights to dwell in a *succah* during the festival of *Succot*. It also broadly defined religion itself as follows:

In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to his or her self-definition and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.⁵²

After *Amselem*, the "value" of a religious belief in the eyes of the Court no longer mattered. What mattered was simply whether the belief was deeply held and integral to the claimant's self-definition. This comprehensive definition, which affirmed religion as integral to identity, was a welcome change from the confused and narrow interpretation in *Chamberlain*.

The majority then established the scope and content of freedom of religion under the Que-

48 *R. v. Edwards Book and Art Ltd.*, [1986] S.C.R. 713, 35 D.L.R. (4th) 1 [*Edwards Books* cited to S.C.R.].

49 Retail Business Holidays Act, R.S.O. 1980, c. 553, s. 3(4).

50 *Edwards Books*, *supra* note 48 at 716.

51 *Amselem*, *supra* note 33.

52 *Ibid.* at para. 39.

bec *Charter of Human Rights and Freedoms* and the Canadian *Charter of Rights and Freedoms* as follows:

freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials.⁵³

Thus, *Amselem* stands for the important precedent that a “religious belief” need not be reasonable, objectively held or sanctioned by official dogma, but rather a “sincerely held belief with a nexus with religion.” Once non-trivial interference in a religious belief is established, religious conduct can only be limited if it would potentially cause harm or interference with the rights of others with a view to the underlying context in which the conflict arises.

This legal framework broadening the scope of freedom of religion was affirmed in *Multani*. In a 5-3 decision (Major J. took no part in the judgement), the majority quashed a decision by a public school's council of commissioners to prohibit Multani from carrying a concealed *kirpan* (Sikh ceremonial dagger) to school. Since the religious belief was sincerely held and the burden was non-trivial, Multani's freedom of religion was infringed. The Court held that this prohibition could not be saved by s. 1 since it was not minimally impairing. After the broad interpretation of reasonable accommodation for the particularities of sincerely held religious beliefs in *Amselem* and *Multani*, the SCC appears to be moving in the direction of a more accommodating *modus vivendi*. By seeking to accommodate the greatest number of viewpoints in the public square, we move away from the “winner take all” litigation approach towards genuine diversity and tolerance.

The Same Sex Story: Balancing Religion and Equality Under the Charter

The debate over same-sex rights under the *Charter* has transcended law into the realm of culture, religion, identity and politics. The conflict between same-sex equality and freedom of religion has become the focal point for the competing faces of liberalism, evident in a number of recent cases dealing with civil marriage, freedom of contract and both public and private education. One of the first major cases to balance religious freedom, same-sex equality rights and the civic values articulated by Chief Justice Dickson in *Big M Drug Mart* was *Trinity Western*.⁵⁴ At issue in this case was the refusal of the British Columbia College of Teachers (BCCT) to approve the teacher training program of Trinity Western University (TWU), a private university associated with the Evangelical Free Church of Canada. The BCCT denied the application on the grounds that the student Code of Conduct contained discriminatory practices by having students agree to abstain from “biblically condemned” practices which encompassed “sexual sins...including homosexual behaviour.”⁵⁵ A majority of the SCC overturned the decision of the BCCT for lack of evidence that graduates of the TWU program would be unfit to teach in the public school system. As a result, the Court distinguished the protected *belief* of TWU from the unprotected *conduct* of graduates in the public school system.

Trinity Western implicitly affirmed Mill's harm principle as the most appropriate mechanism to balance competing rights claims. The case was decided in TWU's favour on the absence of evidence that students in the public education system had their rights infringed upon by TWU graduates. Iacobucci J. and Bastarache J. writing for the majority, define the scope of religious

53 *Ibid.* at para. 46.

54 *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772.

55 *Ibid.* at para. 12.

freedom as follows:

Students attending TWU are free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others. Their freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society.⁵⁶

In the absence of evidence of tangible harm through the conduct of TWU graduates, the imposition of a symbolic affirmation of homosexuality in a private, religious school would lead us squarely down the path of rational consensus liberalism. TWU does not need to agree with or publicly affirm homosexual conduct to give effect to s. 15 rights. The impetus for including s. 15 in the *Charter* was not to use the law to forge a societal consensus on the “good life.” The premise of this paper is that the judiciary’s duty to intervene is triggered when tangible harm has been caused. If TWU graduates teaching in the public education system were found to be treating homosexual students differently, or substituting their own religious views on homosexuality in place of the curriculum, then a good case could be made for limiting s. 2(a) for infringing on the rights of individual students. However, to proactively restrict *Charter* rights to protect students from an abstract, nebulous notion of potential harm would fail to provide the kind of accommodation of difference and disagreement that lies at the heart of pluralism.

Moving from the private to the public education context, the *Chamberlain* decision further complicated this conflict of rights with the sensitive issue of the role of parents and teachers in early childhood education. Under the *School Act*⁵⁷ of British Columbia, the Minister of Education confers on school boards the authority to approve supplementary education resource material, subject to Ministerial discretion. At issue was the Surrey School Board’s decision not to approve three books depicting same-sex parented families for the family life educational curriculum of Kindergarten – Grade One (K-1) children.⁵⁸ The Board cited the cognitive dissonance and age-appropriateness of such controversial material in light of some parents’ objection to the morality of same-sex relationships. The crux of the case rested upon the interpretation of “strictly secular” and “non-sectarian” requirements of the *School Act*.

