

# **The Courts' Spectacles: Some Reflections on the Relationship Between Law and Religion in *Charter* Analysis**

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## I. INTRODUCTION

In Canada we enjoy a vibrant and vigorous freedom of religion and conscience, the product of legislative action—e.g. human rights codes—judicial decisions, and a common sense ethos possessed by most Canadians who try to live together as good neighbours. One sign of the health of Canadian political culture is that we continue to debate the broad parameters, as well as the particular details, of religious liberty. CIAJ conferences have gained a reputation as places which foster the free exchange of ideas. In keeping with that spirit of debate, I wish to offer several ideas for consideration on the topic of this panel, “Religious Neutrality: A Matter of State?” My fellow panelists have touched on the international dimensions of the topic; my focus will be on the domestic, specifically the role played by Canadian courts in dealing with this issue.

Almost six years ago the Chief Justice of Canada, Beverley McLachlin, gave a paper at McGill University, entitled “Freedom of Religion and the Rule of Law,” in which she argued that when dealing with religious freedom courts are “in the unique position of managing a dialectic of normative commitments.”<sup>1</sup>

The main point which I wish to make in this paper is that when courts engage in this “managing” exercise they do not operate as philosophically-neutral actors. Instead, the case law reveals that they perform the “managing” exercise through philosophical lenses that are not blank, but reflect philosophical choices which inform their balancing task.

In the case of freedom of religion, Canadian courts most often engage in this balancing exercise in the context of their “reasonable limits” analysis under section 1 of the *Canadian Charter of Rights and Freedoms*. Section 2 of our *Charter* guarantees certain fundamental

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<sup>1</sup> Chief Justice Beverley McLachlin, “Freedom of Religion and the Rule of Law,” in Douglas Farrow, ed., *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion, and Public Policy* (Montreal: McGill-Queen’s University Press, 2004) 12 at 29 [McLachlin C.J.C., “Freedom of Religion”].

freedoms to every person, including “freedom of conscience and religion.” However, section 1 provides that all guaranteed freedoms are subject to such “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The quarter century of case law under the *Charter* has demonstrated that courts tend to give expansive interpretations to the content of the freedoms secured by section 2, and then turn to section 1 to perform the balancing between those freedoms and other interests that arise in a case.

In my view, philosophical perspectives—stated or unstated— influence how courts conclude whether restraints on religion are justifiable. In this paper I identify six of those perspectives that have emerged in the case law or legal literature:

- (i) the characterization of religion as a species of the modern value of autonomous choice;
- (ii) the notion that religious practice is a ‘very different matter’ than religious belief, thereby suggesting that religious practice may be subjected to greater restraints than belief;
- (iii) the claim that the rule of law constitutes an all-encompassing belief system that can make prior claims on all aspects of human existence;
- (iv) the lingering notion that a secular government is a philosophically-neutral government;
- (v) equating “society” with the government in section 1 analysis; and,
- (vi) the prevailing legal position that public morality in Canada rests on a foundation of utilitarianism.

I should emphasize that my purpose in this paper is limited to identifying some of the philosophical lenses which courts bring to an examination of freedom of religion and then presenting contrasting commentaries offered by others on each lens. I will not engage in a detailed critique of each lens, nor will I advance a preferred solution to the issues raised. Moreover, I have not attempted to craft some over-arching analytical paradigm in which to assess the impact of these lenses on religious freedom. I suspect some will regard this paper as somewhat disjointed, and they will not be wrong. My goal for this paper is more

limited in scope: by identifying issues that sometimes go un-stated or unrecognized by the courts, I hope to stimulate a more direct recognition and treatment of them in future cases as courts encounter claims involving a religious dimension.

## II. THE FIRST LENS: RELIGION AS A SPECIES OF AUTONOMOUS CHOICE

While the concept of religion may defy precise definition, its basic place in human life was captured by the English philosopher Roger Scruton in this short passage where he contrasts the religious worldview with that which has emerged from the Enlightenment:

Religion is a stance towards the world, rooted in social membership, and influencing every aspect of the experience, emotion and thought ...

Religious people see the world in a way that enlightened people may not see it. Not only do they possess faith, belief in the transcendental and hopes and fears regarding providence and the afterlife. Their world is parceled out by concepts of the holy, the forbidden, the sacred, the profane and the sacramental. These concepts may be absent from the intellectual life of faithless people.<sup>2</sup>

Richard Dawkins, in his recent apologia, *The God Delusion*, accepts such a characterization of the religious person, at least by way of contrast with the rational one, painting the difference between the atheist and the religious believer as follows:

An atheist in this sense of philosophical naturalist is somebody who believes there is nothing beyond the natural, physical world, no supernatural creative intelligence lurking behind the observable universe, no soul that outlasts the body and no miracles—except in the sense of natural phenomena that we don't yet understand ...

