RIGHTS INFLATION: ATTEMPTS TO REDEFINE MARRIAGE AND THE FREEDOM OF RELIGION

THE CASE OF TRINITY WESTERN UNIVERSITY SCHOOL OF LAW

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TABLE OF CONTENTS

INTRODUCTION 197

I. THE INFLATIONARY DEMANDS OF EQUALITY 200
  A. Inflationary Concern at the Marriage Reference Case 203
  B. Hall v. Powers 207

II. THE REDEFINITION OF MARRIAGE IN CANADA 212

III. THE TRINITY WESTERN UNIVERSITY LAW SCHOOL CASE 217
  A. Lead-up to Litigation 224
    1. The TWU Proposal 226
    2. Federation of Law Societies of Canada 229
    3. Law Society of British Columbia 230
  B. Judicial Review 237
    1. B.C. Supreme Court 237
    2. B.C. Court of Appeal 238
  C. Academic Opposition 243

CONCLUSION 253

INTRODUCTION

The redefinition of marriage has brought with it an intolerance on the part of the legal elite[1] toward those religious institutions and communities that insist on believing and practicing a worldview that has, at its cultural center, the traditional definition of marriage.[2]

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[1] I define this elite as legal academics and a sizable proportion of the legal governance bureaucracy—i.e., law societies (known as "state bars" in the U.S.).

[2] Elaine Craig, *TWU Law: A Reply to Proponents of Approval*, 37 DALHOUSIE L.J. 621, 624–25 (2014) [hereinafter Craig, *TWU Law*].

Perhaps we ought not to be surprised by that outcome as that is the natural outworking of law. When a law comes into being, it is deemed to be moral by most citizens—that is to say, it is morally right and proper. For why would we ever pass a law that is not morally right and proper? A law, by definition, is a societal stamp of morality,[3] but it is more than that. For example, a law may expressly allow and keep in place alternative views on a moral position. Law reflects the moral attitudes or customs of a community.[4] That presupposition leads us, as a liberal democratic society, to conclude that opposition to current law is morally wrong and not proper.[5] According to this reasoning, in the context where law has redefined marriage, any view or opposition that does not accept the redefinition is, by definition, wrong.[6]

This way of thinking was evident in the oral arguments before the British Columbia Court of Appeal on the Trinity Western University (TWU) law school case, where I represented my client intervener, the Canadian Council of Christian Charities.[7] The controversy in the TWU law school case is over TWU's admission requirement that students sign a Community Covenant stating, in part: "In keeping with biblical and TWU ideals, community members voluntarily abstain from . . . sexual intimacy that violates the sacredness of marriage between a man and a woman."[8]

During oral arguments, I heard legal counsel for the LGBTQ Coalition say that if the Law Society of British Columbia accredited TWU, it would be complicit in TWU's emphasis on traditional marriage

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3 *See Law*, WEBSTER'S NEW WORLD COLLEGE DICTIONARY (Michael Agnes ed., 4th ed. 1999) (defining law as a recognized custom that is binding in a community).

4 The English word "mores," derived from the Latin *mōrēs*, means "[t]he accepted traditional customs and usages of a particular social group." *Mores*, THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1982).

5 Of course, Western democracies have a lot of experience with conscientious objectors who claim to oppose an "unjust" law and refuse to obey it. *See, e.g.*, Amin George Forji, *Just Laws Versus Unjust Laws: Asserting the Morality of Civil Disobedience*, 3 J. POL. & L. 156, 156 (2010) (discussing unjust laws and those who inspired civil disobedience against them in various western cultures); Henry J. Richardson, III, *Dr. Martin Luther King Jr. as an International Human Rights Leader*, 52 VILL. L. REV. 471, 471 (2007) (discussing Dr. Martin Luther King, Jr.'s role as an international human rights leader). However, that does not diminish my assertion that a law, by definition, has a certain gravitas of legitimacy in the eyes of the general public.

6 *E.g.*, Noah Michelson & Sara Boboltz, *Here is All You Need to Prove Bigots Wrong About 'Traditional Marriage'*, HUFF. POST (Sept. 3, 2015), http://www.huffingtonpost.com/entry/here-is-all-you-need-to-prove-bigots-wrong-about-traditional-marriage_us_55e83d69e4b0c818f61ab9e6.

7 Trinity W. Univ. v. The Law Soc'y of B.C., 2016 BCCA 423 (B.C.).

8 *Community Covenant Agreement*, TRINITY W. UNIV., www.twu.ca/student-handbook/university-policies/community-covenant-agreement (last visited Jan. 17, 2017).

which is "an unconstitutional definition of marriage."[9] To suggest that heterosexual marriage is an unconstitutional definition of marriage is curious, given the history of marriage in the West,[10] and it clearly expresses the extent to which advocates seek to move opinion on marriage. Further, it is a blatant disregard of the preamble to the Civil Marriage Act that acknowledges the diverse views on marriage.[11] The advocates have gained a new-found confidence to do so because marriage has been redefined in Canada,[12] and it has moved the conversation on to what ought to be done to those religious entities that insist on maintaining the traditional heterosexual definition.

There can be little doubt that the redefinition of marriage in Canada has played a major part in reimagining the law's role in accommodating religion, religious institutions, and their traditional sexual norms in the eyes of, at least, the legal profession. This has occurred at a time when there is considerable debate in the legal academy that challenges the very position of religion's status in the law.[13]

In a recent article, I argued that there is a legal revolution underway against the special protection historically given to religion in Western legal traditions.[14] The analysis involved the work of Thomas S. Kuhn[15] as the analytical framework to understand the changing paradigm shift among legal academics and professionals who do not accept the special legal status that liberal democracies grant to accommodate religion.[16] These academics and professionals not only advocate the removal of religion's legal accommodation, but elevate equality claims against discrimination as the primary concern in human rights discourse.[17]

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9 *See* Barry W. Bussey, *The Experts Demand Deference: Law Societies & TWU*, CANADIAN COUNCIL OF CHRISTIAN CHARITIES: INTERSECTION (Jun. 9, 2016), https://www.cccc.org/news_blogs/barry/2016/06/09/the-experts-demand-deference-law-societies-twu/ (recounting the author's personal experience during the oral arguments before the British Columbia Court of Appeal and the Ontario Court of Appeal).

10 *See* JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION AND LAW IN THE WESTERN TRADITION 33, 288 (2d ed. 2012) (discussing the biblical foundations of marriage in Western tradition).

11 Civil Marriage Act, S.C. 2005, c 33 (Can.) ("WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage.").

12 *Id.*

13 *See, e.g.*, YOSSI NEHUSHTAN, INTOLERANT RELIGION IN A TOLERANT-LIBERAL DEMOCRACY 125 (2015) (arguing monotheistic religions are intolerant by nature).

14 Barry W. Bussey, *The Legal Revolution Against the Place of Religion: The Case of Trinity Western University Law School*, 2016 BYU L. REV. 1127, 1129 (2016).

15 THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

16 Bussey, *supra* note 14, at 1127, 1154–55.

17 *Id.* at 1159.

This Article digs further into the effects of the legal redefinition of marriage as experienced by religious law schools, and by extension, all religious institutions that maintain the traditional definition of marriage. It also refers to the Canadian case involving the proposed school of law by Trinity Western University in Langley, British Columbia.[18] The TWU law school case is a prime example of the point of this paper: The redefinition of marriage has led to an intolerance of religious institutions that maintain the belief and practice of traditional marriage. There is a growing contempt of such religious opinions and practices because they are viewed as wrong. This contempt is evident in a number of instances that are reviewed in this Article—including the use of very unflattering language by the Law Benchers of the various Canadian law societies towards TWU, and a number of rather outlandish arguments against TWU asserted by legal academics. When we step back and consider the dramatic denunciations TWU has received from the legal profession, it is very clear that there is a contemptuous attitude—if not a vilification—of those who would maintain the traditional view on marriage.

I. THE INFLATIONARY DEMANDS OF EQUALITY

All rights have an inflationary nature to them. If left unchecked, a particular rights claim will dominate all other rights claims. Every advocate for a particular right is focused on that right and sees the world through that lens. However, living in a liberal democracy, as we do, all rights are subject to reasonable limits.[19] Those limits allow other rights to have a space. Without such limits we simply could not function.

Equality rights are as inflationary as other rights. It seems that the inflation of a particular rights claim is directly related to its ability to attract the attention and imagination of cultural elites. Over the last two decades, sexual equality rights have had a major impact on human rights litigation in Western democracies.[20] Given the amount of

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[18] Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423 (B.C.); *About TWU*, TRINITY W. UNIV., www.twu.ca/about (last visited Feb. 12, 2017).

[19] *See* R. v. Oakes, [1986] 1 S.C.R. 103, 136–37 (Can.) (establishing the test for what constitutes a reasonable limit).

[20] I am not making a judgement of whether this movement is right or wrong, but I am saying that there has been a dramatic increase in awareness and sensitivity on the issue that has occupied a significant amount of litigation. Consider just a sampling of the Canadian Supreme Court's decisions in this area over the last few decades: Sask. Human Rights Comm'n v. Whatcott, [2013] 1 S.C.R. 467 (Can.); Chamberlain v. Surrey Sch. Dist. No. 36, [2002] 4 S.C.R. 710 (Can.); B.C. Coll. of Teachers v. Trinity W. Univ., [2001] 1 S.C.R. 772 (Can.); Little Sisters Book and Art Emporium v. Canada (Minister of Justice), [2000] 2 S.C.R. 1120 (Can.); M. v. H., [1999] 2 S.C.R. 3 (Can.); Vriend v. Alberta, [1998] 1 S.C.R. 493 (Can.); Egan v. Canada., [1995] 2 S.C.R. 513 (Can.); Canada (Att'y Gen.) v. Mossop, [1993] 1 S.C.R. 554 (Can.); Haig v. Canada, [1993] 2 S.C.R. 995 (Can.).

consideration sexual equality has received, there is little wonder that with each success in recognition and accommodation, there is a further demand that sexual equality be made on par with other long-established equality rights, such as religious freedom.[21]

However, it is a false dichotomy to consider this a battle between "equality" and "religion" for the simple reason that "religion" is itself an equality right in s. 15 of the Charter.[22] What advocates of equality are demanding is not simply equality rights but, as Iain T. Benson has termed it, "asymmetrical equality" claims that have the effect of vanquishing religious rights, despite religion being listed alongside other rights in typical equality or non-discrimination provisions. It is to be expected that sexual equality rights would gain traction with other rights given our political and social context. What was not expected was the move toward domination of sexual equality vis-à-vis religious freedom, including religious equality, in the private sphere.[23] Thus, the *asymmetrical* character of the sexual equality claim if it does not keep religious equality (and religious settings and contexts) in view.[24]

The TWU law school case has become ground zero for the clash of equality rights and religious freedom in Canada.[25] The case is a direct result of the redefinition of marriage in Canada. As will be noted below, TWU had already faced a similar challenge to its admissions policy that the Supreme Court of Canada (SCC) decided in 2001 in TWU's favor.[26] The only legally relevant intervening event or decision between the 2001 TWU decision and the current challenge was the redefinition of marriage.[27] It is that event alone that makes a subsequent challenge to TWU's admissions criteria plausible.

The current TWU legal challenge exposes a number of fractures within the legal profession, including those between legal academics and the profession, legal academics and the judiciary, and Christian and non-

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[21] Canadian Charter of Rights and Freedoms, Part I, § 2(a) of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

[22] *Id.* at § 15(1) ("Every 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.") (emphasis added).

[23] I do not think one right dominating the other in the public sphere is justified either, but that will take another paper to consider.

[24] I owe the insight of the asymmetrical character of the sexual equality rights claims to my discussions with Professor Benson. *See* Iain T. Benson, Getting Religion and Belief Wrong by Definition: Why Atheism and Agnosticism Need to be Understood as Beliefs and Why Religious Freedom is not 'Impossible': A Response to Sullivan and Hurd (Apr. 20, 2017), https://ssrn.com/abstract=2955558.

[25] Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423, para. 2 (B.C.).

[26] Trinity W. Univ. v. Coll. of Teachers, [2001] 1 S.C.R. 772, paras. 110–11 (Can.).

[27] Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, paras. 1–2 (Can.).

Christian (or non-religious) legal professionals.[28] Further, the case illustrates how the redefinition of marriage has the potential to dramatically alter the relationship between religious institutions and public governing bodies.[29]

If the liberal democratic project[30] is to be successful, there needs to be a recognition that rights of sexuality and the right of religious freedom are both rights of equality. As currently imagined by equality advocates, the relationship between the two rights is asymmetrical. That is to say, "religious rights" are, in a sense, deflated to nonexistence. That is simply not the case. There must be a recalibration of the relationship between the two, recognizing that both are within the context of equality rights. It is not to be the relationship of a zero-sum game, but rather there needs to be a proper balancing of interests where both rights maintain equal respect and value. They must both have space, even though the positions of each may be repugnant to the other. That requires us to come to terms with the increasing dissonant posture on both sides of the cultural divide. The only way forward is to agree to disagree in a spirit of peace and civility, recognizing the basic human dignity of the other. Without the willingness to live with dissonance, as "background noise," our society will face an uncertain future.

For society at large, that means that religious communities must have the right and freedom to establish their own institutions, such as universities, that propagate their traditional religious and moral norms—including traditional marriage. Even though such institutions will be at odds with the secular norm on sexual equality,[31] it is a basic requirement for the ongoing liberal project of maximizing individual freedom while maintaining civil peace.

Unfortunately, as equality rights have advanced, there has been an increasing demand for more space that not only includes the public sphere but also the private sphere.[32] Because space in both spheres is

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[28] Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423 paras. 1, 2, 51 (B.C.).

[29] *See id.* at paras. 183–85 (predicting that if the state equates accreditation with endorsement of TWU's definition of marriage, most religious facilities will never gain approval).

[30] I describe the "liberal democratic project" as seeking to maximize individual freedom while maintaining civil peace.

[31] *See* Katherine Shaw Spaht, *Revolution and Counter-Revolution: The Future of Marriage in the Law*, 49 LOY. L. REV. 1, 1–2 (2003) (discussing various ideological "revolutions" that are affecting traditional marriage and family life).

[32] *E.g.*, *Christian-Owned Bed and Breakfast Must Host Gay Weddings, State Panel Finds*, FOX NEWS (Dec. 6, 2016), http://www.foxnews.com/us/2016/12/06/christian-owned-bed-and-breakfast-must-host-gay-weddings-state-panel-finds.html; Hazel Torres, *Christian Bakers Challenge Oregon State's Gay Wedding Cake Ruling, $135K Fine Before Appeals Court,* CHRISTIAN TODAY (March 7, 2017), https://www.christiantoday.com/article/christian.bakers.challenge.oregon.states.gay.wedding.cake.ruling.135k.fine.before.appeals.court/105357.htm; Yesenia Robles, *Colorado Baker*

finite, there must be some agreement to coexist. However, the inflationary characteristic of equality rights, which would asymmetrically eclipse religious rights, will ultimately have to be curbed if we are going to be successful in the liberal democratic project.

A. Inflationary Concern at the Marriage Reference Case

In October 2004, as counsel for my client intervener, the Seventh-day Adventist Church in Canada, I argued its position at the SCC in the Same-Sex Marriage Reference Case.[33] That case was brought by the Government of Canada to ask the SCC whether Parliament had the constitutional jurisdiction to redefine marriage.[34] The SCC ruled that it did.[35] In 2005, Parliament redefined marriage, for civil purposes, as "the lawful union of two persons to the exclusion of all others."[36]

The primary concern of my client was the inflationary nature of equality rights.[37] It was one thing to redefine civil marriage, but what would that mean for the future of religious organizations, such as schools, or clergy who refused to perform marriages that violated their conscience? My client's fear was reasonable, given the manner in which equality claims evolved as quickly as they did. Equality was not a constitutionally protected right until the Canadian Charter of Rights became law in 1982.[38] Even then, the Section 15 equality rights provision of the Charter did not come into effect until April 17, 1985, three years after the rest of the Charter.[39] That delay is an indication of the government's recognition of the dramatic effect that equality rights would have on the Canadian polity. Time was needed to adjust.

As I stood at the lectern, I noted my clients' concern "that the redefinition of marriage will eventually lead to state coercion of

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Wants U.S. Supreme Court to Hear Gay Wedding Cake Case, DENVER POST (July 22, 2016), www.denverpost.com/2016/07/22/colorado-baker-gay-wedding-cake-supreme-court/; Sandhya Somashekhar, *Washington State Supreme Court Rules Against Florist Who Turned Away Gay Couple*, WASH. POST (Feb. 18, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/02/17/washington-state-supreme-court-rules-against-florist-who-turned-away-gay-couple/?utm_term=.5368bba97c12.

[33] Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 703 (Can.).

[34] *Id.* at para 40.

[35] *Id.* at paras. 40, 43, 50, 52–54, 73.

[36] Civil Marriage Act, S.C. 2005, c 33 (Can.).

[37] Transcript of Oral Argument at 173–74, Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698 (Can.) (Argument of the Interveners Seventh-Day Adventist Church in Canada by Barry Bussey) [hereinafter SCC Oral Argument].

[38] Canadian Charter of Rights and Freedoms, Part I, § 15 of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

[39] Subsection 32(2) provides that Section 15 shall not have effect until three years after Section 32 comes into force. Section 32 came into force on April 17, 1982; therefore, Section 15 became effective on April 17, 1985. *Id.* at §§ 15, 32(2).

nonconforming groups who do not share the state's enthusiasm."[40] While the Court may have seen such cautions as "hypothetical scenarios,"[41] religious groups understand that non-compliance with societal norms often brings with it state coercion. There are many examples of this in Canadian history. For example, the Jehovah's Witnesses' anti-Catholic sentiments and proselytizing in Quebec led to Quebec authorities refusing a Jehovah's Witness's business a license to operate.[42] It took the SCC's intervention to stop the injustice.[43] The Court said: "To deny or revoke a permit because a citizen exercises an unchall[e]ngeable right totally irrelevant to the sale of liquor in a restaurant is beyond the scope of the discretion conferred . . . ."[44]

In 1995, the SCC in *Egan v. Canada* recognized "sexual orientation" as an un-enumerated but constitutionally protected "analogous" ground of equality in the Charter.[45] Many were concerned that such a result would lead to a redefinition of marriage, something that was a great unknown.[46] However, Justice La Forest tried to alleviate any concerns about the place of marriage in the decision, noting:

> [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. . . . [M]arriage 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.[47]

Less than ten years later, the SCC held that parliament could, in fact, redefine marriage, just as Justice La Forest hinted was possible.[48]

Martha McCarthy is a prominent sexual equality rights lawyer in Toronto, who litigated the *M. v. H.* case[49] that went to the SCC.[50] The

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40 SCC Oral Argument, *supra* note 37, at 173.

