ARTICLES

NOTES TOWARDS A (RE)DEFINITION OF THE "SECULAR"

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Despite the centrality of the term when descriptions of the contemporary state are given, the term "secular" has received little analysis in any judgment of the Canadian courts. This paper examines the meaning of the term "secular" in relation to the nature of human acts as based on faith. Some contextual concerns will also be addressed, since it is against the backdrop of how the courts and society view philosophy and religion that the meaning of "secular" and faith (including religious faith) are determined.

A deeper ground for moral education is both necessary to citizenship and largely missing from contemporary education of all sorts including the law. What now stands in the place of moral education is a series of disconnected concepts (e.g."tolerance," "equality," "self-esteem," and "rights") that are themselves obscured by a loss of historic understanding of such concepts as "virtue" and the rise of a superficial language of "values."

Until faith—understood as metaphysical assertions that we do not empirically prove—is recognized as an inevitable aspect of human action and therefore of culture, a simplistic focus upon a "non-religious secular" will lead to a thinning of our common life, not an improvement of it. Recognition of the necessarily "faith-based" ground for many of society's key notions means that we will either function with these notions articulated or un-articulated. Much is to be gained from a wider understanding of the terms so that what we take for granted may, in fact, be recognized expressly.

Through a better understanding of the scope of the term "secular" we will have the possibility in law and society to conceptualize a more robust protection of expressions of conscience and religion, thus building a more liberal and democratic society.

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Redefining the Secular: What Does "Secular" Mean?

The term "secular" has come to mean a realm that is neutral or, more precisely, "religion-free." Implicit in this religion free neutrality is the notion that the secular is a realm of facts distinct from the realm of faith. This understanding, however, is in error. Parse historically the word "secular" and one finds that secular means something like non-sectarian or focused on this world, not "non-faith." States cannot be neutral towards metaphysical claims. Their very inaction towards certain claims operates as an affirmation of others. This realization of the faith-based nature of all decisions will be important as the courts seek to give meaning to terms such as secular in statutes written some time ago.

The often *anti*-religious stance embodied in secular*ism* excludes and banishes religion from any practical place in culture. A proper understanding of secular, however, will seek to understand what faith claims are necessary for the public sphere, and a properly constituted secular government (non-sectarian not non-faith) will see as necessary the due accommodation of religiously informed beliefs from a variety of cultures. Our current ability to respect and incorporate religion and/or spirituality in the public sphere is uneven.

Growing recognition of native spirituality, for example, is a positive step in this regard: there is no reason why children in public schools should discuss the spirituality of the longhouse but never be exposed to the beliefs of the synagogue, church, or temple. Such recognition must be extended to all groups in Canada and they must be treated fairly with respect to funding and access, otherwise the inchoate "religion" or faith of the state will unfairly dominate the consciences of its citizens.

When the "natural faith" of those that govern no longer views itself as "religious," it must still recognize that in its affirmations of the greatest goods—*e.g.* when the pieties are boiled down to such things as "*Charter* values"—these pieties act as the lineaments of the "religion" of the state.[1] The question then will be how minority religious views are to be accommodated and fostered. George Grant warned years ago that a

[1] It is probably wise to restrict the use of the term "religion" to those beliefs rooted in belief in a Divinity and framed around express religious practices. While implicit faith may stand in for conscious religious affirmation and adherence in a society, it is nonetheless different in many key ways. For similar reasons, it is useful to keep the concepts of the *de facto* faith in a state and such thing as a "state religion" distinct.

The Centre for Cultural Renewal, an Ottawa based think-tank with which the writer is associated, is dedicated to investigating the connections between morality, religion and public policy and attempts to link a reclamation of language with the task of strategic cultural renewal. The topic of "values" has been addressed in one of its publications. Newsletters and a variety of tapes on subjects related to some of the themes in this paper may be located on the Centre's website: www.centreforrenewal.ca.

"religion of humanity" which attempted to use a shared belief in "progress" or "technique" as the cement for culture had better look to those with a more comprehensive explanation for meaning when its own thin glues began to fail.[2]

Contemporary *secularism*, therefore, poses a great challenge to religions of all sorts, and the failure of the courts to address this is unfortunate. It is worth reminding ourselves of George Grant's assertion and question:

> when the religion of progress becomes the public religion we cannot look forward to a vital religious pluralism, but to a monism of meaninglessness. And what becomes of the constitutional state in a society where more and more persons face their own existing as meaninglessness?[3]

Judicial or political decisions that insist upon implicit faith elevation and explicit faith submersion pose a great threat to a thriving and genuine pluralism in the contemporary age. What can advertise itself as neutral is often anything but, and "implicit faith" positions, because they fail entirely to acknowledge their grounding as faith, can all too easily establish a hegemony against explicit faith traditions, traditions that have every right to "share" the public sphere. Until the necessarily "implicit faiths" are acknowledged, explicit faiths are at a marked disadvantage in finding any place in the public sphere, including: politics, public education, and law itself. The new "secular" state and its supporters view their (now practically, if not numerically, dominant) implicit faith views as the only proper (*i.e.* funded) education of the young or the only kind of neutral constitutional principles. But they are anything but "neutral."

Many inconsistencies are emerging as the new secularism finally moves to establish its own faiths against those of the prior, explicitly religious, era. Some of these will be discussed below.

It is important to challenge the hidden faith of this new secularity, because in describing all other religions and faiths as "others" and its own faith as *fact* or somehow "neutral," it views religious faith as a problem to minimize rather than a necessary sphere to accommodate, much less encourage. The mass of religious people know, even if they cannot exactly articulate it, that religion is not being treated fairly in contemporary society. Calls for just treatment go unheard and decisions in

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2 George Grant, *English-Speaking Justice* (Toronto: Anansi, 1985) at 86.

3 G. Grant, "Religion and the State" *infra* note 64 at 195-196. A more recent treatise on this theme, containing some useful observations about the need for liberalism to look more favourably on religion, is to be found in D. Walsh, *The Growth of the Liberal Soul* (Missouri: Missouri University Press, 1997).

area after area display the same tendency to relegate express faiths to the private and implicit faiths to the podium.

For those who believe that there are foundations for society that are best preserved by understanding religious views and allowing religious insights to animate citizenship, arguments around the key notions of personhood, faith, and the right approach to pluralism are important and timely. But, arguments on these lines must be clear and convincing if they are to make an impact on judges who have been schooled within contemporary categories of thought. As Justice Willard Estey stated around the time of his retirement from the Supreme Court of Canada: "you are looking to us judges to answer questions under the Charter of Rights and Freedoms that we have never been trained to deal with."[4]

The Context for the Charter: How the Courts View Philosophy and Religion

Since the "repatriation" of the Canadian *Charter of Rights and Freedoms*[5] in 1982 the courts have applied a variety of constitutional remedies to strike down legislation, read in, or sever language in enactments that, in their opinion, are in breach of the *Charter*. Section 1 of the *Charter* is the limiting provision, providing that the only limitation on the enumerated rights and freedoms are "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[6] Cases determined under the *Charter*, therefore, require judges to make decisions that assume a primacy for rationality within some notion of freedom and democracy. Such determinations call for a degree of historical and political sophistication. By focusing primarily on various readings of the term "secular," this paper argues that current approaches by elites (such as the courts, politicians, and Royal Commissioners) to the rights

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4 Stated at a Conference, attended by the author, at the University of British Columbia in 1985.

5 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982 C. 11 [hereinafter *Charter*].

6 The *Charter* protections include the following key provisions: section 2 "*Fundamental Freedoms*" including "freedom of conscience and religion," "freedom of thought, belief and opinion including freedom of the press....," "freedom of peaceful assembly," and "freedom of association"; section 7 "*Legal Rights*" which states that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"; and section 15 "*Equality Rights*" which states that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Section 15(2) expressly allows for affirmative action programs.

enumerated in the *Charter* are insufficient to deal adequately with either the rights enumerated or the society within which rights disputes are being adjudicated.

In Canada's first case dealing with Sunday closing legislation, Chief Justice Dickson, speaking for the Court, stated that it was important to recall that "the Charter was not enacted in a vacuum, and must therefore...be placed in its proper linguistic, philosophic and historical contexts."[7] An analysis of the philosophical and historical framework of rights has not occurred in all cases—even where one might have thought it indicated. The Court's direction, that analysis be placed in a larger context has recently led to the additional inclusion of *religious* principles. In *Egan* v. *Canada*, the first Supreme Court of Canada *Charter* case to deal with whether a same-sex relationship should be considered a spousal relationship, Justice La Forest noted:

> [M]arriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical *and religious traditions*. But its ultimate *raison d'être* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate....In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.[8]

The references here to history, philosophy, religious tradition, nature, biology, and social realities are in marked contrast to the lack of such analysis in many other *Charter* cases.

