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UNEXAMINED FAITHS AND THE PUBLIC PLACE OF RELIGION: EMERGING INSIGHTS FROM THE LAW

ABSTRACT

The article examines certain key terms, such as “beliefs” and “faith” and how these are understood in relation to the public sphere. It examines some writings of recent popularist authors such as Richard Dawkins and Christopher Hitchens, and is critical of the authors’ claims that they do not have faith or beliefs. Drawing on legal decisions in Canada and South Africa the article suggests that this sort of terminological looseness has legal and political implications when it comes to whether or not beliefs of all sorts (religious and non-religious) are treated fairly in the public sphere.

Arguing for a more diverse public sphere, the article cautions that law should give greater attention to principles of *modus vivendi* rather than “convergence” in which the attempt is to eradicate legally allowable positions from the public sphere and place those who hold them, and their communities, at a disadvantage. The law must not, by inflating its own role, put added pressures on the liberty that accommodation and subsidiarity require.

1. INTRODUCTION

The topic of this conference, “Religion, Faith and the Public University” is well chosen because it asks us to consider why “religion” and “faith” are in relation to the “public university” and why “religion” and “faith” are listed separately. It is correct to view religion and faith as different things, though they are often conflated, because while all human beings necessarily have “faith” not all people are religious. This seemingly obvious assertion is, however, one that contains significance for how we discuss religions in relation to the public sphere including public education at all levels.

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What is the relevance of faith and religion being discussed in relation to a public university? What is it in the nature of the “public” or how it is currently viewed as “secular” that suggests there is any tension here? Why is religion and/or faith viewed as in any kind of tension with the public university once we have recognized that “faith” (that which we believe in whether scientifically verifiable or not) is part of all human endeavours including higher education? These are some of the questions I seek to address in this paper.

2. BELIEF AND FAITH AS NECESSARY ATTRIBUTES OF ALL CITIZENS WHETHER RELIGIOUS OR NOT

All citizens have beliefs and faith whether or not they are aware what they are. To act is to assume and that assumption is “faith” though that basic insight is often unexamined and missed when faith is used as an equivalent term for “religious belief.”¹ Another way of putting this is to note that the question is not *whether* people are believers but *what* they believe in. There is no good reason to exclude beliefs that come from religious beliefs from access to public goods (such as funding) in favour of those beliefs that come from atheist or agnostic beliefs. For it is prejudice related to the sources and kinds of belief that undergird secularism’s attempt to restructure the public sphere on a “material” basis. Yet the hidden assumption in the category of “secular” as it is often used is that somehow religious beliefs are to be stripped out of the public sphere and other beliefs, therefore, are left in.²

A scholar of an earlier generation who spent a good part of his life teaching and working in South Africa, philosopher R.F.A. Hoernlé has also noted that:

every bona fide judgment is characterised by belief... [and] if “faith” is firm belief, conviction of truth, then faith in this context is indistinguishable from knowledge (Hoernlé 1952:55).

For both Newman and Hoernlé, there was a connection between mental judgments and belief and human actions. On a practical level no line should

1 Newman (1899: 295) recognized that everyone who acts must take matters on faith and wrote: “Life is for action. If we insist on proofs for everything, we shall never come to action: to act you must assume, and that assumption is faith.” I have developed this theme at greater length in Benson (2000:519-549).

2 I have written of the category of “hidden” and “express” meanings, drawing upon the work of Owen Barfield, in relation to the “secular” elsewhere (Benson 2002:125–139). See also, the reference to the “materialistic” conceptions at the basis of English secularism in references to the work of George Jacob Holyoake referred to elsewhere in this article.

be drawn between belief and actions in terms of faith and all human beings necessarily act out of “faith.”

Contemporary atheists such as Richard Dawkins (2007) or Sam Harris (2005, 2007), however, frequently speak as if they “have no beliefs”: a position that is nonsensical. The belief that one has no beliefs is, obviously, itself a belief.

Both writers are not alone on their attack on religion and God from what they believe to be a “belief-less” position. Christopher Hitchens, another writer in much the same line has summed up this line of thinking as follows:

And here is the point, about myself and my co-thinkers. *Our belief is not a belief. Our principles are not a faith.* We do not rely solely upon science and reason, because these are necessary rather than sufficient factors, but we distrust anything that contradicts science or outrages reason. We may differ on many things, but what we respect is free inquiry, openmindedness, and the pursuit of ideas for their own sake. We do not hold our convictions dogmatically (Hitchens 2007:Introduction) (emphasis added).