41 Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 720-721 (Can.).

42 Roncarelli v. Duplessis, [1959] S.C.R. 121, 122 (Can.).

43 *Id.*

44 *Id.* at 123.

45 [1995] 2 S.C.R. 513, 513–514 (Can.).

46 *See* Bruce L. Guenther, *Ethnicity and Evangelical Protestants in Canada*, *in* CHRISTIANITY AND ETHNICITY IN CANADA 395, 397 (Paul Bramadat & David Seljak eds., 2008) (describing the Interfaith Coalition for Marriage and Family's efforts to prevent the redefinition of marriage by intervening in *Egan* and similar cases, and the "marriage movement" that followed).

47 Egan v. Canada, [1995] 2 S.C.R. 513 paras. 21–22 (Can.) (plurality opinion).

48 Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 699 (Can.). La Forest was not speaking for the majority on the marriage issue in the *Egan* decision, but rather only for the plurality made up of Chief Justice Lamer, Justice Gonthier, Justice Major, and Justice La Forest. Egan v. Canada, [1995] 2 S.C.R. 513, 526 (Can.).

49 M. v. H., [1999] 2 S.C.R. 3 (Can.).

50 *Martha McCarthy, LSM*, MARTHA MCCARTHY & CO. (2015), http://www.mccarthyco.ca/Martha-McCarthy.html (last visited Feb. 18, 2017).

SCC ruled that the heterosexual definition of "spouse" in Ontario's Family Law Act (FLA)[51] was unconstitutional.[52] That 1999 win at the SCC "set the stage for equal marriage in 2003," noted McCarthy.[53] She described the strategy behind the sexual equality movement to redefine marriage. "[W]e said it wasn't about marriage, it was about equal rights for unmarrieds," she said. "But, of course, as soon as we won that, we could argue that the only thing gays and lesbians don't have now is marriage."[54] She continued: "[T]here was a real symbolism to *M v. H*, because it was about spousal support. . . . When we won that case, there really was a huge celebration because we knew the dominoes were all falling."[55]

"With each case that advanced the protections and recognition of sexual orientation, the closer the marriage issue has come into focus," I argued before the SCC in the Marriage Reference case.[56] However, anyone reading the law review articles on the subject knew that marriage was not the end of the sexual evolution; other sexual norms were going to be reviewed.[57] Professor Bruce MacDougall argued that "[a]s gay and lesbian unions are being legally recognized, so rules respecting other forms of unions, polygamous, incestuous, and so on will be re-examined."[58]

This rapid movement in asymmetrical equality championed by many as the "right side of history"[59] was nevertheless disconcerting for

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[51] Family Law Act, R.S.O. 1990, c. F.3, s. 29 (Can.).

[52] M v. H., [1999] 2 S.C.R. 3, paras. 1, 134, 136 (Can.).

[53] Ellen Vanstone, *Redefining the Family*, CANADIAN LAW. MAG., Feb. 2005, at 22.

[54] *Id.*

[55] *Id.*

[56] SCC Oral Argument, *supra* note 37, at 173.

[57] *Id.* at 173–74; *see also* Spaht, *supra* note 31, at 1–2 (discussing various ideological "revolutions" that have occurred and the impact they have had on traditional marriage).

[58] Bruce MacDougall, *The Separation of Church and Date: Destabilizing Traditional Religion-Based Legal Norms on Sexuality*, 36 U.B.C. L. REV. 1, 5 (2003); *see also* Reference re: Section 293 of the Criminal Code of Canada, 2011 BCSC 1588 (B.C.) (re-evaluating a rule respecting polygamous unions, as MacDougall predicted, in a judicial reference decision the Province of British Columbia asked for); R v. Labaye, [2005] 3 S.C.R. 728, paras. 3, 62, 71 (Can.) (upholding consensual group sex and "swinging" as not violating the Canadian Criminal Code).

[59] This continues to be the ubiquitous rallying call of those advancing sexual equality. *E.g.*, Paul Bramadat, *Managing and Imagining Religion in Canada from the Top and the Bottom: 15 Years After*, *in* RELIGION AND THE EXERCISE OF PUBLIC AUTHORITY 61, 68 (Benjamin L. Berger & Richard Moon, eds., 2016) (quoting Frances Mahon, a lawyer for Out On Bay Street, an LGBTQ advocacy group, who supported the Law Society of Upper Canada's decision against TWU) ("[The decision] suggests to me [the Law Society of Upper Canada] chose to be on the right side of history."); Elaine Craig, *The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program*, 25 CAN. J. WOMEN & L. 148, 170 (2013) [hereinafter Craig, *The Case for Rejecting TWU*] ("In deciding whether to approve a law degree from TWU, the Federation and its

those religious minorities that continued to believe and practice traditional marriage not only within their religious communities but within their religious organizations. My client was concerned about other institutional concerns going forward in the new era of changing social sexual norms.

During oral argument, I began by explaining that the state's redefinition of marriage comes with the potential for coercive power.[60] The state's virtually unlimited resources to inculcate and promote such an institution will, if unchecked, drift into the domain of religious institutions.[61] While such impact cannot be accurately predicted, it can nevertheless be reasonably anticipated as substantial, and by necessity, will seek to erode religious freedom and expression.[62]

One of the concerns I raised was that of the autonomy of church schools.[63] The Seventh-day Adventist Church runs a number of elementary and secondary institutions, and one post-secondary institution, across Canada.[64] There were concerns that the Church's curriculum on family planning would eventually clash with a new provincial curriculum on marriage in due course. Church schools that refused to adopt the new curriculum may face decertification, I argued, from the provincial departments of education. Students would then face a problem with being accepted into post-secondary education without a recognized Grade Twelve diploma.[65]

The concern was not without foundation. In 2002, the Marc Hall case, from the province of Ontario, became a case-in-point for the concerns of religious schools regarding the changing sexual norm environment.[66] The reasoning of that Ontario court decision has become a template for the arguments going forward against the law's accommodation of religious institutions, despite the fact that the case has no precedential authority because there was only one hearing held on a temporary injunction application.[67] There was never a hearing on

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member law societies will need to choose on which side of legal history they wish to stand.").

Similarly, Martha McCarthy reminisced that, during her fight to redefine marriage, "[t]here were low moments," but what kept her going was the "knowledge that we were on the side of the angels." Vanstone, *supra* note 53, at 22.

[60] SCC Oral Argument, *supra* note 37, at 173.

[61] *Id.* at 174.

[62] *Id.*

[63] *Id.* at 174–75.

[64] *Who We Are*, SEVENTH-DAY ADVENTIST CHURCH IN CAN. (Jan. 1, 2017), http://www.adventist.ca/about/who-we-are/.

[65] SCC Oral Argument, *supra* note 37, at 175.

[66] Hall v. Powers (2002), 59 O.R. 3d 423, para. 5 (Can. Ont. C.A.).

[67] *Id.* at para. 1.

the substantive issues of the case, as it was later dropped.[68] This Article now turns to a review of that case.

B. Hall v. Powers

Marc Hall was a Roman Catholic, grade 12 student at a Roman Catholic high school in Oshawa, Ontario.[69] He sought permission to bring his boyfriend to the school prom and the principal denied his request because of the school's religious teaching against homosexuality.[70] The school board refused Mr. Hall's appeal of the principal's decision.[71] Hall then commenced legal action against the principal and the school board, alleging discrimination on the basis of sexual orientation, in violation of the Canadian Charter of Rights and Freedoms.[72] Because a trial date would occur after the prom, he applied for an injunction to restrain the school from preventing him to attend the prom with his boyfriend.[73]

Justice MacKinnon, in granting the injunction,[74] noted that the Catholic school was a government actor (in part because it received government funding) and therefore subject to the Charter.[75] The court was not convinced that the Catholic Church was clear in its doctrine with respect to the morality of homosexual behavior. Justice MacKinnon stated:

> The Board's decision was taken by those informed by Catholic principles and, it was argued, was well within the sphere of denominational decision-making protected by s. 93 [of the Constitution Act, 1867]. The Bishop's affidavit asserted that it was "an authentically Catholic position". But the evidence before me indicates it is not the only Catholic position, nor is there any evidence that it is the majority position. Nevertheless, where such a decision is made

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[68] John R. Kennedy, *10 Years Later, Marc Hall is Much More than 'The Prom Guy'*, GLOBAL NEWS (last updated Dec. 27, 2013, 10:37 AM), http://globalnews.ca/news/290335/10-years-later-marc-hall-is-much-more-than-the-prom-guy/.

[69] Hall v. Powers (2002), 59 O.R. 3d 423, para. 2 (Can. Ont. C.A.).

[70] *Id.* at para. 4.

[71] *Id.*

[72] *Id.* at para. 13.

[73] *Id.* at para. 1.

[74] To be successful in an application for an interlocutory injunction, the applicant must establish: a) there is a serious issue to be tried; b) they will suffer irreparable harm if the interlocutory injunction is not granted; c) the balance of convenience favors the granting of the relief sought—i.e., there will be more harm to the applicant if not granted than to the respondent if granted. *Id.* at paras. 11, 14.

[75] He said: "The proper approach is to look at the rights as they existed in 1867 but then to apply 2002 common sense. In 2002, a School Board's legal authority (whether public or separate) is part of our provincial public educational system which is publicly funded by tax dollars and publicly regulated by the province. . . . [T]he defendant Board is, in law, a religious government actor." *Id.* at para. 43.

> bona fide and within [a] protected sphere, is it insulated from *Charter* scrutiny?
>
> It is not the task of a civil court to direct the principal, the Board, the Roman Catholic Church or its members, or indeed any member of the public as to what his or her religious beliefs ought to be. The separation of church and state is a fundamental principle of our Canadian democracy and our constitutional law. Debates as to what the Catholic faith should require on the issue of homosexuality ought generally to be resolved within the Roman Catholic Church and not in a court of law. But I find that Mr. Hall is entitled in this court to question the correctness of the statement in the defendant's materials that Catholic teachings and Board policy in fact proscribe "homosexual behaviour" and a "homosexual lifestyle" so as to justify prohibiting Mr. Hall from attending his prom with Mr. Dumond. If individuals in Canada were permitted to simply assert that their religious beliefs require them to discriminate against homosexuals without objective scrutiny, there would be no protection at all from discrimination for gays and lesbians in Canada because everyone who wished to discriminate against them could make that assertion.[76]

Justice MacKinnon said, on the one hand, that it is not the role of the court to dictate beliefs to the Catholic Church.[77] However, the Court failed to accept the Church's own authority on its beliefs.[78] As I have noted in another article, "[t]he Catholic Church is not a democracy [such that it would require a 'majority position']. It has a history, a culture, and a doctrine that are not based—nor are they claimed to be based—on liberal pluralistic ideology."[79] In spite of this, the Court not only imposed its "progressive views" on this religious community, but it rejected the community's own religious authorities as to what it believed and expected its members to follow.[80]

The court muscled in on the Church's role to determine for itself what constituted its faith.[81] The Church's teaching was distasteful to the judge's sensitivity of society's change in sexual mores.[82] Justice MacKinnon presented a reinterpretation of section 93 of the Constitution Act, 1867, that gave Roman Catholic schools public funding.[83] Said the Justice:

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76 *Id.* at paras. 30–31.

77 *Id.* at para. 31.

78 *Id.* at paras. 31–32.

79 Barry Bussey, *Teaching True Values,* LIBERTY MAG., http://www.libertymagazine.org/article/teaching-true-values (last visited Mar. 15, 2017); *see also* Paul E. Sigmund*, The Catholic Tradition and Modern Democracy*, 49 REV. POLS. 530, 546 (1987).

80 Hall v. Powers (2002) 59 O.R. 3d 423, paras. 44–46 (Can. Ont. C.A.).

81 *Id.* at para. 49.

82 *Id.*

83 *Id.* at para. 44.

> The question is this: Does allowing this gay student to attend this Catholic high school prom with a same-sex boyfriend prejudicially affect rights with respect to denominational schools under s. 93(1) of the Constitution Act, 1867?
>
> I find the answer to this question is "no" because, among other reasons, the evidence demonstrates a diversity of opinion . . . regarding homosexuality . . . .
>
> In addition, it is my view that Principal Powers' decision was not justified under s. 93, both because the specific right in question was not in effect at the time of Union in 1867 and because, objectively viewed, it cannot be said that the conduct in question in this case goes to the essential denominational nature of the school.[84]

The contention between religious freedom and equality in the *Hall* case foreshadowed the similar tensions in the TWU law school case. As Justice MacKinnon, taking an "asymmetrical equality" approach, said: "The idea of equality speaks to the conscience of all humanity—the dignity and worth that is due each human being. Marc Hall is a Roman Catholic Canadian trying to be himself."[85] Similar reasoning was later evident in the Ontario Divisional Court and the Ontario Court of Appeal in the TWU law school case.[86]

Given the current context of the TWU law school, Justice MacKinnon's reference to the 2001 TWU case is helpful in understanding the argument against TWU today:

> In Trinity Western (supra), our Supreme Court acknowledged the right of provincial governments to insist on a policy of non-discrimination, including non-discrimination on the basis of sexual orientation, in provincially regulated schools in British Columbia. Unlike the private university in that case, the defendant Board is, in law, a religious government actor. *Even schooling that is not funded by the government must still respect the right of the province to insist on certain minimal requirements in the education of all students.*[87]

Justice MacKinnon's reference to private schools having to follow "certain minimal requirements" of provincial education authorities, in the context of non-discrimination policies, was picked up by Professor MacDougall.[88] MacDougall provided a rationale as to why even private religious schools must follow the secular norms of non-discrimination.[89] MacDougall reasoned:

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[84] *Id*. at paras. 44–46.

[85] *Id.* at para. 59.

[86] Trinity W. Univ. v. Law Soc'y of Upper Can. 2015 ONSC 4250, paras. 110–13, 115 (Ont.); Trinity W. Univ. v. Law Soc'y of Upper Can. 2016 ONCA 518, para. 59 (Ont.).

[87] Hall v. Powers (2002) 59 O.R. 3d 423, para. 43 (Can. Ont. C.A.) (emphasis added).

[88] Bruce MacDougall, *The Separation of Church and Date: Destabilizing Traditional Religion-Based Legal Norms on Sexuality*, 36 U.B.C. L. REV. 1, 16 (2003).

[89] *Id.* at 15, 19.

> In the context of an accredited school or college, however, the state is lending or transferring its authority—and duties—to such institutions. The constitutional obligations of the state ought to be transferred with that authority and duty. Otherwise, as R. MacKinnon J. suggested, the state could handily avoid many of its *Charter* obligations by transferring its duties to religious organizations which could claim religious immunity from compliance with *Charter* guarantees of equality.[90]

To suggest that schools, by virtue of obtaining provincial accreditation, have state "authority" and "duties" is an attempt to transform private actors into public actors, which they are not nor can be. That is not what accreditation is about. Any general review of accreditation standards and procedures[91] does not reveal at their core any requirement that the institution adopt the responsibilities of the provincial government as mandated by the Constitution. For example, while the Ontario Postsecondary Education Quality Assessment Board requires its members to be "sensitive to issues of gender, race, language, culture, and religion that may affect the conduct of a review or decision,"[92] the primary emphasis of its work is to ensure that programs offered by the institution properly educate the student with the appropriate minimum requirements.[93]

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[90] *Id.* at 19.

[91] For example, see the requirements for accreditation in Ontario: POSTSECONDARY EDUC. QUALITY ASSESSMENT BD., ONT. QUALIFICATIONS FRAMEWORK, http://www.peqab.ca/Publications/oqf.pdf (last visited Feb. 4, 2017); ONTARIO UNIVS. COUNCIL ON QUALITY ASSURANCE, QUALITY ASSURANCE FRAMEWORK (2010), http://oucqa.ca/wp-content/uploads/2016/10/Quality-Assurance-Framework-and-Guide-Updated-October-2016-Compressed-Version.pdf; POSTSECONDARY EDUC. QUALITY ASSESSMENT BD., HANDBOOK FOR PRIVATE ORGANIZATIONS APPLYING FOR MINISTERIAL CONSENT UNDER THE *POST-SECONDARY EDUCATION CHOICE AND EXCELLENCE ACT, 2000* (2016), http://www.peqab.ca/Publications/Handbooks%20Guidelines/2016HNDBK private.pdf.

[92] POSTSECONDARY EDUC. QUALITY ASSESSMENT BD., *supra* note 91, at 9.

[93] According to the Handbook:

> By ensuring its standards reflect recognized practice, PEQAB
> - facilitates comparative quality assessment
> - facilitates lifelong learning by documenting the standards students have met and the outcomes they have achieved
> - facilitates labour mobility
> - facilitates credit transfer and recognition
> - fosters accountability by requiring institutions to articulate standards and outcomes
> - ensures graduates possess knowledge and skills necessary for employment and further study
> - ensures that students and society are served by programs of assured quality.

Id. at 2.

Hall laid the foundation for the arguments against TWU in the law school context. Of course, *Hall* differs from the TWU law school case in that it is a secondary school as opposed to a university.[94] The Catholic school is publicly funded and therefore a public actor,[95] whereas TWU is a private actor.[96] Despite this, the substantive issues remain the same. We have a religious school in both instances.[97] Students are not compelled to attend either. By virtue of attending voluntarily, the students are agreeing to abide by stipulations and lifestyle codes that are not themselves illegal. As noted above, the Court in *Hall* made it clear that its view that the school must comply with the province's prohibitions against discrimination would remain the same even if the school had not received government funding.[98] The Ontario courts also made it clear in *TWU* that the private nature of the school was immaterial, and that it could not "force" a law society to condone its worldview.[99]

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94 Hall v. Powers (2002), 59 O.R. 3d 423, para. 2 (Can. Ont. C.A.); Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423, para. 5 (B.C.).

95 Hall v. Powers (2002), 59 O.R. 3d 423, para. 16 (Can. Ont. C.A.).

96 Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423, para. 5 (B.C.).

97 Hall v. Powers (2002), 59 O.R. 3d 423, para. 2 (Can. Ont. C.A.); Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423, para. 5 (B.C.).