The metaphorical or pantheistic God of the physicists is light years away from the interventionist, miracle-wreaking, thought-reading,

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<sup>2</sup> Roger Scruton, *Arguments for Conservatism: A Political Philosophy*, (London: Continuum, 2006) at 130–131 [Scruton, *Arguments for Conservatism*].

sin-punishing, prayer-answering God of the Bible, of priests, mullahs and rabbis, and of ordinary language.<sup>3</sup>

To whichever starting point one is attracted—that of Scruton or that of Dawkins—the end point is the same: religious believers stand on a different philosophical footing than others. Precisely because of such differences, the distinction between religious believer and non-believer possesses practical, and immediate, political and legal implications.

How has Canadian law dealt with this “otherness” of the religious believer? In a perceptive article Benjamin Berger argues, persuasively in my view, that Canadian constitutional law has cast the unfamiliar “otherness” of religion into terms more familiar and compatible with its structural and normative assumptions informed by the contemporary political culture of liberalism.<sup>4</sup> His analysis of Canadian constitutional decisions leads him to conclude that Canadian courts have constructed a picture which regards religion as essentially individual, private, and addressed to notions of autonomy and choice.<sup>5</sup> At the core of this conception, according to Berger, rests the liberal emphasis on a:

commitment to the goods of autonomy and individual liberty as the mechanism for human flourishing. Liberalism understands the individual as best served when left to his or her own devices and free to make his or her own choices, unencumbered by contextual constraints ... liberalism takes the view that the individual is best able to flourish when left to exercise free choice with respect to the good.<sup>6</sup>

By creating religion in its own image, so to speak, constitutional law renders religion into “a highly digestible state,”<sup>7</sup> all the while allowing the law to “remain agnostic to the good—as to meaning.”<sup>8</sup>

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<sup>3</sup> Richard Dawkins, *The God Delusion* (Boston: Houghton Mifflin Company, 2006) at 14, 19.

<sup>4</sup> Benjamin Berger, *Law's Religion: Rendering Culture* (2007) 45 Osgoode Hall L.J. 277.

<sup>5</sup> *Ibid.* at para. 10

<sup>6</sup> *Ibid.* at paras. 25–26.

<sup>7</sup> *Ibid.* at para. 24.

<sup>8</sup> *Ibid.* at para. 40.

The price of this effort to hammer the square peg of religion into the round hole of autonomous choice is two-fold. First, it results in a judicial reluctance to recognize the social and cultural dimensions of religion. As Berger concludes, “even if successful at accommodating or tolerating what it understands to be religion, aspects of religion as culture remain entirely unattended to and, therefore, unresolved in their tension with the constitutional rule of law.”<sup>9</sup>

Second, the law’s characterization of religion as “just another choice” strongly influences how the law manages the relationship between religion and the state. Berger argues that the law’s painting of religion as another kind of choice made by an autonomous individual potentially forecloses avenues of discussion about religious freedom. In the same vein John Finnis has argued that any hope for discussion about an overlap between reason and faith risks early derailment if one presumes that no religion’s claims about God, man, the world and society are reasonable, that religion’s claims add nothing to what is established in moral or political philosophy, or if religion’s status is regarded as nothing more than one way of exercising some fundamental right that lies at the heart of a liberty interest.<sup>10</sup> As Finnis puts it:

These celebrations of the right to “decide for oneself” and “define one’s own concept” trade, as we shall see, on an important truth. But they abandon reason when they assert that the relevant intelligible and basic good in issue is not the good of aligning oneself with a transcendent intelligence and will whose activity makes possible one’s own intellect and will, nor even the good of discovering the truth about some meaningful and weighty questions, but rather the good of self-determination or self-respect. For these are no true goods unless the goods around which one determines oneself deserve the respect due to what is true, rather than self-interested make-believe.<sup>11</sup>

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<sup>9</sup> *Ibid.* at para. 62.

<sup>10</sup> John Finnis, *Religion and State: Some Main Issues and Sources* (2006) 51 Am. J. Juris. 107 at 112.

<sup>11</sup> *Ibid.*

### III. THE SECOND LENS: IS RELIGIOUS PRACTICE ‘A VERY DIFFERENT MATTER’?

One only need scratch the surface of religions to discover that most are not simply religions of belief, but also religions of practice. That religious belief and practice are “inherently related”<sup>12</sup> should come as no surprise. Religion is not a purely private matter because man intrinsically is a social, not a solitary, being.<sup>13</sup> In their treatment of freedom of religion international declarations and conventions recognize the social reality of the integration of religious belief and its manifestation through practice, and they protect both.<sup>14</sup>

In the *Trinity Western University v. British Columbia College of Teachers* (“*TWU*”)<sup>15</sup> case, however, the Supreme Court of Canada characterized religious practice as a “very different matter” than religious

<sup>12</sup> John Courtney Murray, “The Problem of Religious Freedom,” in J. Leon Hooper, S.J., ed., *Religious Liberty: Catholic Struggles with Pluralism* (Louisville: Westminster/John Know Press, 1993) 152.