McLachlin C.J., writing for the majority, quashed the Board’s resolution for acting outside of its mandate under the *School Act*. According to the majority, the Board violated the principles of secularism and tolerance in s.76 of the Act, departed from its own regulation by failing to consider the relevance of the proposed material and needs of children of same-sex parented families, and applied the wrong criteria by failing to consider the goal that all children be made aware of the diversity of family models in society. McLachlin C.J. measured religious freedoms against the *Charter* values of dignity and tolerance and found that *Charter* values prevailed. Importantly, all nine judges of the SCC affirmed the unanimous B.C. Court of Appeal’s interpretation of “secular” as being religiously inclusive, rejecting the B.C. Supreme Court’s characterization of “secular” as “non-religious” or “not influenced even in part by religion.” This important shift away from an a-religious secularism would later be affirmed in the SCC decisions of *Amselem* and *Multani*.

In a lengthy, strongly worded dissent, Gonthier J. (writing for himself and Bastarache J.) would have deferred to the expertise of the School Board and upheld the resolution on administrative law principles. The lack of a privative clause, the local expertise in balancing interests of different groups, the purpose of the Board’s authority to allow for local input, and the highly contextual and polycentric nature of the analysis all weighed in favour of deference to the

⁵⁶ *Ibid.* at para. 36.

⁵⁷ *School Act*, R.S.B.C. 1996, c. 412, s. 85(2)(b).

⁵⁸ The three books at issue depict parents in same-sex relationships and were submitted for approval as “educational resource material” to be used at the discretion of individual teachers in K-1 classrooms.

School Board. Gonthier emphasized the paramount role of parents in the education of children and the state's secondary role (especially with the K-1 age group), respecting the decisions of local school boards who can take into account contextual factors and the needs of parents.⁵⁹ He joined the majority in criticizing the religiously exclusive interpretation of "secular" espoused by Saunders J. of the B.C. Supreme Court in which one's moral view should not be heard in the public square if it manifests from a religiously grounded faith.

The reasoning in the dissent echoes the *modus vivendi* liberalism articulated by John Gray in seeking peaceful coexistence, as opposed to a rational consensus, on the issue of homosexuality. It is fine if a consensus develops organically as is arguably occurring with the death penalty in Canada. But if we are to be honest with Canada's pluralism of faiths and identities, as well as the very impetus for the liberal state, than it is not the role of the judiciary or the state to impose this societal consensus on a divided public. This is perfectly articulated in Gonthier's dissent:

Nothing in the *Charter*, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy...The key is that people will disagree about important issues, and such disagreement, where it does not imperil community living, must be capable of being accommodated at the core of a modern pluralism.⁶⁰

The true measure of tolerance in a liberal state is found not in our ability to reach a societal consensus along the lines of *Charter* values, but in our ability to live together peaceably in disagreement. This *modus vivendi* was the impetus for the liberal state, and must be reclaimed by liberal theorists, political leaders and judges if it is to hold promise and meaning for increasingly diverse societies in an age of globalization.

From the realm of education to the private sphere, same-sex equality litigation has also had a significant effect upon freedom of contract under provincial human rights legislation. In *Brockie*,⁶¹ a lower-level but oft-cited case from the Ontario Divisional Court, the appellant Scott Brockie challenged an order of the Board of Inquiry of the Ontario Human Rights Commission requiring him to provide printing services to the Gay and Lesbian Archives (GALA) and other organizations existing for the benefit of gays and lesbians. Brockie held the religious belief that homosexual conduct was sinful and while he did serve homosexual *individuals*, he argued that s. 2(a) of the *Charter* protected his religious freedom to refuse service to a gay advocacy *organization*. The Court found the original order to serve GALA and all related organizations to be overly intrusive in achieving its objectives, but still ordered Brockie to pay the \$5,000 in damages and provide printing services to gay and lesbian organizations unless the specific material came into direct conflict with the core elements of his religious beliefs. Notably, the Court rejected Brockie's distinction between discrimination based on sexual orientation and discrimination based on the political act of promoting the causes of those who have such characteristics.⁶²

As Peter Pound and Iain T. Benson have noted, when it comes to human dignity, the distinction between a person and a cause (or political organization) is important.⁶³ If Brockie had happily served homosexual clients, how does his refusal to support a political organization

59 *Chamberlain*, *supra* note 42 at para. 103.

60 *Ibid.* at para. 137.

61 *Brockie v. Ontario (Human Rights Commission)*, [2002] O.J. No. 2375, 222 D.L.R. (4th) 174, [*Brockie*].

62 *Ibid.* at para. 29.

63 See T. Peter Pound & Iain T. Benson, "Court Overturns Key Aspect of Human Rights Board of Inquiry Decision: Religious Freedom Respected, but Narrowly. Ontario Human Rights Commission v. Scott Brockie," LEX VIEW, No. 51 (2002), online: Centre for Cultural Renewal <<http://www.culturalrenewal.ca/qry/page.taf?id=53>>.

and lobby group on religious grounds infringe upon the rights of GALA? If GALA faced undue hardship in its reasonable accommodation of Brockie's religious beliefs (to use the language of human rights legislation), they might well satisfy the harm principle and thus limit Brockie's freedom of religion. If, on the other hand, any other printer in Toronto could provide the same services, it would be difficult to prove tangible harm and compel Brockie to act against his religious beliefs. In fact, the Canadian Civil Liberties Association intervened in *Brockie* at the Divisional Court level and argued that there was no valid ground to impose a supposed "state policy" of advancing the "visibility" of gays and lesbians over the beliefs of a citizen such as Brockie to express his own beliefs in the public square.