98 Hall v. Powers (2002), 59 O.R. 3d 423, para. 43 (Can. Ont. C.A.).

99 Religious freedom, said the Ontario Divisional Court,

> does not carry with it, however, a concomitant right in TWU to compel the [Law Society of Upper Canada] to accredit it, and thus lend its tacit approval to the institutional discrimination that is inherent in the manner in which TWU is choosing to operate its law school. To reach a conclusion by which TWU could compel the respondent, directly or indirectly, to adopt the world view that TWU espouses would not represent a balancing of the competing *Charter* rights. Rather, such a conclusion would reflect a result where the applicants' rights to freedom of religion would have been given unrestricted sway.
>
> In exercising its mandate to advance the cause of justice, to maintain the rule of law, and to act in the public interest, the respondent was entitled to balance the applicants' rights to freedom of religion with the equality rights of its future members, who include members from two historically disadvantaged minorities (LGBTQ persons and women). It was entitled to consider the impact on those equality rights of accrediting TWU's law school, and thereby appear to give recognition and approval to institutional discrimination against those same minorities. Condoning discrimination can be ever much as harmful as the act of discrimination itself.
>
> The respondent was also entitled, in the exercise of its statutory authority, to refuse to accredit TWU's law school arising from the discriminatory nature of the Community Covenant. It remains the fact that TWU can hold and promote its beliefs without acting in a manner that coerces others into forsaking their true beliefs in order to have an equal opportunity to a legal education. It is at that point that the right to freedom of religion must yield . . . .

Trinity W. Univ. v. Law Soc'y of Upper Can., 2015 ONSC 4250, paras. 115–17 (Ont.) (citations omitted).

Though the injunction aspect of *Hall* did not allow for a thorough evaluation of the constitutional issues in a trial (leading a judge to later hold it to have no legal precedential value[100]), and though it was decided before marriage was redefined in 2005, it nevertheless foreshadowed the arguments against accrediting TWU's law school.[101] The re-definition of marriage gave further impetus to the reasoning that the law must keep up with the times (i.e., "common sense"), and that the legal accommodation given to religious institutions is subject to evolving equality rights.[102]

II. THE REDEFINITION OF MARRIAGE IN CANADA

In response to the decision of various courts of appeal that redefined marriage to include same-sex unions,[103] the Canadian federal government drafted its own legislation, which said in part:

1. Marriage, for civil purposes, is the lawful union of two persons to the exclusion of all others.
2. Nothing in this Act affects the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs.[104]

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[100] In a subsequent hearing, Justice Shaughnessy R.S.J. granted leave for the plaintiffs to discontinue the action. Hall v. Powers (2005), 80 O.R. 3d 462, para. 16 (Can. Ont. Sup. Ct. J.). The defendants asked that the interlocutory injunction be set aside. *Id.* The justice was of the view that he did not have the jurisdiction to grant that request. *Id.* at para. 14. However, he recognized that there was no evaluation of the constitutional issues:

> The defendants submit that the use of a lower standard for the interlocutory injunction had an impact on the decision, which is now a precedent of sorts. In this regard, I would note that injunction reasons are not often accorded great weight, as they are written on an urgent basis based on limited material and the legal issues, out of necessity, are dealt with in a cursory and preliminary manner.

Id. at para. 5. Given the fact that there was no trial on the evidence, Justice Shaughnessy noted, "a trial judge might have reached the conclusion that the defendants' legal position is correct. Accordingly, Justice MacKinnon's Reasons should be read in light of these developments." *Id.* at para. 7.

[101] *See* Hall v. Powers (2002), 59 O.R. 3d 423, paras. 59, 61 (evoking sentiments of equality and human dignity in a decision to override the religious freedom of a religious school).

[102] Civil Marriage Act, S.C. 2005, c 33 (Can.); Craig, *The Case for Rejecting TWU*, *supra* note 59, at 168 (arguing that evolving societal values require a change in the balance between religious freedom and equality).

[103] *See, e.g.*, Halpern v. Canada (Att'y Gen.) (2003), 60 O.R. 3d 321, paras. 2, 87 (Can. Ont. C.A.) (discussing the constitutional issues related to the human dignity and equality of same-sex couples); Barbeau v. British Columbia (Att'y Gen.), 2003 BCCA 251, paras. 1, 7 (B.C.) (ruling that the common law bar to marriage of same-sex couples is offensive to the Canadian Charter of Rights and Freedoms).

[104] Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 699 (Can.).

The federal government then asked the SCC four questions as to the constitutionality of the proposed act.[105] The SCC held that section 1 of the proposed act was constitutional—Parliament had the jurisdiction to redefine marriage—but that Parliament did not have the jurisdiction to enact section 2.[106] Section 2 was an issue of solemnization of marriage, for which the Constitution gives responsibility to the provinces, not the federal government.[107]

Even more surprising was the SCC's refusal to answer the fourth question—whether the opposite-sex requirement for marriage was consistent with the Charter.[108] The Court noted that the federal government was intent on going ahead with the redefinition regardless of the Court's answer to the question.[109] The Court did not want to get caught up in the political maelstrom;[110] ironically, by failing to answer the fourth question, it did.

The SCC's ruling did not elaborate on the meaning of marriage, its definition, its purpose, or on the state interest concerning it.[111] Rather, the ruling was a decision on the legal jurisdiction over who controls the capacity and solemnization of marriage.[112] There was no flowery

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[105] The questions were:

1. Is the annexed *Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes* within the exclusive legislative authority of the Parliament of Canada? If not, in what particular or particulars, and to what extent?
2. If the answer to question 1 is yes, is section 1 of the proposal, which extends capacity to marry to persons of the same sex, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars, and to what extent?
3. Does the freedom of religion guaranteed by paragraph 2(*a*) of the *Canadian Charter of Rights and Freedoms* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?
4. Is the opposite-sex requirement for marriage for civil purposes, as established by the common law and set out for Quebec in section 5 of the *Federal Law—Civil Law Harmonization Act, No. 1*, consistent with the *Canadian Charter of Rights and Freedoms*? If not, in what particular or particulars and to what extent?

Id.

[106] *Id.*

[107] *Id.*

[108] *Id.* at paras. 3, 7.

[109] *Id.* at para. 65.

[110] *Id.*

[111] *Id.* at paras. 21–22 (stating only that "The Meaning of Marriage Is Not Constitutionally Fixed" and that "[m]arriage, from the perspective of the state, is a civil institution").

[112] *Id.* at paras. 31–33.

language about the marital institution: an astute decision by a Court walking through a politically-sensitive minefield.[113]

The Court addressed the issue of religious freedom, noting that "[t]he protection of freedom of religion afforded by s. 2(a) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence."[114] Said the Court:

> The right to freedom of religion enshrined in s. 2(a) of the *Charter* encompasses the right to believe and entertain the religious beliefs of one's choice, the right to declare one's religious beliefs openly and the right to manifest religious belief by worship, teaching, dissemination and religious practice. The performance of religious rites is a fundamental aspect of religious practice.
>
> It therefore seems clear that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(a) of the *Charter*. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the *Charter*.
>
> The question we are asked to answer is confined to the performance of same-sex marriages by religious officials. However, concerns were raised about the compulsory use of *sacred places* for the celebration of such marriages and about being compelled to otherwise assist in the celebration of same-sex marriages. The reasoning that leads us to conclude that the guarantee of freedom of religion protects against the compulsory celebration of same-sex marriages, suggests that the same would hold for these concerns.[115]

Canadian constitutional law requires the provinces, not the federal government, to protect clergy from being forced to perform marriages against their conscience.[116] The compulsory use of "sacred places" raises the question as to what "sacred places" means. One can clearly envision the sanctuaries, but what of church halls and church school auditoriums? There appears to be a growing consensus that such religious facilities are not to be used contrary to the beliefs of the religious community.[117]

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[113] *See id.* at para. 8 (explaining that while the questions on same-sex marriage were politically charged, there was sufficient legal content for judicial consideration).

[114] *Id.* at para. 53.

[115] *Id.* at paras. 57–59 (emphasis added) (citation omitted).

[116] *Id.* at paras. 55, 58–59.

[117] *See* Smith v. Knights of Columbus, 2005 BCHRT 544, paras. 108–09 (explaining that the Knights of Columbus had a "constitutionally protected right" to deny a same-sex couple access to its facilities for a marriage ceremony because that practice does not align with the Catholic Church's beliefs); *see also* Spousal Relationship Statute Law Amendment Act, S.O. 2005, c 32 (Can.) (amending the Human Rights Code to state that in certain institutions, an individual may refuse another individual the right to use a sacred place for solemnizing a marriage "if allow[ing] the sacred place to be used . . . would be contrary to . . . the doctrines, rites, usages or customs of the religious body to which the person belongs").

The SCC recognized the autonomy of religious communities in their internal regulations concerning same-sex marriage.[118] The rather patronizing language—"[t]he protection of freedom of religion . . . is . . . jealously guarded in our *Charter* jurisprudence"[119]—is reminiscent of Chief Justice McLachlin's view that religious freedom does not have autonomy in and of itself, but is rather a subset of the "rule of law."[120] The late Philosophy Professor Jean Bethke Elshtain strongly disagreed with McLachlin's position in her response in the same volume, taking exception to the Chief Justice's characterization of religion "within law."[121]

In referring to the *Hyde v. Hyde* definition of marriage "in Christendom,"[122] the SCC opined:

> The reference to "Christendom" is telling. *Hyde* spoke to a society of shared social values where marriage and religion were thought to be inseparable. This is no longer the case. Canada is a pluralistic society. Marriage, from the perspective of the state, is a civil institution. The "frozen concepts" reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life.[123]

The clear implication, of course, is that religion is neither progressive nor does it take into account the "realities of modern life." When it comes to the issue of marriage, the SCC is of the view that today's religious norms have no public policy role in marriage. The religious views, as Professor Richard Moon notes, were considered and rejected by the "political and judicial decision-makers, who responded

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[118] Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, paras. 57–58 (Can.).

[119] *Id.* at paras. 52–53.

[120] The Right Honourable Beverley McLachlin, PC, *Freedom of Religion and the Rule of Law: A Canadian Perspective*, *in* RECOGNIZING RELIGION IN A SECULAR SOCIETY: ESSAYS IN PLURALISM, RELIGION, AND PUBLIC POLICY 12, 15–16 (Douglas Farrow ed., 2004).

[121] Jean Bethke Elshtain, *A Response to Chief Justice McLachlin*, *in* RECOGNIZING RELIGION IN A SECULAR SOCIETY 35, 35–36 (Douglas Farrow ed., 2004) ("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.").

[122] In the 1866 English case of *Hyde v. Hyde*, marriage was described as follows:

> What, then, is the nature of this institution as understood in Christendom? Its incidents may vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

Hyde v. Hyde (1866) 1 LRP & D 130 at 133 (Eng.).

[123] Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, para. 22 (Can.).

with legal measures banning sexual-orientation discrimination and affirming the equal value of same-sex relationships."[124]

Despite the fact that the religious norms on marriage were discounted in the public arena, they were entitled to remain in the private religious arena.[125] Religious communities were entitled to carry on their cultural identities with marriage at the center as long as it remained private.[126] In other words, it is not against public policy for religious institutions to maintain their commitment to traditional heterosexual marriage. This is evident in the following: First, as noted above, the SCC clearly exempted clergy from having to perform marriages against their conscience or the beliefs of their religious community.[127] Second, the federal government passed the Civil Marriage Act that made provision for religious objection by members of the clergy.[128] And third, the government amended the Income Tax Act to protect religious charities from losing their registered charitable status for supporting traditional marriage.[129]

Nevertheless, the point is clear: Religion has no public role in public policy concerning marriage. However, it is also evident that religious communities did have autonomy to decide for themselves how marriage will be practiced within their own institutional framework.

What makes the TWU law school case so important is that the legal elites are moving beyond allowing religious communities autonomy on marriage to a view that, even within the internal workings of religious institutions, the religious understanding of marriage must give way to the public secular norm. It is this shift that is particularly egregious for the religious communities going forward and why so much is dependent on the outcome of this case. The argument is that because TWU is engaged in a "public enterprise"—that is to say, running a university—it must abide by the secular norms. This is the MacDougall argument in *Hall*.[130]

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124 Richard Moon, *Conscientious Objections by Civil Servants: The Case of Marriage Commissioners and Same-Sex Civil Marriages*, *in* RELIGION AND THE EXERCISE OF PUBLIC AUTHORITY, *supra* note 59, at 149, 155.

125 *Id.* at 150–51.

126 *Id.*

127 Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, paras. 57–60 (Can.).

128 Civil Marriage Act, S.C. 2005, c 33 (Can.) (stating that the Canadian Charter of Rights and Freedoms accommodates religious freedom and allows religious groups to refuse to perform marriages that are contrary to their religious beliefs).

129 Income Tax Act, R.S.C. 1985, c 1 s. 149.1 (6.201) (Can.) (stating that a registered charity shall not have its registration revoked "because it or any of its members, officials, supporters or adherents exercises, in relation to marriage between persons of the same sex, the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms*").

130 Hall v. Powers (2002), 59 O.R. 3d 423, paras. 15–16 (Can. Ont. C.A.).

In summary, equality rights, like all rights, are inflationary in their demands, and deflationary in their characterizations (as in the case of its treatment of religion), to the point that they would dominate all other rights if given the chance. Sexual equality demands that religious freedom must not inhibit sexual equality's march to be "on the right side of history." There is an air of inevitability to its claims. However, if we are to remain a liberal democratic society, we must recognize that sexual equality, like all rights, must be curbed. There are necessary limits—including the limit that other rights, such as religious equality, occupy the same real estate.

Generally speaking, when equality rights came up against religious freedom claims, there had to be some maneuvering to ensure the integrity of both. When marriage was redefined in Canada, the SCC noted that space had to be given for religious communities to maintain their own cultural identity within the private religious sphere.[131] However, as *Hall* showed, there is some judicial opinion—at least in Ontario—that equality rights have significant sway to push past religious norms based on using modern day "common sense."[132] The arguments and reasoning in *Hall* foreshadow the arguments made in the TWU law school case.

III. THE TRINITY WESTERN UNIVERSITY LAW SCHOOL CASE

The context of the TWU law school case is highly influenced by the redefinition of marriage as an incremental step in the inflationary demands of equality. It is that societal context that is underlying the passionate opposition against TWU. This was also noted by Ontario Bencher Gavin MacKenzie.[133]

Remember how Martha McCarthy described the incremental advances of sexual equality rights leading to the declaration that the Ontario FLA heterosexual definition of "spouse" was unconstitutional?[134]

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[131] Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, paras. 55–58 (Can.).

[132] Hall v. Powers (2002), 59 O.R. 3d 423, para. 43 (Can. Ont. C.A.).

[133] Specifically, Bencher Gavin MacKenzie stated:

> I do think that it bears mention that there is probably no issue on which public attitudes have changed more in the last fifteen years or so than the question of public attitudes towards discrimination based on sexual discrimination, and there have been intervening events that may well lead to a different legal conclusion today than was formed by Supreme Court of Canada in the BCCT case when it was decided.
>
> Perhaps, most importantly, the enactment in 2005 of the Civil Marriage Act, which recognizes the legitimacy of same sex marriage throughout Canada.

Transcript of Public Session in Osgoode Hall, Toronto, at 27 (Apr. 10, 2014, 9:00 AM), http://www.lsuc.on.ca/uploadedFiles/ConvocationTranscriptApr102014TWU.pdf (Gavin MacKenzie).

[134] Vanstone, *supra* note 53, at 20.

She then "knew the dominoes were all falling," and that same-sex marriage was next.[135] It was. This is very important to understand. Incremental changes add up. They eventually lead to what some hold as the inevitability of a complete paradigm shift, not only with regard to marriage, but sexual equality in general.

Applying this same incremental approach reasoning to the TWU law school case, we have a situation where asymmetrical rights advocates are not satisfied with redefining marriage for secular purposes and have moved to their next goal: a redefinition of marriage within the private religious sphere. The demands on TWU from the sexual equality advocates, the law societies, and the legal academics are representative of the inflationary nature of equality rights, and have now moved into this next level.

In short, if the advocates have their way, religious communities can no longer maintain the traditional definition of marriage for their own institutional life. Indeed, the law itself must remove any accommodation that would continue such discrimination. As a prelude to this discussion, this Article offers the very tongue-in-cheek, yet serious, description of the future envisioned by Professor Robert Wintemute, who, on one hand, stated that LGBT individuals are to respect freedom of religion "by not asking the law to intervene to change the internal doctrines of religions as to who may be a religious leader, or who may enter a religious marriage," but then presented a much more ambitious project of changing the internal doctrines of religion.[136] In other words, he is an advocate for the incremental, inflationary approach of equality rights:

> Ultimately, as a result of the courageous efforts of LGBT and heterosexual individuals working from within to change internal doctrines, *I believe that religious institutions will realize* one by one that they have been wrong all these years about discrimination based on sex, sexual orientation, and gender identity, and *will voluntarily change their internal doctrines*. They were wrong with regard to their persecution of Jews, their forced conversion of Indigenous peoples, and their support for slavery and apartheid, and they have acknowledged and learned from these mistakes. As sex, sexual orientation, and gender identity discrimination in religious institutions wither away, *the need for an exemption for the religious private sphere will disappear*. Although it is unlikely to occur within my lifetime, I look forward to the day when, for example, the *first lesbian Pope issues her apology for the sins of the Roman Catholic Church against LGBT persons around the world*.[137]

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[135] *Id.* at 22.

[136] Robert Wintemute, *Religion vs. Sexual Orientation: A Clash of Human Rights?*, 1 J.L. & EQUALITY 125, 154 (2002).

[137] *Id.* (emphasis added).

This is an apt description of what the equality revolution is aspiring toward. It is the inevitable march of history to the Promised Equality Land. Those who refuse to get "on the right side of history" are bound to be run over by it. Professor Wintemute's approach is seemingly non-violent; he is willing to allow the religious community space, for the time being, to continue in their backward ways, which will eventually be changed by the "courageous efforts of LGBT and heterosexual individuals working from within to change internal doctrines."[138] That is not the approach of those who are against the TWU School of Law.[139] The anti-TWU legal elites give TWU no space to operate according to its religious beliefs on marriage.[140] They demand compliance with the secular definition of marriage, regardless of the current state of the law, and they seek the law to "change with the times."[141] At work is an overarching confidence in their interpretation of the law—as it ought to be—and their successes to date in the equality rights discourse. This attitude has become quite pronounced in a number of liberal circles.

Harvard law professor Mark Tushnet's May 6, 2016 blog post, *Abandoning Defensive Crouch Liberal Constitutionalism*,[142] has created a stir[143]—and rightly so. His 1200-word essay called for the end of "[d]efensive-crouch constitutionalism" that saw proponents of liberal positions "looking over their shoulders for retaliation by conservatives."[144] He called for the end of such posturing by presenting

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[138] *Id.*

[139] *See* Letter from OUTlaws Canada Leaders to Law Soc'y of Upper Can. (Mar. 1, 2014), http://www.startproud.org/wp-content/uploads/2016/03/TWUOUTlawsCanadaMar1-REV-1.pdf (urging the Law Society of Upper Canada "to refuse or qualify TWU's accreditation" because of "TWU's discriminatory policies towards LGBTQ students").

[140] Craig, *The Case for Rejecting TWU*, *supra* note 59, at 155–57.

[141] *See id.* at 168 (arguing that evolving societal values require a change in the balance between religious freedom and equality).