To claim as Hitchens does, that his belief is not a belief and that the atheistic principles he endorses are not a “faith” is bad philosophy but helpful since it shows rather well how far such thinkers (and they are the intellectual end of what is a very widely representative popular set of misconceptions) have come from their own roots. George Jacob Holyoake, after all, writing in the 19th Century, and the man credited by the *Oxford English Dictionary* with coining the term “secularism” recognized the more basic truth of the matter when he subtitled his important book on secularism a “Confession of Belief” (Holyoake 1896).

As to “facts” and “reason,” well, there again, the new atheists don’t really understand what they are writing about. Hitchens cannot prove that God does not exist: he simply takes it as an item of his atheistic faith that God does not. Similarly all the other claims of religion that Hitchens derides. We can say to him: “What, you believe that everything arose from nothing? How can you *prove* this?” Science can never prove something came from nothing because it cannot measure a change from nothingness to somethingness.

So atheists are men and women of faith in many ways just like the rest of us. Their dogmas are different but they are dogmatic (in that their beliefs emerge from the first principles of their faiths). True, in many things their faiths are different but they are still faiths and their beliefs are still beliefs no matter how much Hitchens and those like him wish it was different. Humans are stuck being believers and that is all there is to it. Being dogmatic does not necessarily mean being rude and it certainly does not equate to understanding

what dogma is. That is why so many atheists and men and women on the street, think, like Hitchens, that they don't believe anything: but they do.

An additional insight, relevant here to the observation that human actions are divided now from recognition that human life is necessarily lived with "faith" and "beliefs" is provided by philosopher of science (and language) Michael Polanyi.

Our objectivism, which tolerates no open declaration of faith, has forced modern beliefs to take on implicit forms....And no one will deny that those who have mastered the idioms in which these beliefs are entailed do also reason most ingeniously within these idioms, even while.... they unhesitatingly ignore all that the idiom does not cover (Polanyi 1958:288) (emphasis added).

Perhaps one of the implicit forms or modern "beliefs" is hidden in the idea of the "religious free secular?" That would fit with what the philosophers and theologians have suggested. This is the climate in which people so readily speak and write of themselves being "unbelievers" in a public order characterized by a religion-free (but not, as I have argued, faith-free) public sphere. The public sphere, if the writers quoted are correct, is necessarily a realm of "faith" whether or not such faith draws its inspiration from religious presuppositions.

More recently, philosopher Thomas Langan has written on the idea and importance of the category of "natural faith" which is, as it were, a means of overcoming these dualistic and false constructions to show that everyone is a believer and necessarily has faith of some sort (Langan 1996; Calcagno & Langan 2009). Again, we need to recall that not all faiths are religious faiths.

3. THE ROLE OF LAW IN RELATION TO RELIGIOUS FREEDOM AND THE RISK OF OVER-INFLATING LAW'S JURISDICTION

Law recognizes many things that it does not create though it may, in careful ways, regulate in relation to them. Thus, the fact of the family, of liberty itself and of rights (including religious liberty) is not created by law, they, in a sense, transcend law and are prior to it. This has been recognized by Francis Lyall in the following terms:

As a general statement drawn from the common law, liberty is the basic position in law in Britain. Liberty is not conferred by a legal instrument: it is the normal condition, and infringements on that liberty can exist only as allowed by legislation or case law. Interference with the manifestation

of traditional religious belief is therefore something which has to be justified in terms of public order or public good (Lyll 2000:253).³

This realization and the concomitant one that law must recognize its limits, inherent within the ideas of “subsidiarity” and accommodation is currently being challenged in Canada and elsewhere by the idea that law is larger than or prior to what I have described as matters that ought to be immune from complete legal subordination .

Some years ago, a very interesting exchange on this theme occurred between a leading Canadian judge and American political science professor. At a conference co-sponsored by the Centre for Cultural Renewal and the McGill University Department of Religious Studies entitled *Pluralism, Public Policy and Religion*, the Canadian Chief Justice presented a paper on the importance of conscience and religion. In the course of her remarks, the Chief Justice indicated her thinking at that time with respect to the relationship between law and the “religious citizen”. Of particular interest to our examination is how she formulated that relationship:

The modern religious citizen is caught between two *all-encompassing sets of commitments*. The law faces the seemingly paradoxical task of asserting its own ultimate authority while *carving out a space within itself* in which individuals and communities can manifest alternative, and often competing, sets of ultimate commitments (McLachlin (2004:16) (emphasis added).⁴

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

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

3 The seminal decision of *Caldwell v. Stuart* [1984] 2 S.C.R. 603 stands for the proposition that a Catholic school board can insist that its Catholic teachers comply with Church teachings in respect of marriage. The decision not to renew the contract of a Catholic teacher who had married a divorced man in a civil ceremony, contrary to Church teaching was upheld by the Supreme Court of Canada. The right of religion was found by Justice MacIntyre “at large” in the sense that it was based on the right of religion itself not any piece of legislation or constitutionally “entrenched right at Confederation.”