In 2003, *EGALE Canada Inc. v. Canada (A.G.)*⁶⁴ was the first of a series of cases across the country that expanded the common law definition of marriage to include same-sex couples. At the time, only Holland, Belgium and Spain had legalized same-sex marriage. In a rapid and radical transformation, the *EGALE* decision was followed by the Ontario Court of Appeal in *Halpern v. Canada (A.G.)*⁶⁵ and the Quebec Court of Appeal in *Hendricks c. Quebec (P.G.)*⁶⁶. By 2005, same-sex marriage was legal in all other provinces and territories except for Alberta, P.E.I., Nunavut and the Northwest Territories. In a controversial policy move, the federal government did not appeal any of the decisions, and instead referred draft legislation to the SCC following the *Reference Re Same Sex Marriage*.⁶⁷ This led to the enactment of the *Civil Marriage Act*⁶⁸ in July 2005, which extended the right of civil marriage to same-sex couples across the country.

In the landmark *Halpern* decision, the Court held that the common law rule in *Hyde v. Hyde*⁶⁹ which prescribed marriage as a union between a man and a woman violated s. 15(1) of the *Charter* by denying homosexual couples access to the regulatory regimes that govern and constitute marriage at law. The Ontario Court of Appeal found that the human dignity of same sex couples had been violated by the discriminatory effect of the formal distinction based on sexual orientation and this could not be saved under s. 1. Accordingly, the existing definition was declared invalid and was reformulated as "the voluntary union for life of two persons to the exclusion of all others."⁷⁰ The same-sex trilogy of cases and the piece meal evolution of the common law that followed forced the federal government's hand in enacting the *Civil Marriage Act* on a fiercely divided public in the name of *Charter* rights.

PART III: IN GOOD FAITH TO WHOM? RECONCILING COMPETING SOURCES OF AUTHORITY

As the case law has shown, the Canadian state is now conceived, in popular and constitutional discourses, as officially "secular" yet supportive of religious pluralism and multiculturalism.⁷¹ Religious freedom has been given a wide interpretation, subject only to potential interference in the rights of others. In contrast to the US position at law of an impregnable wall

64 *EGALE Canada Inc. v. Canada (Attorney General)*, [2003] 225 D.L.R. (4th) 472, B.C.J. No. 994 [*EGALE* cited to D.L.R.]. Following the *Halpern* decision, the British Columbia Court of Appeal issued another ruling in July 2003 lifting the stay it had put on the government in its earlier decision to prevent the unequal application of the law between Ontario and British Columbia.

65 *Halpern v. Canada (Attorney General)*, [2003] 225 D.L.R. (4th) 529, O.J. No. 2268 [*Halpern* cited to D.L.R.].

66 *Hendricks v. Canada (Attorney General)*, [2004] 238 D.L.R. (4th) 577, Q.J. No. 2593 [*Hendricks* cited to D.L.R.].

67 *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698.

68 *Civil Marriage Act*, S.C. 2005.

69 *Hyde v. Hyde*, 1866 C.C.S. No. 30, L.R. 1 P. & D. 130.

70 *EGALE*, *supra* note 64 at para. 18.

71 Ryder, *supra* note 41 at 169. Ryder examines Canadian political traditions, constitutional texts, and jurisprudence regarding church and state, to distinguish Canada's position of neutrality *between* religions with the American constitutional requirement of neutrality *about* religion. In the former, the state can aid religion so long as it does so in a manner that respects the principle of neutrality or even-handedness between religions. In the latter, the state is constitutionally pre-empted from enacting laws regarding the establishment of religion.

between church and state, the Canadian position is more nuanced. While there is an underlying separation of church and state, Canada's approach to multiculturalism has been translated into a fostering of religious expression and conduct, provided that it is done in a neutral, even-handed manner.

We have only to look at our comparative constitutional elements to explain this difference. According to the First Amendment of the United States Constitution (1791), "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof".⁷² This non-establishment clause stands in marked contrast to the *Charter* Preamble, which recognizes both the supremacy of God and the rule of law. The reconciliation of sacred and secular sources of authority, coupled with Canada's commitment to nurture communities of faith in an even-handed manner, is no simple task for Canada's increasingly pluralistic society of diverse faiths, cultures and identities.

Early *Charter* cases established an expansive definition to religious freedom in an attempt to foster religious practice in an even-handed manner, yet religious values are ultimately evaluated against the values of the rational, non-religious actor, articulated in Canada as the constitutional rule of law. When such worldviews collide in a conflict of rights, religious 'choice' will be only be accepted in belief not action (*Trinity Western*), private not public (*Big M Drug Mart*), or if in public, only in accordance with *Charter* values (*Chamberlain*). This is a problem that Chief Justice McLachlin, Jean Bethke Elshain, Iain T. Benson, Bruce MacDougall and Benjamin Berger have all attempted to resolve by finding the proper balance between religious freedom and the 'secular' rule of law.

Religion and the Rule of Law: A Dialectic of Citizens or Normative Commitments?

Chief Justice McLachlin's article entitled "Freedom of Religion and the Rule of Law: A Canadian Perspective"⁷³ offers us a rare glimpse into the reasoning underlying decisions of the SCC. Far from a cloistered, modest perspective, McLachlin C.J. makes the bold assertion, borrowed from Yale professor Paul Kahn, that the rule of law "makes total claims upon the self and leaves little of human experience untouched."⁷⁴ As religion exerts a similarly comprehensive claim, the law must assert its own ultimate authority while carving out a space for individuals and communities to manifest alternative, often competing, sets of ultimate commitments.

This view demonstrates a "dialectic of normative commitments" which McLachlin C.J. explains as follows:

What is good, true, and just in religion will not always comport with the law's view of the matter, nor will society at large always properly respect conscientious adherence to alternate authorities and divergent normative, or ethical, commitments. Where this is so, two comprehensive worldviews collide...It is the courts that are most often faced with this clash and charged with managing this dialectic.⁷⁵

This language of "total claims upon self" echoes what was once the exclusive realm of metaphysical claims of complete submission to this ultimate authority. As Iain T. Benson has noted, this worldview positions law as "capable of determining not only what is just but what is 'good'

72 U.S. Const. amend. I.

73 McLachlin, C.J.C., *supra* note 26 at 12.

74 *Ibid.* at 16.