[142] Mark Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, BALKINIZATION (May 6, 2016) [hereinafter Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*], https://balkin.blogspot.ca/2016/05/abandoning-defensive-crouch-liberal.html.

[143] *See* Ryan T. Anderson, *Absurd Idea: Harvard Professor Says Treat Conservative Christians Like Nazis*, NAT'L INT. (May 9, 2016), http://nationalinterest.org/blog/the-buzz/absurd-idea-harvard-professor-says-treat-conservative-16110 (criticizing Professor Tushent's blog post); Randy Barnett, *Abandoning Defensive Crouch Conservative Constitutionalism*, WASH. POST: THE VOLOKH CONSPIRACY (Dec. 12, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/12/12/abandoning-defensive-crouch-conservative-constitutionalism/?utm_term=.caa0d2e73efd (same); Servando Gonzalez, *Did We Lose the Culture War?*, INTELINET.ORG (July 15, 2016), http://www.intelinet.org/sg_site/articles/sg_culture_war.html (same); Greg Weiner, *Crouching Congress, Hidden Judges*, LIBR. L. & LIBERTY (Dec. 20, 2016), http://www.libertylawsite.org/2016/12/20/crouching-congress-hidden-judges/ (same).

[144] Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, *supra* note 136.

six points to establish the fact that the liberals have won the culture wars and no longer need to cater to the critical conservatives.[145] In short, Professor Tushnet advocates an aggressive stance, not only to challenge legal decisions that liberals disagree with on the basis that they were "wrong the day [they were] decided,"[146] but to take a hard line (i.e., "You lost, live with it") on the losers of the culture wars.[147]

After all, he says, "[t]rying to be nice to the losers didn't work well after the Civil War, nor after *Brown* [*v. Board of Education*]. (And taking a hard line seemed to work reasonably well in Germany and Japan after 1945.)."[148] He does not end there:

> I should note that LGBT activists in particular seem to have settled on the hard-line approach, while some liberal academics defend more accommodating approaches. When specific battles in the culture wars were being fought, it might have made sense to try to be accommodating after a local victory, because other related fights were going on, and a hard line might have stiffened the opposition in those fights. But the war's over, and we won.[149]

Professor Tushnet further asserts there is no need to cater to swing vote judges, such as Justice Anthony Kennedy.[150] He then added a rather curious comment: "Of course all bets are off if Donald Trump becomes President. But if he does, constitutional doctrine is going to be the least of our worries."[151]

Professor Tushnet, by his own account, received a lot of "hate mail" over that post.[152] In a December 20, 2016 post, he responded to the criticism.[153] He now claims that the May 6 post was misread "as advice

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[145] *Id.*

[146] *Id.* As one Canadian commentator states in the context of the TWU case:

> In *TWU* and *Chamberlain*, the Supreme Court tries to avoid choosing one right over another or favouring one group over another. The Court wants to affirm sexual orientation equality but also to respect deeply held religious opposition to homosexuality, or to remain neutral on such issues of fundamental value. It can do both only by adopting an artificially narrow view of sexual orientation equality and an implausible approach to religious inclusion or neutrality.

Richard Moon, *Sexual Orientation Equality and Religious Freedom in the Public Schools: A Comment on* Trinity Western University v. B.C. College of Teachers *and* Chamberlain v. Surrey School Board District 36, 8 REV. CONST. STUD. 228, 229–30 (2003).

[147] Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, *supra* note 136.

[148] *Id.*

[149] *Id.*

[150] *See id.* (using a crude expletive to express the utter indifference that liberals can now show toward Justice Kennedy).

[151] *Id.*

[152] Mark Tushnet, *Doubling Down (on "The Culture Wars Are Over")*, BALKINIZATION (Dec. 20, 2016) [hereinafter Tushnet, *Doubling Down*], https://balkin.blogspot.ca/2016/12/doubling-down-on-culture-wars-are-over.html.

[153] *Id.*

to liberal judges rather than to liberal academics."[154] However, as law professor Paul Horwitz noted, "it does not read as giving advice to judges" nor is it addressed to a "'we' composed entirely of 'liberal academics,' or at least of liberal academics acting as actual academics."[155] Rather, "it reads as advice to a 'we' composed of liberals actually engaged in wielding power."[156] The main concern, says Professor Horwitz, was Professor Tushnet's "advocacy of an aggressive, uncompromising consolidation and advance" on the liberal agenda.[157] Many U.S. voters, said Professor Horwitz, were against the "idea of having centralized establishment elites entrenching their own power and using it by hook or crook to push their victories into new territories on new positions and take a 'hard line' against those 'losers.'"[158] Such "centralized establishment elites" may also be viewed as "civic totalists"[159] or "illiberal fundamentalists."[160] Professor Iain T. Benson summarizes,

> Civic totalists wish to use the law to drive all of society (both public and private spheres) towards their viewpoint of contested matters. Such positions, therefore, whether they emerge from religious communities or outside them, and whether or not they are advanced by religious or non-religious citizens, are inconsistent with the best

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[154] *Id.*

[155] Paul Horwitz, *Doubling Down AND Walking Back on "Abandoning Defensive Crouch Liberal Constitutionalism"*, PRAWFSBLAWG (Dec. 31, 2016), http://prawfsblawg.blogs.com/prawfsblawg/2016/12/doubling-down-and-walking-back-on-abandoning-defensive-crouch-liberal-constitutionalism.html.

[156] *Id.*

[157] *Id.* In his second post, Professor Tushnet discussed limiting religious accommodation with regard to issues including same-sex marriage, multicultural education, transgender rights, affirmative action, and abortion. Tushnet, *Doubling Down*, *supra* note 146.

[158] Horwitz, *supra* note 149.

[159] This is a term coined by Stephen Macedo and used by William Galston. William Galston, *Religion and the Limits of Liberal Democracy*, *in* RECOGNIZING RELIGION IN A SECULAR SOCIETY 41, 43 (Douglas Farrow ed., 2004).

[160] This is a term I suggest fits the situation described by the British Columbia Court of Appeal when it ruled in favor of TWU law school, stating: "This case demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is in itself intolerant and illiberal." Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423, para. 193 (B.C.). Further examples would include Yossi Nehushtan's position that "illiberal" religion should not be tolerated by a liberal democracy, s*ee generally* YOSSI NEHUSHTAN, INTOLERANT RELIGION IN A TOLERANT-LIBERAL DEMOCRACY 1 (2015) (discussing why a tolerant-liberal democracy should not tolerate religion), and Kenneth Strike, who states: "Liberal societies have a legitimate interest in regulating both public and private associations in order to produce liberal citizens." Kenneth Strike, *Freedom of Conscience and Illiberal Socialization: The Congruence Argument*, 32 J. PHIL. EDUC. 345, 346 (1998). It is implied that the state may regulate private schools to be "liberal"—as the state defines it.

> sort of free and democratic society that honours diversity in practice.[161]

While Professor Tushnet has toned down his rhetoric considerably in the face of the Trump presidency that has seen the U.S. make a very hard turn to a conservative agenda, he remains defiant that "[t]he culture wars are over, and we won."[162] Indeed, he argues that gay marriage is a reality, multicultural education is entrenched, and the current fight over transgender rights appears to be a "winning" issue for the liberals.[163] Even on the issues of affirmative action and abortion, the law is not going to change, unless President Trump appoints two new Justices to the United States Supreme Court. What is left outstanding and to what extent will accommodations be made for religious objectors?

Professor Tushnet has long maintained that religion is not special.[164] Given his consistent stance that the "culture wars are over, and we won,"[165] there is little doubt that his triumphal stand would see, if given the power, the removal of religious freedom accommodation as we know it.

It is my contention that Professor Wintemute's desire for a non-violent[166] means to obtain the goal of changing religious institutional discrimination will be frustrated. The reason is simple: History does not always go the way revolutionaries expect. The Christian religion has been an advocate of traditional marriage for 2000 years.[167] It is rather unlikely that there will ever be a time when there does not exist, somewhere in a liberal democracy, a Christian community holding traditional marriage as its cultural identifier. Christians run organizations as par for the course. If we are to remain a liberal

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[161] Iain T. Benson, An Associational Framework for the Reconciliation of Competing Rights Claims Involving the Freedom of Religion 105 (Sept. 16, 2013) (unpublished Ph.D. dissertation, University of the Witwatersrand), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.951.9831&rep=rep1&type=pdf.

[162] Tushnet, *Doubling Down*, *supra* note 146.

[163] *Id.*

[164] *See* Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 71–72 (2001) (explaining that protections found in the Free Exercise Clause are also found in other constitutional provisions).

[165] Tushnet, *Doubling Down*, *supra* note 152.

[166] *See* Wintemute, *supra* note 130, at 153–54 (expressing a desire that religious institutions voluntarily give up their "bigoted" ways without the need for state enforcement of equality rights).

[167] Jeff Johnston, *Three Reasons Why Pastors—and Other Church Leaders—Should Talk about Homosexuality in the Church*, FOCUS ON THE FAMILY, http://www.focusonthefamily.com/socialissues/sexuality/three-reasons-why-pastors-and-other-church-leaders-should-talk-about-homosexuality-in-the-church (last visited Mar. 17, 2017).

democratic society, such organizations are entitled to protection of their beliefs and practices.[168]

If religious institutions, such as TWU, refuse to adopt the secularist understanding of marriage and sexual equality, then it is not surprising that similar opinions akin to those of Professor Tushnet will gain currency. These are opinions that lean to state coercion for compliance.[169] Ultimately, that is where the inflationary demands of equality rights lead us.

This is where the anti-TWU side now stands. They have refused to accept the current state of the law that has allowed TWU to exist and carry out its function as a religious university granting accredited degrees. As discussed below, this is a right that was recognized, at considerable cost, with respect to TWU's education faculty back in 2001. The anti-TWU forces are now demanding that the law change. Only the Ontario courts have agreed with the anti-TWU position.[170] The courts in British Columbia and Nova Scotia have all favored TWU.[171] The SCC has just announced its decision to hear the appeal,[172] and it is there, at the highest court, where we will find out which will prevail: state enforcement of secular sexual norms, or state accommodation of religious norms in the private sphere.

Sections III.A.–III.C. of this Article outline the TWU law school case, with a primary focus on its experience in British Columbia. This case is one that spans the entire country with litigation: in Ontario, Nova Scotia, and British Columbia. This Article focuses on British Columbia for the following reasons: First, it is the home province of TWU;[173] second, the arguments are mirrored, with slight administrative differences, in all three jurisdictions; and third, the Article is limited to one case in the interest of brevity. Nevertheless, the Courts in Ontario took a very different stand toward TWU than the courts in Nova Scotia

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[168] "The individual and collective aspects of freedom of religion are indissolubly intertwined. The freedom of religion of individuals cannot flourish without freedom of religion for the organizations through which those individuals express their religious practices and through which they transmit their faith." Loyola High School v. Quebec (Att'y Gen.), [2015] 1 S.C.R. 613, para. 94 (Can.).

[169] Horwitz, *supra* note 149.

[170] Steve Weatherbe, *Big Win for Trinity Western: BC Judge Says Ban on Christian Law School Infringes Religious Freedom*, LIFESITE NEWS (Dec. 10, 2015), https://www.lifesitenews.com/news/big-win-for-trinity-western-bc-judge-says-ban-on-christian-law-school-infri.

[171] *Id.*

[172] Law Soc'y of B.C. v. Trinity W. Univ., No. 37318 (S.C.C. appeal docketed Feb. 23, 2017).

[173] TRINITY WESTERN UNIVERSITY, PROPOSAL FOR A SCHOOL OF LAW AT TRINITY WESTERN UNIVERSITY 5 (2012) [hereinafter TWU PROPOSAL], https://www.twu.ca/sites/default/files/assets/proposal-for-a-school-of-law-at-twu.pdf.

and British Columbia.[174] Both courts in Ontario held against TWU—all the others held in favor of TWU.[175] Even so, this Article can still maintain that the redefinition of marriage has led to a redefinition of religious freedom in the minds of the legal profession as it relates to TWU. Therefore, further analysis of the approaches taken by the courts of the three jurisdictions will be left for another time.

A. Lead-up to Litigation

To understand the TWU law school case, one must first be aware that this is not the first time that TWU has had to face protracted litigation over its admissions policies.[176] TWU's admissions policies, though wording has changed from time to time, have consistently required students to abstain from sexual relations outside of the traditional marriage relationship.[177] In 2001, the SCC ruled that the British Columbia College of Teachers (BCCT) was wrong to deny accreditation to TWU's education degree.[178] The BCCT was of the view that TWU's admissions policy was discriminatory against the LGBTQ community.[179] In particular, the BCCT argued that TWU graduates, after being educated in the TWU Christian environment, would discriminate against LGBTQ students when they became teachers in the public school system.[180] The SCC rejected the BCCT's argument and said that "TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions." "[T]he admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence."[181] The Court recognized that TWU is a private institution, exempt from the human rights legislation of British Columbia, and that the Charter of Rights and Freedoms does not apply to it either.[182] Further, the Court noted that Charter equality rights are not engaged when there is a "voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution."[183]

The SCC's analysis made it clear:

> TWU's Community Standards, which are limited to prescribing conduct of members while at TWU, are not sufficient to support the

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[174] Weatherbe, *supra* note 170.

[175] *Id.*

[176] Trinity W. Univ. v. B.C. Coll. of Teachers, [2001] 1 S.C.R. 772, paras. 4–7 (Can.).

[177] *Id.* at para. 10.

[178] *Id.* at paras. 43–44.

[179] *Id.* at para. 6.

[180] *See id.* at para. 35 (rejecting this argument).

[181] *Id.* at para. 25.

[182] *Id.*

[183] *Id.*

> conclusion that the BCCT should anticipate intolerant behaviour in the public schools. Indeed, if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church. The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected. The BCCT did not weigh the various rights involved in its assessment of the alleged discriminatory practices of TWU by not taking into account the impact of its decision on the right to freedom of religion of the members of TWU. Accordingly, this Court must.[184]

Given that resounding victory in 2001, TWU did not foresee another litigation in the offing. TWU Professor, Dr. Janet Epp-Buckingham, said to the University of Ottawa's Christian law students that TWU thought the 2001 SCC decision should have eliminated any question about TWU's right to open a law school.[185] "We did not anticipate that the Community Covenant would be so controversial," she said.[186] How wrong they were.

The interview of Professor Buckingham (JEB) by CBC reporter Anna Maria Tremonti (AMT) is but one example of the media's opinion on the 2001 case. Professor Buckingham explained to Tremonti the importance of the 2001 case.[187] Here is how the conversation continued:

> AMT: Now since the ruling was made gays and lesbians have been granted the right to marry in Canada. Is it possible that that precedent no longer stands in any case?
>
> JEB: The definition of marriage was changed in 2005 by the Civil Marriage Act and that piece of legislation makes it clear that it was changing the definition of marriage for *civil* purposes. Now, there is a distinction between civil purposes and religious purposes and the legislation makes it clear that it is not against the public interest to hold diverse views of marriage and that religious institutions should not be penalized for having diverse views of marriage.
>
> AMT: Others in the legal community—the deans, the law students, the bar association have another view. Are you prepared to fight this one again?
>
> JEB: Well we know that there is a difference of opinion on this. In fact, the B.C. Liberties Association, several law professors, and numerous

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[184] *Id.* at para. 33.

[185] Janet Epp-Buckingham, Professor, Trinity W. Univ., Remarks at University of Ottawa Law School Christian Legal Fellowship (Mar. 28, 2013) (on file with author).

[186] *Id.*

[187] *Would a Law School at a Private Christian University Discriminate Against Gays and Lesbians?*, CBC RADIO: THE CURRENT (Mar. 28, 2013) [hereinafter Professor Epp-Buckingham Radio Interview], http://www.cbc.ca/radio/thecurrent/would-a-law-school-at-a-private-christian-university-discriminateagainst-gays-and-lesbians-1.1636945 (radio interview by Anna Maria Tremonti with Professor Epp-Buckingham).

> law students have also supported us. Also, quite a few lawyers in the community. So it's not just everybody is against Trinity Western …
> AMT: But if it goes to court are you willing to do that?
> JEB: We are certainly willing to go to court on this but we do hope that Trinity Western University doesn't have to go to the Supreme Court of Canada every time we want to start a new program.[188]

Note Tremonti's assumption that the redefinition of marriage changes the calculation of the 2001 decision's applicability to the law school situation. This assumption is what is at play with the legal elite's opposition to TWU. There are a number of reasons why that cannot be accepted as a sound basis for rejecting TWU, which will be discussed below. However, the point here is simply that at least certain prominent members of the media hold the view that the redefinition of marriage means all institutions, including religious institutions, must now accept the new secular norm. It brings to mind Professor Tushnet's statement that "the war's over, and we won."[189]

1. The TWU Proposal

a. What Makes a Great Law School?

The two principles that are determinative of a great law school, according to Harvard Professor A. James Casner, are:

> First, a great law school strives to make its students, if I may borrow Justice Frankfurter's phrase, masters of the art of relevancy. In other words, it provides a program of instruction designed to develop in them the ability to ascertain the factors that are relevant in coming to a conclusion in regard to a legal problem and to formulate a sound judgment on the basis of such factors.
> Second, a great law school, through its faculty and as an institution, plays a significant part in the continuing development of the law.[190]

That was in 1956. Notice the emphasis on the practical—developing an ability to "ascertain the factors that are relevant in coming to a conclusion in regard to a legal problem and to formulate a sound judgment."[191] While no one can deny that this approach may be found, to some degree, in most law schools, there is some question about just how practical the modern law school experience is today.

Professor Willis L.M. Reese noted that while there is an interest in giving students today "some notion of how you sort out the relevant and irrelevant facts and the grist, if you will, of a real live case," it is very

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[188] *Id.*
[189] Tushnet, *Abandoning Defensive Crouch Liberal Constitutionalism*, *supra* note 136.
[190] A. James Casner, *What Makes a Law School Great*, 2 U. ILL. L.F. 270, 271 (1956).
[191] *Id.*

difficult to "find enough faculty members who want to do it."[192] This is because this kind of teaching is seen as a lower or "inferior" faculty position, not in the mainstream, that does not interest many professors (the faculty are "egotists and showmen").[193] Furthermore, there are few students who are interested in taking such courses.[194] The modern law school professor does not want their school to be known as a "technical" school; rather, says Professor Reese, "we say we're philosophers—halos around our heads, and that sort of thing."[195] Despite Professor Reese's 1980s assessment of law schools being tongue-in-cheek, it nevertheless reveals the general pattern of the modern approach to legal education, which has not been focused on practical work, but instead on theory or "critical reasoning."