In dealing with philosophical points, the judges of the Court seem confused as to how to approach the issues. Decisions made relatively close together in time are inconsistent. In one, the court said that matters of philosophy and "metaphysics" are not for the courts to delve into and that "philosophical questions" are for the legislature;[9] in others, the Court resorted to Aristotle, or even C.E.M. Joad—both philosophers—before making its own decision.[10]

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7 *R.* v. *Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295, 18 D.L. R. (4th) 321 [hereinafter *Big M Drug Mart*].

8 *Egan* v. *Canada* (1995) 124 D.L.R. (4th) 609 at 625 [emphasis added] [hereinafter *Egan*]. La Forest J. and three other judges expressly noted that it is open to legislators to make distinctions between traditional marriages and common-law marriages.

9 *Tremblay* v. *Daigle* (1989) 62 D.L.R. (4th) 634 (S.C.C.) at 650. Dealing 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*.

10 *R.* v. *Chaulk* [1991] 2 W.W.R. 385 (S.C.C.) ; *R. v. Morgentaler* [1988]1 S.C.R. 30 at §252.

On occasion, reliance upon, then doubt about, "philosophy" may appear in the same judgment. In one decision, an approving reference to Aristotle's belief that "reasoned capacity for choice was central to the issue of moral culpability" was followed by a statement that "...a court is in no position to make determinations on questions of morality."[11] Yet the affirmation of a "reasoned capacity for choice" must be a relevant philosophical aspect of morality.

In *Rodriguez* v. *British Columbia (Attorney General)*,[12] Chief Justice Lamer, in his dissenting judgment, opined that the Court should answer the question of the constitutionality of assisted suicide "...without reference to the philosophical and theological considerations fuelling the debate on the morality of suicide or euthanasia."[13] In a key passage in his reasons, Sopinka J. referred to a novel concept—a "non-religious sanctity" when he referred to the "…generally held and deeply rooted belief in our society that human life is sacred or inviolable (which terms I use in the non-religious sense described by Ronald Dworkin…)."[14]

This approach is at stark variance with the approach called for in *Big M Drug Mart*,[15] and *Egan*,[16] above, that the *Charter* must be placed in its proper linguistic, historical, philosophical, and religious context if it is to be properly interpreted. There is no basis in philosophy, history or theology for a "sanctity" (the very term comes from the term for "holy") outside religion. Why would a justice of the court choose an important term such as "sanctity" for key notions—that human life is "sacred or inviolable" and that there is "an intrinsic value of human life and…the inherent dignity of every human being…"—and then promptly attempt to empty it of its settled content?

The court appears enmeshed in a functional "metaphobia"—an undue fear and avoidance of metaphysics. One useful example of this insecurity or incoherence in dealing with morality and law may be seen in *R.* v. *Butler*.[17] In *Butler*,[18] the Supreme Court of Canada upheld the *Criminal Code*[19] definition of "obscenity" in the face of a *Charter* challenge on the

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11 *R.* v. *Chaulk ibid.* at 461, 474 per McLachlin J.

12 (1993) 107 D.L.R. (4th) 342 [hereinafter *Rodriguez*].

13 *Ibid.* at 366.

14 *Ibid.* at 389.

15 *Supra* note 7.

16 *Supra* note 8.

17 (1992) 89 D.L.R (4th) 449 [hereinafter *Butler*].

18 *Ibid.*

19 *Criminal Code of Canada*, R.S.C. 1985, c. C-46.

basis of the "freedom of expression." In so doing, the Court was at pains to attempt to base the restriction of pornography on the basis of "harm," even though it could not establish a clear causal connection between the existence of pornography and harm arising from it.

The Court could not avoid the fact that such a restriction depends upon a moral basis, yet, in its manner of reasoning it undercuts any valid ground for moral evaluation by saying that the restriction must be found in the *Charter* itself. This approach is nonsensical because the *Charter* is an open-ended document that states its rights in outline and in the broadest terms. Whether the breach or limitation is demonstrably justified in a free and democratic society is an *external* analysis, involving matters not to be found in the *Charter* itself.

Mr. Justice Sopinka, in giving the majority judgment,[20] stated that it is no longer an appropriate objective of law "to advance a particular conception of morality"[21] because:

> [T]his particular objective is no longer defensible in view of the Charter. *To impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms*, which form the basis of our social contract. D. Dyzenhaus, "Obscenity and the Charter: Autonomy and Equality" (1991), 1 C.R. (4th) 367 at p. 270, refers to this as "legal moralism," of a majority deciding what values should inform individual lives and then coercively imposing those values on minorities. The prevention of "dirt for dirt's sake" is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*.
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> *On the other hand, I cannot agree with the suggestion of the appellant that Parliament does not have the right to legislate on the basis of some fundamental conception of morality* for the purposes of safeguarding the values which are integral to a free and democratic society. As Dyzenhaus writes, "Moral disapprobation is recognized as an appropriate response when it has its basis in *Charter* values."[22]
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> As the respondent and many of the intervenors have pointed out, much of the criminal law is based on moral conceptions of right and wrong and the mere

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20 Mr. Justice Sopinka spoke for himself and six other judges. The minority reasons of Gonthier J. agreed with those parts of Sopinka's judgment referred to here. On the analysis being discussed, therefore, the nine judges of the Supreme Court of Canada were unanimous.

21 *Butler*, *supra* note 17 at 476 [emphasis added].

22 D. Dyzenhaus, "Obscenity and the Charter: Autonomy and Equality" (1991), 1 C.R. (4th) 367 at 376.

> fact that a law is grounded in morality does not automatically render it illegitimate.[23]

Sopinka J. recognized that moral corruption and harm to society are inextricably linked. But if it is "moral corruption of a certain kind," that "leads to the detrimental effect on society,"[24] and if Parliament has the right to legislate "on the basis of some fundamental conception of morality," then it is simply *not possible* to avoid "*a* particular conception of morality": the very thing that Sopinka J. said was "no longer appropriate."

This is a good recent example of what may be termed the philosophical insecurity (or incoherence) of modern justice. It is interesting to note that, ultimately, the definition of obscenity based on a "community standards test" was found to be acceptable under the *Charter*. But what is a community standards test but the coercive imposition of the majority wishes over those of the individual? According to Sopinka J. (and the whole Court) that imposition was not permissible.

The views of the community, therefore, could form the basis of constitutionally acceptable law, despite the limits on individual autonomy in the area of obscenity. But "harm," here, was inferred, not proven, and any "moral" concerns were expressly rejected as a valid basis for the law. By seeking to avoid a particular moral framework, the court cannot erect any moral ground. The court creates a circular approach that makes moral articulation impossible. Indeed, it is not just the courts that exhibit this confusion.

For example, "community standards" with respect to other matters were deemed irrelevant in another elite setting. In the November 1993 Report of the Commission on New Reproductive Technologies, entitled *Proceed With Care*, the Commissioners had to decide whether lesbians should have access to donor insemination. The Commissioners knew that the majority of Canadians did not believe that lesbians should have access to donor insemination. At issue was whether populism, the results of polls, or the desires of the majority are satisfactory ways of determining over time what is "right" and "wrong" in society. The Commission majority wrote that:

> As we made clear in Part One of this report, the Commission believes that society's approach to new reproductive technologies should be governed by the social values of Canadians. *We are also aware, however, of the difference between social values and individual opinions. We believe that social values held by Canadians are reflected in the Canadian Charter of Rights and*

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23 *Butler*, *supra* note 17 at 476-77.

24 *Ibid.* at 477.

> *Freedoms, and the prohibitions on discrimination it contains must be our guide in this matter*.[25]

Here the *Charter* principle of discrimination (and therefore equality) was seen to "trump" popular wishes and the Report of the majority of Commissioners recommended permitting lesbian access to donor insemination on equality grounds.

Some interesting tensions emerge from this analysis. For the Supreme Court of Canada, the wishes of Canadians are important (affirmed as "consensus," rejected as "majoritarianism") for determining whether we should allow assisted suicide (*Rodriguez*) or obscenity (*Butler*) to be constitutionally permissible criminal acts, but irrelevant for the definition of who is a "human being" (*Tremblay* v. *Daigle*) or whether abortion restrictions are valid (*Morgentaler*). For the Royal Commissioners, decisions on a contentious social question must be based on "*Charter* values" which, in their interpretation, can be contrary to the wishes of the majority (lesbian access to artificial insemination).