75 *Ibid.* at 21-22.

and 'true'.⁷⁶ The definition and imposition of the "common good" as a sort of objective truth is precisely what liberalism was reacting against. Individual autonomy, not societal consensus as dictated by the state or judiciary, is liberalism's true vehicle for self-fulfillment and the determination of what is "good" and "true." The irony is that the very same liberal values are used by the Chief Justice as a justification of the absolute comprehensiveness of the rule of law.

In her response to Chief Justice McLachlin, political philosopher and ethicist Jean Bethke Elshtain questions this characterization of religion and the rule of law as a dialectic of normative commitments. Instead of assuming that law is a comprehensive worldview capable of managing this dialectic, Elshtain views the adversarial legal system as a last resort. Her alternative to McLachlin's "clash of commitments" can be summarized as follows:

I believe that the 'dialectic of normative commitments'...is (or should be) primarily a dialectic of *citizens*, variously located, through a culture of democratic argument: citizens engaging one another and sorting things out, as often they will, in a rather untidy, rough and ready way.⁷⁷

Elshtain's view of the goods at stake are not totalistic religious or legal goods, but more complete understandings of a *public* good, variously derived. Instead of reducing differences of opinions to the rights trump card in the adversarial courtroom, the Courts should take a more modest approach and allow the pluralism of the public sphere to flourish free from pre-emptive adjudication. Only when that pluralism inflicts tangible harm on other groups and individuals should the courts intervene. This "dialectic of citizens" would necessarily take place in the realm of civil society, which I will analyze in greater detail in Part IV.

Elshtain also correctly notes that "religious faith is not a private matter: it is constitutive of a form of public membership in a church, temple, synagogue, or mosque."⁷⁸ Religious adherents⁷⁹ cannot leave their faith at the gate when they enter the public square. Elshtain's views of the totality of religion are echoed by Benjamin Berger:

When religious conscience is properly understood as a pervasive claim upon the lives of believers, a liberalism that demands the severance of moral claims and political positions and a vision of secularism that requires an a-religious public space are irreconcilable with the freedom of religion accorded by the *Charter*.⁸⁰

To the devout adherent, religious belief infuses all aspects of being. It flows from a divine authority and at the same time "asserts the complete pervasiveness of this transcendent principle."⁸¹ Liberalism's fundamental flaw is that while it tolerates different worldviews, it ultimately asserts its superiority over them. It fails to recognize that adherence to a faith community, whether it be religious or non-religious, is more than an individual choice in the rational liberal exercise; it is another valid way of experiencing reality. It is deeply tempting for all of us who view the world through a liberal lens to see religion, like every other decision in life, as a matter of individual choice. However, this approach is blind to the deeper issues at play. When

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

77 Jean Bethke Elshtain, "A Response to Chief Justice McLachlin" in *Recognizing Religion*, *supra* note 26 at 39.

78 *Ibid.* at 38.

79 I use "adherents" instead of the misleading term "believers" as all thinking individuals are "believers" in something, whether it be religious or not. See Iain T. Benson, "Notes Towards a (Re)definition of the Secular" (2000) 33 U.B.C L. Rev. 519.

80 Berger, *supra* note 19 at 67.

81 *Ibid.* at 46.

we measure an irrational, divine source of authority against objective reason in the form of the rule of law, the decision is an easy one. This flawed assumption means that the terms of the debate are already decided before religious groups even get to court. However, by failing to understand the values underlying the constitutional rule of law and liberalism itself, we fail to see law and religion for what Berger has described as a “cross-cultural encounter.”⁸²

Understanding the “Secular”

Central to the debate at hand is the way in which basic terms like “secular” are defined and understood. Iain T. Benson has written extensively on the use (and misuse) of “secular” and “secularism” which are frequently cited in defining the contours of law and politics in Canada.⁸³ According to Benson, the “secular” has come to incorrectly signify a realm that is neutral or “religion-free,” something which poses a challenge to all religions. He critiques the *Chamberlain* decision’s confused understanding of a-religious “secularism” and the religiously inclusive “secular”:

Its confusion about secularism led to practical results that did not so much uphold diversity as undermine it. Contrary to the court’s own principles, the *Chamberlain* decision produced a rank-ordering of rights in which the sexual dogma of same-sex advocates effectively trumped all challengers, including those of parents with religious convictions about their children’s education.

By delving into the historical uses of the term “secular,” Benson explains that the Roman Catholic distinction between “secular” and “religious” is purely jurisdictional in the sense that “secular clergy” served in the world (ie. parishes) and “regular clergy” were those who lived according to a “rule” (ie. those who took vows of poverty and obedience) and served outside of the parish.⁸⁴ From these religious origins, the concept of secularism has become a belief system or faith unto itself. Its purported neutrality and objectivity is dangerously misleading, as it has been elevated to a new form of sectarianism which places explicit belief systems at a marked disadvantage in politics, public education and law itself.