4 This section is taken from Benson (2010:31–34).

adherence to alternate authorities and divergent normative, or ethical, commitments. Where this is so, *two comprehensive worldviews* collide. It is at this point that the question of law's treatment of religion becomes truly exigent. The authority of each is internally unassailable. What is more, *both lay some claim to the whole of human experience*. To which system should the subject adhere? How can the rule of law accommodate a worldview and ethos that asserts its own superior authority and unbounded scope? ... It is the courts that are most often faced with this clash and charged with managing this dialectic. (McLachlin 2004:21–22) (emphasis added).

Law here is viewed, frankly and openly, as a “comprehensive worldview” capable of competing with and even encompassing religion. Moreover, law is deemed capable of determining not only what is just but what is “good” and “true”. It is able to lay claim “to the whole of human experience”.

Whatever else one can say of this, it elevates law to the status of transcendent determinations and therefore judges to the role of de facto clerics. It is starkly at variance with earlier decisions of the court that spoke of its inability to deal with “metaphysical” or “philosophical” matters⁵ and with the common law tradition in which liberty, not law, is the primary condition in sharp contrast to the quotation from Francis Lyall that began this section.

On the other hand, and with respect, the Chief Justice's formulation tends towards a monistic or totalistic conception and is quite contrary to that kind of political pluralism referred to by other scholars, such as William Galston, in which there is a vision of “social space” and “spheres of autonomy” that must resile from claims to be a comprehensive good. On this reading, the Chief Justice's conception of law asks too much when it views itself as larger

5 *Tremblay v. Daigle* (1989) 62 DLR (4th) 634 (SCC) at 650, (1989)2 SCR 530. The case dealt with whether the Quebec *Charter* provision saying “every human being has a right to life” provided protection for a third trimester infant *en ventre sa mère*. Near the beginning of its unanimous (and unattributed) Reasons, the Supreme Court of Canada stated:

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

than the religious and other conceptions *alongside of which* it must operate as but one of several ordering frameworks within a constitutional democracy recognizing ordered and interlocking liberties.⁶

This limitation on the role of law was recognized in her response to the Chief Justice’s address by the University of Chicago’s Jean Bethke Elshtain, who replied:

Surely, where the rule of law in the West is concerned, there is a great deal about which the law is simply silent: the “King’s writ” does not extend to every nook and cranny. Indeed, a great deal of self-governing autonomy and authority is not only permitted but is necessary to a pluralistic, constitutional order characterized by limited government. In other words, the law need not be defined as total and comprehensive in the way the Right Honourable Chief Justice claims (Elshtain 2004:36).

That the Chief Justice of the highest court in a country that prides itself on being open to the “evolutionary” nature of rights jurisprudence could so clearly subordinate religion to law is a very clear sign of the times and shows yet another hurdle to the proper characterization of ordered liberties at the heart of the relationship between religions and the public square. It is not out of place to suggest, with respect, that further evolution in the law is needed – but in a direction that respects the historical relationship between law and what is properly prior to it.

4. THE NEED FOR THE PUBLIC SPHERE TO BE DIVERSE AND THE RISK OF ASSUMED EVENTUAL CONVERGENCE AND AGREEMENT

I have written in various ways elsewhere about the work of English philosopher John Gray in relation to different versions of liberalism. Gray has identified what he describes as a version of “liberalism” that poses a threat to genuine liberalism because rather than endorsing living together with disagreement (which Gray calls “modus vivendi”) there is a risk of moving towards “one size fits all” or convergence (Benson 2008:298–299 citing Gray 2000:105). Gray

6 In a recent essay, in the same volume as that containing the article of the Chief Justice discussed in this paper, William Galston succinctly sets out a history of the development of the notion of political pluralism from Aristotle through Hobbes to Rousseau and Rawls, showing the tensions between religious communities and the developed principles of political pluralism (Galston 2004:41–50). He states: “the common good of a pluralist society is not merely the aggregate of individual or group interests, but it is not and must not be a comprehensive good either” (Galston 2004:48) (emphasis in original).

says that the future of genuine liberalism will involve turning its face away from the assumption that tolerance will eventually bring us all to agreement (using law as the means of effecting convergence).