Since they have generally eschewed express moral evaluation, the type of analysis the judges and elite groups such as Royal Commissions now embark upon is this: somehow to determine what "social values" govern and whether a non-majoritarian "consensus" has emerged in society (because majoritarian focus, like moral principles, have been rejected in name—though both have been used in the "community standards" or "intrinsic value of life" aspects in *Butler* and *Rodriguez*).

Constitutional cases increasingly resemble games of chance more than debates of principle. Noone can say with any confidence whether a matter will be struck down, read in, left to the legislature, or avoided entirely using any number of legal techniques. Lest anyone say that this is how law has always been, the inconsistent approaches of similar cases under the *Charter* makes the current situation different from the always difficult task of predicting legal outcomes, and the inconsistency is visible with regard to the treatment of religion and the nature of the "secular" as well. This is not surprising, perhaps, because philosophical insight, in addition to legal insight, is important to knowing not only how contemporary rights claims are to be defined, but how they are to be rank-ordered or accommodated when they conflict.

As recently as 1953 Lord Denning wrote about the necessity of a relationship between law, morality, and religion:

> The severance of the three ideas—of law from morality, and of religion from law—belongs very distinctly to the later stages of mental progress.

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[25] Canada, "Proceed With Care," *Report of The Royal Commission on New Reproductive Technologies* (Ottawa: Canadian Communications Group, 1993) at 456 [emphasis added].

> This severance has gone a great way. Many people now think that religion and law have nothing in common. The law, they say, governs our dealings with our fellows: whereas religion concerns our dealings with God. Likewise they hold that law has nothing to do with morality. It lays down rigid rules which must be obeyed without questioning whether they are right or wrong. Its function is to keep order, not to do justice.
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> The severance has, I think, gone much too far. Although religion, law and morals can be separated, they are nevertheless still very much dependent on each other. Without religion there can be no morality: and without morality there can be no law…
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> If religion perishes in the land, truth and justice will also. We have already strayed too far from the faith of our fathers. Let us return to it, for it is the only thing that can save us.[26]

Lord Denning is surely correct to note the inter-relationship between law and metaphysical assumptions and morality. He is surely *incorrect* to say there is "no morality" without religion. There is no morality without "metaphysical claims," and no metaphysical assumptions without "natural faith," but most modern analysis, and much religious expression, does not distinguish between *natural faith* (which everyone must have to act) and *religious faith* (which is a specific set of faith assumptions). There is morality *without* religion, just as there is morality *informed by* religion; and all forms of morality are based, as this paper suggests, on some kind of faith. The question is: Which kind of morality makes the most sense and explains the human situation best? No matter what answer is given to this question, all approaches must recognize that faith (religious or otherwise) is a primary fact of life for all human beings. Therefore, "faith questions" (including those questions that involve morality) must be considered as part of all debates in society. A movement by secularism away from the Jewish and Christian traditions, which have always sought to enrich both their own communities and the societies around them by raising key questions relevant to life in community, has left contemporary approaches that avoid faith questions (and morality) empty.

Unfortunately, Lord Denning's error (that there is no morality without religion) is as common with a particular sort of religious believer as is the belief of non-religious people that their affirmations are not based upon faith. It may well be that saying "only religious morality is possible," or that "only faith is religious" both stand in the way of wider social acceptance of what many liberal theorists (religious and non-religious)

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[26] A. Denning, *The Changing Law* (London: Stevens & Sons Ltd., 1953) at 99, 122.

now recognize as essential: the re-grounding, re-learning, and re-introduction into public education of *liberal virtues*.[27]

When religious believers learn that "virtues" exist "outside" religion, and non-religious believers learn that they too operate out of a series of "faith assumptions," then perhaps we shall be closer to an engagement that is long overdue in our society, where we recognize that all human beings operate on *some basis of faith*.

What I have attempted to show is that any description of the Court's approach to philosophical or theological questions must begin with a frank assessment of what the courts actually have said about law and philosophy in the *Charter* era.[28] It is worth noting the comment of the late George Grant regarding the court's decisions in the early years of the *Charter*. In one of his last published essays, Grant wrote:

> *When society puts power into the hands of the courts, they had better be educated...The more the justices quote philosophy or religious tradition the less they give the sense they understand what they are dealing with.* Another long article would be required to spell out the causes in legal and general

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[27] For useful discussions by liberal theorists of core notions without any analysis of the necessarily "faith-based" grounding of such notions see, for example, S. Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford: Clarendon Press, 1990) and W. Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (Cambridge, Cambridge University Press, 1991). In Chapters 11 and 12 of his book, Galston comes close to a recognition that faith animates liberal intuitions when he describes the "*beliefs* and character traits that help sustain a liberal community." *Ibid.* at. 257 [emphasis added]. By not taking this recognition that "beliefs" animate both liberals and what he calls "traditionalists," one step further to ground them both in faith, Galston, though he strives for balance and offers many valuable insights, nonetheless fails to recognize that, epistemologically, both liberalism and traditionalism rely upon "natural faith." Had Galston done this he might then have had a better ground for the "third way" he seeks to establish between traditionalists and liberals, where such things as the "virtues" may be seen as informed by, consistent with, and, indeed, open to religious insights while they are taught as "common curriculum" in public schools. Nonetheless, Galston's frank assessment that liberalism needs religion ought to give pause to those "liberals" who view religion through entirely skeptical lenses [see footnote 72 *infra*].

[28] Anthony Peacock, in his introduction "Rethinking the Constitution," refers to Canada as a country "…mired in deep intellectual crisis." It is useful to consider the implications of Peacock's rather depressing catalogue of examples showing the sad state of the contemporary Canadian legal (including law school) scene. See A.A. Peacock, ed. *Rethinking the Constitution: Perspectives on Canadian Constitutional Reform, Interpretation and Theory* (Toronto: Oxford University Press, 1996) vii at xiv. See also, F.L. Morton and R. Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

> education which lead to the jurisprudential shallowness among the judges. As much as abortion, this question goes to the very roots of modernity.[29]

The Nature of the "Secular" in Canadian Society

As we have said, the term "secular" can have a number of different meanings. At least three definitions of a "secular" state seem to be most frequently used:

1. The state is expressly non-religious and must not support religion in any way (neutral secular);
2. The state does not affirm religious beliefs of any particular religious group but may act so as to create conditions favourable to religions generally ("positive" secular);
3. The state is not competent in matters involving religion but must not act so as to inhibit religious manifestations that do not threaten the common good ("negative" secular).

In all three of these the state is viewed as "outside" the "faith-claims" represented by "religious views." This "external" aspect is largely implicit. To these three a fourth definition should be added:

4. The state must not be run or directed by a particular religion or "faith-group" but must develop a notion of moral citizenship consistent with the widest involvement of different faith groups (religious and non-religious).

This last definition does not view the state as outside a variety of competing faith-claims but situates the state as itself inside and, therefore, concerned with the questions of faith in society. The focus is not on "religion" only, but on "faiths" of a variety of kinds. It is this fourth understanding that best suits the development of a free and democratic society animated by a meaningful (moral) pluralism consistent with intelligible notions of freedom, respect, and responsibility—essential to the coherence of the constitution itself.

If Canada is a secular society, what sort of secular society is it? Does the meaning we give to the term secular make a difference to the kinds of law and politics that operate in the state? If we accept the second or third definition of "secular" set out above, then a state has a positive duty to evaluate its actions to ensure that it is, in one, promoting favourable conditions for religion. In the third definition, it must evaluate its actions and policies to ensure that it is not harming religion.

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[29] G. Grant, "The Triumph of the Will" in I. Gentles, ed., *A Time to Choose Life: Women, Abortion and Human Rights* (Stoddart: Toronto, 1990) at 18 [footnotes omitted] [emphasis added].

It is clear that if the term "secular" is used in the so-called neutral sense above, "that the state must not support religion in any way," what results is not, in fact, neutral in terms of religion at all. For it is one of the highly debatable but little debated aspects of the so-called neutral secular that where it is employed, it tends to hide metaphysical (or faith) assumptions under its cloak.

In all of the first three categories, however, the nature of faith claims is not directly addressed leading both to an unnecessary exclusion of religious faith claims (as against non-religious faith claims) and a corresponding failure to identify certain affirmations *as* faith claims at all. The fourth definition permits a better grounding for citizenship as a shared moral enterprise and for the adjudication of competing faith claims as just that, competing "faith claims."

Banishing state support of religion does not articulate or restrict the state's involvement in matters of faith. On the contrary, the exclusion of the most articulate, historically significant, and widely accepted traditions (the religions) will tend to leave the public influenced by those faiths that are new, fragmented, often ahistorical, and incoherent. The failure to examine the category of faith as the necessary grounding of all human actions is widespread and as common amongst religious as non-religious citizens.