Benson advocates for a religiously inclusive view of the state which is not run or directed by a particular religion, but aims to develop a notion of moral citizenship with the widest involvement of religious *and* non-religious faith groups:

A proper understanding of the secular, however, will seek to understand what faith claims are necessary for the public sphere, and a properly constituted secular government (non-sectarian not non-faith) will see as necessary the due accommodation of religiously informed beliefs from a variety of cultures.⁸⁵

By correctly understanding the “secular” as non-sectarian as opposed to non-faith, the terms of the debate, whether they be in the courtroom, classroom or public square, are enlarged to not simply tolerate, but to better understand, and seek guidance from, Canada’s diverse faiths. However, if religious expression goes completely unchecked by the judiciary in the name of pluralism, there is a danger of tacitly encouraging and accepting religious extremism, preaching hatred and the infliction of tangible harm on others in the name of a superior metaphysical

82 *Ibid.*

83 See Iain T. Benson, “Considering Secularism” in *Recognizing Religion*, *supra* note 26 at 83-98, and “The Freedom of Conscience and Religion in Canada: Challenges and Opportunities,” (2007) 21 *Emory Int’l L. Rev.* (2007) at 151-161.

84 Elshain, *supra* note 77 at 537-8.

85 *Ibid.* at 520.

claim to truth.

If Benson's perspective is one of largely unmitigated pluralism that hopes for a much more modest, deferential SCC in regards to religious groups and civil associations, then Bruce MacDougall presents the opposite view. MacDougall compares the distinctions of heterosexual and homosexual rights made by the SCC in *Trinity Western* and the B.C. Court of Appeal in *Chamberlain* (which was overturned in certain aspects on appeal at the SCC) and the refusal of marriage commissioners to officiate at same-sex civil marriages to similar, yet unacceptable distinctions based on race or gender. On the marriage commissioner issue, he argues that it is constitutionally inappropriate to accommodate religious freedom in that it would deny equality of access for same-sex couple through the use of a "religious veto."⁸⁶ In any other competing rights claim in the public sphere, MacDougall argues that freedom from discrimination on the basis of sexual orientation should prevail over religious sensibilities, though he is quick to say that this does not set up a hierarchy of *Charter* protections. In marked contrast to Benson, MacDougall posits that "in order for true equality to exist, the members of a group must not be shown just compassion and condonement, but must be *celebrated* by the state"⁸⁷ (emphasis added). In sum, the full realization of dignity based on s. 15 rights not only requires equal treatment, but the public affirmation of homosexuality by the Canadian state and judiciary. The values of "tolerance" and "equality" would therefore become the vehicles for imposing a societal consensus on a divided public in the name of *Charter* values.

The flaw in MacDougall's analysis is in the belief that greater social cohesion and understanding will flow from imposing this consensus in the name of dignity and the public affirmation of homosexuality. By relegating the dissenters to the private sphere, MacDougall fails to tackle the problem head on (ie. through dialogue, civil society and Elstain's "dialectic of citizens") and compounds the lack of understanding and fragmentation of Canadian society. Lastly, MacDougall takes issue with the religious characterization of homosexuality as an issue of morality, arguing that such moralities of aspiration are not well suited to legal adjudication in a secular world. I would argue that different individual moralities of aspiration are *exactly* what are needed to reflect and affirm genuine tolerance and a plurality of worldviews in the public sphere.⁸⁸

Somewhere in between Benson's religiously inclusive conception of the state and MacDougall's public affirmation of *Charter* values is Benjamin Berger's view of increased cultural pluralism in the public sphere, subject only to the "civic values" of security, dignity and autonomy. Berger writes that conventional approaches to liberalism and secularism have intensified the challenge of reconciling freedom of religion in a secular polity by providing a misguided vision of an a-religious and hyper-rational public space devoid of moral commitments.⁸⁹ He goes on to describe the constitutional rule of law and religious freedom as a distinctly "cross-cultural encounter". Berger criticizes the fact the rule of law has been positioned as *the* arbiter of competing worldviews when rights collide, instead of a participant in a pluralistic public sphere. Accordingly, his solution to the doctrinal requirements of religion and law is "the invocation of a core set of civic values – the values that will guide liberalism and mediate pluralism."⁹⁰

While this language of civic values appears to strike a balance between religious freedom and the security, autonomy and dignity of the individual, the interpretation of these broad, ill-defined "values" has the potential to lead us back down the path of convergence. By elevating

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

87 *Ibid.* at 359 [emphasis added].

88 See also Geoffrey Trotter "The Right to Decline Performance of Same-sex Civil Marriages—A Response to Professor Bruce MacDougall" (2007) 70 Sask. L. Rev. 2 at 365.

89 Berger, *supra* note 19 at 67.

90 *Ibid.*

certain rights as *Charter* or civic “values,” it imposes a “one size fits all” remedy when rights collide. The judicial treatment of dignity illustrates this vague and potentially overbroad application.⁹¹ If dignity were interpreted to mean public affirmation of homosexuality (as MacDougall has argued), then failure to affirm such dignity in the public sphere would leave little room for disagreement. In an indirect way, Berger’s language of “civic values” could be used to impose a societal consensus and strip the public sphere from the cultural and religious pluralism he espouses. According to Benson:

If citizens (religious and non), continue to attempt to speak to surrounding cultures in confused language (such as by misusing the term “secular” or using the pseudo-moral language of “values” when they mean an objective category of truth and meaning), they will never succeed in communicating those matters that are deepest and most essential to citizenship and culture.”⁹²

Only by identifying and challenging some of the normative assumptions of underpinning the law, can we create a public sphere that accommodates a diversity of faiths, identities and cultures. However, the point of this paper is that pluralism should be mediated by the harm principle, not by civic values that can unwittingly bind liberalism to a rational consensus.

PART IV: LIBERALISM UNBOUND: TOWARDS A MORE INCLUSIVE PUBLIC SPHERE

Liberalism needs to be reclaimed. Imposing a societal consensus as to the common good based on ill-defined “*Charter* values” flies in the face of liberalism’s *raison d’être* and the *modus vivendi* principles that should guide a pluralistic society. Borrowing heavily from Kant, Hannah Arendt offers guidance with her theory of judgement based on an “enlarged mentality.”⁹³ It maintains that judgement is distinct from provable truth claims because it involves the act of reflecting on a matter from the perspective of others. Since judgement is seen as inherently subjective, it cannot compel others in the same way as an objective truth. We see these same ideas reverberating in Charles Taylor’s discussion of the normative “good” and John Gray’s principles of *modus vivendi*.