If one views this insight of John Gray against the conception of law put forward in her McGill address by the Canadian Chief Justice, one can very clearly see the same choice exists within law as within politics – between “convergence” and “modus vivendi.”

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

[T]here are a number of constitutional provisions that underline the constitutional value of acknowledging diversity and pluralism in our society, and give a particular texture to the broadly phrased right to freedom of association contained in section 18. Taken together, they affirm the right of people to self-expression without being forced to subordinate themselves to the cultural and religious norms of others, and highlight the importance of individuals and communities being able to enjoy what has been called the ‘right to be different’. In each case, space has been found for members of communities to depart from a majoritarian norm.⁷

Canadian jurisprudence, as well, has acknowledged the concept of diversity within the public sphere and the risk that rank-ordering would pose to sharing that public space. Yet, as I shall argue below, some of the decisions themselves seem to apply the very rank-ordering the Canadian Supreme Court has said it wishes to avoid.

Thus, in the 1994 decision of *Dagenais*, then Chief Justice Lamer stated that “When the protected rights of two individuals come into conflict...Charter principles require a balance to be achieved that fully respects the importance of both sets of rights.”⁸ Similarly, in 2001 in a decision involving whether a

7 *Minister of Home Affairs v Fourie (Doctors For Life International & Others, Amici Curiae); Lesbian & Gay Equality Project & Others v Minister of Home Affairs* 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC) (*Fourie*) at paras 60-61 per Sachs J. This decision and the question of associational rights in general have been addressed previously.

8 *Dagenais v. Canadian Broadcasting Corp.* (1994) 3 S.C.R. 835, at para. 72.

Christian University, *Trinity Western*, could maintain a Code of Conduct banning certain conduct including sexual conduct, Justice Iacobucci, in giving the reasons of the Court, upholding the conduct clause, stated that: “Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute.”⁹

The theory, therefore, is one of sharing the public square. But is religion “inside” the public or “outside” it? And is the public (including the State with its law and politics) “inside” religions? This latter point is very important at a time when some suggest that recourse to the courts ought to be the manner in which dogmatic disputes within religious communities are sorted out if they involve equality rights.

5. *CHAMBERLAIN V. SURREY SCHOOL BOARD*: THE RE-UNDERSTANDING OF THE “SECULAR” IN THE CONTEXT OF PUBLIC EDUCATION AND THE PUBLIC SPHERE

The Supreme Court of Canada in a landmark decision without any parallel in other jurisdictions, determined that the phrase “secular principles” and therefore the term “secular” (the latter not mentioned in the Statute at issue) must be understood to include religious citizens and not put them at any disadvantage in relation to the public sphere in relation to those who are not religious.

Mr. Justice Gonthier for himself and Justice Bastarache, who would have upheld the British Columbia Court of Appeal’s decision on all points and therefore wrote in dissent on part of the decision, said this about the “secular”:

137 In my view, Saunders J. [the trial judge] below erred in her assumption that “secular” effectively meant “non-religious”. This is incorrect since 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. I note 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”. According to the reasoning espoused by Saunders J., if one’s moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has “belief”

9 *Trinity Western University v. British Columbia College of Teachers* (2001) 1 S.C.R. 772 at para. 29.

or “faith” in something, be it atheistic, agnostic or religious. To construe the “secular” as the realm of the “unbelief” is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism. 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. (Emphasis added).¹⁰

Such an approach is at stark variance with the approaches taken by countries such as France in which “strict separation” notions or ideas framed from secularist presuppositions take the public realm in a very different direction from the one being reached for in decisions like *Chamberlain* or *Multani*.

The Constitutional Court of South Africa came to a similar conclusion about the public sphere though one might disagree with the placing of “sacred” and “secular” in opposition in the way it is done in the passage that follows. In *Fourie* a more careful and nuanced understanding of the public realm as a sphere of “co-existence” is set out in the following passage from the judgment of Sachs J. as follows:

In the open and democratic society contemplated by the Constitution there must be mutually respectful co-existence between the secular and the sacred. The function of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other. ... The hallmark of an open and democratic society is its capacity to accommodate and manage difference of intensely-held world views and lifestyles in a reasonable and fair manner. *The objective of the Constitution is to allow different concepts about the nature of human existence to inhabit the same public realm, and to do so in a manner that is not mutually destructive and that at the same time enables government to function in a way that shows equal concern and respect for all.* ... It is clear from the above that acknowledgment by the State of the right of same-sex couples to enjoy the same status, entitlements and responsibilities as marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected. The two

