Shameful Subjects, Queer Passions, and Law's Stained-Glass Closet: A Feminist Critique of Kantian Discourse Concerning TWU's Law Degree

Connor Steele

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Department of Classics and Religious Studies
Faculty of Arts
University of Ottawa

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Abstract

This dissertation employs the queer phenomenology of Sara Ahmed and the critical discourse analysis method of Norman Fairclough to analyze the dispute concerning Trinity Western University's (TWU) proposed juris doctor program. The dispute provides a case study to demonstrate the changing "feeling rules" within Canadian constitutional culture over roughly 23 years, from approximately 1995 to 2018. The project critiques (hetero)sexist shame as an often-harmful technique of moral discipline and emotional regulation, showing how Canadian constitutional culture deploys shame to determine who will belong to law and who will be (partially) beyond its boundaries.

A crucial aspect of the struggle to define the law's parameters are disputes over what it means to act reasonably. Because this dissertation argues that reason is highly gendered, the philosophy of Immanuel Kant provides indispensable conceptual tools through which one can critique (hetero)sexism while uncovering its foundational assumptions. The frequency and intensity with which many subjects of Canadian constitutional culture deploy shame to enforce their conception of what the Constitution demands illuminates a perhaps intractable problem within human rights discourse; namely, that shame is both necessary for and antithetical to the concepts of human dignity and rational agency, upon which rests much contemporary Kantian human rights discourse. In light of this problem, the best normative justification for denying TWU's application was the need to prevent unjustified shame based on morally extraneous characteristics, even as this justification cannot entirely redress the problem of shame in Canadian constitutional culture.

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The first matter I must acknowledge is that I write on the unceded territory of the Algonquin People. I hope that my work will help us build a less colonial state upon the soil of Turtle Island, though my research can only accomplish this indirectly. I would also like to acknowledge the generous funding from the Social Sciences and Humanities Research Council of Canada, without whose support my dissertation would not have been possible.

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Collectively, my parents' commitment to disability equality and full acceptance of their gay son is a testament to the wonderful things queer persons can achieve when they have the support of their family, in addition to the power of the human heart for infinite expansion in response to unforeseen circumstances. My parents' singular love has made me less fearful of cross-sex relationships and monogamy than I likely would have been, were they not so committed to treating each other with equal concern and respect.

My brother, Jarrett Steele, and his spouse, Jana Tamosetis, who kindly suffer my frequent habit of forgetting to acknowledge them, have a magnificent sense of whimsy and an enthusiasm

for nature that I can only hope to emulate. I would also thank my aunt and uncle, Diana and Grant Youdelis, for proving that the notion of family transcends ties of blood.

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Introduction
Discrimination, the Politics of Recognition, and Contextual Judgement

> *The task of taking a fresh look at homosexuality is not one which is undertaken with alacrity. That is because homosexuality conjures up more passion and prejudice than possibly any other subject except that of colour. The two [bigoted] attitudes have much in common; it is the fear and ignorance behind them that give them their venom. The word "homosexuality" does not denote a course of conduct, but a state of affairs, the state of loving one's own, not the opposite, sex; it is a state of affairs in nature. One should no more deplore "homosexuality" than left-handedness. One can condemn or prohibit acts of course; that is another matter. But one cannot condemn or prohibit homosexuality, as such* — Alastair Heron[1]

> *Men make their own history, but they do not make it just as they please; they do not make it under circumstances chosen by themselves,…The tradition of all the dead generations weighs like a nightmare on the brain of the living. And just when they seem engaged in revolutionising themselves and things, in creating something entirely new, they anxiously conjure up the spirits of the past…* — Karl Marx[2]

The TWU Law School Controversy and the Challenge of Perspective

As the Rev. Dr. Martin Luther King Jr. observed in his famous *Letter from a Birmingham Jail*, which criticized those who justified segregation and racist ideas generally on religious grounds, "injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly affects all indirectly."[3] Fortunately, we do not have to be a Doctor of Theology or the leader of a rights movement to understand discrimination. Our judgements concerning it are frequently intuitive.

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[1] Alastair Heron, ed, *A Quaker View of Sex: An Essay by a Group of Friends*, rev. ed. (London: Friends Home Service Committee, 1963), 26. Though published with the help of The Friends Home Service Committee, this historic pamphlet was not officially promulgated as the doctrinal position of the British society of Friends. Nevertheless, many within various Societies of Friends (a Christian denomination) have long advocated for queer rights. Quakers generally lack the organizational mechanisms, as well as attending belief in centralized authority, to produce official doctrinal statements. As we shall see later, I partially object to the division the pamphlet makes between status and conduct (or act and identity).

[2] Karl Marx, "The Eighteenth Brumaire of Louis Bonaparte," in *The Marx-Engels Reader*, 2nd ed., ed, Robert C. Tucker (1869; repr. New York: W. W. Norton and Company, 1978), 595.

Indeed, we need to look no further than Sesame Street for timeless guidance.

The great 20th century American sage, Kermit the Frog, states with succinct insight, "it's not easy bein' green;"[4] but, as Kermit later makes clear in his reflection, the only reason why being green is shameful for him is that his particular social context does not value green skin pigmentation. We can extrapolate from this insight and conclude the following: a distinction that makes no difference is not a difference; a classification that makes a difference, however, makes all the difference. Like Kermit, we generally dislike feeling excluded, singled-out, stigmatized, or demeaned owing to personal characteristics. Often, our assumption that the (undervalued) personal characteristics we have are immutable, morally benign, or an essential part of our identity can exacerbate the shame we may suffer because of them.

Stigma depresses us because, as Victor Hugo notes, "the ultimate happiness in life is the conviction that one is loved; love for oneself — better still, in spite of oneself."[5] An unfortunate consequence of this assertion is, however, that a great deal of our happiness depends upon others over whom we may exercise little control., As our experience and Hugo's writing poignantly illustrates, one of the most tormenting forms of human misery is the belief that we are hated for whom we are or the persons whom we love, sometimes despite our best efforts at self improvement. No one wishes to "manage a spoiled identity," as Irving Goffman famously puts

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[3] Martin Luther King Jr., "Letter from a Birmingham Jail," in *Applied Ethics: A Multicultural Approach*, 6th ed, eds. Larry May and Jill B. Delston (1963; repr., New York: Routledge, 2016), 234.

[4] Jim Henson performing as Kermit the Frog, *Bein' Green,* Jim Henson, Joe Raposo, 1970, Arts Music Inc, Track 13 on *Sesame Street: Platinum All-Time Favorites,* January 1st, 1995.

[5] Victor Hugo, *Les Miserables*, trans. Julie Rose (1862; repr., New York: Modern Library, 2008), 141.

it.[6] Our worries regarding difference, stigma, and social subordination mean that more of us contemplate what has been called the "expressive dimensions" of discriminatory conduct, in addition to the harms alleged to flow from such action. That is, quite apart from any specific rights violations, some argue that the state treats us badly when it communicates an unjustly denigrating message concerning a group to which we belong by what the state does or does not do.[7]

The personal is political. Any cogent account of discrimination first requires us to reflect on our present moment, always aware of Karl Marx's perceptive comment in the second epigraph to this introduction. We live in a time and country that is especially sensitive to (unjust) distinctions, as previously dehumanized groups claim their right to recognition as equal moral persons.[8] Relatedly, we live in a time and country that is acutely preoccupied with ideals of egalitarian romantic love, personal wellness, therapeutic self-fashioning, as well as emotional regulation and cultural competence.[9] This curious veneration of love and romance — combined with an equally strong fascination with individual liberty and discomfort with our mortality, as well as ambivalence about aspects of our more conservative past — has made Canadian culture hyper-erotic and sexually repressed.[10]

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[6] Irving Goffman, *Stigma: Notes Towards the Management of Spoiled Identity* (Englewood Cliffs, NJ: Pertinence-Hall, 1963).

[7] Richard H. Pildes, "Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism," *Journal of Legal Studies* 27, no. 52 (1998): 755.

[8] Charles Taylor. "The Politics of Recognition," in *Multiculturalism*, ed. Amy Gutmann, (Princeton, NJ: Princeton University Press, 1994), 25-73.

[9] Eva Illouz, *Saving the Modern Soul: Therapy, Emotions, and the Culture of Self-Help* (Berkeley, CA: University of California Press, 2008), esp. 105-52.

[10] Mariana Valverde, *Sex, Power, and Pleasure* (Toronto: Woman Press, 1985), 35.

Canadians, with varying degrees of aplomb, indifference, and dismay, have also witnessed the rapid disappearance of explicit Christian privilege within the law and civil society.[11] Such circumstances have contributed to quick transformations in how we structure intimacy and kinship. These have benefited gender and sexual minorities and questioned the liberal distinction between public and private spheres.[12] These developments have worsened a paradoxically oppressive politics of victimhood and an irrational sentimentality regarding what is left of our so-called private lives.[13] Canada also grants broad protection to freedom of religion.[14]

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[11] Mark A. Noll, "What Happened to Christian Canada," *Church History* 75, no. 2 (2006): 243-75.

[12] Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Cambridge, MA: Polity Press, 1992), 62.

[13] Lauren Berlant, "The Subject of True Feeling: Pain, Privacy, and Politic," in *Left Legalism/Left Critique*, eds. Wendy Brown and Janet Halley (Durham, NC: Duke University Press, 2002), 105-33.

[14] *Canadian Charter of Rights and Freedoms*, s 2, Part 1 of the *Constitution Act,* 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.
Section 2 of the *Canadian Charter of Rights and Freedoms* reads as follows:

> Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
> (c) freedom of peaceful assembly; and
> (d) freedom of association.

Former Chief Justice Brian Dixon articulated the governing justification for a definition of freedom of religion. In the following passage:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare *religious* beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that. Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.

Exercising freedom of religion may sometimes conflict with what many think antidiscrimination laws mandate. Sensitivity concerning discrimination causes some to question distinctions and hierarchies that were once thought natural and, therefore, beyond scrutiny. Others claim that our desire for social justice sometimes goes too far.

To them, tradition is valuable. Some distinctions are just. They are rooted in centuries of legal practice as well as philosophic and religious perspectives. From this debate between progressivism and conservatism, there arises the thorny problem of how to distinguish a genuine claim of discrimination from one that is doubtful. This conflict is especially tricky when persons have enduring attachments to the shame they currently feel or have felt in the past and their status as victims. Consequently, we should always ponder who benefits from maintaining the *status quo* and who benefits from changing it.[15] The unstable character of victimization and its rhetorical power is especially apparent when we analyse the interactions between conservative Christian groups and gender and sexual minorities. At first blush, we do not think of passion

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> One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.
>
> *R. v. Big M Drug Mart Ltd*, [1985] 1 SCR 285, paras. 94-5 18 DLR (4th) 321 (CanLII). Those who cite this passage from the case often in support of a broad definition of religious freedom, often at the expense of gender and sexual minorities, frequently miss four critical points in the paragraph. First, concerns of diversity and human dignity for the justification of freedom of religion. Second freedom of religion can be limited to protect the freedom of the other person. Third, freedom of religion can be limited to uphold a public standard of morality. Fourth, it primarily protects one's own conscience, not the right to influence the morals and beliefs of others, except by persuasion and dissemination of religious expressive material.

[15] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton, NJ: Princeton University Press, 1995), 52-77.

when we ponder law school accreditation. When religion and sex are involved in matters of public administration, however, circumstances become contentious at a fast pace.

Brayden Volkenant is a committed Evangelical. He believes that the Bible is the inspired word of God. His Evangelical faith, though not the sole feature of his personality, is a crucial facet of his life. Part of what it means to live a virtuous life for Mr. Volkenant is chastity. Chastity means faithfulness within divinely ordained heterosexual marriage and celibacy outside it. A righteous Christian life also means living in a community with others. Such a life should extend to institutions of post-secondary education. Trinity Western University (TWU) in Langley, British Columbia (part of the Canadian "Bible Belt"), gave him an opportunity to live this virtuous life. TWU reflects a long and vibrant history of evangelicalism within Canada. The institution is an expression of a distinct Evangelical subculture with specific behavioural expectations. Such expectations have an illustrious pedigree. They gain sustenance from the fountainheads of reason and revelation, which is embodied in a community covenant (see Appendix).[16]

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[16] For a defense of this covenant, see: Dwight Newman, "On the Trinity Western University Controversy: An Argument for a Christian Law School in Canada," *Constitutional Forum* 22, no. 3 (2013): 1-14. With great admiration for Newman, the problem with his approach, as I shall argue more fully in subsequent chapters, is that it represents Evangelicalism as the most authentic form of Christianity and makes opposition to queerness an essential part of Evangelicalism. He also tends to essentialize and romanticize the ideal of community. I critique this notion of community below. As a matter of legal doctrine, to be successful in a freedom of religion challenge, a claimant must show that she has a belief or practice possessing a nexus to religion, and that she is sincere in her belief. *Syndicat Northcrest v. Amselem*, 2004 SCC 47, para. 46, [2004] 2 SCR 551 (CanLII]. A court cannot inquire into the history or normative content of a belief, lest judges become the arbiters of religious dogma (para. 50). Consequently, a lawyer could argue that my mode of analysis is impermissible. Nevertheless, first, I am not trying to provide a positivistic doctrinal legal analysis, so I am able to do what a lawyer, strictly speaking, cannot. Second, based on the phenomenological perspective I shall be advocating, it is impossible for courts, at least in some respects, not to become the arbiters of religious dogma. In August 2018, TWU announced the CCA would be voluntary for the coming in subsequent school years as it applies to students.

He completed his undergrad at TWU. Now he wishes to attend a private law school in which his fellow students will abide by those same convictions, which TWU is now trying to offer. In addition to the University's Evangelical mission, his *alma mater* has an excellent academic ranking, some other professional programs, and small class sizes. It also promises to provide him with the practical training it says legal education institutions sorely need. Unfortunately for Mr. Volkenant, individual law societies refused to ratify the decision of Canada's national accreditation body (The Federation of Law Societies). They denied this accreditation, even though TWU underwent extensive review, and a special committee found that its religious convictions caused no equity concerns. Disagreeing with the Federation, some members of the law societies of British Columbia, Nova Scotia, and Ontario claim that TWU discriminates based on sexual orientation and gender (identity/expression). They allege that this discrimination occurs through TWU's Community Covenant Agreement (CCA). The CCA prohibits homoerotic activity on and off campus. Presumably, Mr. Volkenant has never engaged in same-sex sex. He does, however, comprehend celibacy. As every Evangelical should, he has abstained from sexual intercourse before marriage. Mr. Volkenant feels unjustly shamed. He is angry that some members of the law societies and the public would stereotype Evangelicals as (hetero)sexist. The CCA is not about discrimination. It is about religious freedom. He joins TWU as the representative plaintiff in its fight to defend religious freedom, not just for itself, but for all faith communities in Canada. He enters the fray so that no one will feel shame owing to his sincere religious convictions over which he has little control. It is not for human beings to change the dictates of God.