So where one author may write about "the myth of religious neutrality,"[30] or another may show that the many current debates between "orthodox secularists" and "orthodox religious believers" amount to "a clash of orthodoxies,"[31] the difficulty that remains in discussing the "secular" is that the grounds of agreement and disagreement are so rarely discussed in terms of what is taken on faith. The religious believer may hold that outside of the worship of the true God there is only worship of idols, but this argument is likely to have little impact on a person who does not believe that he or she believes at all—"if I do not believe in *God*, why would I believe in the concept of an *idol*?"

What can be shown, more convincingly, is that everyone, religious or not, has faith in things they take on faith. This is easily demonstrable. One, for example, looks in the rear-view mirror and has faith in the mirror's reliability. One does not test it afresh each time. This may seem like a trivial example, but it is, nonetheless, an example of "natural faith." Whatever else it is, therefore, the secular cannot be a realm of "non-

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30 R.A. Clouser, *The Myth of Religious Neutrality* (Notre Dame: University of Notre Dame Press, 1991). Mention of this book here is no indication that the book's important thesis is erroneous, merely that its central distinction does not cover all the possibilities. I thank Professor Clouser for providing me with a copy of his most useful book.

31 R.P. George, "A Clash of Orthodoxies" (1999) 95 First Things 33.

faith." For there is no such realm. The question, then, is *what kinds of faith* are operative, not *whether or not* there is faith at work.

What Aldous Huxley noted with respect to metaphysics is in every way applicable to the necessarily "faith-based" nature of the secular:

> Men live in accordance with their philosophy of life, their conception of the world. This is true even for the most thoughtless. It is impossible to live without a metaphysic. The choice that is given us is not between some kind of metaphysic and no metaphysic; it is always between a good metaphysic and a bad metaphysic, a metaphysic that corresponds reasonably closely with observed and inferred reality and one that doesn't.[32]

What Huxley says of metaphysics applies to faith and the world around us. The choice is not between faith and "no faith" but between, as Huxley says with respect to metaphysics, a good faith and a bad one. A good faith is one that corresponds reasonably closely with observed and inferred (and some might wish to add inspired) reality, and a bad one is a faith that does not. A "good" faith includes that series of affirmations consistent with a robust understanding of citizenship and the common good. In a constitutional order, a "bad" faith would take a view of the individual that is inconsistent with ordered freedom and such things as "tolerance," "respect," "dignity of the person," *etc.* Indeed, many liberals, though they insist upon them, do not wish to recognize them as based on any kind of faith.[33]

However, this elementary approach is avoided by most contemporary analysts and must be rediscovered if we are to explain the nature of the secular to contemporary sceptics who do not believe they believe or whose lack of confidence in what they perceive as faith blinds them to the many things they necessarily take "on faith." The four cardinal virtues of courage, wisdom/prudence, temperance/moderation and justice, for example, could be taught (with appropriate illustrations) in public schooling. Even the three "theological virtues" (faith, hope, and charity) could be taught while still recognizing that teaching their dogmatic or indoctrinational aspects would be properly left to families and religious communities. The introduction of such a "virtues based" curriculum ought not to conflict with religious or non-religious liberal beliefs and ought to provide a much richer ground for citizenship and public education than the current "soft relativism" of "values-based" education which amounts to little more than a *mélange* of half-formed sentiments.

It would be better that children, the citizens of tomorrow, be taught something of "justice" and "prudence" and the structure of the virtues

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[32] A. Huxley, *Ends and Means* (London: Chatto & Windus, 1937) at 252.

[33] See note 27, *supra*.

than that they be cast adrift with a series of non-rank-ordered (and non-rank-orderable, given their entirely subjective nature) and necessarily ambiguous "values." After all, an axiom of modernity, perhaps *the* axiom of modernity, is that "you have your values and I have mine." In such a setting, how can a student differentiate between what is genuinely good and necessary and what is personal and, perhaps, trivial? George Grant and others have written about the bankruptcy of "values" frameworks, and if their insights become generally known and widely accepted, a wholesale change to many aspects of contemporary education should follow.[34]

What Kind of "Secular" State Are We According to the Law?

As soon as one begins to look at the law historically, one realizes that judges and politicians have changed their views on this question over time. One thing is consistent, *at least in words*: the Canadian approach to religion and the state is still seen as different from the dominant manner in which that relationship is viewed in the United States.[35] Consider the

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[34] The seriousness of the problem is touched upon in a recent work that traces the origins of "values" language in Nietzsche's thought. Professor Edward Andrew of the University of Toronto notes a fact that, in our current cultural malaise, ought to be widely known by those who think "values" improve culture or who speak easily about such things as so-called "*Charter* values": "…there has been only partial awareness [in the Western academy] that the language of values entails that nothing is intrinsically good and nobody is intrinsically worthy." E.G. Andrew, *The Genealogy of Values* (Lanham: Rowman and Littlefield, 1995) at 170. George Grant once said, in a Canadian Broadcasting Corporation interview that values language is "…an obscuring language for morality used when the idea of purpose has been destroyed…and that is why it is so wide-spread in North America" G. Grant, Transcript "The Moving Image of Eternity" *Ideas* (Toronto: CBC, 1986); thanks to producer David Cayley for bringing this transcript to my attention.

[35] There is nothing in the language of the *Charter*, nor in Canadian history, that would require the kind of interpretation that has been given in the United States to the First Amendment (1791). That Amendment reads: "*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof*; or abridging the freedom of speech, or the press; or the right of people peaceably to assemble, and to petition the Government for a redress of grievances" [emphasis added]. The U.S. Supreme Court's First Amendment jurisprudence has been subjected to withering criticism by Michael W. McConnell, laying bare the court's lack of comprehension of "the central place of religious pluralism [and] hence minority religions…" see M.W. McConnell "Taking Religious Freedom Seriously" in T. Eastland, ed., *Religious Liberty in the Supreme Court* (Grand Rapids: Eerdmans, 1993) 497 at 500.

Where the Canadian Supreme Court has commented on American decisions, it has suggested that different constitutional considerations apply and that the American approaches are complicated by their own history—complication that it believes it is not wise to import into Canadian jurisprudence. See, for example,Chief Justice Dickson's comments in *Big M Drug Mart*, *supra* note 7 at 339 (S.C.R.) 356 (D.L.R.):

language of the *Canadian Bill of Rights*.[36] In the Preamble the following is set out:

> The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;
>
> Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law…[37]

While the *Charter* Preamble shrinks to two propositions, "the Supremacy of God and the Rule of Law" there is nothing in the document that precludes governmental *encouragement* of religion. There is no non-establishment clause. But even if there were, encouragement in a general sense by any meaningful definition, is a long way from "establishment" in ways that would offend the freedom of citizens. Any such restriction would therefore have to be read in by courts, since the document itself does not require it. Affirmation of "democratic" principles, properly interpreted, would urge an inclusive stance to accommodation of religious pluralism rather than a narrow reading.

There are, however, strong grounds to argue against a "false neutralist" interpretation of the term "secular." In the first place, a "neutralist" position is an illusion, because what the State affirms in law

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> In my view, this recourse to categories from the American jurisprudence is not particularly helpful in defining the meaning of freedom of conscience and religion under the Charter. The adoption in the United States of the categories "establishment" and "free exercise" is perhaps an inevitable consequence of the wording of the first Amendment. The cases illustrate, however, that these are not two totally separate and distinct categories, but rather, as the Supreme Court of the United States has frequently recognized, in specific instances "the two clauses may overlap."

He concluded that American decisions on freedom of religion must be applied with care by Canadian courts and at 341 (S.C.R.) 357 (D.L.R.) said:

> In my view the applicability of the Charter guarantee of freedom of conscience and religion does not depend on the presence or absence of an "anti-establishment principle" in the Canadian Constitution, a principle which can only further obfuscate an already difficult area of the law.

[36] *Canadian Bill of Rights*, S.C. 1960 c. 44, reprinted in R.S.C. 1985, App. III. On commenting on the *Canadian Bill of Rights* in an early *Charter* decision, Beetz J. stated that "the Bill of Rights retains its full force and effect" after the *Charter*. See *R. v. Singh* [1985] 1 S.C.R. 177 at 224.

[37] *Constitution Act*, 1982, Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, Part 1, Preamble.

is the assertion of "faith claims" of some sort against the "faiths" of others.