<sup>13</sup> Second Vatican Council, *Declaration on Religious Freedom (Dignitatis Humanae)*, at para. 3: “The social nature of man, however, itself requires that he should give external expression to his internal acts of religion: that he should share with others in matters religious; that he should profess his religion in community.” Kevin Seamus Hasson, *The Right to be Wrong: Ending the Culture War over Religion in America* (San Francisco: Encounter Books, 2005) at 12–13, made the point more colloquially: “We don’t believe in private because we don’t live in private. We humans are social creatures. If something is important to us we naturally want to celebrate it, or mourn it, together with others.”

<sup>14</sup> See art. 18 of the *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71; art. 18(1) of the *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, arts. 9-14 (entered into force 23 March 1976); art. 9(1) of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221 at 223; art. 12(1) of the *American Convention on Human Rights*, OR OEA/Ser.L.V/II.82 doc.6 rev.1 (1992) at 25 (entered into force 18 July 1978); and art. 1 of the *Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res. 36/55, UN GAOR, 36th Sess. (adopted at the 73rd plenary meeting, 1981) at 171. A seminal case in the early years of the Charter followed suit. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para. 94., Chief Justice Dickson declared that freedom of religion encompassed “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.” See also *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 759; and *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551 at para. 135 [*Amselem*].

<sup>15</sup> [2001] 1 S.C.R. 772.



belief, with the result that “the freedom to hold beliefs is broader than the freedom to act on them.”<sup>16</sup> To the extent this observation simply was a statement that thought kept to oneself is a different kind of human activity than thought manifested in practice, it states the obvious. If, however, the observation suggests that different degrees of legal protection should accrue to religious belief and religious practice because of some intrinsic difference between the two, then I think the view misapprehends the social reality of religious faith.

Courts tend to display unease about entering into the realm of claims involving religious practice. Again, Berger offers insight on this issue. He contends that the reason the jurisprudence “manifests a degree of comfort with religion as belief and displays a kind of anxiety and awkwardness with religion as practice”<sup>17</sup> can be traced to the liberal framework of constitutional rights:

As belief only, religion is a preference that remains solidly and unproblematically within the realm of the personal. Once released into action, however, it might seep into the public, where interest and preference have a troublesome presence.<sup>18</sup>

Martha Nussbaum, in her new book, *Liberty of Conscience: In Defense of America's Tradition of Religious Equality*, argues for a broad protection for religious freedom:

Liberty, or the free exercise of religion, means being able to follow one's own conscience in matters of religious belief and—within limits set by the demands of public order and the rights of others—religious conduct. One thing that the religion clauses do is to

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<sup>16</sup> *Ibid.* at paras. 36–37. This dichotomy between religious belief and religious practice has been referred to in other decisions of the Supreme Court. See *Amsalem*, *supra* note 14 at para. 187; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 at para. 226; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 at para. 72. See also those of the lower courts *Baldasaro v. Canada* (2003), 109 C.R.R. (2d) 235, 2003 FC 1008 (CanLII); *Brockie v. Ontario (Human Rights Commission)* (2002), 222 D.L.R. (4th) 174 at para. 42 (Ont. Sup. Ct.); and *Hall (Litigation guardian of) v. Powers* (2002), 59 O.R. (3d) 423 at para. 27. (Ont. Sup. Ct.)

<sup>17</sup> Berger, *supra* note 4 at para. 43.

<sup>18</sup> *Ibid.* at para. 45.

protect areas of liberty within which people can hold different beliefs and also exercise religious conduct.<sup>19</sup>

So, whatever comfort might accompany relegating religion to the theoretical realm of thought and belief, such a jurisprudential approach risks ignoring the reality of the subject of its inquiry. Precisely because faith is practised in public, questions necessarily arise about the appropriate limits the law may place on the exercise of freedom of religion. In answering those questions one cannot justify limits by rationalizing that constraints on religious practice do not interfere to the same degree as limits on religious belief.