Philip Wudda agrees. He is also an alumnus. Indeed, he was a student leader and felt wholly integrated into TWU's campus culture. He is gay, though he put his desire to fulfill the

CCA ahead of his feelings for other men. As an undergraduate, he upheld the covenant faithfully. He was able to do this owing to the love and acceptance he received from students at TWU when he disclosed his sexual orientation. Like Mr. Volkenant, Philip Wudda would have attended TWU's School of Law. He feels shame and indignation because some persons ignore his identity as a gay Evangelical who can be faithful to what the Bible requires. Those who attack TWU, allegedly in his defence, are exaggerating and distorting a critical part of himself to protect a disfigured conception of his sexual orientation. Though he disagrees with the CCA on sexual matters, he prizes his religious fellowships more highly. He also cherishes religious freedom and believes that Canada has never cured prejudice by restricting the individual and collective liberties of its (minority) subjects. Consequently, he writes to the law societies to correct their misconceptions. Mr. Volkenant and Mr. Wudda seem to value individual and collective liberty over equality and to implicitly endorse the liberal distinction between the public and private spheres. They also often overlook the role of emotions and history in equality claims, in addition to how these claims shape the contours of religious freedom in Canadian constitutional culture.

Jill Bishop, also an alumna, has different concerns. Her parents homeschooled her until she applied to TWU. It was the only university in Canada that accepted homeschooled students without entrance exams. Moreover, Ms. Bishop was an Evangelical her whole life, and TWU had the benefits of adding to her Christian faith and pleasing her parents, who helped her with the considerable cost of education. When she arrived at TWU, her circumstances changed. Ms. Bishop signed the CCA agreement in good faith, but she did not know that she would become lesbian and develop feelings of deep love for her partner. She would not have signed if she knew, and she could not meaningfully have given informed consent. She did not know what it was like to be lesbian until she became lesbian.

Her reorientation gave Ms. Bishop an uncomfortable choice: either deny this newfound part of herself and exacerbate the (un)conscious shame she has felt all her life while never quite knowing why; or live out her new lesbian identity and risk losing her place at university. Even if the administration did not discipline her directly, she could still have experienced more pedestrian, but no less degrading, ostracism. Ms. Bishop chose the first of these options and graduated from TWU. She found that it was not an accepting environment. Indeed, she felt there was a culture of silence and condemnation concerning homoerotic sex. She does not want future TWU law students to experience the injustice and pain that she did.

According to Ms. Bishop, respect for (sexual and gender) diversity was honoured more on paper than in practice. She is concerned at the prospect of TWU's proposed law school and fears that the harm she experienced will happen to others. She believes that the loving and Christian action for TWU to take is to accept the outcast and follow Jesus' example. She writes to the law societies to ensure that they have this context. Additionally, she wants them to remember that (hetero)sexism is not confined to TWU, but endemic to the Canadian legal system.

Cole Caljoux provides yet another view. He is a transgender man and "mother of two." On top of the difficulties he experienced during his gender transition, he feels that custody proceedings, in which he alleges that his children were taken away from him owing to his gender (identity), exacerbated his shame. Now an aspiring lawyer, he writes to the law societies to ensure that persons in similar situations do not experience what he suffered. The perspectives of Ms. Bishop and Mr. Caljoux seem to prize equality over freedom and to implicitly question the liberal distinction between the public and the private spheres. They also highlight the role of

emotion and context in shaping equal justice claims and the contours of religious freedom in Canadian constitutional culture.

Unfortunately for Mr. Volkenant and his supporters, TWU lost at the Supreme Court of Canada. A majority of the Justices affirmed that the Law Societies' decision to deny accreditation was reasonable. It lost, even though in 2001, the British Columbia College of Teachers raised concerns like those of the Law Societies, and the Supreme Court ruled in TWU's favour. This change, which marks a significant blow to Christian (sexual) privilege in Canada, did not happen quickly. Nor is it now complete.

TWU's loss at the Supreme Court is a culmination of a 23-year process of emotional (re)orientation within Canadian constitutional culture, in which queers are constructed as ideal (often passionless) constitutional subjects and (hetero)sexist Christians become increasing strangers to the law. As well as possibly marginalizing (hetero)sexist Christians; this oversight obscures how anti-queer bias continues to be a socio-structural problem.

This dissertation concerns the controversy regarding the accreditation of TWU's proposed law school, particularly the emails from lawyers and members of the public submitted to the provincial Law Societies of British Columbia, Nova Scotia, and Ontario as responses thereto, as well as the Supreme Court cases resulting therefrom. As summaries of Mr. Volkenant's position and those of the three other persons described indicate, to understand what is at stake for the various parties to this dispute we need context, patience, and interdisciplinary multimodal frameworks. The project employs the common, though not uncontroversial,

methodological strategy within political philosophy of building on our firmly held intuitions in a manner analogous to how the natural sciences use empirical data.[17]

A good theory is one that can explain and justify our intuitive beliefs while pointing to how we should amend them because of new information. We may criticise this approach owing to the non-empirical character of intuitive judgements, in addition to possible circularity when we evaluate arguments against our considered intuitions.[18] Nonetheless, theoretical assumptions are essential in fields we often label as objective like mathematics. These assumptions, however, do not detract from these fields' intersubjective claims to truth. As well, while human beings err morally, if there is moral truth, it is likely found in our enduring ethical intuitions.[19]

Consequently, proceeding from our moral intuitions is no more objectionable than attempting to follow the basic rules of logic. Both provide an assumed grammar for our arguments.[20] These intuitions tend to have deep historical roots while they also adapt to redress contemporary problems. We shall understand that one of these intuitions is the following: All persons are morally equal. As such, we should reduce unjust shame; for it is antithetical to the ideal of equality.

A suitable framework would show the phenomenological horizon in which many of the participants operate while also providing us opportunities to look beyond the immediate intellectual and affective boundaries of this dispute. In other words, we require an interdisciplinary theory of discrimination. Specifically, we ought to use an approach to

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[17] Daniel McDermott, "Analytical Political Philosophy," in *Political Theory: Methods and Approaches*, eds. David Leopold and Marc Stears, (Oxford: Oxford University Press, 2008), 11-28.

[18] McDermott, 11.

[19] McDermott, 18.

[20] McDermott, 19-20.

discrimination that connects it to our all-too-human passions. As our testimonials illustrate, we require an analytical lens that allows us to classify, explain, and evaluate the emotions involved in this dispute, particularly shame, and how these emotions connect with our normative judgements concerning gender and sexuality.

KANTIAN FRAMEWORK

The philosophy of 17th century Prussian Immanuel Kant and his many disciples provides such a framework. This framework is enhanced when we adopt a feminist hermeneutic of suspicion that pays close attention to the phenomenology of emotions, specifically shame. Kant's philosophy is especially suitable for our purposes owing to the strong links he makes between rationality, shame, respect, and the supremacy of justice.

This project will use the word Kantian to describe the philosophy of Kant, the purported secular and post-metaphysical adaptations of this philosophy that John Rawls and Ronald Dworkin (who are sometimes labelled neo-Kantians) offer, as well as a general ethos Kant's philosophy inspires within Canadian constitutional culture. We can describe moral Kantianism with the ten following ideas. First, we should not discern ethical principles from either the natural world or divine commands. We can construct a superior ethical system from the constraints placed upon us by our reason alone. To do less is disrespectful of our intuition that we are partially independent of nature and God. Second, the capacity that separates imperfectly rational beings from the rest of the natural world is our ability to reflect upon our existence and set goals. Third, it is possible to improve our judgement — on both an individual and collective level — to reach a higher degree of moral maturity.

Fourth, though it may appear that the natural world entirely constrains us, we should assume that we can choose among a set of options and evaluate these carefully against our

enduring principles and commitments. Fifth, the best way to honour the capacity to reason is to consider rational beings as possessing dignity as opposed to worth. Things have worth because we may exchange them for something or someone else. Conversely, every self-conscious creature is unique and deserves equal concern and respect. Sixth, their dignity requires us to show deference to the different life plans self-conscious animals make, so long as these life plans are compatible with the equal freedom and equality of all. Seventh, we must avoid shaming others unjustly or acting shamefully. Irrational shame and disgraceful conduct degrade our status as rational creatures. We should refrain from behaving servilely or treating others as slaves to our will. The dignity of free and equal beings means we must have cogent countervailing reasons to justify any interference with their choices. Deliberations produce moral rights, and these should act as strong checks upon our desires.

Eighth, because we desire others to respect our choices, we must afford them the liberty, respect, and concern that we want for ourselves. When we deliberate regarding what we ought to do, we should often imagine ourselves as acting for the whole community. We should ask if we could do our conduct on a large-scale or if similarly situated rational agents would perform it. In this way, we achieve freedom through submission. We are subject to laws our own rational will could have authored. Ninth, cherishing reason requires that we analyse and control our emotions. They are evaluations that are frequently false, and they are the primary source of poor behaviour. Feelings incline us to selfishness. This self-interest clouds what reason dictates. Tenth, the always incomplete hope of individual moral autonomy should make us wary of persons who wish to restrict the choices of others to preserve and further their own opposing collective ways of life. Overemphasising collective goals cause persons to become means to the aspirations of

others. In all but extreme cases, we should prioritise individual rights (that is, justice) over the collective good (that is, consequences).

Though Kantianism has many strengths, a crude interpretation of it tends to cause the irrational dispositions and the shame that it tries to curtail and channel. As well, Kant‘s preoccupation with autonomy and dispassion helps to produce a (hetero)sexist conception of reason, virtue, and duty that subordinates women, queers, and other minorities. Specifically, it supports the androcentric distinction between the public and the private spheres.

Kant and his followers are often conflicted concerning the nature and worth of emotions. From this conflict, there usually flows a deep mistrust of religion and sex. These phenomena frequently ignite (queer) passions within us. Such feelings potentially render us irredeemably irrational and, thereby, subhuman. Uncovering an implicit Kantian ethics in Canadian constitutional culture makes the tactics it uses to transform, incorporate, or reject (feminine) difference clearer. Kantian principles frequently provide the (un)acknowledged standards determining who is “in” and who is “out” of the bounds of Canadian constitutional culture.

We should discuss authors in their historical context.[21] Much separates Kant’s environs from those of 21st-century Canada, but this dissertation is not intended to offer a historical, much less comprehensive, exegesis of Kantian thought. Instead, it attempts to think through contemporary problems using Kant’s philosophy because he provides an illuminating conceptual framework.

Thus, I do not need to show beyond a reasonable doubt that the Kantian framework is the perfect one, nor do I need to show that it is the ideal one for our society at this specific time. All I

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[21] Quentin Skinner, “Meaning and Understanding in the History of Ideas,” in *Meaning and Context: Quentin Skinner and his Critics*, ed James Tully (Cambridge: Polity Press, 1998), 29-30.

must demonstrate is that, with proper modification, it is the best fit with a large portion of our considered convictions regarding human rights. If we conceive of our values as points on a grid, therefore, all I am endeavouring to prove is that the Kantian perspective provides something like a line of best fit in Euclidean geometry. There will be critical points excluded from the line, and we should recognize those. I do not claim that Kant offers a universal or an objective perspective. These assertions would undermine the project's feminist aspirations. Instead, what I suggest is that Kant provides useful tools that help us understand how power operates, mechanisms for critiquing its use, and designates a particular "assemblage" of legal power in contemporary Canada..[22] Above all, Karl Marx is correct when he observes that social theory should endeavour to change the world, instead of pretending to think about it disinterestedly from afar.[23] The proper intellectual posture toward social theory is not genuflection. Instead, should use Kantian social theory as a "toolkit" from which to draw considering our present task.[24]

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[22] Kevin D. Haggerty and Richard V. Ericson define assemblages as follows: 'Assemblages' consist of a 'multiplicity of heterogeneous objects, whose unity comes solely from the fact that these items function together, that they "work" together as a functional entity' They comprise discrete flows of an essentially limitless range of other phenomena such as people, signs, chemicals, knowledge and institutions. To dig beneath the surface stability of any entity is to encounter a host of different phenomena and processes working in concert. The radical nature of this vision becomes more apparent when one realizes how any particular assemblage is itself composed of different discrete assemblages which are themselves multiple Kevin D. Haggerty and Richard V. Ericson, "The Surveillance Assemblage," *British Journal of Sociology* 51, no. 4 (2000): 603. The author of this article cites the following: Paul Patton "Metamorpho-Logic: Bodies and Powers in A Thousand Plateaus," *Journal of the British Society for Phenomenology* 25, no. 2 (1994): 159; Gilles Deleuze and Félix Guattari, *A Thousand Plateaus* (Minneapolis, MN: University of Minnesota Press, 1987), 385.

[23] Karl Marx, "Theses on Feuerbach," in *The Marx-Engels Reader*, 2nd ed., ed, Robert C. Tucker (1888, repr. New York: W. W. Norton and Company, 1978), 145.

[24] Gilles Deleuze and Michel Foucault, "Intellectuals and Power," trans. Donald F. Bouchard and Sherry Simon, in Michel Foucault, *Language, Counter Memory, Practice: Selected Essays and Interviews*, ed. Donald F Bouchard (Ithaca, NY: Cornell University Press, 1977), 208.

These contentions will become more apparent as we employ Sara Ahmed's queer phenomenological approach and the critical discourse analysis method of Norman Fairclough to discover how religious freedom and sexual orientation function as "straightening devices" within Canadian constitutional culture. These categories are often placed in opposition, creating a binary in which each is said to circumscribe the scope of the other. Legal subjects use both to delineate the boundaries of (un)acceptable passion. Notably, the frequency and intensity with which many subjects within Canadian constitutional culture deploy shame to enforce their conception of what the Constitution demands illuminates a perhaps intractable problem within human rights discourse. Namely, that shame is both necessary for and antithetical to the concepts of human dignity and rational agency upon which rests much contemporary Kantian human rights discourse.

Applying Kantian phenomenological framework will allow us to see that shame and disgust anxieties fuel (hetero)sexism, how this creates morally questionable and/or factually false judgements about gender and sexual minorities, is disrespectful of their status as moral agents, and, thereby, difficult to condone within the context of legal education. Thus, one of the purposes of this project is to "challenge and explain the metaethical foundations of value-based arguments in constitutional adjudication.… [Because] Under the circumstances of moral disagreement and value pluralism—and when [judges] are unable to resort to sources of legitimacy that would remove the choice from their hands—constitutional courts face metaethical questions."[25] It is necessary to examine the passions that undergird (hetero)sexism in their historical and theological context. To do less is disrespectful to both sides of the TWU law

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[25] Bosko Tripkovic, *The Metaethics of Constitutional Interpretation* (Oxford: Oxford University Press, 2017), 2.

school dispute. Particularly, the thankfully quickly disappearing figure of the sodomite explains why the law societies were justified when they refused Trinity's application.

Outline of the Project

This dissertation has two interrelated goals — the first descriptive, the other prescriptive. First, it will contextualize and trace the transformation of shame regarding queer sex, especially (implicit) discourses concerning sodomy. Second, it will argue that the imperative to repudiate these misogynist discourses of shame justified denying TWU's proposed law school and attenuated its allegations of discrimination.