10 *Chamberlain v. Surrey Sch. Dist. No. 36*, (2002) 4 S.C.R. 710, 749 (Can.) Chief Justice McLachlin, who wrote the decision of the majority, accepted the reasoning of Mr. Justice Gonthier on this point thus making his the reasoning of all nine judges in relation to the interpretation of “secular.”

sets of interests involved do not collide; they co-exist in a constitutional realm based on accommodation of diversity.¹¹

In line with the argument above, however, it would have been a better description of the relationship between the state (law and politics) and the religions and religious believers and their communities to have described these as part of a co-operative relationship in which there is jurisdictional separation but, as the passage correctly noted, co-operation within “the same public realm.”

The characterization of the division in the above passage as “secular” and “sacred” at the outset does not assist this later conceptualizing since, for a religious citizen, the public order of the State, too, has its own *sacred* dimension (everything within creation being, in a some sense, “Graced” or “holy”) and such citizens are perfectly entitled to function fully within the public sphere and be accommodated and offer others accommodation there.

In fact, if we wish those who hold public office or positions to act conscientiously, and their consciences are formed by their beliefs and their beliefs may well be informed by what they believe to be true about religion (how can they not?) then such public officials must necessarily bring their religious beliefs into the public sphere with them.

We cannot properly seek to have conscientious public officials whom we urge to act differently than their religions dictate when they are at work. That is why the principle of accommodation exists: because we do not (except in unusual circumstances) want to force people to leave their beliefs at their work-place doors. To argue the opposite is to set the groundwork for a requirement of public hypocrisy. Hardly the thing most people would want who recognize the link many people have (see the quotation at the outset of this paper) between their religious beliefs and their ideas of right and wrong.

If we imagine the accommodation of religious clothing (or such religious or cultural indicators as the nose-ring in *Pillay*,¹² or the wearing of a kirpan in *Multani*,¹³ or the erection of suchots on a condominium balcony in *Amselem*

11 *Fourie*, above, at para’s 94 – 98 emphasis added. Justice Sach’s conception of differing beliefs co-existing *within* the public realm is of signal importance and sets the stage, along with the approach of Justice Gonthier in *Chamberlain*, for a redefinition or, better yet, re-understanding of what might be termed central public terminology.

12 *KwaZulu-Natal MEC for Education v Pillay* 2008 (1) SA 474 (CC).

13 *Multani v. Commission scolaire Marguerite-Bourgeoys* (2006) 1 SCR 256, 2006 SCC 6 (wearing of Kirpan in public school allowed, on the basis of freedom of religion; absolute ban overturned). For a comment on this decision see Lauwers and Benson (2006).

etc.) we see that accommodation is a necessary aspect of life in community (which has public and private dimensions). Where the personal is political the personal religious is in the public political; it will always be a question of principled accommodation not simple exclusion; the co-operation of religious belief and public systems not, as it is sometimes mis-formulated, the “strict separation” of the two.

6. THE PUBLIC SPHERE BEST UNDERSTOOD AS A REALM OF COMPETING BELIEF SYSTEMS

As already argued, the public might best be understood as a realm of competing belief systems. The public university, therefore, is a microcosm of the wider public realm and must also understand itself as partaking of this elemental belief competition.

It is better to simply say and make clear that the public realm includes believers of all sorts whether atheist, agnostic or religious and the role of the law when certain types of conflicts emerge is to order or reconcile the relationships according to the principles of justice, trying wherever possible to give maximum scope to religious association and participation rather than taking a crabbed and narrow approach.

It is often the case that when most people use the term “secular” they mean “public” and it would aid clear thinking in this area if that term was used in the future.

What we have most recently in this emerging area are general guidelines allowing maximal scope for judicial development. The Supreme Court of Canada, as already referred to, has made it clear that it wishes to, in principle, avoid rank-ordering rights.¹⁴ Is this agnosticism, about which rights are weightier than others, sustainable? Is it wise? More importantly, is it real? In a recent decision from the Canadian Supreme Court touching upon the freedom of religion in relation to civil laws, the majority judgment began by affirming that multi-culturalism and pluralism must be protected but noting the fact-specific and nuanced application that defies “bright-line application”:

Canada rightly prides itself on its evolutionary tolerance for diversity and pluralism. This journey has included a growing appreciation for multiculturalism, including the recognition that ethnic, religious or cultural differences will be acknowledged and respected. Endorsed in legal instruments ranging from the statutory protections found in human rights codes to their constitutional enshrinement in the *Canadian*

¹⁴ See the decisions of *Dagenais v. Canadian Broadcasting Corp* and *Trinity Western University v. British Columbia College of Teachers* at footnotes 8 and 9 above.