More importantly, to the extent that courts engage in “managing dialectic commitments,” resorting to an analytical paradigm that espouses a stark belief/practice dichotomy may limit the courts’ ability to recognize the proper dimensions of the legal problem they are asked to adjudicate. I turn once more to Roger Scruton who describes the practical limits of an approach based on a belief/practice dichotomy:

It is partly a result of the Enlightenment view of religion that we believe that we can solve the problems caused by secularization simply by granting religious freedom. If religion is primarily a matter of belief and doctrine, then by allowing freedom of belief, and freedom to discuss and proselytize, it is thought, we ensure that people will make their own religious space, communities will be able to worship god in their own way, and rival faiths will live side by side in mutual toleration. However, the Enlightenment view is profoundly wrong. Belief and doctrine are a part of religion, certainly; but so too are custom, ceremony, ritual, membership, sacrifice, the division between sacred and profane and the visceral hostility to sacrilege. By allowing religious freedom we do nothing to create a public world in which religious communities can feel truly at home.<sup>20</sup>

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<sup>19</sup> Martha C. Nussbaum, *Liberty of Conscience: In Defense of America’s Tradition of Religious Equality* (New York: Basic Books, 2008) at 19.

<sup>20</sup> Scruton, *Arguments for Conservatism*, *supra* note 2 at 144.

#### IV. THE THIRD LENS: THE AMBIT OF THE CLAIMS OF THE LAW

Turning to the third issue—the scope of the claims of the law—let me refer to two contrasting views. In her 2002 McGill speech Chief Justice McLachlin argued that the authority claimed by the law “touches upon all aspects of human life and citizenship.”<sup>21</sup> The Chief Justice contended that the rule of law is “an all-encompassing authoritative system of cultural understanding.”<sup>22</sup> Religion, too, she acknowledged, also makes comprehensive claims on the individual believer. In her view, one deals with two such comprehensive systems by having the courts find “in the comprehensive claims of the rule of law, a space in which individual and community adherence to religious authority can flourish.”<sup>23</sup>

University of Toronto Professor David Novak argued to the contrary in his 2005 book, *The Jewish Social Contract: An Essay in Political Theology*.<sup>24</sup> He contended that an historical, religiously constituted community asks for more than tolerance from society; it asks for the respect of its ontological priority.<sup>25</sup> Religious freedom, according to Novak, stands as a right existing prior to the power of the state; it is not simply an entitlement from the state. Novak argued that “the hallmark of a democratic social order is the continuing limitation of its governing range”<sup>26</sup> and that a democracy “ought never regard its programs, no matter how serious, of ultimate importance in the lives of its citizens.”<sup>27</sup>

The contrast between these two visions is stark. It should be evident that a court approaching the task of fashioning reasonable limits on religious liberty under section 1 of the *Charter* using the Chief Justice’s paradigm will begin from quite a different philosophical starting point than that presented by Professor Novak.

There is a second dimension to the question of the respective ambits, or spheres, of law and religion—the place of the religious voice in the debate and determination of public policy. John Rawls has exerted the

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<sup>21</sup> McLachlin CJ, “Freedom of Religion,” *supra* note 1 at 14.

<sup>22</sup> *Ibid.* at 18.

<sup>23</sup> *Ibid.* at 20.

<sup>24</sup> (Princeton: Princeton University Press, 2005).

<sup>25</sup> *Ibid.* at 18.

<sup>26</sup> Novak, *supra* note 24 at 9.

<sup>27</sup> *Ibid.* at 21.

greatest influence in contemporary thinking in this area. In *Political Liberalism*<sup>28</sup> Rawls proposed the principle that political questions which touch on constitutional essentials, or basic questions of justice, will be settled legitimately only if the decision-makers reach their decisions using public reason. Public reason is the set of reasons that all citizens “may reasonably be expected to endorse,” the set of reasons which are acknowledged as good reasons by an “overlapping consensus of all reasonable people.” The truth or correctness of these reasons is of secondary concern; of more importance is observing a principle of reciprocity under which the reasons employed and decisions made on basic questions must be reasons and decisions that the decision-makers believe could reasonably be accepted by other people as free and equal citizens. Initially Rawls excluded from the process of public reasoning what he called “comprehensive doctrines,” which included religious doctrines. He later revised his position to permit the introduction of “reasonable” comprehensive doctrines into public reason provided that, in due course, “public reasons, given by a reasonable political conception, are presented sufficient to support whatever the comprehensive doctrines are introduced to support.”<sup>29</sup>

The Supreme Court of Canada has not often directly considered the extent to which comprehensive doctrines, such as those resting on religious beliefs, may play any role in discussing constitutional essentials or basic questions of justice. In *Chamberlain v. Surrey School District No. 36*<sup>30</sup> the Court acknowledged that because religion is an integral aspect of people’s lives, religious concerns do have a place in the deliberations on public questions—religion “cannot be left at the boardroom door.”<sup>31</sup> However, the Court continued its analysis by suggesting that on matters of public policy religious concerns cannot exclude the concerns of other members of the community, concluding with a somewhat enigmatic principle of public decision-making under which “each group is given as much recognition as it can consistently demand while giving the same recognition to others.”<sup>32</sup>

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<sup>28</sup> John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005).