Chapter 1 outlines a conflict theory feminist perspective regarding sexuality, religion and gender as lived, linguistic, and historical phenomena that colour the horizon of our emotional lives. These emotions, in turn, reproduce structural inequality by furthering (hetero)sexist assumptions within Canadian constitutional culture. Chapter 2 examines the philosophical foundations of this constitutional culture, through an exposition of Kant and some of his notable North American followers. It argues that while Kantian philosophy may have resources for challenging (hetero)sexist assumptions concerning emotions, it is also wary of human passions and their effects on our ability to reason. Chapter 3 investigates some of the history behind this ambivalence, with special attention paid to the patriarchal ideas that animate historic discomfort with queer (anal) sex. Chapter 4 uses this framework to analyse some relevant cases leading up to the TWU law school dispute. Chapter 5 applies this framework to the law society submissions, focusing on (hetero)sexist ideas concerning religion and emotion, it shows how discourses of Kantian justification sometimes exacerbate conflict while seeking to alleviate it.
Chapter 6 analyses the judgement of the Supreme Court concerning TWU's law school. It observes feminist motifs in the majority reasons that may presage a shift in the feeling rules of

Canadian constitutional culture. The other judgments in the case show the continuing need to critique (hetero)sexism and misogyny in Canadian law.

Approval of the proposed law school would have made the Law Societies complicit in constitutionally prohibited restrictions upon sexual integrity. These restrictions have perpetuated stereotyping, subordination, and psychological (as well as physical) injuries. The legal profession has come to see these as moral harms requiring effective redress. Having an (im)moral conviction is different from enforcing that conviction through sanctions within the context of law school pedagogy. The possibility of punishment creates an inequitable barrier to accessing legal education. These two things mandated the denial of TWU's proposal, so long as it had a mandatory CCA for law students. Behavioural restrictions of the type TWU once had were inappropriate within the context of legal education. It requires aspiring lawyers to treat their fellow students as means to their spiritual development rather than moral persons capable of setting their own ends. Interference with the religious freedom of TWU was justified. The legal profession has an interest in upholding freedom, justice, and equality as constitutional *Grundnorms*. Lawyers, whether they act in private practice or not, are the persons most responsible for upholding the deeper principles that sustain the legal system.[26] As Dianne Pothier observes, "Lawyers have an extra level of responsibility [exceeding that of teachers]. Lawyers are potentially involved in the administration of constitutional and statutory equality and anti-discrimination provisions. If my contentions concerning shame and Kantianism are correct, an inevitable result of this project is that it too must shame TWU. Because shame is an inevitable

[26] William H. Simon, "Ethical Discretion in Lawyering," *Harvard Law Review* 101, no, 6 (1988): 1100; David Luban, *Legal Ethics and Human Dignity*, Cambridge Studies in the Philosophy of Law (Cambridge: Cambridge University Press, 2007), 65-95; Wendell W. Bradley, *Lawyers and the Fidelity to Law* (Princeton, NJ: Princeton University Press, 2010), 9; Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 146.

yet volatile emotion that can have negative consequences, the project uses several strategies to mitigate the effects of shame. First, it attempts to provide thorough consideration of the CCA in its theological, historical, and sociological context.

Without this context, it is challenging to appreciate the moral reasons for denying the proposed law school. Second, it attempts to combine justification (a type of argument that makes deductions from assumed shared common premises) with persuasion (a method of discourse that attempts to start from the perspectives of our adversaries and deploys emotions, hoping that we may move them closer to our position by appealing to a shared capacity for empathy and mutual respect).[27] Third, and to that end, the project attempts to provide an overview of important historical events that have shaped queer life, in addition to a phenomenology of what it is like to be queer, so that those in favour of the law school may appreciate better the harms and the moral wrongs that the previously enforced CCA caused. Fourth, and most important, the project maintains that Kant, TWU, and Canadian Constitutional culture share a common flaw; namely, they rely on gendered shaming practices and reify the public-private distinction. The gendered shaming practices, though perhaps unavoidable presently, undermine their shared commitment to equality and autonomy.

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[27] Bryan Gersten, *Saving Persuasion: A Defence of Rhetoric and Judgement* (Cambridge: MA, Harvard University Press, 2006), 2-7, 70-100.

Chapter 1:
Shame, Masculinity, and Legal Hegemony

The kind of thought involved in emotions is a critical engagement with the prevailing norms and social structures that suggest particular emotional responses. Emotions are responses to thoughtful reflection on what is good or bad, high or low, in the world around us. As a corollary, this view of thoughtful emotions includes the idea that societal structures have something to do with the emotions that we feel. Normative reflection and emotion cannot be meaningfully disaggregated. As such, embedded in each emotion is a value-based commitment that is open to examination and, potentially, condemnation… [An] implication of the evaluative view of emotions… is that emotions can be mistaken [because they are not entirely irrational] … If emotions are a product of our critical, if often less-than-conscious, reflection about the norms and assumptions in the world around us, then we can fall into error…. This means that emotions are, in fact, open to outside scrutiny and criticism — Benjamin L. Berger [1]

Considerable advancements in gender equality notwithstanding, (hetero)sexism is the pervasive feature of contemporary Canada. Society maintains (hetero)sexism through enduring stereotypes that (un)consciously conflate masculinity and agency. A large part of this oppression occurs through the value judgements embedded in our emotional life. In the traditional patriarchal script, femininity gestures to the negativity that androcentric culture can never accurately depict. Femininity denotes that which we presuppose but is challenging to describe discursively in (hetero)sexist cultures. Whereas men are hard and rational, women are soft and passionate. Whereas men are honourable and public, women are shameful and private. Whereas men are agents who can repel violence, women are patients who must suffer violence. Whereas men inhabit a universal subject position through achievements in philosophy, art, and science, specific existences trap women, and they become nearer to the disgusting stuff of nature.[2]

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[1] Benjamin L. Berger, "Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences," *McGill Law Journal*, 51, no. 1 (2006): 115-6.

[2] Luce Irigaray, *This Sex Which Is Not One*, trans Catherine Porter and Caitlyn Burke (Ithaca, NY: Cornell University Press, 1985), 23-34, 86-110; [2] Klaus Theweleit, *Male Fantasies: vol. 1: Women, Fluids, Bodies, History*, trans. Stephen Conway, Erica Carter, and Chris Turner, Theory and History of Literature (Minneapolis: University of Minnesota Press, 1987), 222-49,

Whereas men fall just short of divinity owing to intellect, aesthetics, and technological inventions, overemphasized anatomy can disable females, confining women to the immanent, mundane, and the natural.[3] This oppression occurs mainly through reproduction and the accompanying unremunerated physical and emotional labour that has attended, and, to a large extent, still attends, domesticity.[4]

385-400; Klaus Theweleit, *Male Fantasies: vol .2 : Male Bodies: Psychologizing the White Terror* , trans. Stephen Conway, Erica Carter, and Chris Turner, Theory and History of Literature (Minneapolis: University of Minnesota Press, 1989), 61-77, 94-7, 143-175, 252-5, 307-8; Gail Peterson, "The Whore Stigma: Female Dishonor and Male Unworthiness," *Social Text*, no. 37 (1993): 39-46.

[3] Thomas Laqueur, *Making Sex: Body and Gender from the Greeks to Freud*. (Cambridge, MA: Harvard University Press, 1990), 149-244. Though we are accustomed to thinking that the question of biological sex versus social gender presentation is relatively simple, feminist biologist Anne Fausto-Sterling offers the following complication in the following quotation: [A] newborn is a multilayered sexual creature, the result of having a chromosomal sex, a fetal gonadal sex, fetal hormonal sex, a fetal internal reproductive sex, a brain sex … an external genital sex, and, starting from the moment the child leaves the womb, a developing body image and social gender fortification…this entire list of "sexes" combine to produce a youngster's sense of self as male or female, something they call juvenile gender identity. Finally, at puberty, the gonads which differentiated during fetal development become active, creating yet another layer— pubertal hormonal sex. These "raging hormones" of the pre-teen and teen years influence the development of erotic sensations and desires {pubertal erotic sex) and adult sex-differentiated anatomy… pubertal morphological sex. All of these different sexes and identities in turn converge to produce adult gender identity, the sense of self as an adult male or an adult female. It's a neat scheme; a little complicated, to be sure, but still containing nice neat lines. All a person has to do is navigate these developmental paths and the end result is clear—either a person who is self-evidently male, or one who is self-evidently female develops. Nice, until we realize that each of the layers can, potentially, develop independently of one another. [Citations omitted]
Anne Fausto-Sterling, *Sex/Gender: Biology in a Social World*, The Routledge Series Integrating Science and Culture (London: Routledge, 2012) 10-11.

[4] Marilyn Waring*, If Women Counted: A New Feminist Economics*, paperback ed. (San Francisco, CA: Harper Collins Publishers, 1990), 7; for a more contemporary affirmation of the thesis concerning the unpaid domestic labour of women, consult Caroline Saunders and Paul Dalziel, "Twenty-Five Years of Counting for Nothing: Waring's Critique of National Accounts" *Feminist Economics* 23, no. 2 (2017): 200-18, and the helpful references contained in this article. Four the authoritative discussion concerning emotional labour and femininity, consult Arlie Russell Hochschild, *The Managed Heart: The Commercialization of Human Feeling*, rev. ed. (2003; repr., London: University of California Press, 2012), 137-82.; Betty Friedan, *The Feminine Mystique* (1963; repr., London, Penguin Books, 1965), 68.

As Virginia Woolf puts it with concision and clarity, "the public and private worlds are inseparably connected . . . the tyrannies and servilities of one are the tyrannies and servilities of the other." [5] Consequently, though it may be necessary, perhaps even freeing, for some marginalized persons in some circumstances, generally, the notion that the home creates a presumptively inviolable zone of privacy, love, and support is an ideal that benefits privileged white males.[6] The denial of this fact, in part, explains the exclusion of women and "feminine topics" from theories concerning law and politics. Because this project argues that the personal is political, I accept that gender is both a cultural structure that conveys or withholds certain privileges for the purposes of socialization and a performative aspect of individual identity. Indeed, it is unclear how we may make an intelligible division between identities and social structures.[7] As Iris Marion Young observes, "the self is the product of social processes, not their origin.[8]

In the introduction, we discussed how an excellent theoretical framework is one that explains and justifies our intuitions while also giving us ways to critique them against reason and

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[5] Virginia Woolf, *Three Guineas* (1938; repr., New York: Harcourt, 1966), 147.

[6] Stephanie Stem, "Residential Protectionism: and the Legal Morphology of the Home," *Michigan Law Review* 107, no. 7 (2009): 1105-7; Kenneth A. Stahl, The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law," *Cardozo Law Review* 29, no. 3 (2008): 1225; Tobin Siebers, *Disability Theory* (Ann Arbour: Michigan University Press, 2008), 141-160;; Elaine Craig, *Troubling Sex*, Law and Society Series, (Vancouver: UBC Press, 2012), 41; Nancy Nason-Clark, and Barbara Fisher-Townsend, *Religion and Intimate Partner Violence: Understanding the Challenges and Proposing Solutions* (Oxford: Oxford University Press, 2017).; Tom Shakespeare, *The Sexual Politics of Disability: Untold Desires*, (London: Cassell Publishing, 1997). 35-40. ; Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and The Limits of Law*, (Durham, NC: Duke University Press, 2015), 38-4

[7] Judith Lorber, *The Paradoxes of Gender* (New Haven, CT: Yale University Press, 1994) 30-1.

[8] Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990), 44.

our experience.[9] In this chapter, we shall see that this basic idea supports the layperson's understanding that emotions are both intensely personal and culturally inherited. This chapter will defend our common hunch that feelings are neither entirely within or outside our control. We shall see that this assumption bolsters the frequently correct supposition that shame feeds misogyny. The stereotypes that cisgender "boys don't cry," or that cisgender "girls" (ought to) do so more than their male peers illustrates how shame reinforces androcentric bias. A discursive approach to power best accords with our everyday experience of being neither entirely constrained nor wholly free. A phenomenological approach to vital aspects of personal identity explains the seemingly contradictory feelings that specific personal characteristics are simultaneously essential aspects of our autobiography and also historically contingent. Additionally, a phenomenological approach to identity makes sense considering our common perception that identities (if they exist as unified things at all) are messy and ephemeral creations, often stemming from conflicting desires and experiences within a specific person. Finally, a phenomenological perspective accounts for the unpredictable ways such desires and experiences condition our interactions with others.

This chapter explains the implications of claiming that power imbalances within discourses construct human beings, especially how they perceive their religions, genders, and sexualities. It describes the method used in this study to analyse the Law Society submissions and relevant case law, as well as the theoretical approaches employed to critique heterosexual hegemony and the misogyny that is frequently involved in it. Specifically, it elucidates Michel Foucault's concept of power. It critiques a sovereigntist (that is, top down) approach to legal studies. As a better alternative, it discusses the law-as-governance-approach. It recruits Sara

[9] Daniel McDermott, "Analytical Political Philosophy," in *Political Theory: Methods and Approaches*, eds. David Leopold and Marc Stears, (Oxford: Oxford University Press, 2008), 11.

Ahmed's queer phenomenology to provide a nonessentialist etiology of sexual orientation and gender. As well, her framework lets us ask how desire effects our construction of space, time, emotional states, and bodily comportments. Last, her work provides a sophisticated yet intuitive account of intersectional identities. We need this for any compelling theory of oppression and hegemony. The chapter suggests that heterosexual and cisgender common-sense-knowledge is best illuminated when we think of it as a well-trodden path. Shame and disgust are compelling emotions that reward following this path while punishing those who deviate from it. These penalties cause a uniquely queer sensibility. This disposition has roots in a long history of oppression.

Moreover, the normative content of these passions explains why the shame of discrimination because of sexual orientation and gender is morally wrong and psychologically harmful. For these and related reasons, we should challenge the persistent cultural script of judicial dispassion. It overlooks our assumptions concerning feeling-rules, in addition to how they colour legal reasoning. This myopia does not consider the emotional labour that legal practice requires. Emphasizing the social construction of reality supports a phenomenological and historical understanding of Canadian constitutional culture. The chapter concludes by defining this useful heuristic.

Data, Methods, and Methodology

In addition to examining some court cases preceding the case involving TWU's law school, I have chosen to analyse the letters of ordinary Law Society members and concerned members of the public, which were submitted to law societies as they made their accreditation

decisions. I have done so for two reasons. First, this perspective is understudied; and, second, the submissions give us access to emotion.

I employ the critical discourse analysis method, pioneered by the work of Norman Fairclough,[10] which draws inspiration from both (Neo)Marxist theories as well as the functionalist linguistic theory of Michael Halliday.[11] The principal aim of this endeavour is to expose the power relations that language informs and perpetuates. Critical discourse analysis has three distinct but interrelated components. First, we assess such things as word frequency, grammatical construction, and missing or implied concepts within a text. From there, we ponder these features considering the document taken in its context. Finally, we link the previous two steps of analysis with broader social trends. Critical discourse analysis is not simply an intellectual endeavour, however, the term critical implies that the author has an active political stake in the analysis of language and so is not disinterested in the outcome of his project.
As the term functionalist implies, both Halliday and Fairclough emphasize how language is used in concrete social relations, rather than analyzing language as an abstract and disembodied system of communication. Because Halliday and Fairclough concern themselves with language as a practice and not as an abstract noun, they take the contradictions in language for granted. Moreover, they assume that miscommunication and misinterpretation are not extrinsic to the process of language. Rather, miscommunication is a pervasive feature of language. Indeed, errors of communication are sometimes the primary sources of linguistic and political developments.