However, Professors Kurt Saunders and Linda Levine note that "[t]hinking like a lawyer is neither pure art nor science . . . law possesses attributes of both. . . . The lawyer does not start from general principles and reason 'forward' to some as yet unknown but inevitable conclusion," they argue.[196] "Rather, the lawyer begins with a conclusion or a claim—the client's goal. He or she then designs justificatory strategies for reaching that goal, reasoning backward through a process akin to 'reverse engineering.'"[197]

Thus, there is considerable debate about what makes a great law school. It is more than buildings, resources, and competent faculty. While those are obviously important, it requires a complex combination of those items and more to make a law school truly great. TWU's proposal has taken all of the factors into account to come up with a creative and exciting proposal that, but for the opposition to its position on marriage, promises to make a worthy contribution to legal education in Canada.

b. What TWU Proposed

TWU's School of Law proposal is unique in that it is geared toward ensuring that the TWU graduate has developed practical skills for law practice.[198] Most law schools center on the theoretical, but TWU "will integrate academics, professionalism, ethics, and practical skills development" to develop essential competencies, including "hands-on

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[192] Willis L.M. Reese, Note, *What Makes A Law School Great?*, 6 DALHOUSIE L.J. 339, 347 (1980).

[193] *Id.*

[194] *Id.*

[195] *Id.* at 349.

[196] Kurt M. Saunders & Linda Levine, *Learning to Think Like a Lawyer*, 29 U.S.F. L. REV. 121, 182–83 (1995) (footnote omitted).

[197] *Id.*

[198] TWU PROPOSAL, *supra* note 173, at 10.

experience in drafting legal documents, negotiating legal agreements and providing advocacy services to under-represented groups and individuals."[199]

The TWU approach aims to do the very thing that Professor Willis said was difficult to do: bring on faculty who are serious about teaching the practical side of legal practice.[200] TWU students will "participate in a one-on-one mentor relationship with a seasoned lawyer and practice their skills through practicum placements."[201] The purpose is to ensure that TWU graduates are confident and capable of practicing law immediately.[202]

"What we are wanting to focus on is to graduate practice-ready lawyers like a medical school that produces ready-to-work doctors," said Professor Janet Epp-Buckingham in a CBC Radio interview.[203]

> But right now, law schools across Canada have a more theoretical focus and they count on the articling year for law students to learn the actual practice skills. What we want to do here is create a law school based on Christian values that's like a super high-quality medical school.[204]

Buckingham explained that while most law schools have some focus on "'hard legal skills' like legal research, writing, advocacy, and negotiating," they do not have as much focus on drafting documents.[205] "We also want to look at 'soft skills' like teamwork, leadership, problem solving, relationship building, and at a Christian law school I would also add being a reconciler. We want to look at lawyers who can diffuse stress and conflict rather than promote it."[206]

TWU's proposal is also focused on three underserved areas of legal practice. First, it will have a focus on non-profits and charities law.[207] Charity law is something that very few Canadian law schools offer.[208] It

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[199] *Proposed School of Law: Hands on Curriculum*, TRINITY WESTERN UNIVERSITY [hereinafter *Hands on Curriculum*], http://www.twu.ca/proposed-school-law/hands-curriculum (last visited Feb. 14, 2017).

[200] TWU PROPOSAL, *supra* note 173, at 35; Reese, *supra* note 192, at 347.

[201] *Hands on Curriculum*, *supra* note 190.

[202] *Id.*

[203] Professor Epp-Buckingham Radio Interview, *supra* note 187.

[204] *Id.*

[205] *Id.*

[206] *Id.*

[207] TWU PROPOSAL, *supra* note 164, at 11.

[208] The only charity law course I am aware of is the University of Ottawa's "Charities and Non-Profit Organizations" course. *CML4122 Charities and non-Profit Oranizations*, listed on *Undergraduate Programs and Courses: Common Law*, UNIV. OTTAWA, http://www.uottawa.ca/academic/info/regist/calendars/courses/CML.html#CML 4122 (last visited Mar. 8, 2017); *see also* Benjamin Miller, *Making Charity Law a Part of Your Legal Education*, CANADIAN LAWYER: 4STUDENTS (Nov. 21, 2016),

also plans to get involved in assisting marginalized groups, such as those living on the streets of Vancouver's Downtown Eastside where TWU proposes a pro-bono legal clinic.[209] Second, TWU will focus on small businesses and entrepreneurship so that its graduates will be competent to assist in small start-up enterprises.[210] Third, TWU's emphasis on developing the practical skills of law will assist its graduates in having the competencies to practice in small- and medium- sized law firms.[211] This is a needed shift from the current model of law schools catering to the larger urban firms.

Finally, the proposal also has a strong emphasis on ethics:

> Leadership, integrity, and character development are central to TWU's Christian identity, worldview and philosophy of education. We encourage students to see the practice of law as a high calling, and for that reason we will challenge them to confront, debate, and ponder the great questions of meaning, values, and ethics. Our hope is that TWU School of Law graduates will believe in and demonstrate a different perception of professionalism than the current marketplace promotes. TWU-educated lawyers will be expected to be not just legal technicians, but also trusted advisors who serve clients of every kind.[212]

2. Federation of Law Societies of Canada

When TWU's law school proposal was submitted to the Federation of Law Societies of Canada (FLSC) in June 2012, it created a stir among legal academics.[213] The Canadian Council of Law Deans was among the first to raise opposition.[214] Dean Bill Flanagan, of Queen's University (in Kingston, Ontario),[215] wrote: "We would urge the Federation to investigate whether TWU's covenant is inconsistent with federal or provincial law."[216] He also asked that the Federation "consider this covenant and its intentionally discriminatory impact on gay, lesbian and bi-sexual students when evaluating TWU's application to establish an

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http://www.canadianlawyermag.com/6238/Making-charity-law-a-part-of-your-legal-education.html (discussing the lack of charity law courses in Canadian law schools).

209 *Hands on Curriculum*, *supra* note 190.

210 *Id.*

211 *Id.*

212 *Id.*

213 TWU PROPOSAL, *supra* note 173, at 10; Letter from Bill Flanagan, President, Canadian Council of Law Deans, to John J.L. Hunter & Gérald R. Tremblay, President, Fed'n of Canadian Law Soc'ys (Nov. 20, 2012), http://www.docs.flsc.ca/_documents/TWUCouncilofCdnLawDeansNov202012.pdf.

214 Letter from Bill Flanagan to John J.L. Hunter & Gérald R. Tremblay, *supra* note 204.

215 *Bill Flanagan*, QUEEN'S UNIV., http://law.queensu.ca/faculty-research/faculty-directory/bill-flanagan (last visited Feb. 6, 2017).

216 *Id.*

approved common law program."[217] It became necessary for the Federation to set up a separate committee to investigate the concerns raised by the academics and critics of TWU.[218]

Despite all of the opposition, which was investigated by a special Ad Hoc committee, the Federation decided on December 16, 2013, to give its approval.[219] Federation President Marie-Claude Bélanger-Richard, Q.C., said that "[t]he Federation followed a fair, rigorous and thoughtful process."[220] She further added, "[w]e took into account and listened very carefully to all points of view that were expressed about this proposal."[221]

3. Law Society of British Columbia

As a result of the Federation of Law Societies of Canada's (FLS) preliminary approval, on December 16, 2013, TWU's proposed law school became an approved faculty of law for the purposes of enrollment in the Law Society of British Columbia's (LSBC) admissions program.[222] This operated as a matter of course since the LSBC had delegated its authority on approving new law schools to the FLS.[223] On December 17, 2013, the BC Minister of Advanced Education approved TWU's proposed law program and authorized TWU to grant JD degrees.[224]

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[217] *Id.*

[218] *See* FED'N OF LAW SOC'YS OF CAN., SPECIAL ADVISORY COMM. ON TRINITY W.'S PROPOSED SCH. OF LAW, FINAL REPORT 3 (2013), http://docs.flsc.ca/SpecialAdvisoryReportFinal.pdf (setting up a Special Advisory Committee).

[219] *Id.* at 19 ("It is the conclusion of the Special Advisory Committee that if the Approval Committee concludes that the TWU proposal would meet the national requirement if implemented as proposed there will be no public interest reason to exclude future graduates of the program from law society bar admission programs.").

The Approval Committee followed with its own approval: "TWU's proposed school of law will meet the national requirement if implemented as proposed. The proposed program is given *preliminary approval*." FED'N OF LAW SOC'YS OF CAN., CANADIAN COMMON LAW PROGRAM APPROVAL COMM., REPORT ON TRINITY WESTERN UNIVERSITY'S PROPOSED SCHOOL OF LAW PROGRAM 11 (2013), http://docs.flsc.ca/ApprovalCommitteeFINAL.pdf.

[220] News Release, Fed'n of Law Soc'ys of Can., Federation of Law Societies of Canada Grants Preliminary Approval of Trinity Western University's Proposed Law Program (Dec. 16, 2013), http://docs.flsc.ca/FederationNewsReleaseFIN.pdf.

[221] *Id.*

[222] *Id.*

[223] News Release, Fed'n of Law Soc'ys of Can., Federation of Law Societies of Canada Approves Proposals for Two New Canadian Law Degree Programs (Feb. 15, 2011), http://flsc.ca/federation-of-law-societies-of-canada-approves-proposals-for-two-new-canadian-law-degree-programs/.

[224] *The Minister's Decision to Allow Trinity Western University's Law School Challenged in Court*, CNW (Apr. 14, 2014), http://www.newswire.ca/news-releases/the-ministers-decision-to-allow-trinity-western-universitys-law-school-challenged-in-court-514079351.html.

However, as noted above, academics such as Professor Craig called for the individual law societies to take back authority from the FLS and to conduct their own investigation into TWU's proposal.[225] The LSBC decided to conduct its own investigation and encouraged the public to send in written submission as to whether it should approve TWU's proposal.[226] To my knowledge, nothing like this has ever been done for any other law school proposal. The invitation for a public response was emulated by other law societies.[227] Approximately 140 submissions were in favor of TWU with some 147 opposed.[228] Those submissions represented many more individuals, as some were signed by scores of people.[229]

a. Review of Federation's Decision

On April 11, 2014, the LSBC Benchers voted down (20-6) the motion that would have removed TWU's faculty of law approval.[230] In addition to the public input, the LSBC commissioned a number of reports and legal opinions to assist the Benchers.[231]

The transcript of the debate reveals a very thoughtful and considered approach to the question at hand. Overwhelmingly, the

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[225] Craig, *The Case for Rejecting TWU*, *supra* note 59, at 153–54.

[226] *Bencher Meeting Consideration of TWU, April 11, 2014*, LAW SOC'Y OF B.C., https://www.lawsociety.bc.ca/page.cfm?cid=3891 (last visited Feb. 6, 2017).

[227] *See, e.g.*, *Treasurer's Statement Regarding Vote on TWU Law School*, THE LAW SOC'Y OF UPPER CAN., http://www.lsuc.on.ca/newsarchives.aspx?id=2147485737&cid=2147498273 (last visited Feb. 3, 2017) (showing that the Law Society of Upper Canada asked for public submissions, just as LSBC did, and received over 200); *TWU: Public Submissions*, N.S. BARRISTER'S SOC'Y, http://nsbs.org/twu-public-submissions (last visited Feb. 3, 2017) (showing the Nova Scotia Barrister's Society webpage for public submission).

[228] *See* Proposed TWU Faculty of Law - Public Submissions, https://web.archive.org/web/20160415112420/https://www.lawsociety.bc.ca/docs/newsroom/TWU-submissions.pdf (last visited Mar. 20, 2017) (showing 140 submissions in favor of TWU with 147 submissions opposed).

[229] *See, e.g.*, Letter from Ruth A.M. Ross, Interim Exec. Dir., Christian Legal Fellowship, to Timothy E. McGee, Exec. Dir., The Law Soc'y of B.C. (Feb. 28, 2014), http://www.lawsociety.bc.ca/docs/newsroom/TWU-submissions.pdf (showing a single letter submission from the Christian Legal Fellowship endorsed by 175 people).

[230] The motion read:

> Pursuant to Law Society Rule 2-27(4.1), the Benchers declare that, notwithstanding the preliminary approval granted to Trinity Western University on December 16, 2013 by the Federation of Law Societies' Canadian Common Law Program Approval Committee, the proposed Faculty of Law at Trinity Western is not an approved faculty of law.

Transcript of The Law Society of British Columbia Bencher Meeting at 7 (Apr. 11, 2014) [hereinafter Transcript], https://www.lawsociety.bc.ca/docs/newsroom/TWU-transcript.pdf (Jan Lindsay).

[231] *LSBC Benchers Call for Referendum on TWU School of Law*, TRINITY WESTERN UNIVERSITY: TWU LAW SCHOOL BLOG (Sept. 26, 2014), http://twulawschool.tumblr.com/page/10; *Bencher Meeting Consideration of TWU, April 11 2016*, *supra* note 226.

Benchers were convinced that they had a duty to protect the public interest, which included upholding the law despite their personal views on TWU's discriminatory admissions policy.[232] They were persuaded by the various legal opinions about the applicability of TWU 2001 to the current case.[233] This sense of duty to the law is remarkable, in hindsight, given what unfolded in the following months. The Benchers would go from the April 11 meeting confirming that the rule of law required TWU's approval, to reversing that decision a few months later on October 31.[234] This was remarkable. Despite their stated commitment to the law, the Benchers ultimately succumbed to the popular opinion of their membership. Politics within the legal community ultimately won at the Law Society level. It would take the courts to re-establish the primacy of law.

During the debate on the motion, Joseph Arvay, Q.C., a very well-respected and competent human rights lawyer, objected to what he described as "the metaphorical sign at the gate of the law school which says, 'No LGBT students, faculty or staff are welcome.'"[235] Since the Law Society is required to respect the rights and freedoms of everyone in BC, he argued, it must refuse TWU. He noted that the Federation's report recognized that TWU would be "an unwelcome place for LGBT students and faculty even if it was not a complete ban."[236] Thus "a sign that says 'LGBT are not welcome' is as bad as a sign that says 'you cannot apply.'"[237] Mr. Arvay had no problem with a religious law school, nor one that has a core belief "that same-sex marriage and [the] sexual intimacy that this entails [is] a sin."[238] Rather, he opposes "that belief being imposed on those who do not share that belief."[239]

"We are the law," Arvay declared later in the meeting, after listening to a number of his fellow benchers decry TWU's admissions

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[232] *See, e.g.*, Transcript, *supra* note 230, at 14 (Lynal Doerksen) (stating that, regardless of her personal feelings, the test for whether to approve TWU must be disconnected from such feelings); *id.* at 20 (David Mossop) (stating that, despite his personal views in favor of gay marriage, he will vote to approve TWU); *id.* at 22 (Miriam Kresivo) (stating that, despite her very strong personal feelings against TWU's policies and religion in general, she must apply the law and remove herself from her feelings).

[233] *See, e.g.*, *id.* at 20 (David Mossop) (stating that in his view, the Benchers' decision was bound by the previous Canadian Supreme Court case on TWU); *id.* at 22 (Miriam Kresivo) (stating that there are legal opinions which indicate that the previous TWU case from the Canadian Supreme Court is still good law and must be applied).

[234] Trinity W. Univ. v. Law Soc'y of B.C., 2015 BCSC 2326, paras. 47–48 (B.C.).

[235] Transcript, *supra* note 230, at 8 (Joseph Arvay).

[236] *Id.*

[237] *Id.*

[238] *Id.* at 10.

[239] *Id.* at 11.

policy, but said they had to keep with the law.[240] "I am nonetheless very troubled by the very many comments to the effect that the community covenant is repugnant, it's hurtful, it's discriminatory, it's hypocritical, it's heartless, but we're bound by the law," said Arvay.[241] He continued with resolve, "I don't recognize that law, that kind of law in this country. I don't recognize a law that is so divorced from justice that we are bound by it. We are the law; we are the law-making body charged with making a decision at hand."[242]

Arvay's comments reiterates the point of this Article: Advocates for equality are so adamant in their position that they are willing to knock down any legal impediment that would deny dominance over their definition of and their boundaries of asymmetrical equality. It matters not that the law provides a space for private religious institutions, like TWU, to believe and practice traditional marriage on campus.

It is disconcerting that even those who felt bound by the law to support TWU were very harsh in their criticism of TWU. That contemptuous attitude toward TWU ultimately led to the events that were to follow in BC—the referendum and the ultimate rejection of TWU's accreditation by the same Benchers.[243] They had so compromised their support of the law through their vilification of TWU that they poisoned the chalice going forward. Just a few examples of this attitude should suffice in explaining why Arvay could say what he said.

David Mossop, Q.C., asserted that while TWU has a legal right to have its community covenant, "it doesn't mean you should do it."[244] "The present trend in Christian churches is to accept gay marriage," Mossop continued, "it's happened in the Anglican Church. . . . I'm sure the three [TWU] representatives will disagree with me, they'll never change their views, but maybe their children and grandchildren may change their views."[245] Mossop then went on to describe a more sinister reality about the state of the BC Bar and its relationship to TWU. While TWU has "a great curriculum," that is not enough:

> [T]o be a successful law school in British Columbia or in Canada, you have to have broad support within the legal community. You do not have that broad support. There are significant members of this profession who are against your approval. There is nothing the Law Society can do about that.[246]

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[240] *Id.* at 46.

[241] *Id.*

[242] *Id.*

[243] Trinity W. Univ. v. Law Soc'y of B.C., 2015 BCSC 2326, paras. 47–48 (B.C.).

[244] Transcript, *supra* note 230, at 21 (David Mossop).

[245] *Id.*

[246] *Id.* He also stated:

In other words, BC lawyers will not hire TWU graduates because of their opposition to the Community Covenant—despite the fact that TWU graduates would be competent.[247] It will be "a millstone around your neck."[248] Such language to describe a religious minority law school for doing something that it has a legal right to do evinces outright bigotry—a bigotry of which the BC Court of Appeal was aware.[249]

Bencher Elizabeth Rowbotham, Q.C., said: "I find it very disturbing that people can be discriminated against on the basis of sexual orientation simply because an institution is a private institution. However, that is our law in Canada and I think that if it's to be challenged, this is not the forum to do so."[250]

Bencher Cameron Ward said:

> In my view, making people feel unwelcome anywhere because of their personal characteristics is a particularly repugnant form of discrimination. As a Bencher, as a lawyer, and as a Canadian citizen, I feel I have the duty to oppose such discrimination, not to promote or to condone it. In my opinion, TWU's community covenant is an anachronism, a throwback that wouldn't be out of place in the 1960s. The Law Society recently invited the university to amend it, to remove its discriminatory language. TWU refused. The Trinity Western University is stubborn enough to stick to its principles, I'm stubborn enough to stick to mine. I will proudly be voting in favour of the resolution.[251]

Bencher David Crossin, Q.C., said "[TWU] chose a path that is effectively discriminatory, certainly hurtful, and to many highly hypocritical," but he nevertheless said he is bound by the law.[252]

Bencher Pinder Cheema, Q.C., said:

> That's an individual thing for individual lawyers. That will be, if I could use the biblical example, a millstone around your neck. And over time, the pressure will come from the faculty and from the student bodies at the law school to change the covenant. Maybe eight to 15 years from now, you will change the covenant and at that time, those people in charge will say, why did we ever do this in the first place?