<sup>29</sup> *Ibid.* at xlix – l. Nussbaum follows Rawls on this point, arguing that we can only respect one another’s freedom and equality if we are prepared to “keep religious orthodoxy out of our common political life”: Nussbaum, *supra*, note 19 at 65.

<sup>30</sup> [2002] 4 S.C.R. 710.

<sup>31</sup> *Ibid.* at para. 19.

<sup>32</sup> *Ibid.*

An approach to public decision-making employing an “overlapping consensus” possesses a certain attraction. On its face it seems fair and practical. But it contains its own philosophic assumptions which impose their own limits. John Finnis has been a trenchant critic of Rawl’s principle of overlapping consensus. Two of his criticisms merit particular attention when trying to assess whether a “comprehensive doctrine-lite overlapping consensus” provides a sound way for engaging in public decision-making, including balancing interests under section 1 of the *Charter*. First, Finnis points to the limits inherent in the principle of overlapping consensus. He argues that it stands in opposition to the need for sound reasons in support of a decision,<sup>33</sup> and that it is especially unreasonable that the truncation of reason’s reach, or of conscience’s judgment, by the requirement of consensus should apply precisely in relation to the most important political matters, such as basic human rights.<sup>34</sup>

Second, Finnis suggests that sound reasons in support of a decision may well rest within a comprehensive doctrine. He throws out a provocative question: can sufficient grounds for an uncompromising adherence to human rights exist once it is denied that the existence of human persons begins and is lived in radical dependence upon an utterly transcendent and freely creative intelligence and providence?<sup>35</sup>

Can one glean from the *Charter*’s language any clue to help in choosing between these contending visions of the ambit of law and religion and the place of comprehensive doctrines in the making of public decisions? The *Charter* opens with a Preamble:

“Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law...”

A number of years ago I suggested that the language of the Preamble might provide a way to avoid legal enmity between the secular and the divine, and I pointed to the opening language in Pope John Paul II’s work, *Faith and Reason*, as presenting a complementary, rather than an antagonistic, view of the relation between the two: “Faith and reason are

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<sup>33</sup> John Finnis, “On ‘Public Reason’”, Notre Dame Legal Studies Paper No. 06-37 (Notre Dame Law School, 2006) at 4, online: Social Science Research Network <<http://ssrn.com/abstract=955815>>.

<sup>34</sup> *Ibid.* at 5.

<sup>35</sup> *Ibid.* at 9.

like two wings on which the human spirit rises to the contemplation of truth.”<sup>36</sup> More recently, Professor Bruce Ryder, of Osgoode Hall Law School, has argued that the Preamble’s principle of the ‘supremacy of God’ represents “a kind of secular humility, a recognition that there are other truths, other sources of competing world views, of normative and authoritative communities that are profound sources of meaning in people’s lives that ought to be nurtured as counter-balances to state authority.”<sup>37</sup>

Professor Ryder’s analysis is intriguing and suggests, perhaps, that the *Preamble* to the *Charter* offers rich food for future thought about the appropriate starting point for any interpretive approach for section 1 of the *Charter*, especially when issues of the relationship between the law and religion are in play.

## V. FOURTH LENS: THE NEUTRALITY OF THE STATE

One often hears the state described in terms of neutrality. The state, or government, in its formulation of policy and law usually does not operate in a philosophically or morally neutral way. Indeed, it would be fanciful to describe any human institution, including the government and its agencies, as neutral; any human institution by its nature will possess a point of view reflective of the thinking of its directing members.

Translated into the realm of religious freedom, the lack of neutrality of state actors has been recognized, in slightly different ways, by Charles Taylor and Roger Scruton. Taylor, in his recent book, *A Secular Age*,<sup>38</sup> traces the place of the secular, or temporal, through the ages. In a review essay of the book, Wilfred McClay summarized Taylor’s argument in the following terms:

Gradually, by a succession of smaller steps, this state of affairs led to modern secularity, where we see for the first time in human history a form of “exclusive humanism” that accepts “no final goals beyond human flourishing, not any allegiance to anything else beyond this flourishing.” There is no more grounding of the

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<sup>36</sup> 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 at 563–64.

<sup>37</sup> Bruce Ryder, “State Neutrality and Religious Freedom” (2005) 29 Sup. Ct. L. Rev. 169 at 177.