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[10] Fairclough, Norman. *Critical discourse analysis: The critical study of language*. Routledge, 2013.; Fairclough, Norman. *Language and power*. Pearson Education, 2001.

[11] Halliday, Michael Alexander Kirkwood, and Christian MIM Matthiessen. *Halliday's introduction to functional grammar*. Routledge, 2013.

Critical discourse analysis holds that language is essential to the social construction of reality. Hence, any emancipatory struggle must engage with the unacknowledged oppressive hierarchies embedded within everyday speech and writing. A classic example of how we can apply discourse analysis to critique patriarchy is criticisms leveled at the common crime-reporting phrase "a woman was raped." This is a passive verbal construction which obscures the crimes of men who rape women. Additionally, using passive voice reinforces women's patriarchal victimization by constructing them as inert objects of male power. It also makes it appear as though rape is natural and something that just happens, rather than a very predictable by-product of patriarchal social relations. Similarly, the phrase "a native man was shot by the police," obscures the racialized violence intrinsic to contemporary policing, especially as it subjugates Indigenous persons. One might also consider the colonial history behind the word native and how in this context it could possibly mark the indigenous man in question as "other" and outside the bounds of civilized (implied white) settler Canadian society. Discourse analysis holds that words are emancipatory as well as oppressive. Language, therefore, has unpredictable effects beyond the intentions of those who use it. Thus, I have made a deliberate choice to use "queer" throughout this dissertation. Queer was, and sometimes still is, used as a pejorative against gender and sexual minorities. Nevertheless, many have adopted this oppressive term and have been able to use their demarcation as beyond the mainstream to mount a productive critique of the ways in which heterosexual domination is naturalized and assumed to be universal.

In an ideal world, the judicial opinion, in contrast to the legal submission, is dispassionate. The submissions were more direct, for they lack these benefits as well as the normative constraints of judicial office. Consequently, interpreting them requires fewer

inferences, thereby minimizing a factor that contributes to bias. Some participants sent their thoughts through the regular post and less than ten mailed handwritten letters. The law societies scanned and uploaded all these documents to their respective websites. All participants knew that their comments would be publicly accessible. The intention behind this process was to give the benchers and the other persons participating in this conversation a broad spectrum of views in conjunction with which they could form their own opinions.

There were approximately 575 submissions from British Columbia, 575 from Ontario, and 250 from Nova Scotia (around 1400 in total). These varied in length from one sentence to 20 pages, but the average was about a page and a half of typed text single-spaced (or about 700 words. Persons concerned with religious freedom and social justice issues (either in their personal lives or areas of practice) are slightly overrepresented. Approximately 55% were against accreditation, 40% were in favour, and 5% were neutral. Several legal advocacy organizations, on all different points along the political spectrum, also wrote to the law societies.

First, I read through all the submissions once and noted general themes. Second, I read through them again marking quotations under those broad themes. Third, I converted the entire text into a Microsoft Word Rich Text File Format; and I ran word frequency statistics and compared these statistics against my list of general themes, modifying the list where appropriate.

ANTI-SHAME PRINCIPLE

Though my analysis is not only concerned with normative judgements, when discussing a controversy like this one, we must be candid concerning our social position. I am a gay, white, cisgender, disabled, and male settler, who comes to this research topic with training in political science, English literature, and Classical civilisations, as well as philology, religious studies, and biblical interpretation. I am also Christian (Quaker). Though I recognize that I am a cisgender

man, and so I cannot appreciate the experience of being a woman under (hetero)sexist conditions fully, my other marginalized statuses, as well as my status of sexual assault survivor, gives me personal and professional insight regarding how masculine domination functions. Feminism rightly gives priority to the experiences of women, but feminist analysis should be open to everyone. Patriarchal configurations of power harm everyone, even, at least to some extent, those in a position of privilege.

Joan W. Scott reminds us that experience should not be taken for granted or thought of as something individual persons possess. Instead, this experience makes them, even as they simultaneously interpret what this experience means.[12] Narrative necessitates normative judgement.[13] Hence, perhaps the most fundamental way in which this analysis respectfully departs from many supporters of TWU is my methodological and ethical suspicion of those who postulate a fixed ontology, particularly when they make arguments employing putatively natural or given "facts".[14] As Jean-Paul Sartre observes, "existence precedes essence."[15] Despite having this ontological perspective, we can still advance a cogent defence of the Law Societies' decisions, which, it is hoped, may have some features attractive to proponents or, and I believe this is equally valuable. provide greater clarity and nuance regarding how some at TWU may disagree with those espousing an antifoundationalist social justice ethic.

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[12] Joan W. Scott, "The Evidence of Experience." *Critical Inquiry* 17, no. 4 (1991): 773-97.

[13] Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore: Johns Hopkins University Press, 1987), 24.

[14] David Hume, *A Treatise of Human Nature*, 10th ed., ed. L.A. Selby-Biggee (1739; repr. Oxford: Clarendon Press, 1960), 3.2, 469-70.

[15] Jean-Paul Sartre, *Existentialism Is a Humanism*, trans. Caroline Macomber, ed. John Kulka (1966; repr. New Haven, CT: Yale University Press, 2007), 20.

No doubt because of my experiences of marginalization, I think we should further actualize the ideal of substantive equality as a preeminent constitutional principle of feminist and Kantian praxis.[16] Substantive equality, as opposed to the formal equality that laws frequently offer us, requires that we undertake the difficult work of investigating the historical accretions that undergird our emotions concerning sex, gender and religious freedom. These assumptions often maintain misogyny. This project will substantially follow the description of discrimination as well as the ideal of equality, Deborah Hellman proposes and:

> [b]egin with what I consider a bedrock moral principle—the equal moral worth of all persons. I take it that this bedrock principle is comprised of two sub-principles: First, there is a worth or inherent dignity of persons that requires that we treat each other with respect. What violates this principle may be contested [and is something that the argument of this [dissertation] will address], but I will assume that the inherent worth of a person sets moral limits on how others may treat her. Second, this inherent dignity and worth of all persons does not vary according to their other traits.…The inherent worth of persons is not something that comes in degrees… It is important to emphasize here the conventional and social nature of wrongful discrimination. We all have many traits… as simply traits, they are inert. What matters about them is their social significance in specific contexts. Drawing distinctions on the basis of certain traits in certain contexts has meaning that distinguishing on the basis of other traits would not.[17]

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[16] Cass Sunstein, "The Anticaste Principle," *Michigan Law Review* 92 (1984): 2440-55; Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000), 87-9.

[17] Deborah Hellman, *When is Discrimination Wrong?* (Cambridge, MA: Harvard University Press, 2008), 7.

While Hellman believes the wrong of discrimination comes from treatment that violates our inherent human dignity, it is more accurate to hold that the wrong of discrimination is principally the experience of emotions concerning negative normative assessments (especially shame and disgust) because of morally irrelevant characteristics. Hence, human rights laws can be thought of as a "shame shield".

In the words of Franz Fanon, human rights prevent us from being "sealed into… crushing objecthood."[18] Persons should not be regarded as things, whether by themselves or by others. Shame is a morally troubling emotion because it may actually (owing to blushing) and metaphorically efface another's subjectivity. This distorted interaction undermines the ideal of equal exchanges between moral persons upon which democracy rests.[19] Shame is not a trivial experience that merely is psychological, a part of maturing, or something with which everyone must cope. Instead, shame is a psychosomatic phenomenon.

Repeated experiences of toxic shame adversely influence our emotional responses, neurological development, as well as bodily comportments. Not only does this contribute to the subordination of marginalized groups; it also has long-lasting impacts upon victims' physical well-being and mental health. As well, shame distorts the characters and perspectives of those who (un)intentionally inflict it upon others.

A slightly different interpretation of an example that Hellman uses will illuminate our differences. Nelson Mandela tells us in his autobiography that the prisons of apartheid South Africa had different uniforms for white inmates and those of colour. The former had to wear pants. The latter had to wear shorts. Even though shorts may have been more physically

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[18] Franz Fanon, *Black Skin, White Masks,* trans. Charles Lam Markmanm (London: Pluto Press, 1986), 109.

[19] Emanuel Lévinas, *Ethics and Infinity: Conversations with Philippe Nemo*, trans. Richard A. Cohen (Pittsburgh: Duquesne University Press, 1985), 85-95, 119.

comfortable at the height of the South African summer, the prison regulation degraded inmates of colour. In apartheid South Africa, clothing embodied colonial subjugation. For male prisoners of colour, shorts were infantilizing and emasculating. They were a symbol of their puerile status. Devoid of context, shorts are a floating signifier. Embedded in context, they can demonstrate discourses-practices of brutal subjugation.[20] Hellman merely says that this is demeaning, but her analysis lacks precision. Additionally, she does not adequately consider the effects of shame on our gendered body. The prison guards' attempt to make Mandela subhuman by depriving him of a proper (adult male) gender and, implicitly, sexuality. Any inquiry into the nature of specific types of discrimination must be interdisciplinary to give adequate weight to the contexts in which it occurs. It should also consider shame and the discursive construction of gender. Gender and shame, even if implicitly, fuel much discrimination and worsen its harmful effects and affects. Finally, basing discrimination upon avoiding shame has the advantage of making fewer metaphysical assumptions than human dignity, thereby complying with the parsimony principle.[21] Consequently, shame is the biological and material manifestation of a metaphysical

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[20] Hellman, 5. Nelson Mandela, *The Long Walk to Freedom* (New York: Little, Brown and Company, 1995), 387.

[21] William of Ockham, "Of the Possibility of a Natural Theology," in *Ockham: Philosophical Writings a Selection*, trans. and ed. Philotheus Boehner, The Nelson Philosophic Texts (cra. 1320-8, repr. New York: The Bobbs-Merrill Company, 1957), 109. Interestingly, the formulation of Ockham's razor attributed to him — we must not multiply entities beyond the necessity — is independent of his writings directly. See introduction of the above cited volume (xx). Whatever its medieval uses, the modern principle of simplicity has two aspects — elegance and parsimony. Elegance says that, other things being equal, we should prepare the principal with fewer premises; for it is more likely to be true. I realize that, if my theory is taken to have primary and essential multiple premises, it is perhaps not elegant in this sense, but I take it central thesis to be the avoidance of shame. Additionally, practical theories always must balance elegance with explanatory value, and my hope is that what my theory lacks in elegance it compensates for any explanatory value. Parsimony holds that, other things being equal, we should prefer theories with fewer ontological postulates. If we can give a satisfactory account of Kantian human rights discourse without a metaphysical conception of dignity, therefore, we should prefer this account on pragmatic and probabilistic grounds. Alan

postulate (that is, human dignity). This division, as I shall argue below, corresponds to the Kantian dichotomy between the noumenal and phenomenal realm of experience. Because Kant is astute when he says that human subjectivity cannot access the noumenal realm (or, "things-in-themselves") our analysis is on firmer epistemological ground if we focus our attention on reactions and behaviours that manifest the absence or presence of an ontological assumption, rather than trying to define this supposition a priori, based on abstract and often ahistorical and decontextualized criteria.

Critical Social Theory And Feminism

To give my commitment to and analysis of equality greater context and more normative content, I use a critical theory, taking much inspiration from the Frankfurt school, that strives for the following:

> [a] connection between reflection in philosophy [history,] and social science informed by an interest in emancipation. It inquires into the rational form of a social order that is both historically possible and normatively justified in general terms. At the same time, it asks why the existing power relations at (and beyond) a society prevent the emergence of such an order. This approach is consistent with Horkheimer's original understanding of critical theory as "a theory guided at every turn by a concern for reasonable conditions of life [that is, conditions capable of coherent justification]. [22]

Rainier Forst is also correct when he claims the following:

Baker, "Simplicity", *The Stanford Encyclopedia of Philosophy* (Winter 2016 Edition), ed. Edward N. Zalta URL<https://plato.stanford.edu/archives/win2016/entries/simplicity/; Elliot Sober, "The Principle of Parsimony," *British Journal of the Philosophy of Science* 32, no. 2 (1981): 145-56.

[22] Rainer Forst, *Normativity and Power: Analyzing Social Orders of Justification*, trans. Ciaran Cronin (Oxford: Oxford University Press, 2017). 1n this quotation, the author is citing: Max Horkheimer, "Traditional and Critical Theory," in Max Horkheimer, *Critical Theory: Selected Essay*s, trans. Matthew J. O'Connell (New York: Continuum 2002), 199 (translation amended by Forst).

> Finite reason does not have access to a "worldless" standpoint from which it can regard its own norms as "merely contingent" or to a divine standpoint from which it could recognize historical necessity. From a finite rational perspective that understands itself as practical, the principle of justification is the principle of reason and the right to justification is its moral implication—no more, but no less either. There is no perspective from which its contingency or necessity could be transcended in a further step; but we have no need of such a perspective either. The only perspective to which we have access is that of a participant, not one of a transhistorical observer. We take stances as part of this history, therefore, and when we speak of moral achievements, we mean that they are in fact moral achievements and we relate to them accordingly with reasons…[23]

Consequently, my dissertation attempts to combine philosophy and sociology, to (re)conceptualise the role of emotions in religious freedom as well as sexual orientation and gender equality claims.

Martha C. Nussbaum offers further clarification of the proper relationship between theory and practice, or the actual and the ideal, when she states the following: "the real also the ideal. Real people aspire. They imagine possibilities better than the world they know, and they try to actualize them ... so any political thinker who rejects ideal theory rejects a lot of reality."[24] While I shall be advocating a non-sovereigntist approach to socio-legal studies, it is still important to think of the state as the entity possessing a monopoly over "legitimate violence" within a given

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[23] Forst, 6-7.

[24] Martha C. Nussbaum, *Political Emotions: Why Love Matters for Justi*ce (Cambridge, MA: Belknap Press of Harvard University Press, 2013), 384.

territory and not to renounce the ideal that whenever state (in)action restricts the freedom and equality of subjects, defensible reasons justify so doing [25]

One of these defensible reasons is the need to repudiate heterosexual privilege within Canadian constitutional culture. Hence, while I acknowledge the considerable transformation in our society's sexual mores between 1992 and 2019, Monique Wittig is still accurate when she says, "[T]o live in society is to live in heterosexuality… Heterosexuality is always already there within all mental categories. It has sneaked into dialectical thought (or thought of differences) as its main category."[26] She is also perceptive when she says that most have regarded the cross sex couple as the allegedly primordial social unit dating back to Aristotle.[27] Michael Warner agrees, stating, "So much privilege lies in heterosexual culture's exclusive ability to interpret itself as society." [28]

For this reason, my dissertation adopts a queer theoretical perspective. Because the term queer is inherently ambiguous, it requires an extensive definition. With the possible exception that this study takes a less fluid and suspicious approach to identity, the project will adopt a definition of queer theory and queer praxis that Frederick L. Greene offers in the following quotation:

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[25] I am, of course, indebted to Max Weber's classic definition of the state as the organization which asserts its right to have a monopoly over the legitimate use of violence within its territory. Max Weber, "The Profession of Politics and the Vocation of politics", trans. Ronald Speirs, in *The Political Writings of Max Weber*, eds, Peter Lassen & Ronald Speirs (Cambridge: Cambridge University Press, 1994), 310-311.