Id.

247 *Id. But see* Memorandum from the Law Soc'y of B.C. Policy & Legal Servs. Dep't to the Benchers (Mar. 31, 2014), https://www.lawsociety.bc.ca/Website/media/Shared/docs/newsroom/TWU-memo1.pdf (noting that the Law Society of BC searched three BC law schools to see whether TWU graduates were engaging in discriminatory conduct, and did not find any evidence that they were).

248 Transcript, *supra* note 230, at 21 (David Mossop).

249 *See* Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423, para. 189 (B.C.) (explaining "that the language of 'offense and hurt' is not helpful in balancing competing rights").

250 Transcript, *supra* note 230, at 30 (Elizabeth Rowbotham).

251 *Id.* at 31–32 (Cameron Ward).

252 *Id.* at 37 (David Crossin).

> In my opinion, TWU's perspective is antithetical to Canadian values of tolerance and respect that are enshrined in our *Charter*. I find this covenant abhorrent and objectionable and it saddens me greatly that TWU has persisted in this outdated, outmoded view. However, as has been echoed by a number of my fellow Benchers, it is our obligation above all else to uphold the rule of law.[253]

Bencher Jamie Maclaren said "[i]t is TWU's institutional and apparently non-negotiable act, in other words conduct of discrimination, that is an affront to the human dignity of LGBTQ people and it diminishes their public standing, that demands our disapproval in the name of equity and fairness."[254]

Bencher Dean Lawton noted:

> I suspect why this caused so much concern among those opposed to accreditation is not the pledge of celibacy, but the statement of marriage being sacred exclusively between a man and a woman. Were it not for the statement about marriage, I expect we would not be considering this matter today.[255]

Dean Lawton's view is indeed the point of this Article.

Bencher Joseph Arvay's position is a common one among the anti-TWU elites. It displays a lack of respect for religious associations or for diversity. They have no problem with the religious law school and its beliefs as long as the school does not "impose" those beliefs on those who do not believe it.[256] Context is everything here—we are talking about a religious law school, not a secular law school. That is key. By definition, a religious law school such as TWU is not imposing on anyone, but is saying: "If you believe as we do on these issues you are welcome to join us. If not, then there are other options for you." TWU 2001 certainly understood this basic idea.[257] Unfortunately, Arvay and the many other anti-TWU advocates refuse to accept that position as an answer.[258] They argue it is not fair that those LGBT students who are offended by TWU's policies are not eligible for those law student positions.[259] Such students, they maintain, are in an unequal position and the law society should not give its imprimatur to such a school.[260]

There are a number of reasons this position is untenable. First, a religious school does not cease to be a religious school because it teaches

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[253] *Id.* at 42 (Pinder Cheema).

[254] *Id.* at 43 (Jamie Maclaren).

[255] *Id.* at 24 (Dean Lawton).

[256] *Id.* at 11 (Joseph Arvay).

[257] *See* Trinity W. Univ. v. Coll. of Teachers, [2001] 1 S.C.R. 772, para. 25 (Can.) (explaining that the school is not for everyone and that this alone does not create discrmination).

[258] *See supra* notes 235–241, 244–38, 240, 243 and accompanying text.

[259] *See id.*

[260] *See id.*

law or has its degrees recognized by the state. Second, state accreditation of TWU degrees is not state endorsement of TWU's religious beliefs or practices. It is simply an acknowledgement that the academic requirements have been met. In the same way, when a church-run nursing home is licensed to operate, the state is not endorsing the religious motivations or the religious practices of that nursing home. Third, it is curious why in this discussion there is no mention of the fact that TWU offers many other academic programs, like history, business, education, biblical studies, and nursing.[261] If it is wrong for the Law Society to approve TWU, then it is also wrong for the province of British Columbia to approve the other degrees for the same reasons. Such logic taken to its ultimate conclusion would mean that it is unacceptable to even have a religious school such as TWU. That outcome does nothing for diversity in a liberal democracy. It seems that law is being singled out as somehow special from the other areas of study. That reeks of legal arrogance.

b. Ultimate Rejection of Federation's Approval

After the April 11, 2014 vote, some LSBC members requisitioned a Special General Meeting held on June 10, 2014, to vote on a non-binding resolution calling on the Benchers to declare that TWU is not an approved faculty of law.[262] The resolution passed 3,210 to 968.[263]

On September 26, 2014, the Benchers voted to hold a referendum on the issue and that the results would be binding on the LSBC.[264] The October 30, 2014 results had 5,951 votes against TWU and 2,088 in favor.[265] On October 31, 2014, the Benchers reversed their April 11, 2014 approval of TWU and refused to approve TWU's J.D. degree.[266] TWU went to the BC Supreme Court for judicial review.[267]

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[261] *Programs of Study*, TRINITY W. UNIV., https://www.twu.ca/academics/programs-study (last visited Mar. 15, 2017).

[262] Harper Grey LLP, *Trinity Western University v. Law Society of British Columbia*, LEXOLOGY (Jan. 26, 2016), http://www.lexology.com/library/detail.aspx?g=7fc0074f-a04b-4751-ae4d-7249b5d61f23.

[263] News Release, The Law Soc'y of B.C., Resolution Adopted at Law Society's Special General Meeting (June 10, 2014), https://www.lawsociety.bc.ca/page.cfm?cid=3926&t=Resolution-adopted-at-Law-Society%E2%80%99s-special-general-meeting.

[264] News Release, The Law Soc'y of B.C., Law Society to Hold Member Referendum on Accreditation of TWU (Sept. 26, 2014), https://www.lawsociety.bc.ca/page.cfm?cid=3975.

[265] Trinity W. Univ. v. Law Soc'y of B.C., 2015 BCSC 2326, para. 47 (B.C.).

[266] *Id.* at para. 48.

[267] *See generally id.* (showing TWU in the British Columbia Supreme Court challenging the Law Society of British Columbia's refusal to approve TWU's J.D. degrees).

B. Judicial Review

1. B.C. Supreme Court

Chief Justice Hinkson granted TWU a judicial review of the LSBC decision.[268] The court held that the Benchers "improperly fettered their discretion" under the Legal Profession Act (LPA) and "acted outside their authority" when they delegated their authority to the LSBC members and let them decide whether to approve TWU's law program.[269] Further, the Decision was contemplated "without proper consideration and balancing of the *Charter* rights at issue," and therefore would not be upheld.[270]

Neither Chief Justice Hinkson nor the Ontario Divisional Court believed "that the circumstances or the jurisprudence respecting human rights have so fundamentally shifted the parameters of the debate as to render the decision in [TWU 2001] other than dispositive of many of the issues in this case."[271] He was bound by TWU 2001 to apply the correctness standard to the issue of whether the LSBC had jurisdiction to approve or disapprove of TWU's law program.[272] The LSBC does have the authority to approve or disapprove the academic qualifications of a common-law faculty, but only if "it follows the appropriate procedures and employs the correct analytical framework in doing so."[273]

Justice Hinkson believed the evidence was clear that the LSBC's non-binding vote supplanted the Benchers' judgment.[274] In allowing this, "the Benchers disabled their discretion under the LPA by binding themselves to a fixed blanket policy set by LSBC members."[275] Therefore, the Benchers had wrongfully restrained their discretion by adhering to the LSBC vote.[276]

TWU was entitled to, but was deprived of, a meaningful opportunity to present its case fully and fairly to those who had the jurisdiction to determine whether the J.D. degrees of the proposed law school's graduates would be recognized by the LSBC.[277]

The LSBC decision infringed TWU's right of religious freedom. The LSBC had the constitutional obligation to consider and balance the

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[268] *Id.*
[269] *Id.* at paras. 120, 152.
[270] *Id.*
[271] *Id.* at para. 78.
[272] *Id.* at para. 90.
[273] *Id.* at para. 108.
[274] *Id.* at para. 120.
[275] *Id.*
[276] *Id.*
[277] *Id.* at para. 148.

religious freedom rights of TWU and the equality rights of the LGBT.[278] Although the Benchers weighed the "competing *Charter* rights of freedom of religion and equality" ahead of their decision in April, they did not adequately weigh these same competing Charter rights when they voted on October 31, 2014.[279] Given the inappropriate fettering of the Benchers' discretion by the LSBC and the failure to attempt to resolve the collision of the competing Charter interests in the October Referendum or the Decision, the appropriate remedy is to quash the Decision and restore the results of the April 11, 2014 vote.

2. B.C. Court of Appeal

The Law Society's appeal of Chief Justice Hinkson's decision was dismissed.[280] The British Columbia Court of Appeal agreed with Chief Justice Hinkson that, based on the broad language found in the LPA, the LSBC's decision to either approve or deny a new law program "could be based on factors beyond the academic education that its graduates would receive."[281] However, the problem was not that the Benchers wrongly sub-delegated their authority to the membership, as Chief Justice Hinkson held, when they decided to hold a referendum.[282] Instead, the problem was that the Benchers decided to follow a resolution regardless of the results and regardless of whether those results were "consistent with their statutory duties."[283]

The appellate court believed that "where *Charter* values are implicated" and Charter rights might be infringed upon as a result of an administrative decision, the "decision-maker is required to balance, or weigh, the potential *Charter* infringement against the objectives of the administrative regime."[284] The October 31, 2014, declaration of the Benchers did not address how Charter values could best be protected while still pursuing the objectives of the LPA.[285] The Benchers conflated their own role with that of the courts, and as a result, failed to fulfill their function.[286]

In balancing the religious beliefs and way of life advocated by TWU and sexual equality rights, the Court noted that the *Doré*[287] decision of the SCC requires the administrative decision-maker to assess the impact

[278] *Id.* at para. 145.
[279] *Id.* at para. 151.
[280] Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423, para. 194 (B.C.).
[281] *Id.* at paras. 57–58.
[282] *Id.* at paras. 64–65.
[283] *Id.* at para. 78.
[284] *Id.* at para. 80.
[285] *Id.* at para. 85.
[286] *Id.* at paras. 90–91.
[287] Doré v. Barreau du Québec, [2012] 1 S.C.R. 395 (Can.).

of the relevant Charter protection, the nature of the decision, and the statutory and factual contexts in assuring the decision reflects a proportionate balancing of the Charter protections.[288] The Law Society did not engage in a balancing of Charter rights.[289] The September 26, 2014 resolution to accept the referendum results and adopt the majority's position was not only an improper fettering of the Law Society's discretion, but it also abandoned their administrative decision-making duties to properly balance the goals of the Act and the Charter.[290] While the TWU 2001 decision is not dispositive, its essential legal analysis has not changed appreciably with respect to the obligation to balance statutory objectives with the Charter rights affected by an administrative decision.[291] In balancing the rights here, the starting premise cannot be that equality rights advocated by the Law Society trump the fundamental religious freedom of TWU. The Charter rights must be balanced against the statutory objectives of the Law Society.[292] The balancing exercise goes further than considering the competing rights and choosing to effectuate one over the other. "The nature and degree of detrimental impact . . . on the rights engaged must be considered."[293] In reviewing the respective impacts, the Court held that the impact on the religious freedom of TWU is "severe."[294] TWU graduates would not be able to practice law.[295] TWU would not be able to operate a faculty of law, contrary to what the Ontario Court of Appeal assumed.[296] As the Court pointed out, the purpose of a law school is to train lawyers.[297] On the other side of the ledger, the impact on sexual orientation equality rights, should TWU be accredited, "would be insignificant in real terms."[298]

In the Court's view, while in principle LGBTQ students would be discriminated against, there is no evidence that their access to law school and the legal profession would be impeded.[299] The Special Committee of the Federation of Law Societies of Canada found that TWU's law school was likely to actually *increase* law school choices for

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[288] Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423, paras. 119, 121 (B.C.) (quoting Doré v. Barreau du Québec, [2012] 1 S.C.R. 395, paras. 55–59 (Can.)).

[289] *Id.* at paras. 141, 145.

[290] *Id.* at paras. 144–45.

[291] *Id.* at paras. 161–62.

[292] Trinity W. Univ. v. Law Soc'y of Upper Can., 2016 ONCA 518, para. 79 (Ont.).

[293] Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423, para. 166 (B.C.).

[294] *Id.* at para. 168.

[295] *Id.*

[296] *Id.*

[297] *Id.* at para. 169.

[298] *Id.* at para. 179.

[299] *Id.* at paras. 171, 173–74.

LGBT students, rather than limit them, by creating more law school seats overall for all students to choose from.[300] Refusing to acknowledge TWU's faculty will not make law school more accessible to any students.[301] The issue is that TWU's Covenant condemned same-sex marriage and would not recognize it as a legitimate practice.[302] The Law Society was ready to approve the law school if offensive portions were removed from the Covenant.[303] Even without that, few LGBTQ would wish to apply.

The Court rejected the argument that approval of the law school would be an endorsement of the Covenant.[304] Such a view "is misconceived."[305] TWU is not seeking a public benefit as in *Bob Jones University v. United States*.[306] Accreditation is not a benefit, but a regulatory requirement to conduct a lawful business.[307] Even if the Covenant was amended and the school was approved, TWU's beliefs on marriage would remain. This underscores the weakness of the Law Society's premise that it would be endorsing TWU's religious beliefs. In a diverse and pluralistic society, this argument must be treated with considerable caution. Licensing of religious care facilities and hospitals would also fall into question.

The neutrality of the State is vital in a secular and diverse society. By that I mean the State must be fair and open-minded between competing belief systems. "Neutrality" in the sense that there are no moral positions is not what I am arguing. What is addressed is the idea that there are different moral positions that are able to stay in play without the state taking sides. Indeed, the Court was of the view that "state neutrality and pluralism lie at the heart of this case."[308] Said the Court:

> State neutrality is essential in a secular, pluralistic society. Canadian society is made up of diverse communities with disparate beliefs that cannot and need not be reconciled. While the state must adopt laws on some matters of social policy with which religious and other communities and individuals may disagree (such as enacting legislation recognizing same-sex marriage), it does so in the context of making room for diverse communities to hold and act on their beliefs. This approach is evident in the *Civil Marriage Act* itself, which

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[300] *Id.* at paras. 174, 179.
[301] *Id.* at para. 175.
[302] *Id.* at para. 176.
[303] *Id.* at para. 183.
[304] *Id.* at paras. 181, 183–86.
[305] *Id.* at para. 181.
[306] *Id.* at para. 182 (citing Bob Jones Univ. v. United States, 461 U.S. 574 (1983)).
[307] *Id.*
[308] *Id.* at para. 132.

> expressly recognizes that "it is not against the public interest to hold and publicly express diverse views on marriage".[309]

The Court recognized that while the Covenant is extremely offensive and hurtful to the LGBTQ community, as noted by the Ontario Court of Appeal, which is not to be minimized, no Charter or legal right offers protection from views that conflict with an individual's strongly held beliefs, absent hate speech.[310] The Court was aware that such commentary was also leveled at TWU:

> Indeed, it was evident in the case before us that the language of "offense and hurt" is not helpful in balancing competing rights. The beliefs expressed by some Benchers and members of the Law Society that the evangelical Christian community's view of marriage is "abhorrent", "archaic" and "hypocritical" would no doubt be deeply offensive and hurtful to members of that community.[311]

So long as it is not causing actual harm to anyone, TWU has a right to act on its beliefs.[312] Denying approval of TWU's faculty of law prevents TWU from exercising its fundamental religious and associative rights.[313] Because of the harsh impact of non-approval, the minimal impact on LGBTQ persons, and the fact that Charter rights are not to be limited any more than is reasonably necessary, the Court declared the Law Society's decision to deny approval unreasonable.[314] In concluding, the Court noted:

> A society that does not admit of and accommodate differences cannot be a free and democratic society—one in which its citizens are free to think, to disagree, to debate and to challenge the accepted view without fear of reprisal. This case demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is in itself intolerant and illiberal.[315]

Not surprisingly, the Law Society of British Columbia has appealed the decision to the SCC.[316] However, this decision, along with the decision of Justice Jamie S. Campbell of the Nova Scotia Supreme Court,[317] has given the TWU position the best results to date in the long

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[309] *Id.* at para. 185 (citation omitted) (quoting the Civil Marriage Act, S.C. 2005, c 33).

[310] *Id.* at para. 188.

[311] *Id.* at para. 189.

[312] *Id.* at para. 190.

[313] *Id.*

[314] *Id.* at para. 191.

[315] *Id.* at para. 193.

[316] News Release, The Law Soc'y of B.C., Law Society to Seek Leave to Appeal TWU Decision to the Supreme Court of Canada (Nov. 8, 2016), https://www.lawsociety.bc.ca/page.cfm?cid=4289&t=Law-Society-to-seek-leave-to-appeal-TWU-decision-to-the-Supreme-Court-of-Canada.

[317] Trinity W. Univ. v. N.S. Barristers' Soc'y, 2015 NSSC 25 (N.S.).

saga. It was the last appellate decision to be made. Eighteen judges (6 in BC; 6 in ON; 6 in NS) have heard the TWU case.[318] Twelve of those judges have ruled in TWU's favor.[319] The six that went against TWU were all in Ontario.[320]

The Ontario Court of Appeal adopted the interpretation of the Charter that was publicized by the law deans in a letter to the Federation and by Professor Elaine Craig.[321] Law Dean Bill Flanagan's letter stated: "Discrimination on the basis of sexual orientation is unlawful in Canada and fundamentally at odds with the core values of all Canadian law schools."[322] There was no acknowledgement of the necessary religious exemptions from generally applicable law.[323] William Galston calls this type of academic thinking "civic totalism."[324] As Iain T. Benson noted, according to the law deans, no view of discrimination was acceptable other than their own.[325] It is important to note that five

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[318] *See* Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423 (B.C.) (listing five judges presiding over the British Columbia Court of Appeal case); Trinity W. Univ. v. Law Soc'y of B.C., 2015 BCSC 2326 (B.C.) (listing one judge presiding over the British Columbia Supreme Court case); N.S. Barristers' Soc'y v. Trinity W. Univ., 2016 NSCA 59 (N.S.) (listing five judges presiding over the Nova Scotia Court of Appeal case); Trinity W. Univ. v. N.S. Barristers' Soc'y, 2015 NSSC 25 (N.S.) (listing one judge presiding over the Nova Scotia Supreme Court case); Trinity W. Univ. v. Law Soc'y of Upper Can., 2016 ONCA 518 (Ont.) (listing three judges presiding over the Ontario Court of Appeal case); Trinity W. Univ. v. Law Soc'y of Upper Can., 2015 ONSC 4250 (Ont.) (listing three judges presiding over the Ontario Supreme Court case).