There is no reason why a democratic state may not, for perfectly good reasons, support religious faith purposes as furthering, amongst other things, the principles of democracy themselves. There is a strong line of argument (in writers as diverse as Tocqueville and Galston) that religious faith affirmations (in, for example, the dignity of the human person created in the image of God) enhance democracy and meaningful conceptions of freedom. Though I discuss this notion in greater detail below, it can also be argued that the "faith claims" of some versions of liberalism are derivative of religious belief, lack a good reasoned basis, and are, therefore, insufficient as grounding for citizenship. But until we characterize these differing viewpoints as a conflict of "faiths," we will see pseudo-neutral secularism's inchoate "faiths" drive the express faith of religion out of public realms. This is clearly visible in court decisions in the area of education.[38]

Chief Justice Lamer began his dissent in *Rodriguez* by noting that the *Charter* "has established the essentially secular nature of Canadian society and the central place of freedom of conscience in the operation of our institutions."[39] But what does it mean to determine that a country has an "essentially secular nature?" Chief Justice Lamer and the court do not tell us. The passage suggests that an affirmation of the "secular" nature of the country is necessary to preserve "the central place of freedom of conscience in the operation of our institutions." So, for Chief Justice Lamer, something in the "secular" is essential to maximizing the freedom of conscience. The Chief Justice provides no authority for his statement that "the *Charter* has established the essentially secular nature of Canadian society." Indeed, as we have seen, the Preamble, history, and even the Court's affirmation of "religious tradition" all suggest a tension here. Chief Justice Lamer, does, however, cite authority for the centrality of "freedom of conscience in the operations of our institutions." That authority is the judgment of Chief Justice Dickson in the seminal case on the freedom of religion, *R. v. Big M Drug Mart*.[40]

Here, the freedom of religion was defined as follows:

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[38] Two prime examples of courts completely missing the faith based nature of all public education and thereby affirming a "false neutral secular" are the Ontario Court of Appeal in *Zylberberg* v. *Sudbury Board of Education* (1988), 65 O.R. (2d) 641 (C.A.) and the British Columbia Supreme Court in *Chamberlain* v. *Surrey School District No. 36* (1998), 60 B.C.L.R. (3d) 311 (SC) [hereinafter *Surrey School*].

[39] *Rodriguez*, *supra* note 13 at 366.

[40] *Big M Drug Mart*, *supra* note 7.

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.[41]

The state cannot coerce an individual to affirm a specific religious belief or to manifest a specific religious practice. It was fatal, in *Big M Drug Mart*, for example, that the Sunday closing legislation had a religiously-based purpose. When later legislation was challenged it survived on the basis that its purpose had become "secular" and any effect on other Saturday-observing consumers could survive a Section 1 analysis.

In *Surrey School*,[42] we see another manner in which a contemporary judge may interpret the meaning of the term "secular." In this decision, three books showing same-sex parents were the subject of an application for approval as classroom resource materials. The School Board Trustees refused to approve the books and various people, including members of a gay advocacy group, petitioned the court to set aside the Trustee's decision.

Madam Justice Saunders held that the Trustee's resolution breached a requirement of the *School Act* which provides that all schools "shall be conducted on strictly secular and non-sectarian principles." The judge held that the School Board had breached this statutory requirement because "the words "conducted on strictly secular principles" preclude a decision *significantly influenced by religious considerations*."[43] For Saunders J., the requirement that a public body function on "secular" principles means that no concerns in education may be *influenced by* or *based upon* religious belief. What is the meaning of this idea? Let us consider the structure of the *Charter* itself.

Section 2(a) of the *Charter* affirms that "the freedom of conscience and religion" is a fundamental freedom. The terms "conscience" and "religion" are listed side by side. If all religious considerations are to be excluded from any influence in the public school setting because of the way Saunders J. interprets the terms "secular" and "non-sectarian" then why, by parity of reasoning, would Saunders J. not also suggest that "conscience" ought similarly to be banned from the exercise of public school determinations? In fact, if conscience is formed by religion (and many if not most people would say that their consciences were formed or

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41 *Ibid.* at 336.

42 *Supra* note 38.

43 *Ibid.* at 330 [emphasis added].

influenced by religion) then why not exclude not only their religious views but their conscience influenced by religion as well?

To follow the idea through leads to the paradoxical result that a religious person could not run for any elected office or, if elected, could not function in a secular manner, at least as Saunders J. interprets the word, while using their religious beliefs or their conscience informed by a religious belief. This nonsensical result shows that the approach to "secular" is, at the very least, shallow and erroneous.

What is behind Madam Justice Saunders' reasoning here? Why would a decision based on the *conscience* of a trustee be exempt from concerns, but a decision based on the *religious convictions* of a trustee be circumscribed? Moreover, if "secular" is read to exclude moral decisions informed by religious convictions but not moral decisions arrived at based on conscience, then what is the reasoning of Saunders J. except *anti-religious*? How could it be anything other than an attack on religion under the guise of "secular neutrality?" This kind of judicial reasoning does not withstand scrutiny and ends up weakening the place both of "religion" and of "conscience" in Section 2.

Awareness of the epistemological grounding of all human acts on faith and a richer historical, philosophical, and religious understanding of society would preclude the specious approaches some judges have recently articulated. When one considers the meaning of faith and the fact that every man and woman alive operates every day on a host of matters they cannot and do not empirically prove from moment to moment (that the car mirrors work, that the sidewalk is actually there in front of me, that "human dignity" is a reality *etc.*) then on what valid basis can one kind of faith be banished to the private realm (religion) and the other declared fit for the public sphere (conscience)? And by what possible rule of moral analysis may a belief based on conscience be deemed to be acceptable while the same belief based on religious considerations be deemed to be unacceptable? Saunders J. has adopted an understanding of "secular" that, in addition to its philosophical incoherence, has no historical warrant.

Historical Background to the Terms "Secular" and "Secularism"

Before the Reformation the concepts of "religious" and "secular" did not exist as descriptions of fundamentally different aspects of society.[44] In fact, within the Roman Catholic tradition the categorization of clergy themselves remains to this day divided between "secular clergy" and

[44] F.M. Gedicks, "The Religious the Secular and the Antithetical," (1991) 20:1 Capital U. L. Rev. 20 145 at 116.

"regular clergy." Those who are "secular" serve in the world (*saecularis:* "the times," "the age," "the world") and those who are "regular" are members of religious orders who live according to a rule (*i.e.* who take vows of poverty and obedience *etc.*). The historic use of "secular" in relation to clergy ought to alert us that the new use, which radically bifurcates religion and the secular, is just that, new.[45] Where the *Oxford English Dictionary* defines "secular," the uses of the word that suggest that the secular is "non-sacred" in character arise as recently as the mid-nineteenth century.[46]

"Secular" should be viewed alongside "secularization" and "secularism," though the differences between them are important. "Secularization" has been defined as:

> The process in which religious consciousness, activities and institutions lose social significance. It indicates that religion becomes marginal to the operation of the social system, and that the essential functions for the operation of society become rationalized, passing out of the control of agencies devoted to the supernatural.[47]

The distinction between the secular and the religious is, in a sense, jurisdictional. This functional distinction, noted in contemporary Catholic thought and represented in different ways in the earlier uses with respect to "secular clergy" and "regular clergy" can all too easily be mistaken as a distinction between faith and "no faith." But it is clear that on the moral and spiritual level the question of who runs a hospital—church or state—is, on one reading, not relevant in terms of whether the hospital, in fact, runs according to certain moral or even religious teachings.

Put another way, just because a particular religious group runs a hospital (or a school) does not necessarily mean that religious principles animate its operations. Conversely, the fact that a secular school board runs a school does not mean that its operations are not run according to religious principles. The actual content of what is taught is the important

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[45] *The Oxford Dictionary of the Christian Church* (London: Oxford University Press, 1974) *s.v.* "secular clergy." The same book also notes that the term "secularism" was first used around 1850.

[46] *The Oxford English Dictionary*, 2nd ed., *s.v.* "secular," "secularism," and "secularity." All uses suggesting a meaning of "secular" that denotes an absence of connection with *religion* post-date G.J. Holyoake, *The Principles of Secularism Briefly Explained* (London: Holyoake & Co., 1859).