[26] Monique Wittig, *The Straight Mind and Other Essays* (1992, repr. Boston, MA: Beacon Press, 2002), 39-40.

[27] Wittig, 41-2.

[28] Michael Warner, "Introduction," in *Fear of a Queer Planet: Queer Politics and Social Theory*, ed. Michael Warner, Cultural Politics (1993, repr. Minneapolis, MN: University of Minnesota Press, 2004), xxiv-vi.

> "Queer theory"… means at least three different things: (1) "queer theory" as a theory of the queer, the odd, the abnormal and a theory privileging that perspective or experience; (2) "queer theory" understood as a queer—different, atypical—kind of theory; and (3) "queer theory" where "queer" operates as an imperative to "queer" or defamiliarize theory, making its assumptions and occlusions subject to analysis…queer theorists foreground the queer, by which 1 mean not only the explicitly homoerotic and the various ways in which persons come to inhabit a gender and a sexuality, but also the odd and the abnormal as well as the disgusting, ambivalent, or perverse. [When we examine the] exceptional and abject, queer theory frequently discovers what is essential to the dominant and unqueer…Queer theory explodes the center/margin or privileged/subordinated paradigms [that are] so ubiquitously operative [in our (hetero)sexist culture]…Queer theory argues that there is beauty, power, and truth, even magic, where dominant culture and its authorized language posit only ugliness, impotence, and falsehood.[29]

Put simply, as Michael Warner phrases it, the primary purpose of queer theory is to trouble regimes of the (ab)normal and of normalization.[30] I shall use an explicitly queer affirmative lens that prioritizes the lived experience of queers to respond to what Pippa Feinstein and Sarah E. Hamill describe as the "silencing of queer voices" in the TWU law school litigation .[31]

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[29] Frederick L. Greene, "Introducing Queer Theory into the Undergraduate Classroom: Abstractions and Practical Applications," *English Education* 28, no. 4 (1996): 325-6.

[30] Michael Warner, *The Trouble Normal: Sex, Politics, and the Ethics of Queer Life*, Paperback ed. (Cambridge, MA: Harvard University Press, 2000), 41-81.

[31] Pippa Feinstein and Sarah E. Hamill, "The Silencing of Queer Voices in the Litigation over Trinity Western University's Proposed Law School." *Windsor Yearbook of Access to Justice* 34, no. 2 (2017): 158.

It is possible to be ethical and promiscuous, while enacting various forms of nonnormative sexuality and kinship pairing. Moreover, because the personal is political, in some circumstances, it may be morally and socially beneficial to do so.[32] Queer politics help us avoid a normalizing ethos of partial inclusion, whereby we feel good about being queer, "so long as we feel bad about being sluts," in the words of Tim Dean.[33]

Though it is important to think about sex philosophically and sociologically, it is also important to consider it as an embodied practice that provokes disgust-anxieties, and shaming behaviour.[34] Hence, my project is a deliberate effort to resist the desexualisation of queerness. Using the sodomite throughout this project is not meant to suggest that discomfort with male-male anal sex is the sole cause of opposition to homoerotic behaviour, though that is a crucial contributing factor. Instead, the sodomite is a convenient image that helps us illuminate the historical and the contemporary patriarchal disgust-anxieties that shape Canadian legal discourse concerning sex. Also, it reminds us that sexual and gender identities always stem from presumed sexual practices. Such assumptions exist because of male domination. The androcentric character of Canada colours our sexual and gender identities as well as stereotypes concerning them. Thus, the sodomite is a convenient shorthand for the dehumanizing effects and affects laws have created for queers, in addition to how laws transform queers from self determining sexual subjects to objects of legal knowledge. Queer persons, though laws shape and curtail their

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[32] With the proviso that I acknowledge a great deal more constrained and vulnerability in sex and, consequently, expect more moral discernment when we engage in erotic activity, my views are substantially like those presented in: Dossie Easton and Janet W. Hardy, *The Ethical Slut: a Practical Guide to Polyamory, Open Relationships, and Other Adventures*, 2nd ed. (Berkeley, CA: Celestial Arts, 2009), esp. 8-26, 268-71.

[33] Dean, 20.

[34] Leo Bersani, *Homos* (Cambridge, MA: Harvard University Press, 1995), 1, 6.

identities, still retain their rights as morally equal persons. Conversely, the sodomite is an abject legal phantasm, whose purpose is to deprive queers of humanity by shame.

Two other basic definitions are in order. Misogyny links closely to (hetero)sexism. Kate Mann provides the definition of misogyny I will adopt for this study in the following quotation:

> According to a common, dictionary definition–style understanding of the notion … misogyny is primarily a property of individual agents … who are prone to feel hatred, hostility, or other similar emotions toward any and every woman … simply because they are women. That is, a misogynist's attitudes are held to be caused or triggered merely by his representing people as women … and on no further basis specific to his targets. Such a representation, together with the agent's background attitudes toward women as, for example, disgusting, loathsome, fearsome, or mindless sexual objects is supposed to be enough to trigger his hostility in most, if not all, cases … [But], I argue that misogyny ought to be understood as the system that operates within a patriarchal social order to police and enforce women's subordination and to uphold male dominance … [it] is primarily a property of social systems or environments as a whole, in which women will tend to face hostility of various kinds because they are … failing to live up to patriarchal standards ..."[35]

According to Patricia Beattie Jung and Ralph F. Smith, (hetero)sexism is "a reasoned system of bias regarding sexual orientation. It denotes prejudice in favor of heterosexual people and connotes prejudice against bisexual and, especially, homosexual people...It is rooted in a largely cognitive [and I would argue, emotional] constellation of beliefs about human sexuality." (Hetero)sexism maintains "heterosexuality is the normative form of human sexuality. It is the

[35] Kate Mann, *Down Girl: The Logic of Misogyny* (Oxford: Oxford University Press, 2018), 32-4.

measure by which all other sexual orientations are judged."[36] Though their definition is excellent, it is 25 years old, so I have amended it. First, the related concept of (cis)sexism refers to naturalizing a binary conception of sex/gender, and an assumption that persons' gender(s) ought to match the one society assigns them at birth.[37] Second, sexual orientation, as well as any bias associated with it, concerns more than sexual object choice. It can also influence a range of emotional dispositions and judgements as well as phenomenological perspectives that determine our cognition and experience of the world. Third, (hetero)sexism is also inextricable from other conditions of oppression. For example, (hetero)sexism buttresses racism, classism, and prejudice against persons with various types of disability. These persons often exist outside the charmed circle that so-called natural, holy, and healthy sexuality creates. For this reason, my dissertation adopts a queer liberationist perspective that acknowledges its crucial debt to, and ongoing sustenance from, feminist reflection.

Consequently, if we desire emancipation and equality, which follows from the criticism and recognition of unjust social institutions, we should question heterosexual privilege as an unnecessary and harmful aspect of social life. Though there is no Archimedean point beyond discourse to which queer subjects may liberate themselves, a liberationist perspective is phenomenologically and ethically superior to one that endorses the hegemony of rights. Idealism notwithstanding, "heterosexuality," insofar as it is an oppressive social system, ought to be abolished. "Heterosexuality" is distinct from (ethically neutral) cross-sex desire. Put simply, it is not possible to hold anti-queer bias without also expressing misogyny, though this may be latent. Both attack the belief that persons should possess sexual integrity. As argued more fully below,

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[36] Patricia Beattie Jung and Ralph F. Smith, *Heterosexism: An Ethical Challenge* (Albany: SUNY Press, 1993), 13-4.

[37] Teresa J. Hornsby, and Deryn Guest, *Transgender, Intersex and Biblical Interpretation* (Semeia Studies; No. 83. 2016), 13-20.

the gender of the parties involved has no intrinsic relationship to the ethical quality of the sexual interaction. What makes "traditional heterosexual sex" suspect is its tendency to subordinate women and endorse male privilege, thereby violating women's sexual integrity, but this can happen in a queer relationship as well.[38] Thus, biology is not destiny. We are part of an oppressive, still largely patriarchal. culture that socializes children and adults into confining gender stereotypes.[39]

Given Susan Brownmiller's famous assertion that "[Rape] is nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear,"[40] we can enhance our discussion with a definition of, and a commitment to, sexual integrity, which criticizes heterosexism as a regime of (symbolic) violence that maintains heterosexual norms through varying degrees of force and the eroticization of subjection.

Sexual integrity encompasses, yet goes beyond, the ideal of sexual autonomy, the latter being the ability to choose how and when we have sex and with whom we engage in erotic activity. The concept of sexual autonomy is inadequate for a feminist analysis. Sexual autonomy does not value sex *per se* as a site of pleasure, vulnerability, power, connectivity, expression, and

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[38] John Stoltenberg, *Refusing to Be a Man: Essays on Sex and Justice* rev. ed. (London: UCL Press, 2000), 1-33, 65-88.

[39] Consequently, this dissertation is intentionally and unapologetically campy. This serves four functions. First, it points out the painfully obvious but always disavowed (male) homoerotic charge within Christianity. Second, it seeks to reconfigure this toxic masculinity by framing it within a nonviolent discourse/practice with a long historical lineage, especially among gay men. Third, it calls our attention to the ways in which, despite its pretensions to solemnity, law also is a campy, theatrical, and performative practice. Fourth, it uses humour to defend sexual integrity. Moe Meyer, "Introduction: Reclaiming the Discourse of Camp," in *The Politics and Poetics of Camp*, ed. Moe Meyer (New York: Routledge, 1994), 1-22; David M. Halperin, *How to Be Gay* (Cambridge: MA: The Belknap Press of Harvard University Press, 2012), 201-301, 376-401.

[40] Susan Brownmiller, *Against Our Will: Men, Women, and Rape*, New York: Bantam Books, 1975, 15.

moral development. Instead, sexual autonomy values sex because sexual choices are a product of a rational and optative mind.[41] Experience proves this implicit conception of sex fallacious. Few, if any, non-commercial sexual transactions are products of rational deliberation. For example, Dan Ariely summarizes several experiments that demonstrate the obvious intuition that sexual arousal dramatically impairs reasoning and makes us contemplate behaviour we otherwise would not.[42]

Sexual autonomy has three epistemologically dubious and morally troubling assumptions. First, it often presupposes a dualistic conception of the self, in which an undefined mental essence has a proprietary interest in the thing over which it exercises control.[43] Hence, for a person espousing a traditional liberal view of sexual autonomy, rape is wrong, especially if it is physically violent, because it does not respect persons right to choose their sexual partners, as well as the ownership they have over their own bodies.[44] This replicates the patriarchal distinctions between matter and form and mind and body, marking the more privileged categories as masculine and the less privileged categories as feminine.[45] Someone espousing an autonomy ethic usually sees rape as an aberrant case attributable to deviant individuals and not something endemic to the (hetero)sexist social system. Second, by overemphasizing the mental

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[41] Donald A. Dripps, "Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent," *Columbia Law Review* 92, no. 7 (1992): 1785-7.

[42] Dan Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (New York: HarperCollins, 2008), 95-102.

[43] Nicola Lacey, "Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law," *Canadian Journal of Law and Jurisprudence*, 8, no. 2 (1998): 54.

[44] "Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his." John Locke, *The Second Treatise on Government*, ed. CB Macpherson (1609, repr. Indianapolis, IN: Hackett, 1980), 1.5 §27, 9.

[45] Elizabeth Grosz, *Volatile Bodies: Toward a Corporeal Feminism*, Theories of Representation and Difference, (Indianapolis, IN: Indiana University Press, 1994), 20-30.

aspects of erotic activity, sexual autonomy often makes it challenging to see that the harms of (mainly male) (hetero)sexual violence arise because erotic subjugation is uniquely psychosomatic.[46] Third, it implicitly conceives of sex in terms of a contractual relationship, in which the partner gendered as masculine penetrates and the partner gendered as feminine is penetrated.[47] Such ideas overlook that part of the joy and fear of sex comes from surrendering some autonomy, specifically if we consider this autonomy to denote a bounded and complete identity. Sexual autonomy, therefore, fails to ponder adequately the way that sex is inherently disabling, owing to, among other things, the weakness we experience during orgasm.[48]

Conversely, a feminist conception of sexual integrity begins with human weakness and our attending need for connection.[49] It acknowledges that, though control over our bodies, especially ability to prevent contact from unwanted persons and our reproductive capacities, is essential, the project of becoming an integrated moral and sexual being is always fragile and incomplete.[50] For this reason, those committed to sexual integrity as an ideal are wary of shame.

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[46] Judith Herman, *Trauma and Recovery: The Aftermath of Violence — From Domestic Abuse to Political Terror* rev. ed. (New York: Basic Books, 1997), 36-74; Judith Butler, *The Psychic Life of Power: Theories in Subjection* (Stanford, CA: Stanford University Press, 1997), 1-5.

[47] Wittig, 21-46.

[48] Leo Bersani*, Is the Rectum a Grave? And Other Essays* (Chicago: Chicago University Press, 2010), 18.

[49] Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* (London: Routledge, 1996), 139-81; Martha C. Nussbaum*, Frontiers of Justice: Disability, Nationality, Species Membership* (Cambridge, MA: Belknap Press of Harvard University Press, 2006), 155-74.

[50] Elaine Craig, *Troubling Sex*, Law and Society Series, (Vancouver: UBC Press, 2012), 72; bell hooks, *Feminism is For Everybody: Passionate Politics* (New York: Routledge, 2014), 114; Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1, no. 1 (1971): 47–66.; John Martin Fisher, "Abortion, Autonomy, And Control Over One's Body," *Social Philosophy and Policy* 20, no. 2 (2003): 286-306; John Martin Fisher, "Abortion and Ownership." *The Journal of Ethics* 17, no. 4 (2013): 275-

First, shame has historically supported patriarchal ideas concerning sex, antithetical to conceiving women and queers as sexually whole and interdependent agents. Second, shame produces a uniquely disintegrative effect in the self, by overemphasizing persons' undesirable features rather than considering them holistically.[51] Third, because sexual integrity rejects the notion that one can parse human experience into physical and mental dimensions, it is critical of shame. Shame limits freedom in the imaginary domain by predetermining what sexual fantasies can be conceptualized, let alone enacted. Circumscribing our imagination, in turn, shapes our erotic embodiment, thereby limiting our freedom.[52]

Heightened attention to sexual integrity is especially crucial for women and other marginalized communities because of the pernicious stereotypes and discrediting tactics the legal system levelled against them, both because these tactics created historically conditioned shamed subjectivities and because they persist to the present.[53] Sexual integrity sees protecting sexual fantasy, play, and exploration as an act that is just as politically critical as preserving physical dominion over our bodies. Indeed, in some cases, preserving a fantasy life that remains undisturbed, except for very pressing reasons, may be more essential than a rigid conception of autonomy. Sexual integrity, therefore, better explains the harms of sexual violence. First, it

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304.; Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Knopf, 1993), 217.