Charter of Rights and Freedoms, the right to integrate into Canada's mainstream based on and notwithstanding these differences has become a defining part of our national character.

The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright-line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.¹⁵

Many of the dualisms touched upon cause a great deal of confusion and run against the principles of inclusion, diversity, respect and accommodation that constitutional legal cultures claim to recognize and seek to protect. We should be careful not to bleach diversity out of the public sphere by force of judicial pronouncement or legislation. Inappropriate bleaching occurs, for example, where there is said to be, implicitly or explicitly, "one" conception of marriage or male and female relationships or views about abortion as having singular "public" aspects that admit of no dissent. Accommodation protects not only the ability to express a view but the ability to, in acceptable ways, dissent and give witness by doing so. Dissent can be one of the most effective means of furthering justice – as the history of struggles for such things as civil rights in various countries shows quite clearly.

A variety of viewpoints are publically acceptable where matters have not been closed off (such as they have been in the case of racism but even there most cultures would still allow people to speak publicly in favour of what is unpopular up until the point that it offends public morals or peace and order). In fact, the more important a debate is for the public the more likely it is that differing viewpoints will excite passionate responses. For example, labour relations laws have long recognized that such matters as strikes or lock-outs frequently cause disputes, sometimes vociferous but the possibility of passions and violence provide no pre-emptive power to foreclose debates that may lead to violence. In morally contested areas, we must encourage civil debate and open expression as means of furthering greater understanding between citizens.

Thus, the public sphere should be understood as *inclusive* of all sorts of belief systems (whether atheist, agnostic or religious) rather than a-religiously "secular" (when by "secular" we mean "stripped of religion"); when the

15 *Bruker v. Marcovitz*, 2007 SCC 54 para's 1-2. See also Boonstra and Benson (2008).

issue is accommodation we ought not to be too concerned about minority/majority viewpoints – and certainly not as a requirement for there to be accommodation.

7. CONCLUSION

To wrap up the various themes of this article: we have seen that it is important to recognize that there are unexamined faiths. This is important in order to properly discuss the public place of religion alongside other, non-religious, beliefs in the public sphere. In fact, this recognition is of pivotal importance.

The article also discussed that what we mean by “faith” and “belief”; how we conceive of the nature of the “public”; and how we understand the role of “law” itself, are all of fundamental importance to properly analyzing cases involving the freedom of religion.

The largely unrecognized (it must be said) reconfiguration of the meaning of “secular” in the *Chamberlain* decision from Canada’s highest court heralds a better direction for religious inclusivity. Its philosophical accuracy (with respect to the understanding of “secular” as religiously inclusive) commends it for application in other countries.

Many challenges on University campuses today proceed without an awareness of the need to recognize the public place of religion and the need for accommodation.

In some cases where accommodation of individual or associational beliefs is not respected and is pushed in the direction of what this paper has described, for shorthand, “one size fits all” we see a failure to instantiate an appropriate *modus vivendi*. Part of the reason for this may well be the “unexamined faiths” the article has sought to clarify (including the misuse of “secular” and “neutral” in relation to the public sphere).

The article has, it is hoped, demonstrated that how we approach key terms goes a long way to what sort of outcomes we can expect in relation to the freedom of religion and the sharing of the public square in all its public dimensions including universities.

One aspect of this terminological clarification is to demonstrate that faith and belief are not simply other words for “religion” and that many of those who believe they possess “no faith” do – they just believe differently and have different “faiths” than other people. These beliefs are often “unexamined” and some of the terms used contain “hidden meanings”¹⁶ that need to be made

16 For a discussion of Owen Barfield’s concept of “hidden meanings” in relation to the “secular” and alternative theological conceptions of time in relation to

visible. Furthermore, belief in agnostic or atheist assumptions should give no greater access or privilege in the public sphere in such areas as access or funding and the law must not, by inflating its own role, put added pressures on the liberty that subsidiarity requires for the freedoms of associations and the human person to provide genuine alternatives for the exercise of choices and the performances of projects in free and democratic societies.

One further point should be made in conclusion. The affirmation of diversity does not mean that there cannot be any shared programs for civics so as to bolster citizenship and the common good. Thus, to give one example, in the area of public education, a very carefully crafted program on “civics” containing certain minimal requirements for civic recognitions and legal principles of non-discrimination (properly presented) might well be required by the State as the *quid pro quo* for public funding. Such programs and regulations, however, must be very carefully drawn so as not to smuggle in, say, merit claims about religion (“these religions are all the same”) under the rubric of neutrality and “teaching about religions.”