[47] B.R. Wilson "Secularization" in M. Eliade, ed., *The Encyclopedia of Religion* (New York: MacMillan Publishing Co., 1987) 159 at 160. Oxford Professor of Jurisprudence John Finnis, has noted that "Neither the differentiating of the secular from the sacred, nor the social processes of secularization, entail the mind-set or cluster of ideologies we call "secularism" see, "On the Practical Meaning of Secularism" (1998) 73 Notre Dame L. Rev. 491 at 492.

factor. The question then, both for the state and the church, is what kind of faith is active, not just who runs a facility or what name is on the door. This distinction, at times subtle, needs to be kept in mind throughout any discussion of the nature of the "secular" in the modern era.[48]

In *Daly* v. *Ontario (Attorney General)* [49]on the constitutionality of s. 136 of the Ontario *Education Act*,[50] Mr. Justice Sharpe said:

> I find, therefore, that the evidence and the applicable legal principles justify a finding that s. 136 of the *Education Act* prejudicially affects the rights of the applicants guaranteed by the *Constitution Act, 1867*, s. 93(1). In my view, taking religious belief into account in making employment decisions with respect to teachers is a denominational aspect of the rights conferred by s. 93(1). I find further that the evidence shows that, at the very least, with respect to the teaching of religion and family studies, taking into account the religious faith of the teacher is necessary to ensure the enjoyment of the constitutional right.
>
> I am fortified in reaching this conclusion by a body of case law that recognizes the importance of the religious faith of the teacher in a Catholic school. While a specific question of whether preferential hiring in favour of Roman Catholics is protected by s. 93 appears never before to have arisen for judicial consideration, in my view, these cases lend significant support to the Applicant's position.[51]

Here Sharpe J. refers to a line of denominational cause cases.[52]

This finding of Justice Sharpe was upheld by the Court Appeal in *Ontario (Attorney General)* v. *Daly*:

> Implicit in the recognition of the constitutional right to dismiss a teacher for denominational cause is an acknowledgment of the importance of the faith of

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48 McGill Professor of Philosophy Charles Taylor, in a note to a section of an essay on "The Public Sphere" discusses the concept of "radical secularity" and states: "As a matter of fact, excluding the religious dimension is not even necessary to my concept of the secular. A secular association is one grounded purely on common action, and this excludes any divine grounding for the association, but nothing prevents the people so associated from continuing a religious form of life; indeed, this form may even require that political associations be purely secular. There are also religious motives for espousing a separation of church and state." See, *Philosophical Arguments* (Cambridge: Harvard University Press, 1995) at 309 note 15.

49 (1999) 38 O.R. (3d) 37 [hereinafter *Daly*].

50 *Education Act*, R.S.O.1990, c. E. 2.

51 *Supra* note 49 at 37-9.

52 *Re Casagrande* v. *Hinton Roman Catholic Separate School District No. 155* (1987), 38 D.L.R. (4th) 382 (Alta. Q.B.); *Walsh and Newfoundland Teachers' Association* v. *Newfoundland (Treasury Board)* (1988), 220 A.P.R. 21 (Nfld. C.A.). Thanks to Peter Lauwers for providing these authorities.

> the teacher to Catholic education. In my opinion, this right to dismiss necessarily has as its corollary a right to consider the faith of prospective teachers.[53]

While Mr. Justice Sharpe identifies correctly the importance of "religious faith" to Catholic education and both he and the justices of the Court of Appeal upheld the denominational standards and thereby allowed scope for genuine pluralism in education, he makes two serious errors that illustrate the theme of this paper. First, in the passage that follows he bifurcates faith and "intellectual explanations," implying that only "religious" explanations are based on faith and that religious explanations are not capable of "intellectual" grounding; second, he suggests that the "secular" is neutral with respect to faith claims—an example of what is referred to earlier in this paper as the "false neutralist" position.

> The argument that a non-Catholic could acquire knowledge of the Catholic perspective on these matters and convey that knowledge to the students seems to me entirely to miss the point of such a course and to overlook the central objective of Catholic education as reflected by the evidence led by the applicants. *A non-believer would necessarily teach the subject from an intellectual rather that faith-based perspective.* Separate schools do not aim to teach their students about these matters from a neutral or objective point of view. Separate schools explicitly reject that secular approach and have consistently defined their mission to be the inculcation of a particular religious faith as the appropriate way for students to confront these issues in their lives. Given those objectives, it is difficult to see how the non-Catholic teacher's lack of belief could remain concealed from students. Even if the teacher were able to hide the fact that he or she did not embrace the Catholic faith, how could the teacher effectively urge a faith-based approach upon students? *The very notion of religious faith involves an acceptance of the limits of the human intellect and of the need to accept, on faith, certain fundamental precepts as a guide to life.*[54]

Mr. Justice Sharpe's mischaracterization of what is actually at issue with respect to faith and the "secular" could be described as a common misunderstanding. However, if religion and religiously inspired "faiths" are to be treated fairly and our culture is to have an actual sense of how faith (religious and non) operates, then the philosophical and rhetorical analysis that undergirds judicial reasoning on these matters must be taken to a new level.

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[53] [1999] 172 D.L.R. (4th) 241 (Ont. C.A.) at §25, leave to appeal refused, 21 October 1999 S.C.C.A. No. 321.

[54] *Ibid.* at §65 [emphasis added].

It is unfair to exclude opinions that emanate from religiously held faith views (as in *Surrey School*[55]) or to view religion as faith-based but the "secular" as somehow neutral and based in a "non-faith" manner upon the "intellectual" (as in *Daly*[56]). What contemporary philosophers have shown us is that opposing views in all cases are equally based on certain faith assumptions and the question for a free and democratic society is how can competing faith assumptions share the public sphere. The approach taken by Justices Saunders and Sharpe mischaracterize faith, exclude religious faith explanations, and lend support to domination of the public by implicit or atheistically based faith claims.

What religious groups learned some time ago (that dogma and indoctrination have no place in public education, such that religious groups cannot expect that all their dearest beliefs be supported in public school classrooms) must be learned by other groups who are not used to this kind of analysis for their own orthodoxies. Failure to recognize the philosophical underpinnings of all human acts as based on faith and society itself as dependant upon what it takes on faith (about such things as, say, the validity of constitutional principles) tends to drive out those faith-claims that are described in religious language, while leaving unexamined and unchallenged those that oppose them. Thus, in the education sphere, if the kind of judicial analysis discussed above were to continue over time only implicit or atheistic faith-claims would be left as having access to public education—a situation author Lois Sweet has referred to as "secular fundamentalism."[57]

While this result might be supported by those who have an axe to grind against religions (of whatever sort), it cannot be tolerated in a

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55 *Supra* note 38.

56 *Supra* note 49.

57 L. Sweet, *God in the Classroom* (Toronto: McClelland and Stewart, 1997) at 211. More generally, French philosopher Jacques Maritain has described the shift from a sacral to a secular age as "…something normal in itself, required by the Gospel's very distinction between God's and Caeser's domains." However, Maritain notes that this shift has been accompanied by "a most aggressive and stupid process of insulation from, and finally rejection of, God and the Gospel in the sphere of social and political life. The fruit of this we can contemplate today in the *theocratic atheism* of the Communist State." See, *The Social and Political Philosophy of Jacques Maritain: Selected Readings* (New York: Charles Scribner and Sons, 1955) at 248 [emphasis added]. Maritain's choice of the phrase "theocratic atheism," like Lois Sweet's "secular fundamentalism" accurately names what has been a lamentable feature of the 20th century. Courts must be on guard to protect human beings in human society from theocracies of either the theistic or atheistic varieties. Maritain offers a helpful insight when he suggests that human society confronted by "bourgeois liberalism, communism and totalitarian statism" needs a view of freedom "…that is at the same time personalist and communal, one that sees human society as *an organization of freedoms*" at 338 [emphasis added].

society that prides itself on tolerance, open-mindedness, and equality, or by a judiciary required to uphold the rule of law, rationality, freedom, and democracy (see the Preamble and section 1 of the *Charter*). The current dominance in civic discourse and judicial reasoning by philosophically inaccurate distinctions must end for genuine pluralism to be a reality in Canada.

If religion and religiously inspired "faiths" are to avoid being banished entirely from the public sphere, then the rhetorical analysis must be reconfigured. It is imperative that the faith-based nature of human endeavour be discussed so that the tension is not between faith and facts or created by a historically impoverished and inaccurate division between secular and religious but, rather, in terms of what kind of faith-claims can share the public sphere. There is no reason to denigrate opinions that emanate from religiously held views while elevating those animated by inchoate, implicit, and often secularistic faiths.[58]

In a recent book by philosopher Thomas Langan, the concept of "natural faith" is discussed as the basis of all human inquiry.[59] The implications of this work must be thought through, but, at the very least, it would seem as if Langan is creating the possibility here of a bridge between those who believe that religious faith undergirds their view of reality and those who believe they operate out of a position of no-faith. Professor Langan's discussion of "natural faith" is a convincing account of the fact that all human beings operate and must operate on the basis of "natural faith" assumptions ("the floor is there in front of my foot," "all human beings have dignity" *etc.*).