[51] Irving Goffman, *Stigma: Notes Towards the Management of Spoiled Identity* (Englewood Cliffs, NJ: Pertinence-Hall, 1963), 7-10.

[52] Lacey, 63-5.

[53] David M. Tanovich, ""Whack" No More: Infusing Equality into the Ethics of Defence Lawyering in Sexual Assault Cases." *Ottawa Law Review* 45, no. 3 (2014): 497-8. Elaine Craig, *Putting Trials on Trial: Sexual Assault and the Failure of the Legal Profession* (Montréal: McGill-Queens University Press, 2018), 30-2.

understands that sexual violence exists on a continuum.[54] Second, it affirms that the harm of rape and other forms of sexual domination is just as much, if not more, dependent upon a feeling of psychic intrusion rather than the violation of our bodies.[55] While disagreeing with Margaret Radin's normative conclusions regarding sex work and pornography, this dissertation holds that sexuality and gender (identity/expression) are indivisible aspects of personhood which, in at least ideal circumstances, should not be alienated or Commodified. We err if we take an overly mechanistic or an overly idealistic approach to sex, especially if we ignore the patriarchal history that has informed Canadian sexual discipline and discourse.

QUEER LEGAL PHENOMENOLOGY

Conflict theories within sociology, from a feminist, queer, and disability-positive perspective, inform this dissertation. I draw on the work of Antonio Gramsci[56] for the concept of hegemony and its relationship to common-sense knowledge, as well as the work of Michel Foucault[57] for his general theories concerning the productive nature of power, the primacy of discourse, and the importance of practices of self authorship and discipline in contemporary society. Lori G. Beaman summarizes the Foucauldian power/knowledge relationship apropos of legal discourse in the following way: "Conceptualized as a net, the Foucauldian notion of power is integrally

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[54] Catharine A. MacKinnon, "Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence," *Signs*, 8, no. 4 (1983): 645-7.; Catherine A MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989), 171-83.

[55] Robin West, "Legitimating the Illegitimate: A Comment on 'Beyond Rape' (Response to Donald A. Dripp)," *Columbia Law Review* 93, no. 6 (1993), 1442-1459.

[56] Antonio Gramsci, "The Modern Prince," in *Selections from the Prison Notebook*s, trans. and ed. Quintin Hoare and Geoffrey Nowell Smith (New York, 1971), esp. 132-3.

[57] For an examination of the power-knowledge matrix, see Annie Bunting, "Feminism, Foucault, and Law as Power/Knowledge," *Alberta Law Review,* 30, no.3, 1992), 829; Michel Foucault, *Discipline and Punish: The Birth of the Prison* (New York: Vintage, 1977), 27.

linked to knowledge. Power is not exercised from the top down, but rather is diffused, disciplinary, productive. Inherent in the power-knowledge matrix are classification schema which produce notions or truths about what constitutes the "normal," whether it is the normal IQ, the normal prisoner, or the normal family."[58]

My dissertation answers the challenge C. Wright Mills offers in his book, *The Sociological Imagination*. It inquires into the unstable relationship between seemingly "personal troubles" and wider "social issues."[59] This method attempts to see the everyday world, to adopt the phrase of feminist sociologist Dorothy Smith, as problematic.[60] I first came to these ideas through feminist/queer legal and religious studies scholars, such as Mary Jane Mossman,[61] Carol Smart,[62] and Rebecca Johnson.[63] They illustrate how custom and language privilege a masculinist conception of rationality and power,

I hold several key assumptions from queer theory as axiomatic. First, power is productive as well as repressive. Power is never (entirely) exercised unilaterally. Second, there is likely not a pre-social (that is, pre-discursive) self to which freestanding personal attributes adhere in an

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[58] Lori G. Beaman, "Sexual Orientation and Legal Discourse: Legal Constructions of the "Normal" Family, (Canada)," *Canadian Journal of Law and Society* 14, no. 2 (1999),177.

[59] C. Wright Mills, *The Sociological Imagination* (New York: Oxford University Press, 1959), 8.

[60] Dorothy Smith, *The Everyday World as Problematic*, (Boston: Northeastern University Press, 1990).

[61] Mary Jane Mossman, "Feminism and Legal Method: The Difference It Makes." *Wisconsin Women's Law Journal* 3 (1987): 147-68.

[62] Carol Smart, *Feminism and the Power of Law*, Sociology of Law and Crime (London; New York: Routledge, 1989), 10–20.

[63] Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood and the Law* (Vancouver: UBC Press, 2002).

(implicitly) imagined "state of nature."[64] Even if there were such a *homunculus*, it would be impossible for contingently socialized human beings to access him. Fourth, ideology, materiality, and practices exist in a mutually constitutive relationship. Fifth, identities are fluid, performative, and intersecting, but this does not mean they are entirely malleable or unimportant.[65]

Sixth, we should challenge what is assumed to be natural because that is where we find the strongest forms of societies' repressive common-sense knowledge.[66] Seventh, constitutional liberalism, as well as its awkward *ménage-a-trois* bedfellows, secularism and freedom of religion, are ideological concepts like any other.[67] Their ideological nature does not imply that all or any of their manifestations are, solely by this reason, inherently bad, socially harmful, or superfluous to a meaningful human life. Eighth, increased queer rights notwithstanding, responsible (hetero)sexual citizenship remains the implicit benchmark against which we measure all other forms of kinship and erotic activity. The preoccupation with, and the legal privileges afforded to, monogamy is an unjustified restriction on the (perhaps undiscovered) possibilities of

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[64] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity,* 2nd Ed. Feminism/Postmodernism (New York: Routledge, 1997), 142.

[65] Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color," (1991) 43, no. 6, *Stanford Law Review,* 1241-1299.; Sojourner Truth, "Ain't I a Woman?"(1851) Women's Convention, Akron, Ohio, 28-29 May, online: http://schools.nyc.gov/NR/rdonlyres/E151FA9D-6017-4556-981F-CD076D731A72/0/SecondaryTextGuideAnswerKeyAintWoman.pdf; bell hooks, *Ain't I a Woman?*: Black Women and Feminism, (New York: Routledge, 2014), esp. 119-158; Meredith McGuire, *Lived Religion: Faith and Practice in Everyday Life* (Oxford: Oxford University Press, 2008).

[66] Noel Castree, "Socializing Nature: Theory, Practice, and Politics," in *Social Nature: Theory, Practice, and Politics*, ed. Noel Castree and Bruce Braun, (Malden, MA Blackwell Publishers, 2001), 20-33.; Tom Shakespeare, "The Social Model of Disability," in *The Disability Studies Reader*, ed. Lennard J Davis, (New York: Routledge, 2006), 192-203; Raymond Williams, "Ideas of Nature," in *Problems in Materialism and Culture* (London: Verso, 1980), 68.

[67] Timothy Fitzgerald, *Religion in International Relations: The Modern Myth* (New York: Continuum, 2011), esp. 120-135, 210-233.

human kinship and erotic practice. Protestant norms of sexual and relational propriety structure our erotic life.[68] Ninth, romance, as we currently understand it, is a social construction like any other human phenomenon and, specifically, one that excludes vast numbers of subjects deemed unlovable from its saving graces.[69] Though her claim is somewhat overstated, Shulamith Firestone is insightful when she suggests that (hetero)sexism continues because of the love that women (and other marginalized groups) provide to privilege men.[70] Tenth, all of these phenomena are inseparable from racialized and (settler) colonial techniques of governance that still privilege the Anglo Celtic, able-bodied/minded, heterosexual, cisgender, affluent, healthy, youthful, educated, productive, (nominally) Christian, and responsible male.[71] He is the exalted subject of Canadian nationalism.[72] In other words, following the work of Carl F. Stychin, I

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[68] Brenda Cossman, *Sexual Citizens: The Legal And Cultural Regulation of Sex and Belonging*, (Stanford, CA: Stanford University Press, 2007), 2; Lisa Duggan, "The New Homonormativity: The Sexual Politics of Neoliberalism," in *Materializing Democracy: Toward a Revitalized Cultural Politics*, eds. Russ Castronovo and Dana D. Nelson, (Durham, NC: Duke University Press, 2002) 175; Mariana Valverde, "A New Entity in the History of Sexuality: The Respectable Same-sex couple," in *Queerly Canadian: An Introductory Reader in Sexuality Studies*, eds. Maureen FitzGerald and Scott Rayter (Canadian Scholars Press/Women's Press, 2012), 366.

[69] Tobin Siebers, *Disability Theory* (Ann Arbour: Michigan University Press 2008), 141-160.

[70] Shulamith Firestone, *The Dialectic of Sex: The Case for a Feminist Revolution* (New York: Bantam, 1970), 129.

[71] For example, Dwight A. McBride, in a collection of essays on the intersection between queerness and blackness, details why he dislikes the clothing brand Abercrombie and Fitch and disapproves of the gay men who support the brand in large numbers. He argues, and I agree, that gay men who support Abercrombie and Fitch are analogous to gay conservatives. They are persons who are desperately trying to acquire (more) privilege despite their marginalized identity. *Why I Hate Abercrombie and Fitch: Essays on Race and Sexuality,* Sexual Cultures: New Directions from the Center for Lesbian and Gay Studies (New York: New York University Press, 2005), 84-5.

[72] Himani Banerji. *The Dark Side of the Nation: Essays on Multiculturalism, Nationalism and Gender*, (Toronto: Canadian Scholars' Press, 2000).; Sunera Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada*. (Toronto: University of Toronto Press. 2007), 75. For an analysis with how this interacts with queerness, see the essays in the volume

challenge the division Canadian law makes between the good (implied masculine) gay and the bad (implied feminine) queer subject.[73]

Discussions of law which take inspiration from Foucault use the concept of governance as opposed to (juridical) ideas of sovereign authority. The following quotation from Kevin Walby distills this project's perspective on legal phenomena:

> By 'sovereigntist,' I am not referring to a secessionist will but to the lay and scholarly tendency to conceive of the political as agonistically dueled out between civil society and the state or states themselves, which posits law as made and judged by the legislative and judicial branches of state-government, then enforced by the policing agencies of the executive. By 'post-sovereigntist' I am referring to the way power is immanent in our social practices and conduct. A post-sovereigntist understanding of law, continues to focus on the state as a site for the unification of regulatory projects but finds it important to put our analyses of law within the context of a decentered economy of power and governance. The benefits of this post-sovereigntist approach are that: (1) law is always conceptualized as a process; (2) the specificity of legal and normative ordering is retained yet their interpenetrating tendencies are acknowledged; and (3) the hegemonic fiction of law as a unified phenomenon is broken.[74]

Disrupting Queer Inclusion: Canadian Homonationalisms and the Politics of Belonging, eds. OmiSoore H. Dryden and Suzanne Lenon, Sexuality Studies Series (Toronto UBC Press, 2015).

[73] Carl F. Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights*, Queer Theories, Queer Politics (Philadelphia: Templeton University Press, 1998), 200. He acquires this terminology from: Ruthann Robson, "Resisting the Family: Repositioning Lesbians in Legal Theory," *Signs: A Journal of Women in Culture and Society* 19, no. 4 (1994): 975.

[74] Kevin Walby, "Contributions to a Post-Sovereigntist Understanding of Law: Foucault, Law as and Legal Pluralism" *Social and Legal Studies* 16, no 4. (2007): 532.

Law as governance dissects and describes the doing of law, which discourses and practices always mediate, as a performed and constitutive activity of mutually reinforcing self and societal regulation. Moreover, as with gender and sexuality, it is continually constituted through a process of productive failure. It can never entirely regulate the phenomena over which it claims jurisdiction.[75]

This approach will help explain why sexuality *in abstracto* is not innate to the human condition. Siobhan B. Somerville elegantly encapsulates my views in the following excerpt:

> "Sexuality" is used throughout this study to refer to an historically and culturally contingent category of identity. As such, "sexuality" means much more than sexual practice per se. One's sexual identity, while at times linked directly to one's sexual activities, more often describes a complex ideological position, into which one is interpellated based partly on the culture's mapping of bodies and desires and partly on one's response to that interpellation. Thus, there is no strict relationship between one's sexual desire or behavior and one's sexual identity, although the two are closely intertwined.[76]

I also share her conviction that "race" is a cultural construct born of a power hierarchy, in which whites and whiteness are at the top. It is not a biologically given fact.[77] Racializing of certain subjects — as well as the construction of them according to (perceived) ability and related gender conformity — is inextricable from how we become (sexually and religiously) oriented. We should always bear in mind that (within Canada) this takes place in conjunction with and in

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[75] Walby, 533.

[76] Siobhan B. Sommerville, *Queering the Colour Line: Race and the Invention of Homosexuality in American Culture*, Series Q (Durham, NC: Duke University Press, 2000), 6.

[77] Somerville, 7.

furtherance of the historical and ongoing genocide perpetrated upon Indigenous peoples. My convictions concerning sexuality and race hold true for religion as well.[78]

Because she explores the philosophical implications of orientation in all its various meanings, Sara Ahmed's monograph, *Queer Phenomenology: Orientations, Objects, Others*, is helpful when thinking about religion and sexual orientation. Ahmed transcends the fruitless essentialist constructivist divide (that is, the "born that way" debate). She acknowledges both the historicity and social construction of sexual orientation as, for example, invoking an image of Cupid's arrow pointing to our true love,[79] in which there is a binary model of gender and a binary model of sexual object choice. She also asks the crucial question of what it means for subjects to be oriented — both regarding their experience of space and experience of desire — arguing for a crucial link between the two.[80] Sexual orientation then becomes conceived of as a matter of perception, passion, and attachment that follows certain "lines."

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[78] This also means that, while I owe a great debt to, and have much respect for, those grouping themselves under the moniker of "critical religion," Timothy Fitzgerald, *The Ideology of Religious Studies*, (Toronto: Oxford University Press, 2000), 15-25. Russell T. McCutcheon, *Manufacturing Religion: The Discourse on Sui Generis Religion and the Politics of Nostalgia* (New York: Oxford University Press, 1997), 24–30.; Brent Nongbri, *Before Religion: A History of a Modern Concept* (New Haven: Yale University Press, 2013), 50-6,5. I take the more moderate approach to the social construction of religion advocated by James Beckford and ask principally not whether the category has any ontological essence, but who benefits from its deployment and why. His advice is more justified by the fact that I am principally dealing with freedom of religion as it applies to Evangelical Christians in Canada, mitigating the risk of cultural or historical inaccuracy. Many legal doctrines, such as *habeas corpus* or privity of contract, are human inventions, yet are *real*, because they influence human behaviour in the material world. As will be alluded to below, while I applaud critical religion's Kantian posture, it supposes that one can access the transcendental content of religion, which Kant showed to be impossible regarding any phenomena, based on the *a priori* limits of human perception. Religion has no pre-social essence, but neither do concepts as simple as that of "Tree." The best this dissertation hopes for is a pragmatic and functional approach to the categories that inform our world.