[319] *See* Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423, paras. 4, 194 (B.C.) (finding the decision not to approve TWU's law school unreasonable and dismissing the Law Society's appeal); Trinity W. Univ. v. Law Soc'y of B.C., 2015 BCSC 2326, paras. 152, 156 (B.C.) (finding that the Benchers curbed their discretion improperly in letting the LSBC decide the question of whether to approve TWU's law program and quashing the vote); N.S. Barristers' Soc'y v. Trinity W. Univ., 2016 NSCA 59, para. 4 (N.S.) (dismissing the Society's appeal from the lower court decision); Trinity W. Univ. v. N.S. Barristers' Soc'y, 2015 NSSC 25, para. 18 (N.S.) (finding that the NSBC acted improperly both in its resolution and regulation to refuse TWU law degrees).

[320] *See* Trinity W. Univ. v. Law Soc'y of Upper Can., 2016 ONCA 518, paras. 145–46 (Ont.) (upholding the lower court ruling against TWU); Trinity W. Univ. v. Law Soc'y of Upper Can., 2015 ONSC 4250, paras. 143–44 (Ont.) (ruling that TWU's freedom of expression and freedom of association were not infringed upon).

[321] Trinity W. Univ. v. Law Soc'y of Upper Can., 2016 ONCA 518, paras. 134–35 (Ont.).

[322] Letter from Bill Flanagan, President, Canadian Council of Law Deans, to John J.L. Hunter & Gérald R. Tremblay, President, Fed'n of Law Soc'ys of Can. (Nov. 20, 2012), http://www.docs.flsc.ca/_documents/TWUCouncilofCdnLawDeansNov202012.pdf.

[323] *See, e.g.*, Human Rights Code, R.S.O. 1990, c. H.19 (Ont.) (exempting religious organizations from anti-discrimination laws by allowing such organizations to restrict entry to only those who share similar beliefs).

[324] William Galston, *Religion and the Limits of Liberal Democracy in* RECOGNIZING RELIGION IN A SECULAR SOCIETY 45 (Douglas Farrow ed., 2004).

[325] Iain T. Benson, *Law Deans, Legal Coercion and the Freedoms of Association and Religion in Canada*, 71 ADVOC. 671, 672 (2013).

judges on the British Columbia Court of Appeals rejected this perspective on discrimination.[326] Prior to that decision, the view expressed by the deans was the controlling view; now, that view has been reviewed and rejected.[327]

Professor Benson wrote presciently in an article published in BC's *The Advocate* when he chided the law deans, stating: "it is wrong in principle to seek to impose one's views on others under the guise of 'liberalism' or 'equality,' both of which should admit of different approaches, depending upon the context."[328] Otherwise, "without context-sensitive exceptions to general rules of equality or discrimination, religious differences and associational liberty would not long exist."[329] The BCCA followed a similar approach in its decision.[330]

On February 23, 2017, the SCC announced that it will hear the appeals from both the BC and Ontario Courts of Appeal.[331] The SCC must decide between the two very different approaches. On the one hand, the Ontario Court showed deference to the Law Society of Upper Canada's decision that refused to accredit TWU's law school because of TWU's admissions policy. On the other hand, the BC Court refused a similar deference to the Law Society of BC because the Society failed to properly balance the two interests at stake. The BC Court, unlike the Ontario Court, was not prepared to allow religious freedom interests to be severely impacted when the accommodation of religion would have only minimally impaired the sexual equality interests. The BC Court held rights inflation in check. The BC Court's approach is the only way forward to maintain a pluralistic society that respects difference. This drama will soon find resolution in Ottawa, at the nation's highest court, through a decision that is bound to have a profound impact on religious freedom in Canada amidst the inflated claims of sexual equality.

C. Academic Opposition

A primary source of opposition to TWU's law school proposal was the legal academy. It was the law deans that first voiced their opposition

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[326] Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423, para. 183–85 (B.C.).

[327] *See* Barry W. Bussey, *On the Case: Issue 19: Respect for the Religious Freedom of a Christian Law School in British Columbia, Canada*, THE UNIV. OF NOTRE DAME, https://www.nd.edu.au/sydney/schools/law/on-the-case/on-the-case-issue-19 (last visited Feb. 20, 2017) (quoting Letter from Bill Flanagan, President, Canadian Council of Law Deans, to John J.L. Hunter and Gérald R. Tremblay, Fed'n of Law Soc'ys of Can. 2 (November 20, 2012)) (explaining these events further).

[328] Benson, *supra* note 325, at 672.

[329] *Id.*

[330] Bussey, *supra* note 327.

[331] Law Soc'y of B.C. v. Trinity W. Univ., No. 37318 (S.C.C. appeal docketed Feb. 23, 2017); Trinity W. Univ. v. Law Soc'y of Upper Can., No. 37209 (S.C.C. appeal docketed Feb. 23, 2017).

to the Federation, and every common-law faculty in the country passed resolutions condemning TWU.[332] One of the key academic voices against TWU has been Professor Elaine Craig of Dalhousie University in Halifax, N.S., who wrote two influential papers on the subject.[333] She outlined a number of arguments that resurfaced in many anti-TWU submissions to the law societies, and then later in court documents.[334] I focus on her writing for a number of reasons. First, she is an articulate advocate expressing a passionate argument; second, her writing covers the expanse of the positions taken by the anti-TWU side fairly well; and third, her writing was quoted and referred to extensively by a number of anti-TWU individuals and groups.[335] Her later writing was also quoted with approval in the Ontario Court of Appeal decision (one of only two court decisions, to date, that decided against TWU in this current round of litigation).[336]

Professor Craig argued that the Federation should not approve programs that have discriminatory admissions policies "that are antithetical to fundamental legal values."[337] Such institutions "are not competent providers of legal education."[338]

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[332] For a sampling of the statements against TWU from the law faculties around the country, see Letter from Vaughan Black, Chair of Faculty Council, Dalhousie Univ. Schulich Sch. L., to J. René Gallant, President, N.S. Barristers' Soc'y, (Jan. 13, 2014), http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-01-24_FacultyCouncil_TWU.pdf; *Osgoode Faculty Speak Out on TWU*, LAW TIMES (Feb. 24, 2014), http://www.lawtimesnews.com/201402243788/inside-story/monday-february-24-2014; Resolution of the Queen's University Faculty Board concerning the accreditation of the Trinity Western University law school program (Feb. 7, 2014) https://www.scribd.com/document/208746498/Motion-by-Queen-s-University-Faculty-Board-on-TWU-Law-School; Carissima Mathen & Michael Plaxton, *Legal Education, Religious and Secular: TWU & Beyond* 27 (Univ. of Ottawa, Working Paper No. 2014-06, 2014), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2428207; Letter from OUTlaws Canada Leaders to Law Soc'y of Upper Can., *supra* note 133; Vince Pontaletta, *Government Panel Had Concerns About Langley TWU Law School,* PONTALETTA GROUP, http://www.pontalettagroup.com/government-panel-concerns-langley-twu-law-school (last visited Feb. 20, 2017); Letter from Paul Marai, Chair, Bd. of Dirs. of Out On Bay Street, and Japneet Kaur, President, Out On Bay Street, to Law Soc'y of Upper Can. (Mar. 18, 2014) http://www.startproud.org/wp-content/uploads/2016/03/TWUOutOnBayStreetMarch18-1.pdf.

[333] Craig, *The Case for Rejecting TWU*, *supra* note 59; Craig, *TWU Law*, *supra* note 2.

[334] *See* Trinity W. Univ. v. Law Soc'y of Upper Can., 2016 ONCA 518, para. 134 (Ont.) (citing Professor Craig while drawing a distinction between exercising religion and discrimination).

[335] *See* sources cited *supra* note 332.

[336] Trinity W. Univ. v. Law Soc'y of Upper Can., 2016 ONCA 518, para. 134 (Ont.); Trinity W. Univ. v. Law Soc'y of Upper Can., 2015 ONSC 4250, para. 117 (Ont.).

[337] Craig, *The Case for Rejecting TWU*, *supra* note 59, at 152.

[338] *Id.*

The Federation took the position that it did not have the authority to review a proposed law school's hiring and admissions policies, but only whether the law program was compliant with the national requirement.[339] Professor Craig said that this was "insufficient."[340] If the Federation failed in its duty by "not exercising its delegated authority in a manner that protects the public interest and reflects the academic requirements the law societies have agreed upon," said Professor Craig, "then its authority to approve new programs should be withdrawn."[341] Otherwise, a law society would be found endorsing a discriminatory law school.[342] Thus was outlined a plan of action. If the Federation "fails" by approving TWU, then it was up to the individual law societies to conduct their own investigations.[343]

As it turned out, the Federation ultimately did "fail," in the minds of many academics, including Professor Craig, by approving TWU. For Professor Craig, that decision was "disappointing."[344] The Federations' "recommendation represents a refusal to act in the interests of equality and justice. As lawyers, we lack the courage of the B.C. College of Teachers more than [ten] years ago."[345] Noting the "important moment in Canadian legal history and for the pursuit of justice," she queried whether the law societies would "embrace their commitment to the principles of equality, as did the B.C. College of Teachers" when they decided against TWU in the late 1990s in the TWU 2001 case.[346] This clarion call was heeded by three law societies: the Law Society of Upper Canada (Ontario), the Nova Scotia Barristers' Society, and the Law Society of British Columbia.[347]

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[339] *Id.* at 153.

[340] *Id.* at 155.

[341] *Id.* at 154.

[342] *Id.*

[343] *Id.*

[344] Elaine Craig, *Law Societies Must Show More Courage on Trinity Western Application*, GLOBE & MAIL, (Dec. 18, 2013) [hereinafter Craig, *Law Societies Must Show More Courage*], http://www.theglobeandmail.com/opinion/law-societies-must-show-more-courage-on-trinity-western-application/article16023053/.

[345] *Id.*

[346] *Id.*

[347] Sean Fine, *Ontario Appeal Court Upholds Law Society's Stand on Trinity W. Univ.*, GLOBE & MAIL (June 28, 2016), http://www.theglobeandmail.com/news/national/ontario-appeal-court-upholds-law-societys-stand-on-christian-school/article30674427/; Jane Taber & James Bradshaw, *N.S. Law Society Rejects Accreditation as Long as Trinity Western Maintains Same-sex Covenant*, GLOBE & MAIL (Apr. 24, 2014), http://www.theglobeandmail.com/news/national/twu-president-casts-law-school-debate-as-religious-freedom-issue/article18185317/; *Trinity Western Law School Future in Doubt After B.C. Law Society Rejection*, CBCNEWS (Oct. 31, 2014), http://www.cbc.ca/news/canada/british-columbia/trinity-western-law-school-future-in-doubt-after-b-c-law-society-rejection-1.2819684.

Professor Craig argued that TWU's policies "would certainly violate human rights law protections" but for TWU's exemption from such legislation as a religious institution, and that it may be unlawful in other jurisdictions.[348] This is something, she insists, that law societies should keep in mind—they could be found to be in violation of their home human rights legislation by approving a discriminatory law school.[349] Professor Craig's argument was forcefully made by the Nova Scotia Barristers' Society before Justice Jamie S. Campbell.[350]

Justice Campbell held that it simply made no sense for the law society in Nova Scotia to be concerned about whether a law school in BC would be in violation of human rights legislation in Nova Scotia.[351] "The legal authority of the NSBS cannot be extended to a university because it is offended by those policies or considers those policies to contravene Nova Scotia law that in no way applies to it," said Justice Campbell.[352] He continued, "[t]he extent to which NSBS members or members of the community are outraged or suffer minority stress because of the law school's policies does not amount to a grant of jurisdiction over the university."[353]

Professor Craig also compared the TWU case to *Bob Jones University v. United States*,[354] a United States Supreme Court case.[355] Bob Jones University (BJU) had a policy that refused interracial dating among its students based on the religious beliefs of the school's sponsors.[356] The United States Supreme Court refused to recognize a religious exemption for BJU from the Internal Revenue Service's policy that refused charitable tax-exempt status to BJU for its discriminatory admissions policy.[357] Professor Craig, and subsequently a number of interveners and academics, had said that "[a] religiously based anti-miscegenation policy is analogous to TWU's anti-gay policy."[358] The Ontario Court of Appeal agreed that BJU was a comparable situation.[359] The court said:

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[348] Craig, *The Case for Rejecting TWU*, *supra* note 59, at 156.

[349] *Id.* at 157.

[350] *See* Trinity W. Univ. v. N.S. Barristers' Soc'y, 2015 NSSC 25, para. 2 (N.S.) (arguing Elaine Craig's point that the issue regarding TWU's policy is an equality issue).

[351] *Id.* at para. 8.

[352] *Id.*

[353] *Id.*

[354] 461 U.S. 574 (1983).

[355] Craig, *TWU Law*, *supra* note 2, at 658–59.

[356] *Bob Jones Univ.*, 461 U.S. at 580–81.

[357] *Id.* at 612.

[358] Craig, *The Case for Rejecting TWU*, *supra* note 59, at 159.

[359] Trinity W. Univ. v. Law Soc'y of Upper Can., 2016 ONCA 518, para. 138 (Ont.).

> TWU, like Bob Jones University, is seeking access to a public benefit—the accreditation of its law school. The LSUC, in determining whether to confer that public benefit, must consider whether doing so would meet its statutory mandate to act in the public interest. And like in *Bob Jones University*, the LSUC's decision not to accredit TWU does not prevent the practice of a religious belief itself; rather it denies a public benefit because of the impact of that religious belief on others—members of the LGBTQ community.[360]

However, the British Columbia Court of Appeal rejected the American example. "TWU is not seeking a financial public benefit from this state actor," said the court.[361] It is not the tax break sought in BJU.[362] Instead, "[a]ccreditation is not a 'benefit' granted in the exercise of the largesse of the state; it is a regulatory requirement to conduct a lawful 'business' which TWU would otherwise be free to conduct in the absence of regulation."[363] There is a practical benefit to TWU from regulatory approval, but that is not a funding benefit.[364] The BC court said "the reliance on the comments of a single concurring justice in the Bob Jones case is misplaced."[365] Finally, the court did not see the BJU case "as supporting a general principle that discretionary decision-makers should deny public benefits to private applicants."[366]

Professor Craig also argued that the legal context has changed since 2001 as a result of the SCC's decision in *Doré v. Barreau du Québec*.[367] In *Doré*, the SCC held that administrative tribunals are not to be held to a standard of "correctness," but of "reasonableness," when making decisions in their area of expertise.[368] This means, said Professor Craig, that the 2001 TWU case would be decided differently today.[369] Professor Craig's point is that if the SCC was deciding the 2001 case today, it would use the reasonable standard test and would have supported BCCT's decision to deny TWU's teacher training program as a reasonable decision.[370] Thus, she argues, the Federation could reasonably deny TWU's law school application because of its concerns with TWU's discrimination.[371] Professor Craig pointed out that "[a]s

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[360] *Id.*

[361] Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423, para. 182 (B.C.).

[362] *Id.*

[363] *Id.*

[364] *Id.*

[365] *Id.*

[366] *Id.*

[367] Craig, *The Case for Rejecting TWU*, *supra* note 59, at 166 (citing Doré v. Barreau du Québec, [2012] 1 S.C.R. 395 (Can.)).

[368] Doré v. Barreau du Québec, [2012] 1 S.C.R. 395, paras. 52–54 (Can.).

[369] Craig, *The Case for Rejecting TWU*, *supra* note 59, at 166.

[370] *Id.*

[371] *Id.* at 167–68.

societal values change, what constitutes a reasonable balance between protecting freedom of religion and protecting against discrimination on the basis of sexual orientation also changes."[372] Professor Craig believes that today's decision-makers should be much more protective of equality for gay and lesbian individuals than in the past.[373]

According to Professor Craig, "the appropriate balance between freedom of religion and equality for gays and lesbians today requires greater recognition of gays and lesbians than it did fifteen years ago. Freedom of religion would not trump these equality interests as easily as it did when the College of Teachers case was decided."[374] In other words, the SCC's decision in TWU 2001 was not the appropriate balance. The "appropriate balance," according to the anti-TWU academics, is for private religious institutions to adopt the public sexual norm. Religious freedom must yield to the overriding right of equality as defined by the rights advocates. There is then no public and private sphere, but instead one public sphere that permeates the entire human experience.

In short, Professor Craig argued that the evolution of societal "values" has reached the point where a religious organization has absolutely no jurisdiction to define for itself what is and is not acceptable behavior.[375] It is curious that the only issue at stake for the critics of TWU is that the school allegedly discriminates against those who engage in sexual activity outside of the traditional one-man-one-woman marriage. Underlying the criticism is an obvious inability of the opposition to fully understand the grand picture of a diverse society that allows for differences of opinion (and belief) concerning what is acceptable sexual behavior. Unlike Professor Wintemute's assertion that in time there will be no need for religious accommodation as religious institutions "voluntarily" change their views,[376] Professor Craig speaks for those advocates who would see the use of the state as the means to ensure the "appropriate balance."[377]

The legal opinion of constitutional lawyer John B. Laskin, commissioned by the Federation, disputes Professor Craig's assertion.[378] Laskin noted that the SCC continues to apply the same balancing approach of competing rights that it took back in the TWU 2001 case.[379]

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[372] *Id.* at 168.

[373] *Id.*

[374] Craig, *Law Societies Must Show More Courage*, *supra* note 344.

[375] Craig, *The Case for Rejecting TWU*, *supra* note 59, at 168.

[376] Wintemute, *supra* note 136, at 154.

[377] Craig, *Law Societies Must Show More Courage*, *supra* note 344.

[378] Memorandum from John B. Laskin to Gérald R. Tremblay, President, Fed'n of Law Soc'ys of Can., and Jonathan G. Herman, Chief Exec. Officer, Fed'n of Law Socy's of Can. 7-9 (Mar. 21, 2013), http://docs.flsc.ca/SpecialAdvisoryReportFinal.pdf.

[379] *Id.* at 5.