Far from being universal, liberalism’s exclusive focus on the individual is a relatively recent phenomenon that is grounded in the unique circumstances of the West. The ultimate supremacy of the individual and “secular reason” is deeply problematic for Aboriginals, ethnic groups in an increasingly multicultural landscape, and the millions of Canadians who cannot simply relegate their faith to the private sphere. But even the most pluralistic, accommodating liberalism is not a panacea. Since the courts and the state reason from a liberal paradigm with its faith in rationalism, skepticism, individualism and objectivity, liberalism is not seen as an ideology or cultural system in itself, but rather *the* impartial arbiter of ideological or cultural encounters in the public sphere. When rights collide, religion must ultimately “listen to reason.”⁹⁴

Applying *Charter* values should not mean relegating “dissenters” to their own private realms. Human dignity and religious accommodation are not mutually exclusive. The impact of litigating these polarizing positions in a “winner take all” courtroom is felt by more than just some irate fundamentalists. By stripping away religion from the public sphere, diversity is subtly transformed into fragmentation. When ethnic and religious groups are alienated in an

91 It is ironic that in a liberal state so skeptical of the official sanctioning of certain moral claims, select “values” like security, dignity and equality have been used as the measuring stick for all other moral claims or religious beliefs.

92 Elshain, *supra* note 77 at 546.

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

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

a-religious and a-cultural public sphere (ironically, in the name of greater integration), such groups withdraw into their own ghettoized communities. If there is no space in the public sphere for moderate religion, it will retreat into greater extremism, stereotyping and lack of understanding. To take a recent example from Quebec, if Muslim girls are not allowed to play soccer while wearing the hijab for so-called safety reasons, they will simply stop (or be forced to stop) playing the game entirely.⁹⁵ If elements of *sharia* law are not allowed to co-exist in family law arbitrations and tribunals, such disputes will disappear into the dark corridors of the private sphere, far from the scrutiny, accountability and civic value of the public sphere.⁹⁶ If children of deeply religious families are faced with a public school system that does not accommodate certain views on early childhood education, the proliferation of home schooling and private, religious education could be close behind. This would have disastrous consequences for the public school system, not just financially, but in terms of the fundamental civic lessons of understanding, compromise, debate and respect for difference.

To avoid this problem with the vague language of civic values, I have argued for a more accommodating form of liberalism limited only by Mill's harm principle. This principle was affirmed by Dickson, C.J. in *Big M Drug Mart* and *Ross v. New Brunswick School District No. 15*⁹⁷ where the Court stated that an individual's freedom to express one's religious beliefs "is restricted by the right of others to hold and to manifest beliefs and opinions of their own, and to be free from injury from the exercise of the freedom of religion of others."⁹⁸ Without elevating certain vague 'civic values' above all others (be they religious or not), it allows for a more clearly defined and modest balancing of competing rights in the public sphere. Viewing the same-sex marriage debate through the harm principle would go a long way to pre-empt the valid criticisms of the courts imposing a rational consensus in the name of *Charter* values. It would be much more difficult to demonstrate the tangible harm inflicted on heterosexual couples by extending civil marriage to same-sex couples, especially considering the exemption in the *Civil Marriage Act* for religious marriage, which allows officials of religious groups to refuse to perform same-sex marriages.

In *The Collapse of the Harm Principle*,⁹⁹ Bernard Harcourt deconstructs the normative dimensions of the harm principle to show how it has been widely used in the United States for the de facto enforcement of morality. He illustrates how the harm principle has justified the regulation of pornography, prostitution, disorderly conduct, homosexuality, intoxication, drug use and fornication in support of a conservative agenda.¹⁰⁰ Harcourt argues that the pervasive claims of harm and the lack of principled guidance in resolving them, has led to the collapse of Mill's harm principle as a *critical principle*. The question for this paper is how the harm principle can avoid the traps of the civic or *Charter* values argument that impose a societal consensus based on this purportedly objective moral compass.

While Mill's harm principle remains a useful analytical device,¹⁰¹ it needs to be updated in order to falling into the same trap of overbroad, all-encompassing *Charter* values. Our concep-

95 See "Muslim Liberals Decry Charest's Stand on Soccer Hijab", *CBC News* (27 February 2007), online: <<http://www.cbc.ca/canada/montreal/story/2007/02/27/qc-soccerhijab20070227.html>>.

96 See Marion Boyd, "Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion" (20 December 2004), online: Ontario Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/boyd/>> and Eli Walker, "Don't Throw Out my Baby! Why Dalton McGuinty was Wrong to Reject Religious Arbitration" (2006) 11 Appeal 94 - 105.

97 *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, 133 D.L.R. (4th) [Ross cited to D.L.R.].

98 *Ibid.* at para 72.

99 Bernard Harcourt, "The Collapse of the Harm Principle" (1999) *J. Crim. L. & Criminology* 181.

100 *Ibid.*

101 Note that Mill always considered harm to be a necessary, but not sufficient condition for legal enforcement. By interpreting harm through the lens of rights infringement and along *modus vivendi* principles, its overbroad application that Harcourt critiques is limited.

tions of “harm,” like any other justification for law, will be heavily influenced and limited by its cultural context. Many would argue that the harm principle is simply one step removed from the normative assumptions that underlie the *Charter* values approach. Indeed, abstract notions of harm have the potential to justify a paternalistic state, overzealous judiciary and distinctly illiberal approach of legislating morality.