[79] Sara Ahmed*, Queer Phenomenology: Orientations, Objects, Others* (Durham, NC: Duke University Press, 2006), 69.

[80] Ahmed, *Phenomenology*, 1.

To be straight, therefore, is to (metaphorically) follow a straight line. Society devotes considerable resources to ensure we follow this line. Thankfully, this is decreasing somewhat, even though many may have some "natural inclination" to follow it.[81] Heterosexuals constantly straighten themselves along the way, until following the straight path may seem natural. Indeed, it may look inevitable that they found themselves where they are presently, and they may not remember just how they arrived at that location. In other words, heterosexuality and homosexuality is a false yet codependent binary. Normative heterosexuality is still the path of least resistance, as described by the work of sociologist Allan G. Johnson.[82] Though Johnson discusses white privilege and not heterosexual privilege, his analysis is apposite.

Travelling on that path over decades inevitably affects the objects straight persons see and do not see and the attachments they do and do not make. There may be rewards along that path. They may feel entitled to such prizes as more appear and following that path seems more natural. It may look silly, morally weak, and even outrageous that someone would begin a different path. A straight woman may become confident that her journey is natural and right. The attachments she has made along the way are the right ones for (almost) everyone to have. She may develop a privileged sensibility, emotional configuration, and method for being in and perceiving the world. Once she has made her choices, constrained by many forces, memories, foreclosures, and attachments, it is arduous, though not impossible, to cut through the thicket and change direction. Nonetheless, such a directional change would constitute a dramatic reorientation of her perceptual and emotional life.[83]

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[81] Ahmed, *Phenomenology*, 16.

[82] Allan G. Johnson. *Forest and the Trees: Sociology as Life, Practice, and Promise*, Philadelphia: Temple University Press 1997) 27-54.

[83] Ahmed, *Phenomenology*, 19.

To be queer, in contrast, is to have one or a series of experiences which, combined with possible natural propensities[84], place one upon a different and undervalued path—one that (un)consciously deviates from the straight one.[85] We continue along this undervalued path through a series of constrained choices, often against the pressure to straighten ourselves and our desires. This (mis)adventure may precipitate feelings of shame. We may be punished when straying from the straight and narrow and may attempt to hide the journey we are taking.[86] This punishment, in turn, may also create a certain sensibility as we hopefully find supportive travellers along the way, making new kinship networks. With good fortune, we may take pride in the journey and develop a sense of integrity. Understandably, we may lash out in rage and *ressentiment* at (perceived) agents or forces that impeded our development to an (imagined) actualized self.[87]

The metaphor of a path is useful for several reasons. First, it bypasses the inexhaustible questions arising from the free will versus determinism dichotomy. As anyone who has spent

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[84] My use of a social constructionist approach is not meant to deny possible biological causes that influence sexual orientation. Nevertheless, the science to date remains inconclusive, and in any event, an essentialized version of queer identity tends to concede valuable rhetorical ground to social conservatives and legitimate the implicit heterosexual fantasy of a queer-free society. See Janet E. Halley, "Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability," *Stanford Law Review* 46 (1994): 503-568, Robert Alan Brookey, *Reinventing the Male Homosexual: The Rhetoric and Power of the Gay Gene*, Bloomington: Indiana University Press, 2002, 167, Jennifer Terry, ""Unnatural Acts" in Nature: The Scientific Fascination with Queer Animals," *GLQ: A Journal of Lesbian and Gay Studies* 6 (2000): 151-193, Shannon Weber, "What's Wrong with Be(com)ing Queer? Biological Determinism as Discursive Queer Hegemony," *Sexualities* 15 (2012): 697-701, Mary E. Wood, "How We got this Way: The Sciences of Homosexuality and the Christian Right," *Journal of Homosexuality* 38 (1999): 19-40.

[85] Ahmed, *Phenomenology*, 67.

[86] Steven Seidman, *Beyond the Closet: The Transformation of Gay and Lesbian Life*. (New York: Routledge, 2002), 22; Didier Eribon, *Insult and the Making of the Gay Self,* trans. Michael Lucey (Durham, NC: Duke University Press, 2004), 16.

[87] Seidman, 15.

hours lost in the forest may understand (including myself, even though I use an electric wheelchair for mobility), we have considerable freedom to move along a forest trail; yet, many things circumscribe our choices such as, the pattern of roots on the ground, the mud, whether we are severely allergic to poison ivy, the shape of the underbrush, how many persons have travelled there before, the supplies and tools we have, our physical fitness, the amount of daylight remaining, the danger of wildlife appearing, if there is water nearby, and how far we are away from shelter. Those of us who become lost and disoriented frequently understand that turning back in the direction whence we came is often no simple matter either.

Second, the metaphor of pathways illustrates the intersecting nature of our identities and the multiple factors that shape the directions we choose (not to) take. Though we make similar choices, and rarely choose routes entirely untraversed, no two objects can occupy the same space at the same time. As we shall see in the next chapter, this phenomenological perspective helps us value epistemic and ethical humility when we appraise others' behaviour. Phenomenology supports the proposition that we should be slow to judge and punish others. Human beings are not omniscient, and we, therefore, can never possess a God's-eye- view that we would need to definitively assess both our own and others' conduct. The best mortals can achieve are contextually specific judgements, always liable to error and requiring prudent revision against our experiences.

For innumerable reasons, some persons' journey will be more difficult than others. Hence, while specific behavioural patterns and attachments may evidence sexual orientation and gender, there are no definitive, ahistorical, and transcultural criteria that determine how a person may experience gender and sexual orientation (as well as the relationship between the two). Further, this experience is coextensive with racialized statuses, mental and physical ability level,

class, religious affiliation, emotional temperament, access to education, as well as exposure to suffering and trauma.

Consequently, while oppressions are complicated, interrelated, multiple, and difficult to quantify, it is foolish to suggest that all non-hegemonic groups in society are equally oppressed. Though considerably oppressed, I benefit from some male, white, cisgender, class, and (intellectual) ability privileges. By any reasonable measure, I am less subjugated than a quadriplegic two-spirit person, who lives on an underfunded reserve, does not have (formal) higher education, and uses a ventilator for respiration. From this understanding, it is likely that most queers experience more marginalization than most white Evangelicals.

Third, it is also important to consider the directional implications of this analysis. Constitutional law is replete with metaphors that intersect with sexuality. There is a connection between right, traditionally thought the direction of justice, goodness, and "straight-thinking," concepts of legal right, and the notion of political and religious orthodoxy: orthodoxy's etymology is "straight/right opinion" in Greek.[88] By analogy, therefore, when courts or religious institutions attempt to maintain orthodoxy, they are also engaging in a straightening process. It is important to remember the association between "the left," social innovation, and moral deviance.[89]

Fourth, Ahmed makes clear that the concept of orientation connects to the phenomenon of Orientalism, in which the West (or Occident) depicts itself as inherently more rational than the East (or Orient). Contemporary homonationalist discourses demonstrate an intriguing reversal of

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[88] *Orthodox*, accessed February 28, 2018. https://www.etymonline.com/word/orthodox?ref=etymonline_crossreference.

[89] Ahmed, *Phenomenology*, 13-14; Robert Hertz, The Pre-Eminence of the Right Hand: A Study in Religious Polarity, trans. Needham and Needham, *Journal of Ethnographic Theory* 3, no. 2 (2013): 342.

the traditional trope of associating the East with heterodox and licentious forms of sexual expression and the West with dignity and moral purity. The new queerly oriented Oriental, both within and outside our national boundaries, is he who does not have the correct orientation to queer sexuality.

Also, as a discussion of how Kantianism influences the emotional colouring of discourses concerning diversity shall demonstrate, to be "westernized" is to have a particularly "straight" teleological narrative concerning queer rights and their justification as part of the steady progress toward an imagined ideal of justice. Hence, queer phenomenology can help criticize an overly spatial and organic conception of the metaphorical dimensions of the rule of law, as well as the influence of the aesthetic (in the Kantian sense discussed below) aspects of constitutional culture.[90]

At this point, we should look back upon the social positions of the protagonists whom we discussed in the introduction. It is imperative to note the relative advantage of all of them; for they have been lucky to attend university and live in a peaceful and democratic country. Moreover, they are likely all settlers on Indigenous land. Mr. Volkenant's heterosexual head-start and religious faith shape his phenomenological horizon. His conditioning helps him to believe in the divinely ordained naturalness of cross-sex attraction. He knows this tenet is a crucial component of discipleship. He has followed the road of Jesus for some time. This path has challenges and rewards. As he has developed in faith and experience, he has become increasingly committed to staying on the straight and narrow thoroughfare that is compulsory heterosexuality. His trajectory is connected to a specific (hetero)sexist conception of the public sphere. Mr. Wudda has a different sensibility, owing to his identity as a possibly (semi)celibate gay Evangelical, who sometimes struggles to reconcile his sexual desires with the expectations

[90] Ahmed, *Phenomenology,* 109-156.

of God and his fellows. Nonetheless, he still benefits from cisgender male hegemony. This advantage helps him to endorse the division between homoerotic acts and his gay identity.

Ms. Bishop took a different walk. Her religious upbringing moulded her journey of self-discovery in complex ways. Perhaps because she is a woman, she shows increased sensitivity to the consequences of shame and exclusion. Though Ms. Bishop is a woman and has experienced discrimination based on her gender and her lesbian identity, she likely benefits from some aspects of cisgender privilege. Consequently, she has a different worldview than Mr. Caljoux. As well as possible erotic queerness, Mr. Caljoux approaches the CCA as someone suffering from social pain because the gender path he follows contradicts the culturally predetermined one. Depending on the extent to which Mr. Caljoux can (or wishes to) emulate (cis)sexist standards of masculinity, he may also benefit from male privilege.

Regrettably, we do not know if any of these persons are of colour, disabled, socioeconomically disadvantaged, or survivors of additional trauma. These facts would offer us a crisper picture concerning how history shapes their itineraries and how power (or its absence) colours the perspectives they take on TWU. Noting that this metaphor is itself ableist and, therefore, potentially marginalizing, it is helpful to conceive of life as a race. Persons start at different points on the track. Some must run with their legs bound together, blindfolded, or using wheelchairs. Others receive free water bottles on account of their skin colour, religion, or sexual orientation, and gender. Some have friends praising them for little effort. Others struggle in silence with no assistance. We are all, however, expected to do the same race. This demand, combined with the unequal distribution of resources and care, explains why certain persons always seem to keep winning. It also illustrates why it is generally unsporting to worsen pre-

existing disadvantage. It amounts to tripping an inferior runner when we are destined to be victorious

Emotions as Legal Disabilities

My project criticizes the stereotype that women are passive owing to emotionality and men are active agents because of their purported superior rationality. This dichotomy is still pervasive, though often disavowed.[91]

Emotions, and the attending femininity many allege they engender, constitute an imagined legal disability, which negates the ideal of rational agency.[92] A consequence of this assumption is that a specific conception of tolerance, understood as flexibility, emotional control, and forbearance, has become a preeminent masculine legal virtue. This ideal of tolerance also implicitly takes for granted that we are independent, autonomous, and fully developed beings endowed with considerable self-knowledge and goodwill.[93] Despite an increase in the number of women in the legal profession, as well as the prestige that some acquire within it, law is still a homosocial activity predicated on the denial of the feminine to create masculine forms of comradery, professionalism, and responsibilities to the public.[94] This culture of historical and

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[91] Sara Ahmed, *The Cultural Politics of Emotion*, 2nd ed. (Edinburgh: Edinburgh University Press, 2014), 2-3.

[92] Fiona Kumari Campbell, "Legislating Disability: Negative Ontologies and the Government of Legal Identities," in *Foucault and the Government of Disability*, ed. Shelley Tremain, (Michigan: University of Michigan Press, 2005), 109.

[93] Robert McRuer, *Crip Theory: Cultural Signs of Queerness and Disability* (New York: New York University Press, 2006), 12.

[94] Eve Kosofsky Sedgwick, *Between Men: English Literature and Male Homosocial Desire*, 2nd ed., Gender and Culture (York: Columbia University Press, 1993), 1-5; Elizabeth Sheehy and Sheila McIntyre, *Calling for Change: Women, Law, and the Legal Profession*. (Ottawa: University of Ottawa Press, 2006). For an autobiographical social history of the successes and setbacks women have faced in the legal profession and the work that we still need to do, see Linda Silver Dranoff, *Fairly Equal: Lawyering the Feminist Revolution* (Toronto: Second Story Press, 2017).

ongoing sexism has its roots in the adversarial nature of common law legal systems and the professional honour that law accrued under the dubious idea that it was a gentleman's profession.[95] We can consider three mundane but fundamental examples to illustrate how legal theory is androcentric. The law makes a basic distinction between *mens rea* and *actus reus*. This dichotomy first makes a division between the mental and the physical and, second, places the bulk of criminal responsibility on our mental states.[96] Similarly, the legal construct of the reasonable person (for centuries, man) imputes a normative standard of masculine rationality which has only been slightly revised in the past thirty years or so.[97] Third, and especially considering Robert McRuer's concept that performances of ability and gender are always intertwined, the concept of legal standing and the fact that we must literally stand before a court suggest masculine ideas of honour and moral rectitude.[98] A straight body conveys respectful attention and a posture and a consciousness free from, or willing to endure, shame, consider the phrases, "he stands up for himself," or "he is a morally upright judge." Justification can mean to provide a logical defence of our actions, but it can also suggest the function in Microsoft Word that aligns the edges of the document, so that a text appears straight, even and more organized.

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[95] Alan C. Hutchinson, *Legal Ethics and Professional Responsibility*, Second Edition, (Toronto: Irwin Law, 2006), 22; Milton Regan, *Eat What You Kill: The Fall of a Wall Street Lawyer* (Ann Arbour: University of Michigan Press, 2004). For a classic account of the honour and shame dichotomies' gendered nature, even though it is troubling on other grounds, see Ruth Benedict, *The Chrysanthemum and the Sword* (Cambridge: MA: Riverside, 1946), 151, 156.

[96] Eric Colvin and Sanjeev Singh Anand, *Principles of Criminal Law in Canada*, 3rd ed. (Toronto: Thompson Carswell 2008), 88-93.

[97] Victoria Nourse, "After the Reasonable Man: Getting over the Subjectivity/objectivity Questions," *New Criminal Law Review* 11, no. 1 (2008): 33-50.

[98] Robert McRuer, *Crip Theory: Cultural Signs of Queerness and Disability* (New York: New York University Press, 2006), 301.