<sup>38</sup> Charles Taylor, *A Secular Age* (Cambridge, MA: Harvard University Press, 2007).

political or social sphere in the “higher time,” since the overwhelming “horizontal” texture of such a world simply crowds out the transcendent and the sacred, or renders them extraneous.<sup>39</sup>

Scruton also points to the absence of the transcendent as a key characteristic of modern political and legal culture, but argues that in more recent times an indifference to the transcendental has given way to a hostility towards it:

Western societies are organized by secular institutions, secular customs and secular laws, and there is little or no mention of the transcendental either as the ground of worldly authority or the ultimate court of appeal in all our conflicts. This situation is not new: it was with us in the nineteenth century, when it co-existed with widespread religious faith among the people, and a respectful scepticism among the elite. New, however, is the widespread repudiation of the sacred—the chasing away of divine shadows from the life of the city, the life of the body, the life of the emotions and the life of the mind.<sup>40</sup>

In the Canadian context, Iain Benson<sup>41</sup> and Douglas Farrow<sup>42</sup> have both argued how unrealistic it is to continue to regard the labels of “secular” or “secularism” as guarantees of state philosophical neutrality.

While state policy by its nature may not be philosophically neutral, the practical question remains of the manner in which the state resolves matters arising along its interface with religion. Government policy and law may stand in one of three relationships with religions: (i) government policy may not touch at all upon matters of interest to religions, operating instead within a sphere separate from religion; (ii) government policy may touch upon matters of interest to religions, but in a way that complements, or supports, them; or (iii) government policy may touch upon matters of interest to religions in a way that conflicts with them, in the sense of

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<sup>39</sup> Wilfred M. McClay, “Uncomfortable Belief” (2008) 183 *First Things* 35 at 37.

<sup>40</sup> Scruton, *Arguments for Conservatism*, *supra* note 2 at 142.

<sup>41</sup> Iain Benson, “The Freedom of Conscience and Religion in Canada: Challenges and Opportunities” (2007) 21 *Emory Int’l L. Rev.* 111 at 154–155; and Iain Benson, “Notes Towards a (Re)Definition of the ‘Secular’” (2000) 33 *U.B.C. L. Rev.* 519.

<sup>42</sup> Douglas Farrow, “Of Secularity and Civil Religion,” in Farrow, ed., *supra*. note 1 at 140–182.

contradicting them, imposing some burdens on them, or denying them some benefits by reason of the positions taken by religion.

Where government policy touches upon matters of interest to religions, what stance should it take? Variants of an “equal treatment” argument have been advanced as solutions to the issue. In *Big M Drug Mart*, for example, Dickson C.J. hinted at a notion of equality amongst religions as a necessary principle informing government policy.<sup>43</sup> Martha Nussbaum recently fleshed out this point of view, arguing that the basic principle informing the American tradition of religious freedom is that of equality:

Insofar as it is a good, defensible value, the separation of church and state is, fundamentally, about equality, about the idea that no religion will be set up as the religion of our nation, an act that immediately makes outsiders unequal. Hence separation is also about protecting religion—minority religion, whose liberties and equalities are always under pressure from the zeal of majorities. Protecting minority equality in religious matters is very important because religion is very important to people, a way they have of seeking ultimate meaning in their lives. If religion were trivial, it would not be so vitally important to forestall hierarchies of status and freedom in religious matters.<sup>44</sup>

Of course, if the objective of equal treatment is to ensure that government policy does not render certain groups of people “outsiders” by treating them as unequal, then the equality principle would have to regulate not only the relations between government and religions, but also the relations between the government and any philosophical point of view, religious or non-religious. That is to say, limitations could only be justified on religious belief or practice if similar limitations were placed on non-religious beliefs or practices. In other words, to operate in a neutral, or even-handed way, the principle of equality would have to ensure that religion secured no special privilege vis-à-vis government policy, but at the same time was not subject to any special burden.

While theoretically attractive, the equality principle has proven somewhat problematic in practice. We can see this in the arguments commonly made for two exceptions to a principle of state neutrality, or

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<sup>43</sup> *R. v. Big M Drug Mart*, *supra* note 14 at para. 94.

<sup>44</sup> Nussbaum, *supra* note 19 at 11–12.



equal treatment, of religion. First, Canadian jurisprudence has fashioned a principle of accommodation which exempts certain religious believers from the effect of facially neutral laws. In a very real sense this affords a special privilege to religion. Nussbaum argues that good reason exists for such a privilege, contending that accommodation, as a form of non-neutrality, sometimes is required by equality because of the importance we attach to the protected sphere of individual conscience, itself a central dimension of human dignity.<sup>45</sup>

The second exception operates in the other direction. Nussbaum, for example, argues that equality “does not imply that all religions and views of life must be (equally) respected by government: for some extreme views might contradict, or even threaten, the very foundations of constitutional order and the equality of citizens within it.”<sup>46</sup> Finnis, too, posits that some discrimination might be justified amongst religions if a religious culture displayed a disrespect for equality or for freedom from coercion in religious belief.<sup>47</sup> Great care must be taken, however, in applying this second exception. While it may appear uncontroversial to some to impose limits on religion where it poses a threat to the foundations of the constitutional or public order, the concepts of “constitutional order” and “public order” can be made quite malleable. Real risks exist about too easily re-casting conflicts between public policy and religion into questions involving threats to the foundation of the constitutional or public order in order to justify limits on religion. One need look no further than the debate between the majority and minority in the Supreme Court of Canada’s decision in *Bruker v. Marcovitz*<sup>48</sup> where one group of judges saw its decision as a minor re-shaping of a religious practice to conform with contemporary public policy, whereas the other regarded it as an impermissible entanglement of the law in religious affairs.