This observation calls into question how many people *implicitly* speak of the so-called "secular" realm as entirely free of faith claims. It may be true and good (for both religion and the state) that the state is not coextensive with the Church or religious communities and that a jurisdictional competency divides them.[60] It is false to claim, either

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[58] In his "Tamworth Reading Room Letters," John Henry Cardinal Newman 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." See *Discussions and Arguments on Various Subjects* (London: Longmans, 1899) at 295. Any writers today who wish to come to a well informed understanding of the "secular" and faith should examine the works of Newman, particularly *Discussions and Arguments* and his *Fifteen Sermons Preached Before the University of Oxford Between A.D. 1826 and 1843* (London: Longmans, 1898) in which he draws a distinction between "implicit" and "explicit" religion, *ibid.* at 279. It is just such a distinction that I am suggesting in this paper between "explicit faith" and "implicit faith."

[59] T. Langan, *Being and Truth* (Missouri: Missouri University Press, 1996).

[60] Much of contemporary liberal *angst* on this score is based on a belief that religious people in fact want a unification of church and state or some kind of theocracy: see, for

implicitly or explicitly, however, that the state is "faith-free" or "religiously neutral" if by that we mean "contains no 'faith claims'," or must pre-emptively silence religious voices and insights. The demand that certain conscience views of activist teachers should have access to public classrooms but views animated by religious faith must keep silent by virtue of the *origin* of such views (faith outside religious frameworks or within them) is bizarre, biased, and illiberal. Yet this false neutrality is just what some judges and politicians uphold in their decisions about the place of a "religious perspective" and religious access to or participation in the public sphere.

Judges must be careful not to create an approach to competing faith claims that masks the competition of claims. They must also be careful to avoid the temptation (now frequently offered by litigants) to re-fashion what are, in essence, disputes of differing conscience or faith beliefs as disputes based on a supposed and imagined superiority of principles of *equality*, instead of a conflict that is actually rooted in differing faith conceptions. Conscience beliefs of one person may well run head-on into the beliefs of others. Nothing is gained by categorizing one set of beliefs as superior to the other, if one can characterize oneself as an "equality-seeking" litigant. All this does is provide a convenient though inaccurate ground to avoid the real issue.

Note that religion itself is one of the protected rights in Section 15, and that Section 2 protects "conscience and religion." It is properly characterizing conflicts *within sections*, not between them, that will maintain the proper symmetry of *Charter* jurisprudence. Failure to heed this important distinction has already led to increasing confusions of principle.[61]

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example, an article lamenting "desecularization" and the supposed threat that is posed to secularization by such things as the number of beds in Catholic hospitals that "are still under Church control.": E. Doer, "*Desecularization*" (1998) 58:4 Humanist 37. Yet nothing is further from the truth, and, at least with respect to many Protestant groups and the Roman Catholic Church, a separation of church and state is understood as essential in order for religious faith to perform its necessary functions in culture. In the Catholic tradition, a development of this understanding culminated in the text of the Vatican II document Declaration on Religious Liberty *Dignitatis Humanae* (7 December 1965) which grew in many ways out of the work of John Courtney Murray S.J.: see J.C. Murray, *We Hold These Truths* (Kansas City: Sheed and Ward, 1960). A functional separation of Church from State is not a separation of all aspects of society from religion or religious influence. Refusal to acknowledge the valid place for religion and religiously influenced views in all aspects of public life is an earmark of inappropriate "secularization" and current anti-religious bias.

[61] The Ontario Human Rights Commission decision in *Brillinger* v. *Brockie*, [2000] O.H.R.B.I.D. No. 3, Decision No. 00-003-R, Board File No. BI-0179-98, 24 February 2000, provides a good example of where the characterization of Brillinger's desire (on behalf of the Gay and Lesbian Archives) to use Brockie's printing press was

The state affirms certain faith commitments in a multitude of ways. No liberal (religious or non), for example, can *prove* the notion of "the dignity of the human person" which many now profess. That notion comes from earlier religious traditions and relies entirely on faith assumptions, as do many key principles of "liberalism" and liberal tradition.[62] The fact that these basic notions seem not to be understood by elite groups (including lawyers and judges) shows the paucity of legal and general education, and the extent to which religious education now conforms too much to a secularism that wishes to drive religion out of any public place in culture.

The public system must avoid certain kinds of affirmations and instructions and must seek to be genuinely tolerant. It must not, under the *guise of tolerance*, determine some "faith claims" (*i.e.* religiously based ones) out of bounds but leave others ("implicit faith claims") in. That would be to tilt the public sphere in the direction of atheism or agnosticism.

Conclusion: True Liberalism is Inconsistent with a "Faithless" Secularism

This idea, that the "secular" is or can be "faith-claim free" must be examined, particularly when judges are tempted to use some notion of "secular principles" to exclude reasoning based on faith commitments of various sorts. If one can show that the "secular" is not, in fact, free of the metaphysical (an easy task but one that is often overlooked in the analysis), then the ground for the state to pre-emptively rule out expressly "faith-based" or "religious faith influenced" decisions (as in *Surrey School*) disappears, since to exclude "religious faith" articulations while

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inappropriately analyzed as a case of "equality" and "advancement" as against Brockie's religious belief that using his business to advance homosexual acts would be to support sin. The real question in the case is whether private actors ought to be forced to support views against which they are strongly opposed. Should a "pro-choice" printer be forced by Human Rights to publish materials from a "pro-life" organization? Characterizing the matter as a conflict regarding "equality" merely obfuscates the real issues of conscience conflict and accommodation in a pluralistic state. The Commission ordered that Brockie print the materials against his religious convictions with no analysis that what was at issue was a competition of conscience. The decision is under appeal.

[62] S.L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Basic Books, 1993) at 224-226. Carter, quoting Robert Nisbet, notes at 226: "Even [John Stuart] Mill apparent atheist through much of his life, came in his final years to declare the indispensability of Christianity to both progress and order."

leaving in place other "faith-based" considerations, amounts to an impermissible move against religion.[63]

George Grant took a slightly different tack in challenging the so-called neutrality of a "secularized" state in an important critique published nearly 40 years ago. In his now-classic paper, "Religion and the State," Grant noted that liberal humanists (or Marxists) are, in fact, properly to be understood as "religious" people and, by inference, that their states are in a sense also "religious."[64] The key to successful incorporation of competing faiths in culture will depend upon the principles of accomodation.

In the Ontario court decisions of the mid and later 1990s, such as the *Bal* decision, the courts refused to accept an argument on behalf of Sikh, Hindu, Muslim, Mennonite, and Christian Reformed communities that a government Memorandum infringed their religious freedoms by restricting publicly funded alternative minority religious schools.[65] The court in *Bal* did not consider the question of accommodation at all much less in terms of the standard used in human rights cases: up to the point of "undue hardship." Religion here was treated as something that could simply be restricted and the claim that the secular sphere was neutral allowed to succeed. Even though the private sphere of employment and housing requires non-discrimination on the basis of religion and provides bona fide occupational requirement protection for religious believers, the courts have been unwilling to extend equality of treatment to parents seeking access to public schools that would teach in accordance with their beliefs. The result is that unofficially sanctioned "atheistic" or "agnostic"

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[63] A legislative requirement that education be conducted on a "non-sectarian" basis, like the requirement that something be conducted in a "secular" manner relates not to its grounding or influence in faith (religious or not) but, rather, to its *exclusivity*. A "sect" after all is defined as: "a party or faction…" or "a religious following or adherence to a *particular* religious teacher or faith." Broadly supported and historically rooted "faith claims" will stand, one would think, a greater chance of overcoming a preclusion against sectarianism. There can be, on this reading of "sectarian," new sorts of sectarianism. These could include "sectarian liberalism" "sectarian feminism" and "sectarian neo-Marxism" to name but three that exhibit the particularity that makes them appropriately analogous to religious denominations or sects. *Oxford English Dictionary*, *supra* note 46.

[64] G. Grant, "Religion and the State" (1963) 70 Queen's Quarterly 183; republished in *Technology and Empire* (Toronto: Anansi, 1969) 43-60 [hereinafter "Religion and the State"]. The material in these next few paragraphs comes from I.T. Benson, "Religious Conscience, the State and the Law," Book Review of *Religious Conscience, the State and the Law* by J. McLaren and H. Coward, eds. (1999) 24 Queen's L. J. 691.

[65] *Bal* v. *Ontario (Attorney General)* (1994) 21 O.R. (3d) 682 (Ont. Ct. (Gen. Div.)); aff"d (1997), 34 O.R. (3d) 484 (Ont. C.A.), leave to appeal to S.C.C. denied (1998) 49 C.R.R.(2d) 188 (S.C.C.) [hereinafter *Bal*].

beliefs (with their own "faith affirmations," such as that there is no God—every bit a "faith position" since it cannot be empirically proven)—are the "default" position of this kind of pseudo-neutrality.