Courses on civics and citizenship including an ethical component (teaching, for example, the golden rule of “do to others what you would like them to do to you”) are important. The key to the wide acceptance of such programs, however, is not just the course content and how sensitively they are delivered but what scope they allow for the proper recognition of diversity in implementation and allowance of exemptions or alternative means of delivery.

The state may well be entitled to develop a course on ethics and religions but in doing so it must be careful not to make the all too easy claim (especially in relation to religions) that *they are all practically equivalent* for that itself is a claim about the *merits* of religions and that is not a valid use of state powers. With respect to religious education outside of a religious or denominational setting, therefore, greater attention should be given to protect the principle that parents are the primary educators of their children and thus delegate this to the state.¹⁷

Parental delegation contains within it the right of dissent when the state introduces programs that go against parental beliefs. What may seem “neutral” and reasonable to education authorities may not seem so to parents or their religious communities. Practical accommodation will be an exercise in fine-tuning that attempts to reconcile differing viewpoints to the greatest extent

understandings of the “secular”, see Benson (2002:125-139).

17 *R.v. Audet*, [1996] 2. S.C.R. 171 (S.C.C.) where the Supreme Court of Canada recognized that parents delegate their primary authority over education to the state.

possible while acknowledging that neither the claims of parents nor state educators are absolute.

When objections are raised, one way to deal with them might be to clarify the state objectives (such as knowing the basic teachings of other religions) without making the claims about the religions which parents find objectionable. This would enable state educational authorities the ability to examine on the subject matter without getting “inside” the claims about religions that have been found objectionable. A simpler solution, though it lacks the substantive state goals of exposure to other traditions would be to exempt the student from that part of the curriculum that is offensive to parents. In an integrated curriculum setting (for it may be that objections are towards the religious education component in a denominational setting) the only solution might be to find another sort of schooling since parsing out what is religious and non-religious may prove impossible or unworkable for educational authorities.

Alternatively, as suggested, other means (most likely parental) might be found to teach towards the state goals but within the moral and religious framework of parents and their communities. Given that home-education is allowed in most jurisdictions, and that is a complete removal from state education in all but the examinations, it is not reasonable to claim, as some do, that this sort of accommodation threatens state education. Means of examination as to substance (but not merits) of other religions could be found if it is the substance that concerns the state. These alternatives may not be acceptable to those who wish greater public control and uniformity but it is the price to be paid for the maintenance of freedoms and diversity in multi-cultural and plural societies. Flexibility in relation to the ordered principles of civil society (such as parental delegation and state requirements for citizenship) is important and maximum attention to alternative delivery and exemptions are key.¹⁸

18 A case coming before the Supreme Court of Canada, (May 2011) *Lavellée and Jutras v. Commission Scholaire des Chênes et Procureur Général du Québec*, 2009 QCCS 3875; appeal refused, 2010 QCCA 346 raises these sorts of concerns. There the Quebec government introduced a mandatory course on ethics and religion and refused to exempt over 2,000 (Roman Catholic) parents who sought exemption from the public school course on conscience and religious grounds. The parent's lost both at trial and before the Quebec Court of Appeal. In a parallel proceeding involving a Catholic Jesuit High School (state-funded) a trial judge overturned the Province's refusal to grant exemption (*Loyola High School et al. v. Courchesne et al.* 2010 QCCS 2631, June 18, 2010 see: <http://www.jugements.qc.ca/php/decision.php?liste=46252591&doc=7FF18D89A2AE5ADB9810CF4B60DAFDFCF774F8F11CE85819B903D21A6CECE9FD&page=1>, last accessed February 28, 2011). At the time of this writing the parents' case alone is proceeding

BIBLIOGRAPHY

BENSON, I.T.

2000. Towards a (Re)Definition of the “Secular”. *University of British Columbia Law Review* 33(3):519–549.

2002. The Secular: Hidden and Express Meanings. *Sacred Web* 9:125–139.

2008. The Case for Religious Inclusivism and the Judicial Recognition of Associational Rights: A Response to Lenta. *Constitutional Court Review* 1:297-312.

2010. *Living Together With Disagreement: Pluralism, the “Secular” and the Fair Treatment of Beliefs in Canada*. Camrose: The Chester Ronning Centre.

BOONSTRA, K.L. & BENSON, I.T.