However, by looking at harm through the lens of our contemporary, rights-based democracy, we begin to see rights as the deliberative markers of harm. When rights collide, they should be limited by their degree of infringement on the rights of others. While rooted in the harm principle, this mechanism of reconciling competing rights claims will only legally prohibit harm if tangible infringement can be established. By doing so, it limits the scope of the harm principle and avoids its overbroad application along Harcourt’s examples of indirect or abstract harm. This rights-based interpretation of the harm principle also provides for a more accommodating, inclusive public sphere in mediating competing rights claims.

This was the approach taken in *R v. Labaye*,¹⁰² commonly known as the Montreal swingers club case. In *Labaye*, the accused was charged with keeping a common bawdy-house for the practice of acts of indecency under s. 210(1) of the Criminal Code. The accused operated a club in Montréal the purpose of which was to permit couples and single people to meet each other for group sex. Only members and their guests were admitted to the club. On appeal, the conviction was overturned with a 7 – 2 majority judgement that adopted Mill’s harm principle for criminalization of conduct. The test for indecent criminal conduct was established as follows:

In order to establish indecent criminal conduct, the Crown must prove beyond a reasonable doubt that two requirements have been met. The first is that by its nature the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws by (a) confronting members of the public with conduct that significantly interferes with their autonomy and liberty, (b) predisposing others to anti-social behaviour, or (c) physically or psychologically harming persons involved in the conduct. The categories of harm capable of satisfying the first branch of the inquiry are not closed. The second requirement is that the harm or risk of harm is of a degree that is incompatible with the proper functioning of society. This two-branch test must be applied objectively and on the basis of evidence.¹⁰³

Since participation was voluntary and equal, none of the three categories of prohibited harm (which, the Court noted, were not closed categories) mentioned above were found to have occurred.

Notably, the SCC rejected the community standards test as being too subjective in favour of the more objective harm principle. In doing so, it overturned its earlier rejection of the harm principle in *R v. Malmo-Levine*.¹⁰⁴ McLachlin, C.J.C., writing for the majority, explains the shift as follows:

102 *R v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728. For commentary on *Labaye* and the harm principle, see Peter Lauwers and Iain T. Benson, “Swingers Clubs” *R v. Labaye*, LEX VIEW, No. 56 (2005), online: <<http://www.culturalrenewal.ca/qry/page.taf?id=114>>.

103 *Ibid.* at para. 62.

104 *R v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571. In this case, a s. 7 challenge to the constitutionality of the criminal code provisions against marijuana possession under was dismissed. The law was found to be neither arbitrary nor irrational, and the larger public policy question over decriminalization was left for Parliament to decide. Notably, the harm principle was rejected as a legal principle or a principle of fundamental justice for failing to meet the standard of a “significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.”

Historically, the legal concepts of indecency and obscenity, as applied to conduct and publications, respectively, have been inspired and informed by the moral views of the community. But over time, courts increasingly came to recognize that morals and taste were subjective, arbitrary and unworkable in the criminal context, and that a diverse society could function only with a generous measure of tolerance for minority mores and practices. This led to a legal norm of objectively ascertainable harm instead of subjective disapproval.¹⁰⁵

This is a marked shift, as it appears to prohibit Parliament from legislating based on social morality and criminalizing ‘victimless’ crimes. This approach echoes Mill’s conception of liberalism where the only justification for power over a member of the community (or a limitation on individual rights) is the protection from harm. Gray’s principles of *modus vivendi* are also at play here, in that differing views on morality are accepted in an understanding of tolerance as a condition for peace and diversity.

By viewing harm through the lens of the “Constitution or similar fundamental laws” and establishing a more objective, evidence-based standard, *Labaye* goes a long way in addressing Harcourt’s critique of the overbroad application of the harm principle. Our democratic institutions, through the language of rights, provide guidance for a more modest judiciary, to intervene only when rights have been infringed, as opposed to a proactive imposition of normative “*Charter* values” upon a divided public. Like any justification for law, there will always be a subjective element in delineating criminally prohibited harm and the infringement of rights in the public sphere. However, if we are honest with these limitations and develop a better sense of what can be reasonably expected from a liberal state, this view of the harm principle can provide clearer guidance for the mediation of pluralism.

From the Courtroom to Civil Society to Modus Vivendi: Renewing Pluralism

Accommodation of difference lies at the very core of civil society, defined by Elstain as “the many networks, institution and relationships that lie, to a great extent, beyond the purview of the state’s writ in a pluralistic, constitutional order.”¹⁰⁶ In a diverse, multicultural polity like Canada, civil society creates and maintains a shared social fabric. This is the realm in which citizens grapple with divergent views, conflicting rights and the pragmatic realities of a *modus vivendi* on a daily basis. Structurally speaking, civil society appears to be better equipped to sort out differences than the adversarial, winner-take-all litigation system. By developing civic skills of compromise, stewardship, understanding and debate, civil society can play an educative role that our legal system is unwilling, and often unable, to play. Of course, our courts should continue to intervene when harm is inflicted or rights are infringed in the civil society setting. However, it should be take a more modest approach when it reaches its inherent limits as to dialogue, compromise and cross-cultural understanding.

This hybrid space incorporating both public and private spheres is fragile and could be seriously threatened if we impose the rigid separation of church and state rather than call for their cooperation. Too often we create false dichotomies between the rule of law and the supremacy of God as opposed to looking at the vast areas of commonality between *Charter* values of dignity, equality, security and autonomy and religious values like grace, humility, forgiveness, and charity. When these worldviews do in fact collide, the debate is better served in the public sphere or in civil society than in the adversarial courtroom. As I have argued, the courts should adjudicate as a last resort where the “dialectic of citizens” has failed and harm is being inflicted on an individual. Whether it be compelling marriage commissioners to officiate at same-sex

105 *Ibid.* at para. 14.