The BC Court of Appeal adopted Laskin's opinion, on that point, as their own when they balanced the two rights and found in TWU's favor.[380] In a robust manner, Justice Campbell of the Nova Scotia Supreme Court noted that the widespread public acceptance of gay and lesbian rights over the last fourteen years did not render the 2001 case out of step with current legal thought and social values.[381] The case involved not only gay and lesbian rights, but also freedom of religion and conscience.[382] Therefore, he concluded:

> The conversation between equality and freedom of conscience has not become old fashioned or irrelevant over the last 14 years, and the Supreme Court's treatment of it can hardly now be seen as archaic or anachronistic. Equality rights have not jumped the queue to now trump religious freedom. That delineation of rights is still a relevant concept. Religious freedom has not been relegated to a judicial nod to the toleration of cultural eccentricities that don't offend the dominant social consensus.[383]

In the review of the case law since 2001, Justice Campbell concluded that "[r]eligious rights have not been marginalized or in any way required to give way to a presumption that equality rights will always prevail."[384] There remains in the law significant room for religious freedom and religious expression that offends the secular concerns and the claim for asymmetrical equality rights. Unfortunately, Justice Campbell did not acknowledge the fact that religion itself is an equality right. It is not simply religion versus equality, but rather the asymmetrical claim of equality rights that seek to eclipse religion.[385]

Finally, Professor Craig asserted that TWU's Community Covenant will not allow the law program to teach the skill of critical thinking.[386] "Academic staff are required to teach students that the Bible is the ultimate, final, and authoritative guide by which all ethical decisions must be made."[387] Professor Craig maintains, "[t]o teach that ethical issues must be perceived of, assessed with, and resolved by a pre-ordained, prescribed, and singularly authoritative religious doctrine is not to teach the skill of critical thinking about these issues."[388]

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[380] Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423, para. 159 (B.C.).

[381] Trinity W. Univ. v. N.S. Barristers' Soc'y, 2015 NSSC 25, paras. 195–96 (N.S.).

[382] *Id.*

[383] *Id.*

[384] *Id.* at para. 200.

[385] *See supra* notes 22–24 and accompanying text.

[386] Letter from Elaine Craig, Assoc. Professor of Law, Dalhousie Univ. Schulich Sch. of Law, to Rene Gallant, President, N.S. Barristers' Soc'y 10–11 (Feb. 5, 2014), http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-02-05_Craig_TWU.pdf.

[387] *Id.*

[388] *Id.*

Dwight Newman, a law professor in Saskatchewan, points out that Professor Craig's argument falls short on three accounts: First, he pointed out that there is extensive scholarly literature demonstrating that evangelical Christian environments provide an equal if not greater opportunity for the development of critical thinking in students.[389] Second, there is ongoing scholarly conversations within the Christian community about the place of law in private and public life.[390] Third, these Christian scholars have shown that there are various methods of conducting biblical integration.[391] "The fact that somebody commences with faith of some sort should not be a basis for excluding that individual from the realm of critical thinking,"[392] especially with all the disturbing parallels that this argument has to techniques of dehumanization used in the past with other marginalized groups to legitimate discrimination against them. Professor Craig's argument, noted Professor Newman, displays a lack of engagement with the Christian scholarly environment.[393] Further, other scholars suggest that there is a lack of critical thinking at secular law schools.[394]

Professor Newman succinctly describes the robust tradition of critical thinking and animated debate within the Christian tradition and its institutions on biblical interpretation and applicability to current moral and legal debate.[395] This reality weakens the suggestion that TWU, being an inheritor of that tradition, is a place where "pre-ordained, prescribed, and singularly authoritative religious doctrine" is emphasized at the expense of critical thinking.[396] Nothing could be further from the truth.

Professor Craig later retracted the impact of her suggestion, by clarifying that she was not saying Christian institutions are incapable of providing legal education or that the Christian worldview is antithetical to critical thinking.[397] Rather, it's the "specific institutional policies" of TWU as stated in the Community Covenant and the Statement of Faith that are inconsistent with the ethical duty not to discriminate and with

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[389] Dwight Newman, On the Trinity Western University Controversy: An Argument for a Christian Law School in Canada 4 (June 4, 2013) (unpublished paper), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2283782.

[390] *Id.*

[391] *Id.*

[392] *Id.*

[393] *Id.*

[394] *See* Carissima Mathen & Michael Plaxton, *Legal Educ., TWU & the Looking Glass* 75 SUP. CT. L. REV. (2d) 223, 224 (2016) (arguing that graduates from TWU would be able to understand weight of authority and be able to apply the law regardless of their studies of the law under a religious perspective).

[395] Newman, *supra* note 389, at 3.

[396] Craig, *The Case for Rejecting TWU*, *supra* note 59, at 164.

[397] Craig, *TWU Law*, *supra* note 2, at 646.

critical thinking.[398] She argued that there is a distinction between other Christian universities, such as University of Notre Dame in the United States, and TWU:

> The distinction, and it is an important one, is that these institutions do not impose formal policies that discriminate on the basis of sexual orientation or mandate a statement of faith that is inconsistent with creating an institutional environment consistent with some aspects of the requirements that the law societies have arrived at in accrediting Canadian common law degrees.[399]

This distinction argument was accepted by the Ontario Court of Appeal.[400]

Ultimately, even with the advantage of the Ontario Court of Appeal decision, the British Columbia Court of Appeal was not persuaded by Professor Craig's argument on the distinction.[401] The BCCA recognized that while there is discrimination, it must be balanced with the effects on religious freedom.[402] There exist two rights, not one.[403] That requires an assessment of the greater loss.[404] The BCCA viewed the negative effect on TWU's religious freedom by the LSBC decision not to accept the TWU law program as severe, as opposed to the minimal impact on equality rights if TWU is accepted.[405]

What remains striking in the academic arguments is the refusal to accept the current state of the law of religious accommodation as outlined in the TWU 2001 case and onward, including in *Reference Re Same-Sex Marriage*. The academics assume that discrimination, *ab initio*, is wrong even in the realm of a private university and even if it is lawful. The emphasis on reforming the law to make it into the image of radical equality removes space for institutional religious freedom. That is an aggressive stance, and it has met considerable headwind in the Nova Scotia and British Columbia courts.

Nevertheless, this case illustrates that the legal academic world plays a very important role in matters of public policy. Canadian legal scholars, by far, have been outspoken against TWU.[406] Yet they have had a major influence upon all the decision bodies that addressed TWU's law school proposal.[407] Consider that, but for the academic opposition led by

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398 *Id.*

399 *Id.*

400 Trinity W. Univ. v. Law Soc'y of Upper Can., 2016 ONCA 518, para. 134 (Ont.).

401 Trinity W. Univ. v. Law Soc'y of B.C.*,* 2016 BCCA 423, paras. 160–62 (B.C.).

402 *Id.* at para. 164.

403 *Id.*

404 *Id.* at para. 166.

405 *Id.* at para. 191.

406 *See* sources cited *supra* note 332 (containing examples of Canadian legal scholars voicing their opinions against TWU's policy).

407 Trinity W. Univ. v. Law Soc'y of B.C.*,* 2016 BCCA 423, para. 29 (B.C.).

the law deans, the Federation would have dealt with the TWU application as it has done with the previous law school proposals. It would have considered the academic plan in light of the National Requirement[408] and passed the proposal without controversy. However, the anti-TWU opposition caused the Federation to set up a special committee to deal with the concerns raised about TWU's discriminatory admissions policy.[409] That delayed the accreditation process by a number of months at additional cost.[410]

Yet, it did not stop there. Once the Federation approved TWU, the academics called on the law societies to have the "courage" to disregard the Federation's decision and to independently review the proposal.[411] Three law societies accepted that challenge.[412] The taxation on the skills, time and effort of the bureaucratic apparatus of each society had to be immense. It is one thing for larger societies such as Ontario and British Columbia to engage in litigation, but for the smaller Nova Scotia Barristers' Society it was obviously too much. The NSBS did not appeal its loss at the Nova Scotia Court of Appeal, perhaps because the cost of such an appeal was prohibitive.[413]

The common law faculties across Canada have publicly denounced TWU.[414] Reading through those statements, it is evident that the current equality rights paradigm on the campuses of the law faculties cannot comprehend that there could exist in Canada a religious university legitimately operating a law school while holding to the traditional view of marriage as part of its admission criteria.[415] It goes against everything they stand for[416] and, I suggest, their position is in direct opposition to the current state of the law on religious accommodation.[417] The asymmetrical equality norm has become so comprehensive in legal analysis at Canada's law schools that it allows little room for religious practices. The advancement of equality rights under the Charter in recent years appeared to confirm their presupposition that religion must

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[408] *National Requirement*, FED'N OF LAW SOC'YS OF CAN., http://docs.flsc.ca/National-Requirement-ENG.pdf (last visited Feb. 20, 2017).

[409] Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423, paras. 7–9 (B.C.).

[410] *Id.*

[411] Craig, *Law Societies Must Show More Courage*, *supra* note 344.

[412] Trinity W. Univ. v. Law Soc'y of B.C., 2016 BCCA 423, paras. 41–50 (B.C.).

[413] *Update on the Trinity Western University Matter*, N.S. BARRISTERS' SOC'Y (Aug. 15, 2016), http://nsbs.org/news/2016/08/update-trinity-western-university-matter.

[414] Letter from OUTlaws Canada Leaders to Thomas G. Conway, President, Fed'n of Law Soc'ys of Can. (Nov. 12, 2014), http://www.startproud.org/wp-content/uploads/2016/03/2014-11-24-Letter-to-FLSC-with-Enclosures.pdf.

[415] *See id.* (asserting that TWU's Community Covenant is clearly discriminatory towards LGBTQ students).

[416] *Id.*

[417] Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 701 (Can.).

fade into the background.[418] However, the TWU law school proposal has totally upset the academic worldview.[419] It is as if they were blindsided. Not accustomed to a world of private religious universities, their assumption was that, "Yes, such universities may exist but they are really anachronisms of a bygone era and the legal academic world has nothing to fear, as they will never reach our level of expertise." But suddenly TWU shows up and presents not only a law school proposal, but one that is unique: a proposal that challenges the very myopic, theory-focused law school establishment with a curriculum concentrated on practical legal competence, so that its graduates are ready to begin work at a law firm immediately upon graduation.[420] It promises to fill an important gap in legal education—challenging the current law school hegemony.

Though TWU is but a very small Christian establishment, its legitimate proposal for a law school, within the context of a Christian environment that not only states what it believes but actually carries it out on the campus in real time, is now seen as a threat. A threat to the one worldview of equality rights. A worldview that has made no place for serious religious organizations that actually mean what they say. The academic world was quiet as TWU churned out nurses, history, and business graduates. However, to produce law graduates who may someday sit on the judicial bench or be eligible for high public offices in government bureaucracy—that is a totally different matter. Religion, that nemesis of equality,[421] is about to stride in on the legal fraternity. That is a scary proposition to those who see equality as the highest human right. That is a view expressed by former SCC Justice Claire L'Heureux-Dubé, who stated: "I don't believe that a fundamental right can be reasonable if it's not compatible with the notion of equality."[422] The trump of equality rights at the expense of religious freedom seemed just about assured. That is now in question.

CONCLUSION

I fear that there is falling upon the Western world a shroud of irreconcilable differences between the state and religious communities.

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[418] *See* Letter from OUTlaws Canada Leaders to Thomas G. Conway, *supra* note 414 (discussing the equality obligations in the legal field).

[419] *See id.* (claiming the outright unjustness of TWU's policy regarding sexual orientation).

[420] TWU PROPOSAL, *supra* note 173, at 13–14, https://www.twu.ca/sites/default/files/assets/proposal-for-a-school-of-law-at-twu.pdf.

[421] Beverley Baines, *Equality's Nemesis?*, 5 J.L. & EQUAL. 57, 72–73 (2006).

[422] Haroon Siddiqui, *Quebec Charter's Authoritarian Streak: Siddiqui*, TORONTO STAR (Sept. 28, 2013), http://www.thestar.com/opinion/commentary/2013/09/28/quebec_charters_authoritarian_streak_siddiqui.html.

This shroud is one of mistrust: a mistrust born from the growing demand that the state make sexual equality rights superior to the rights of religious communities who continue their religious practice of affirming marriage as being of one man and one woman for life. But there is more.

Canadian constitutional jurisprudence has generally put forth a strong tradition and argument for openness toward diversity[423] and different traditions.[424] Indeed, the *Charter* was birthed out of a liberal society that is described as "free and democratic."[425] "[T]he clear and consistent jurisprudential message," Professor Benjamin Berger notes, "has been that religion has constitutional relevance because it is an expression of human autonomy and choice."[426] The free and democratic society presupposes autonomy, choice, and diversity. It in turn recognizes that religious individuals, to be free, must be able to organize communal associations that assist in their faith commitment and practice. The SCC noted: "The communal character of religion means that protecting the religious freedom of individuals requires protecting the religious freedom of religious organizations, including religious educational bodies . . . ."[427] A free and democratic society, therefore, must recognize that there should be no asymmetrical equality rights claim that destroys religious diversity. Religious liberty has an equality rights aspect in and of itself. Diversity, autonomy, and choice allow freedom to flourish.

Nothing has galvanized public discourse over the last fifteen years quite like the right of religious communities to continue involvement in charitable pursuits such as schools and universities.[428] Asymmetrical equality advocates have put forth the position that such religious enterprises are public endeavors due to the fact that they require the state's imprimatur to be successful. A school or a university requires state accreditation to ensure that graduates receive a recognized diploma. And when that university "discriminates" against sexual minorities by maintaining a code of conduct that expects students to

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[423] Trinity W. Univ. v. B.C. College of Teachers, [2001] 1 S.C.R. 772, para. 33 (Can.) ("The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected.").

[424] Multani v. Commission Scolaire Marguerite-Bourgeoys, [2006] 1 S.C.R. 256, para 99 (Can.) (allowing a Sikh boy to wear his kirpan to school).

[425] R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295, 352 (Can.).

[426] Benjamin L. Berger, *Law's Religion: Rendering Culture*, *in* LAW AND RELIGIOUS PLURALISM IN CANADA 264, 278 (Richard Moon ed., 2015).

[427] Loyola High School v. Quebec (Att'y General), [2015] 1 S.C.R. 613, 618 (Can.) (Chief Justice McLachlin and Moldaver J. speaking for the minority position).

[428] *See* Baines, *supra* note 421, at 78–79 (arguing that the entrenchment of the freedom of religion has caused the religious community in Canada to expect more legal protection than they deserve).

adhere to heterosexual marriage, then an offense has occurred to the non-heterosexual minority. The offense may be classified as a harm to dignity.

This characterization makes it very difficult for a compromise to be obtained. Asymmetrical equality advocates demand either the religious school not practice its belief on marriage or not receive accreditation.[429] In short, having the institution shut down would be more acceptable to this view. This position is simply unworkable for a plural free and democratic society. The liberal democratic project to maximize individual freedom while maintaining civil peace will not be realized. We are bound for troubling politics going forward unless we are collectively able to agree to disagree and respect the choices of the other.

I suggest that the visceral response against TWU is based on the underlying apprehension that TWU's position represents an existential threat to the advance of equality rights of the LGBTQ community. There is an underlying fear that all the gains the LGBTQ community has obtained may slowly whittle away if TWU's graduates are permitted to practice law after having signed on to the Community Covenant agreement that openly challenges the modern redefinition of marriage.

The proverbial elephant in the room that people are ignoring is the fact that we are dealing with truth claims[430] on the meaning of marriage. Both sides are claiming the moral upper hand of "truth."

TWU's religious freedom claim is based on the traditional Christian reading of biblical discourse about marriage.[431] TWU and those who agree with its beliefs would say that God, having made male and female, instituted marriage as the ideal that humankind does not have the prerogative to change. TWU's community definition of marriage reflects

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[429] Craig, *The Case for Rejecting TWU*, *supra* note 59, at 150.

[430] Introducing the concept of "truth" claims in the conclusion of what is already a protracted article may seem too much. However, it is something to explore in a further piece that I, or others, might want to consider. It begs the question: How can there be two different and competing truth claims in this context? Is there a way to test which is correct? The concept of "truth" is something many use to defeat the opposing side—often seen as intolerant. But "what is truth?" Both sides will have their own definitions and views of epistemology. Concepts of science, natural law, and positive law all conjure up approaches for further thought. My point here is simply to say that both sides are adamant in their positions, and room must be had in a free and democratic society to allow for the existence of both. In other words, to allow for diversity rather than asymmetrical domination.

[431] *Matthew* 19:4–6 (New King James) ("For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh . . . . So then, they are no longer two but one flesh. Therefore what God has joined together, let not man separate.").

the notion that marriage is not simply a "civil" institution,[432] but a "sacred" institution—that is to say, of a divine, metaphysical origin.

The opponents of TWU see the matter quite differently. They find it problematic that people use religion to support marriage at all.[433] To them, the opening up of marriage to same-sex couples is a sign of the movement's progress from "formal equality" to "real equality."[434] To them, marriage is symbolic—but it's more than that. "[Marriage] is the institution that accords to a union the profound social stamp of approval and acceptance of the relationship as being of the highest value."[435] It has "priceless social respect, cachet and [honor]. It is the signifier of societal approval for a relationship. . . . It is society's way of *celebrating*—not just recognizing—the union of two people."[436] It is the recognition that that they are *valuable* and society must therefore *celebrate* them.[437] For the LGBTQ community, that means society must go beyond merely accepting and condoning their same-sex marriages to *approving* of them.[438] "Stopping short denotes inferiority; it indicates that there is thought to be something problematic with the group and its members."[439]

Therefore, when a religious institution carrying on a "public" service (i.e., a university) does not *celebrate* same-sex marriage, the LGBTQ community interprets this stance or lack of assent as society degrading them and treating them as inferior. In other words, the opposition to TWU sees the "marriage issue" as having been settled, and TWU needs to become progressive in its view. As BC Bencher Mossop said, just because TWU has a legal right to have its community covenant "doesn't mean [TWU] should do it."[440] TWU, from his perspective, should not act upon its religious beliefs, because those beliefs are not only unacceptable, but also wrong.[441]

However, as Justice Campbell, of the Nova Scotia Supreme Court, noted: "The *Charter* is not a blueprint for moral conformity. Its purpose is to protect the citizen from the power of the state, not to enforce

[432] *Compare* Reference re Same-Sex Marriage, [2004] 3 S.C.R. 698, 699 (Can.) (defining marriage as a civil union between two people) *and Matthew* 19:4–6 (New King James) (defining marriage as the union of a man and a woman).

[433] Bruce MacDougall, *The Celebration of Same-Sex Marriage*, 32 OTTAWA L. REV. 235, 247–48 (2000–2001).

[434] *Id.* at 237.

[435] *Id.* at 242.

[436] *Id.* at 252.

[437] *Id.* at 253.

[438] *Id.* at 256.

[439] *Id.* at 257.

[440] Transcript, *supra* note 230, at 21 (David Mossop).

[441] *Id.* at 21–22.

compliance by citizens or private institutions with the moral judgments of the state."[442]

With two such diametrically opposed views, we have the makings of a very protracted debate. This necessitates that both TWU (including its supporters) and the LGBTQ legal community (including its supporters) be willing to agree to disagree on these truth claims and allow mutual space for co-existence, because we are occupying the same real estate.

[442] Trinity W. Univ. v. N.S. Barristers' Soc'y, 2015 NSSC 25, para. 10 (N.S.).