2008. When Should the Courts Enforce Religious Obligations? Case Comment on *Bruker v. Marcovitz*. [Online.] Retrieved from: <http://www.cardus.ca/lexview/archives/> [2010, 12 November].

BRUKER V. MARCOVITZ

2007 SCC 54.

CALCAGNO, A. & LANGAN, T.

2009. *Human Being: A Philosophical Anthropology*. Missouri: Missouri University Press.

CALDWELL V. STUART

1984 2 S.C.R. 603.

CHAMBERLAIN V. SURREY SCH. DIST. NO. 36

2002 4 S.C.R. 710, 749 (Can.).

DAGENAIS V. CANADIAN BROADCASTING CORP.

1994 3 S.C.R. 835.

DAWKINS, R.

2007. *The God Delusion*. London: Bantam Press.

ELSHTAIN, J.B.

2004. A Response to Chief Justice McLachlin. In: D. Farrow (ed.), *Recognizing Religion in a secular society: Essays in Pluralism, Religion, and Public Policy* (Canada: McGill-Queen’s University Press), pp. 35-40.

GALSTON, W.

2004. Religion and The Limits of Liberal Democracy. In: D. Farrow (ed.), *Recognizing Religion in a secular society: Essays in Pluralism, Religion, and Public Policy* (Canada: McGill-Queen’s University Press), pp. 41-50.

GRAY, J.

2000. *The Two Faces of Liberalism*. London: New Press.

to the Supreme Court of Canada as the Catholic High School case is before the Quebec Court of Appeal.

- Benson Unexamined faiths and the public place of religion
- HARRIS, S.
 2005. *The End of Faith*. New York:Norton.
 2007. *Letter to a Christian Nation: A Challenge to Faith*. New York:Knopf.
- HITCHENS, C.
 2007. *God is Not Great: How Religion Poisons Everything*. Twelve:Warner Books.
- HOERNLÉ, R.F.A.
 1952. Knowledge and Faith. In: D.S. Robinson (ed.), *Studies in Philosophy* (Cambridge: Harvard University Press), pp. 55-61.
- HOLYOAKE, G.J.
 1896. *English Secularism: A Confession of Belief*. Chicago:Open Court Publishing Co.
- KWAZULU-NATAL MEC FOR EDUCATION V. PILLAY
 2008 (1) SA 474 (CC).
- LANGAN, T.
 1996. *Being and Truth* (Missouri: Missouri University Press).
- LAUWERS, P. & BENSON, I.T.
 2006. Accommodating Kirpans in Public Schools. [Online.] Retrieved from: <http://www.cardus.ca/lexview/archives/> [2010, 11 November].
- LAVALLÉE AND JUTRAS V COMMISSION SCHOLAIRE DES CHÊNES ET PROCUREUR GÉNÉRAL DU QUÉBEC
 2009 QCCS 3875.
- LOYOLA HIGH SCHOOL ET AL. V. COURCHESNE ET AL.
 2010 QCCS 2631, June 18, 2010.
- LYALL, F.
 2000. Religious Law and its Application by Civil and Religious Jurisdictions in Great-Britain. In: E. Caparros & L. Christians (ed.), *Religion in Comparative Law at the Dawn of the 21st Century* (Brussels:Bruylant), pp. 251-268.
- MCLACHLIN, B.
 2004. Freedom of Religion and the Rule of Law: A Canadian Perspective. In: D. Farrow (ed.), *Recognizing Religion in a Secular Society* (Montreal: McGill/Queens), pp. 12-16.
- MINISTER OF HOME AFFAIRS V. FOURIE (DOCTORS FOR LIFE INTERNATIONAL AND OTHERS, AMICI CURIAE); LESBIAN & GAY EQUALITY PROJECT & OTHERS V MINISTER OF HOME AFFAIRS
 2006 (1) SA 524 (CC), 2006 (3) BCLR 355 (CC).
- MULTANI V. COMMISSION SCOLAIRE MARGUERITE-BOURGEOYS
 2006 1 SCR 256, 2006 SCC.
- NEWMAN, J.H.C.

1899. *Discussions and Arguments on Various Subjects*. London: Longmans.

POLANYI, M.

1958. *Personal Knowledge*. Chicago:Harper Torch Books.

R. v. AUDET

1996 2 S.C.R. 171(SCC).

TREMBLAY V. DAIGLE

1989 62 DLR (4th) 634 (SCC); [1989]2 SCR 530.

TRINITY WESTERN UNIVERSITY V. BRITISH COLUMBIA COLLEGE OF TEACHERS

2001 1 S.C.R. 772.

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