106 Elstain, *supra* note 77 at 38.

marriages, ordering printing companies to print the materials of gay advocacy groups or refusing to accredit education programs at private universities who disagree with homosexuality, preemptively legislating or ruling in the abstract leads us down the road to Gray's rational consensus liberalism. Let the balancing take place when rights actually collide, not at the proactive, symbolic rights affirmation stage.

Joseph Cardinal Bernardin¹⁰⁷ posited three ways in which religion plays a vital public role: in contributing to civil society through religiously based institutions in education, health care, and family services; in direct outreach to the poorest members of society; and in the realm of civic and moral formation as religion teaches service to one's neighbours and a sense of civic stewardship.¹⁰⁸ The contribution of religious groups to public life is impossible to measure and well beyond the scope of this paper. However, the civilizational antecedents and moral compass that have infused our laws, policies and institutions for hundreds of years are rooted in the Judeo-Christian moral tradition. Charities, non-governmental organizations, volunteer associations and community groups are heavily populated by religious individuals and groups. Principles such as grace, forgiveness, charity and redemption that have infused our common ethos are profoundly rooted in, and many would argue, maintained by, religion. We should be aware and unashamed of that by accepting and fostering religious freedoms, subject only to their infringement of the rights of others, as was the case in *Amselem* and *Multani*.

Let me come back to where I began in considering the issue of compelling marriage commissioners to officiate at same-sex marriages. Solemnization is a provincial responsibility and different provinces have reacted to the *Civil Marriage Act* in different ways (the Act itself leaves open the door as to ways of accommodating religious objections to performing same-sex marriages). For many same-sex activists, the dignity requirement of s. 15 requires symbolic, public affirmation in compelling marriage commissioners to officiate at same-sex marriages irrespective of their religious beliefs. According to Bruce MacDougall, accommodating the religious beliefs of marriage commissioners would create a "religious veto" over the availability of a public service and run contrary to legal authority that protects equality based on sexual orientation.¹⁰⁹

The issue here is not as simple as whether gay and lesbian Canadians should be afforded their *Charter* rights or not. The question is whether public affirmation and celebration of same-sex marriage, in the form of proactively compelling marriage commissioners, is necessary to satisfy the dignity requirement of s. 15. However, as with so many of these "conflicting rights" and false dichotomies of law versus religion, there is a middle ground which can offer a way of respectfully living together in disagreement better than the "one size fits all" approach proposed by MacDougall and others.

First, this conflict between same-sex couples and marriage commissioners would likely occur only in a fraction of cases as same-sex couples would not want to be married by someone who fundamentally disagrees with their way of life, especially considering the places where such religious objections would be most prevalent. Second, in those select cases where this conflict would occur, a more accommodating administrative solution exists. The provincial government would have an obligation to find a marriage commissioner who would be willing to officiate. This step could very well be done subtly and proactively on an administrative level to avoid the situation where marriage commissioners who have religious objections would be asked to perform such a marriage. Third, all future marriage commissioners would be compelled to officiate at same-sex marriages, thus 'grandfathering' the existing marriage officials. Fourth,

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

108 Elshain, *supra* note 77 at 38.

109 MacDougall, *supra* note 86 at 361.

if this administrative solution fails and a *Charter* challenge arises, then the SCC would balance the dignity of the same-sex couple under s. 15 with the religious freedom of the marriage commissioner under s. 2(a) in a contextual, fact-specific analysis. However, by legislating in the abstract to solve a problem that will rarely, if ever, arise, we unnecessarily antagonize both groups. In doing so, “tolerance” becomes a vehicle for convergence which defeats its very purpose, namely, the accommodation of a diversity of worldviews.

The tendency to cast the debate in black and white terms as being either anti-religious or anti-gay alienates both and corrodes the social fabric of civil society. In the name of liberal “tolerance,” dignity” and “*Charter* values,” there is the potential of oversimplifying the “clash of commitments” (to use the language of Chief Justice McLachlin) leading to a stripping away of the genuine tolerance and pluralism that liberalism was originally conceived to protect. What is at stake here is not the alienation of some fundamentalist sects, but an array of religious adherents who play a critical role in civil society groups across the country. Indeed, a far more honest and effective means of confronting perceived intolerance is not to hide it away in the private realm of churches, religious schools and homes, as the disciples of secularism are attempting to do, but to confront it, debate it and try and understand it under the scrutiny of public schools, civil society institutions and political debate. Simply relegating divergent views to the private sphere in the name of a societal consensus will, in addition to stifling important debates on questions of the day, further fragment the civic fabric of Canadian society. Scattered islands of faith communities (whether they be religious, non-religious or cultural as they all share a sincerely-held *faith* in something) do not constitute a pluralistic public sphere, but rather a way to live *apart* in disagreement, leaving all sectors of society impoverished.

The realm of civil society is precisely where Arendt’s “enlarged mentality” can flourish. When we reflect on this matter from the perspective of others, aware of the profoundly cross-cultural encounter saddled with all of its normative assumptions, the debate is transformed from a rigid, rational consensus to a culture of genuine tolerance and diversity. In affirming the complexity of identity and embracing the value of difference, we give reasons for minority groups and divergent religious faiths to reciprocate such tolerance and participate actively in civil society. History has shown that both the religious and non-religious have been, and can be, guilty of a “diminished mentality.” The best setting in which to combat such intolerance, whether it be religious fundamentalism, radical secularism, or other extremist views, is in an enlarged public sphere. Our *modus vivendi*, or how we live together in disagreement, will be the central challenge for Canada’s ever-changing, multicultural society.