Part of the task ahead is how best to express a more richly grounded understanding of the place of religion and "faiths" in culture and in relation to human freedom generally. For only in religion do we have a developed understanding of the place, nature, and causes of evil and the possibility of conversion, Grace, and redemption.[66] Many are concerned about individualism, fragmentation, and the increasing incoherence of contemporary law and philosophy. Few, however, have faced non-religious liberalism and the false-neutral secular with their own reliance upon and failure to acknowledge the many faith claims upon which some of their richest convictions rest.

If citizens (religious and non), continue to attempt to speak to surrounding cultures in confused language (such as by misusing the term "secular" or using the pseudo-moral language of "values" when they mean an objective category of truth and meaning), they will never succeed in communicating those matters that are deepest and most essential to citizenship and culture. The fact that so many religious people and religious leaders, just like those non-religious people and leaders around them, use the language of "values" in such phrases as "family values" or "*Charter* values" shows that they do not understand how modern philosophy has corrupted both the language they themselves use and the traditions they still imagine themselves to inhabit. Reclamation of what T.S. Eliot called "the dialect of the tribe" is essential if there is to be a meaningful cultural understanding of citizenship or nationhood itself.

Those who seek to educate and/or convince judges through legal argument should now speak of the "secular" in a way that suggests it is a realm of faith amongst many other kinds of faith in a pluralistic society. They must show that the assumptions of the public sphere are informed by faith of various kinds and all citizens have every right in all places, by appropriate forms, to inform the public realm of the reasons that give

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[66] James Schall, in a book that would be of tremendous help to students of politics and politicians as well as those interested in the law, notes that all political philosophy must wrestle with three aspects: 1) the problem of evil or coercion; 2) the problem of virtue; and 3) the problem of contemplation of the highest things. See J.V. Schall, *At the Limits of Political Philosophy: From "Brilliant Errors" to Things of Uncommon Importance* (Washington, D.C.: Catholic University of America, 1996) at 2. These are precisely the questions that are rarely debated in contemporary politics and often avoided by the courts. Yet law and morals simply cannot operate in water-tight compartments. For a useful examination of the necessary relationships and the implications of this for law and democracy see R.P. George, *In Defense of Natural Law* (Oxford: Clarendon Press, 1999), especially Chapter 17 "Moralistic Liberalism and Legal Moralism" and Chapter 18 "Law, Democracy and Moral Disagreement."

meaning to their faith, and why that understanding is important for pluralism and the ordered freedom that is essential for liberalism.

For some, this will be discussion in religious language, for others it will be philosophical (virtue or principles or, perhaps, both), but for all it will involve matters taken beyond the simple proofs of the empirical.[67] To do so will require skilful expression and a great deal of charity and patience, as well as a significant increase in our collective philosophical and theological understandings.[68]

This is not the first time in human history that faith communities (defined, in this instance, as those who regard themselves as religious) have had to learn to create a language of engagement with unfriendly or uncomprehending groups around them. This time, however, the task of communication has a new twist. Now those who wish to overcome the misunderstandings of contemporary audiences must show them not only the statues that represent faith in the "unknown gods" but the fact, in the first place, that they even *have* faith *and* "unknown gods."[69]

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[67] Some who read this will resort to the defense of "values" subjectivism and decry attempts to teach and inculcate "shared meanings" as "moral imperialism." But if this is so, why should we continue to insist on such metaphysical affirmations as "tolerance" "respect" and the "good" of such things as "diversity," "dignity of the person," *etc.*? We cannot hope seriously to maintain respect for objective *goods* while deriding the very notion of objective *truth*. The person who denies truth in theory cannot complain when they are denied, for example, tolerance in practice. For what is the demand for "tolerance" but an inarticulate cry for "truth," however diminished the person's sense of what truth entails may be?

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

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

See L. Dupré, *"The Common Good and the Open Society"* (1993) 55 The Review of Politics 687 at 707-8 [emphasis in original]. It ought to come as no surprise that confidence in the concept of the "common good" has diminished as confidence in morals, metaphysics and truth itself has diminished. If there is no "common good" how can there be meaningful justice? While this paper has suggested that moves towards "liberal virtue" are enhanced by discussions of faith generally, Professor Dupré's conviction that it is only a "return to virtue *on a religious basis* [that is] an indispensable condition for any possibility of a genuine conception of, and respect for, the common good" raises a point that needs to be discussed in greater detail.

[69] The reference here is to St. Paul's use of "unknown gods" in Acts 17:22-25.

It is ironic that perhaps the dominant understanding of "secular" in our time hides its divinity and faith-claims within a supposedly neutral language. But its fruits are more clearly seen with each passing year. They are fruits that do not bode well for those of religious faith or citizens committed to notions of a common-good that religious and non-religious citizens can inhabit peaceably, however confidently they might claim, as some more optimistic religious people do, that "we do not live in a secularized world."[70]

As noted by President Clinton's former advisor, William Galston, it is possible to reconcile traditionalism and liberalism, and the state of current Western societies demands that this effort occur because:

> In some measure, religion and liberal policies need each other. Religion can undergird key liberal values and practices; liberal politics can protect—and substantially accommodate—the free exercise of religion. But this relationship of mutual support dissolves if the respective proponents lose touch with what unites them. Pushed to the limit, the juridical principles and practices of a liberal society tend inevitably to corrode moralities that rest either on traditional forms of social organization or on the stern requirements of revealed religion….liberal theorists (and activists) who deny the very existence of legitimate public involvement in matters such as family stability, moral education, and religion are unwittingly undermining the values and institutions they seek to support.[71]

The attacks against religion in recent years ought more properly to awake all citizens to the fact that for religious freedom and the meaningful freedom of society itself, reclaiming a proper understanding of the "secular" is an important task. We need, in short, a re-understanding and redefinition of the secular and a new and broader understanding of faith so that both "religion" and "conscience" can be adequately protected, nurtured, and encouraged in society.[72] Should this

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[70] P.L. Berger "Secularism in Retreat" (1996) 46 Nat'l Interest 1 at 3.

[71] W. Galston, *supra* note 27 at 279.

[72] Given the extraordinary degree to which higher education has lent itself to disciplinary fragmentation over the last century, it is unlikely that anything less than a wholesale reconsideration of contemporary education could produce the effective resources for epistemological re-grounding. A *trans-disciplinary* study is needed to compensate for the radical fragmentation of contemporary specialization and the weakness of inter-disciplinary studies. How else but through a self-consciously integrative approach (between and within disciplines) could law, theology, philosophy, and the social sciences ever be held together so as to provide a intellectual base of integrated ideas that might provide solutions to the massive problems that confront contemporary societies? A return to unified education—to *uni*versity, is required.

> Those occupying the key positions of leadership in law, politics, education, and medicine have consistently shown themselves to be unequipped (even if they have the will) to make the necessary investigations in social policy. The need for what some have

not happen, the maintenance of the ordered freedom required for genuine liberalism and democracy seems unlikely.

called *trans-disciplinary* approaches is suggested in some interesting recent work emanating from the area of theological and philosophical studies by the Cambridge University theologian/philosopher Catherine Pickstock. In a review of a book on economic and political theory, the author concludes that "to arrive at the necessity of a teleological critique of commercialism is to arrive, perhaps without knowing it, at the necessity of a theological critique. The only authentic alternative to the sliced loaf, exchanged for cash, is perhaps not some other type of bread as such, but the *compagnia* resulting from the sharing of the bread of sacrifice." C. Pickstock "*Capitalism or Secularism? Search for the Culprit*" (1996) 108 Telos 165 at 168. I thank Dr. Pickstock for bringing this article to my attention.

The manifest *metaphobia* (fear of metaphysics) exhibited in the curricula of most contemporary disciplines, focused as they are on *techniques*, to the exclusion of *purposes*, must sooner or later come to grips with its equally evident *theophobia* (fear of God) and the effect of both on not only the rigour of the disciplines themselves but the lives of those who work within them, not to mention the effects on culture of the wholesale deracination of learning. Post communist societies do not, in general or to the same extent, share our metaphobic and theophobic stances and by dint of long exposure to state-enforced atheism and having witnessed its effects at close hand, have been quite open about the need to encourage "spiritual enlargement" and "moral obligations." See V. Havel, *The Art of The Impossible: Politics and Morality in Practice* (New York: Knopf, 1997) at 129. Need we descend to the same depths before we learn the necessary lessons?