So, where are we left on this issue of state neutrality? The formulation of law and policy necessarily involves making normative choices. Not all will agree with those choices. Some of those choices will

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<sup>45</sup> *Ibid.* at 21–22, 52.

<sup>46</sup> *Ibid.* at 24.

<sup>47</sup> John Finnis, *Endorsing Discrimination Between Faiths: A Case of Extreme Speech?* University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No. 09/2008 (March 2008) at 6, online: SSRN <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1101522](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1101522)>.

<sup>48</sup> [2007] 3 S.C.R. 607.

conflict with profoundly held religious beliefs of some Canadians. The problem was put well by Professor Steven Smith in his review of Nussbaum's book:

“The modern political problem—the problem of *e pluribus unum*—is to devise ways of maintaining community in a pluralistic society in which citizens have an equal right to adhere to and express their beliefs but in which, inevitably, not all deeply held beliefs will be consistent with those expressed by government. It is, to be sure, a daunting problem.”<sup>49</sup>

Perhaps even an intractable problem. But when approaching this problem in the context of conducting a section 1 analysis in cases that engage religious liberty, in my view it is important for courts to recall that characterizing a government limitation as “neutral,” or “secular,” does not provide a realistic way of examining the problem. Such labels hide, rather than reveal, the true concerns that must be addressed by the judicial analysis.

## VI. FIFTH LENS: THE STATE AS GOVERNMENT

The fifth philosophical lens influencing the consideration of justifiable limits on religious freedom involves the meaning attributed to section 1 itself.

The title for this conference suggests that the “state” affords reasonable accommodation to religion. What, then, is the state? Typically, the state most often is equated with the government. Certainly branches of the government—legislative, executive and bureaucratic—formulate, propose and implement policies and laws which, in their intended or unintended effects, may come into conflict with religions. Such policies and laws may reflect the thinking of large segments of the Canadian populace, or may be the products of limited segments of the government apparatus. Whichever they may be, there is a strong temptation in Canadian constitutional law to pit religion, on the one hand, against a very institutional conception of the state, on the other, and to regard the process of justifying limits on religious freedom as entailing an examination of government policy alone. To some extent, this is the natural result of some language in the *Charter* under which judicial review

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<sup>49</sup> Steven D. Smith, “The Wages of Advocacy” (2008) 180 *First Things* 35 at 39.

of a potential infringement is only triggered if one can point to some act or omission by “government” and some limitation “prescribed by law.”

But section 1 of the *Charter* talks not only of limits “prescribed by law,” or law-makers, but of justifications that are measured in relation to the concept of “a free and democratic society.” That is to say, the process of infringement/justification balancing must be located in the broader context of persons and society, and not simply placed within the confines of the familiar *Oakes* gloss on section 1 which focuses on government action, government objectives and government means. I put out for discussion the question of whether or not the *Oakes* test obscures the larger context created by the language of section 1 where the *Charter* directs a balancing of the interests of one person with those of many persons, that is with “society.” Simply put, while the “society” referred to by section 1 of the *Charter* certainly contains a political dimension—free and democratic—“society” is not co-terminous with government. Or, to frame the question another way, is it a departure from the language of the *Charter* to view a section 1 exercise as balancing the interests of a religious person against the interests of a non-religious government, or should the section 1 balancing exercise be regarded as more akin to considering the interests of a religious person together with those of a multi-dimensional society which includes other religious believers as well as non-believers?<sup>50</sup>

This question, I think, prompts some reflection on Professor Berger’s observation that Canadian jurisprudence does not actually understand religion as culture except in impoverished terms.<sup>51</sup> Berger concludes that “even if successful at accommodating or tolerating what it understands to be religion, aspects of religion as culture remain entirely unattended to and, therefore, unresolved in their tension with the constitutional rule of law.”<sup>52</sup> It is worth considering, I believe, whether this state of affairs results not only from how religion is judicially defined in section 2(a), but whether it also results from a narrow, *Oakes*-inspired

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<sup>50</sup> Iain Benson makes a similar point in his article, “The Freedom of Conscience and Religion in Canada: Challenges and Opportunities,” *supra* note 41 at 155, where he writes: “When we use the ‘state’ to mean the order of government and the law, and ‘society’ to mean citizens at large, including both religious and non-religious citizens, we must remember that religion, in some sense, is within both, since religious and non-religious citizens make up both the state and society.”

<sup>51</sup> Berger, *supra* note 4 at para. 61.

<sup>52</sup> *Ibid.* at para. 62.

conceptualization of the balancing exercise courts are required to engage in under section 1 of the *Charter*? On this point I would commend for consideration the unfolding work of Professor Brad Miller at the University of Western Ontario Law School, particularly his recent essay, “Justification and Rights Limitation.”<sup>53</sup>

## VII. A SIXTH LENS: PUBLIC MORALITY AND RELIGION

A final philosophical lens through which the judiciary has assessed the reasonableness of limits on religious freedom is that relating to issues of personal freedom and morality, particularly in the area of sexual ethics. I think the Supreme Court’s 2005 decision in *Labaye*<sup>54</sup> offers a good example of how this final lens has operated.

Popularly known as the ‘swingers case,’ *Labaye* involved an appeal by the owner of a group sex club from a conviction under the *Criminal Code* for keeping a common bawdy house for the practice of acts of indecency.<sup>55</sup> In a 7-2 decision, a majority of the Supreme Court held that the group sex practiced at the swingers club were not “acts of indecency” because they did not involve any kind of *harm* that could be objectively shown to interfere with the proper functioning of Canadian society.<sup>56</sup>

As the minority in *Labaye* pointed out, the majority adopted a “theory of harm” taken from the utilitarianism of John Stewart Mill.<sup>57</sup> Utilitarianism is based firmly on a vision of man as a being whose happiness results from the ability to satisfy one’s pleasures and avoid pain.<sup>58</sup> It reflects a view that sexual conduct is not ordered towards any end; rather, the body is an instrument that consenting adults can use for any purpose, at any time, with any other adult.

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<sup>53</sup> In Grant Huscroft, ed, *Expounding the Constitution: Essays in Constitutional Theory* (New York: Cambridge University Press, 2008).

<sup>54</sup> *R. v. LaBaye*, [2005] 3 S.C.R. 728 [*Labaye*].

<sup>55</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 210(1).

<sup>56</sup> *Labaye*, *supra* note 54 at paras. 52, 71.

<sup>57</sup> *Ibid.* at para 105.

<sup>58</sup> Roger Scruton, *A Short History of Modern Philosophy* (London: Routledge, 2002) at 237.

This moral philosophy contrasts starkly with the sexual ethics found in many religions, for example, Judaism and Christianity. Many religious groups eschew an instrumental view of the body. For them, man's happiness lies not in the satisfaction of pleasures, but in the ordering of human desires based on criteria that lie outside the will of any particular individual. Freedom is not viewed as a good unto itself, but as a means towards an ordered, or transcendent, end.

What, then, are the possible implications of a section 1 analysis that measures religious teaching, especially religious teaching on sexual ethics, through the filter of the utilitarian moral principles set out in *Labaye*? Will religious teachings that are seen to impede the attainment of the utilitarian principle of the maximum happiness—understood in the sense of the maximum pleasure—be regarded as contrary to public morality?

Again, I think one can see that the philosophical starting point selected by a court for its section 1 analysis will have profound implications for its view of what might constitute “reasonable limits” on religious belief or activity.

## VIII. CONCLUSION

I have identified, in a somewhat disjointed fashion, six “philosophical lenses,” or filters, through which some courts have approached the task of balancing religious freedom with other public interests. These lenses, in my view, represent the key philosophical fault lines along which further judicial debate involving religious liberty should occur.

Let me put these “fault lines” into a larger context. In Canada we enjoy an enviable environment in which people can practice freedom of conscience, freedom of religion and freedom of thought. Our courts, in particular the Supreme Court of Canada, have shown great thoughtfulness and sensitivity in their consideration and treatment of issues involving religious liberty in this country. It is a record of which we can all be very proud.

At the same time, courts must always adhere strongly to principled and reasoned approaches to solving the legal problems placed before us. Principle and reason require intellectual transparency. Judges try their

best to attain this objective. In identifying six philosophical lenses, or fault-lines, at play in contemporary issues of religious liberty, I have sought to point out six areas of the judicial decision-making process in religious liberty claims where transparency of reasoning must be placed at a premium.

When we, as judges, are called upon to decide cases involving claims of religious liberty, I think it incumbent upon us to acknowledge candidly, and articulate as precisely as possible, the philosophical premises which underpin the positions we take in any decisions. Unstated principles or implicit assumptions embedded in judicial decisions work only to obscure the real issues at stake and hamper public understanding of the reasons underlying the judicial solutions we enact.

Only by making express the philosophical premises of our decisions can courts foster a constructive dialogue with the rest of the country about religious liberty in Canada.