One of the goals of this project is to question what Terry Maroney has called the "persistent script of judicial dispassion," as a mystifying (in the Marxist sense of promoting a harmful absence of criticism and worsening class and other forms of inequality) construction that is neither empirically true nor ethically desirable.[99] It is born of a rudimentary understanding of Cartesian dualism that perpetuates (hetero)sexist relations of subjugation at both micro and macro levels.[100] Fascinating and contentious bodies of scholarship concern what an emotion or affect is, what is the precise distinction between emotion and affect, whether contemporary societies even, in fact, have "genuine" emotions; and, if so, what is the relationship, both in terms of culture and neurobiology, between emotion and cognition concerning normative judgements or, indeed, whether cognition even has a role in normative judgement.[101] As far as

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[99] Terry Eagleton, *Ideology: An Introduction* (Verso: London, 2007), 3.

[100] Terry A. Maroney,"The Persistent Cultural Script of Judicial Dispassion," *California Law Review* 99 (2011): 634-46; Terry A. Maroney, "Emotional Regulation and Judicial Behavior." *California Law Review* 99, no. 6 (2011),1 501; Kathryn Abrams and Hila Kerentf, " Who's Afraid of Law and the Emotions?" *Minnesota Law Review* 94 (1997): 2001-8; Kathryn Abrams, *Hearing the Call of Stories*, (California Law Review 79, 1991), 971; Kathryn Abrams, The Progress of Passion, *Michigan Law Review 100*, (2002), 1602; *The Passions of Law*. ed. Susan A. Bandes. (New York: New York University Press. 1999), 367.

[101] Antonio R. Damasio, *Descartes' Error: Emotion, Reason, and the Human Brain* (New York: Anchor Books, 1994). This was one of the first popular and widely acclaimed books of the emotions in cognitive reasoning generally and moral reasoning in particular. It did this by showing that damage to the ventromedial prefrontal cortex, a region particularly associated with emotion and impulse control, impairs the reasoning of patients who tested with normal, and even exemplary, cognitive ability. For similar conclusions regarding the common-sense myth of Cartesian dualism, see Joseph Ledoux, *The Emotional Brain: The Mysterious Underpinnings of Emotional Life* (New York: Simon and Schuster Press, 1996). Catherine Malabou considers the ramifications of brain injury from a more explicitly philosophical perspective. Catherine Malabou, *Ontology of the Accident*, trans. Caroline Shread (Malden, MA: Polity Press 2012). Also within philosophy, there is considerable literature on the proper definition of moral emotion, especially as it relates to the condition of antisocial personality disorder, otherwise known as psychopathy. Good examples of these are: Angela S. Brook, Vernon L. Quinsey, and Dale Langford. "Psychopathy and the Perception of Affect and Vulnerability," *Criminal Justice and Behavior* 34, no. 4 (2007): 531-44.; Adam Smith, ""The Empathy Imbalance Hypothesis of Autism: A Theoretical Approach to Cognitive and Emotional Empathy in Autistic Development," *The Psychological Record* 59, no. 3. (2009): 489-510; Jesse Prinz, "Emotional Basis of Moral Judgements," *Philosophical Explorations* 9, no. 1 (2006): 29-43; Leland F. Saunders, "Reason and Emotion, Not Reason or Emotion in Moral Judgment" *Philosophical*

possible, and within obvious time constraints, I have familiarized myself with the contours of such debates. I am confident in the four following propositions. First, emotion and culture condition morality. Second, emotion and cognition interweave, but persons argue over the extent of this connection. Third, though emotions have various biological origins, they are manipulable and historic alcultural products. Fourth, as such, a greater awareness of emotions and their effects cause a healthier political climate. We must make decisions to operationalize definitions in the conduct of research.[102]

At least concerning emotion, I am in broad agreement with the work of Martha C. Nussbaum. She argues that most, if not all, complex emotions require judgements concerning our environment (and imagined stimuli), even if such judgements do not rise to the level of conscious awareness.[103] Furthermore, preconscious experience (for example environmental stimuli, learned associations, and early childhood) shape judgement. Human beings can exercise

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Explorations 19, no, 3. For interesting rejoinders and qualifications, consult: Elisa Aaltola, "Affective Empathy As Core Moral Agency: Psychopathy, Autism And Reason Revisited," *Philosophical Explorations* 17, no.1 (2014): 76-92.; Bryce Huebne, Susan Dwyer and Marc Hauser, "The Role of Emotion In Moral Psychology," *Trends in the Cognitive Sciences* 13, no.1 (2008): 1-6. This is, of course, related to ongoing debates concerning what is the driving force behind moral cognition, whether there is, in fact a dual process model as authors like Joshua Green and Jonathan heard contend: Joshua Greene, *Moral Tribes: Emotion, Reason, and the Gap between Us and* (New York: Penguin Press, 2013; Jonathan Haidt, "The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment," *Psychological Review* 108, no. 4 (2001) 811-34; Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* (New York: Pantheon Books, 2012). There is then the more troubling question of whether reasoning is an allusion and affectional responses dominate politics. See, for example, William E Connolly, *Neuropolitics: Thinking, Culture, Speed* (Minneapolis, MN: University of Minnesota Press, 2002), Sara Ahmed, *The Cultural Politics of Emotion*, 2nd ed. (Edinburgh: Edinburgh University Press, 2014). There is even the disturbing question of whether we have genuine emotions as a part of the postmodern condition, see Stjepan Gabriel Meéstroviâc, *Postemotional Society* (London: Sage Publications, 1997).

[102] Aristotle. *Nicomachean Ethics,* in Richard McKeon, ed. *The Basic Works of Aristotle*. (Modern Library: New York, 2009) 2.6, 1106b, 5-15, p. 958.

[103] Martha C. Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (New York: Cambridge University Press, 2001), 1-3.

some control over their emotional life, through both (un)conscious behavioural conditioning and (un)conscious cognitive (re)appraisal.[104] She argues that emotion and its cultivation for socially desirable ends is indispensable for a worthwhile human life. Nussbaum contends that emotions, and the desire to suppress them, arise from (a perceived) gap or fit between subjects' desires and their capacity to fulfil them adequately. In short, human beings have emotions because we are vulnerable creatures. We are often upset by this fragility.[105]

Thus, persons err when they espouse an (exclusively) cognitivist approach to moral judgement, inspired by the work of Lawrence Kohlberg. He offers a cognitivist theory of ethical progress that is very similar to the Kantian one. In his typology of moral development, (male) subjects progress from self-interest to greater degrees of moral universality. First, we obey rules to avoid punishment. Second, we obey rules to obtain rewards. Third, we obey rules to obtain good social standing. Fourth, we obey a law out of respect for authority. Fifth, we obey law because of a conception of the social contract and mutual reciprocity. Sixth, we obey law, insofar as that obedience conforms to rationally deduced universal principles.[106] For Kohlberg, these stages have near universal cross-cultural application.[107] Also important to Kohlberg, this happens because of an incremental and almost always irreversible process of cognitive reorganization (read, Enlightenment).[108] It is obvious that few human beings reach Kohlberg's highest two stages of moral development, He frankly concedes this point.

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[104] Nussbaum, *Upheavals,* 19-22.

[105] Nussbaum, *Upheaval*s, 4, 29-34.

[106] Lawrence Kohlberg: *The Philosophy of Moral Development: Moral Stages and the Idea of Justice,* Essays on Moral Development, vol. 1 (Toronto: Harper and Row, 1981), 17-19.

[107] Kohlberg, *Moral Stages*, 23.

[108] Kohlberg, *Moral Stages*, 27-41.

Nonetheless, two ideas are essential for this project. First, many, perhaps even all, forms of theological literalism (colloquially known as the "Bible says so" approach) would seem to place one low on Kohlberg's teleological moral ascension. Second, Kohlberg's progressive moral typology, much like the thought of Kant, Dworkin, and Rawls, is highly gendered. Kohlberg comments that females on average demonstrate lower levels of achievement on his scale of moral development compared to their male counterparts.[109] Carol Gilligan (a student of Kohlberg) notes that this tends to exclude (traditionally) feminine epistemological claims, interpersonal dynamics, and versions of the ethical life.[110] Gilligan postulates that women, or perhaps, those with feminine gender characteristics, reason about ethics conceptualizing progressively more mature caring relationships and networks of communication. Their first injunction, rather than Kohlberg's ideal agent who follows "principle," is not to hurt and to maintain nurturing bonds of affection.

Why then does a common-sense approximation of this ideal of objectivity persist, even when astute criticism beleaguers it? Though he writes of the common-sense myth of free markets, we can use Bernard E. Harcourt's proposition that such common-sense assumptions create an illusion of order where no order exists.[111] We can commend much in the Kantian conception of law and political life. It makes us feel free, equal, and self determining. It provides

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[109] Kohlberg, *Moral Stages*, 12.

[110] Carol Gilligan, "In a Different Voice: Women's Conception of Self and Moral Development," *Harvard Educational Review* 41, no. 4 (1977): 494-510. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1993, repr. Cambridge, MA: Harvard University Press, 2003), esp. 1-20, 151-176. For elaborations of the feminist care ethics into coherent political and legal programs, see, Joan C. Tornto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993); Jennifer, Nedelsky, *Law's Relations: A Relational View of Self, Autonomy, and the Law* (Oxford: Oxford University Press, 2011).

[111] Bernard E. Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (Cambridge, MA: Harvard University Press, 2011), 240.

clear answers to complex questions. It keeps the boundaries of our very messy lives neat and tidy. We are what Alistair McIntyre aptly calls "dependent [imperfectly] rational animals."[112] Accepting Lon Fuller's definition of law as "the enterprise of bringing human conduct under [rational] rules,"[113] (even if one has scruples regarding the accuracy of this definition, it serves as a convenient shorthand for the common-sense opinion concerning what law "actually does"), activities thought of as sexual or religious are often portrayed as essential for social cohesion, while partially exceeding and undermining the rules they maintain.

Religion, emotion and sexuality, all polyvalent and interconnected phenomena, exceed legal regulation while creating the need for more of it. Emotion affects the "unruly edges," to use the term of queer legal theorist Carl F. Stychin, of such governance.[114] In keeping with his research, I am not interested in asking whether citizenship or rights are emancipatory or repressive. They are both. I am interested in questioning these ideas as well as how we deploy them and the emotional excesses they cause.[115]

As Theodor Adorno and Max Horkheimer noted some time ago, the paradox of rationalism is that it often becomes profoundly irrational regarding aspirations toward rationality,

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[112] Alastair McIntyre, *Dependent Rational Animals: Why Human Beings Need the Virtues*, Phill Carus Lectures (Chicago: Open Court Publishing, 2002), 1-11, 43-63.

[113] Lon L. Fuller, *The Morality of Law*, rev. ed. (New York: Yale University Press, 1969), 96-100.

[114] Carl Stychin, "Sexual Citizenship in the European Union," *Citizenship Studies* 5 (2001): 290.

[115] Carl Stychin, *Governing Sexuality: The Politics of Sexual Citizenship and Law Reform* (Oxford: Hart Publishing, 2003), 14.

maintaining binaries that no longer are empirically or normatively defensible.[116] Studying to become a lawyer is learning to have a rationalist emotional orientation. This emotional orientation often conflicts with sexual and religious orientations. The former emotional orientation requires dispassion and the latter two are particularly troubling sites of emotionality.[117]

Arlie Russell Hochschild observes that "feeling-rules" are both expressions of how our imagined internal selves ought to feel in a specific situation, as well as the conventions governing their interpretation.[118] They provide excellent objects of study when criticizing oppressive social practices. They support the assertion that the personal is political. Emotions are intensely private, and they are also always culturally shared and transmitted. Additionally, they help to create a boundary between national political structures and civil society.[119]

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[116] Theodor Adorno and Max Horkheimer, *The Dialectic of Enlightenment: Philosophical Fragments,* trans. Edmund Jephcott, ed. Gunzelin Schmid Noerr, Cultural Memory in the Present (1987; repr. Stanford, CA: Stanford University Press, 2002), esp. 215-240.

[117] In her fascinating anthropological study of discourse and culture in first year law classrooms, entitled, *The Language of Law School: Learning to "Think like a Lawyer*," Elizabeth Mertz demonstrates seven aspects of legal method and education. 1) the focus on legal method and principle to the exclusion of content the law deems extraneous, such as emotion, personal details, (sometimes) non-legal moral concerns, certain types of harm for which there is no discernible legal action or remedy, and so forth; 2) a reorienting of how law students are supposed to perceive and understand the world around them; 3) apparent neutrality but actual bias in this legal orientation; 4) how this legal language is at once incredibly creative and adaptable to problems occurring from social change, while also obscuring the very real differences between (non)legal subjects, which are sometimes at the heart of conflict and create the very inequalities the legal method is purportedly, at least in part, designed to redress; 5) the superficially neutral language of law has, unsurprisingly, very different effects upon different persons; 6) although there is a shared epistemology among law students, practitioners, and teachers, there is also undeniable diversity; 7) all of the aforesaid advantages and disadvantages can be subsumed under the abilities and disabilities resulting from both abstraction and dispassion. Elizabeth Mertz, *The Language of Law School: Learning to "Think Like a Lawyer",* (Oxford: Oxford University Press, 2007), 3-4.

[118] Arlie Russell Hochschild, "Emotion Work, Feeling-rules, and Social Structure," *American Journal of Sociology* 85, no. 3 (1979): 533.

[119] Hochschild, "Emotion Work" 556-8.

A nation may have feeling-rules, creating a distinct national emotional culture, and within that nation, there can be many emotional cultures and subcultures. As well, individual persons may diverge in how they interpret, apply, and contest these rules, such that they can manage better their emotional obligations against other rival claims. Like any aspect of social organization, feeling-rules can be unstable.[120] For instance, when a group's erstwhile unquestioned common-sense knowledge is subject to criticism, it can become anxious and resentful. The shifts in the feeling-rules for a group are more acute when they are born of (perceived) internal dissent.

My project examines a cluster of primarily negative emotions. They warrant definition. Nevertheless, one ought to heed Wittgenstein's counsel that definitions designate "family resemblances."[121] It is difficult to define any phenomenon precisely, let alone one as complex and subtle as the nearly infinite shades of humankind's emotional experience.

Shame is an emotion denoting a negative self-assessment, usually brought about by a "natural" or ascribed undesirable behaviour(s) and characteristic(s) at variance with or representing a significant impediment to meeting (perceived) shared group norms. Such failure may lead to a circumstance whereby the undesirable attribute(s) and disposition(s) seem to signify, circumscribe, and overpower the quintessence of one's being.[122] This feeling of being trapped in a false conception may lead to perceptions of oneself as lesser than others and as

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[120] Hochschild, "Emotion Work," 564-8.

[121] Ludwig Wittgenstein, *Philosophical Investigations.* (Malden, MA: Blackwell 2009); Gordon P. Baker, and Peter M.S. Hacker. *Wittgenstein. Rules, Grammar and Necessity* (Malden, MA: Blackwell 2009), 146.

[122] John Deigh, "Shame and Self-Esteem: A Critique," *Ethics*. 93, no. 2 (The University of Chicago Press, 1983), 244; Cheshire Calhoun, "An Apology for Moral Shame," *The Journal of Political Philosophy:* 12, no. 2, (2004) 141; Gabriele Taylor, *Pride, Shame and Guilt: Emotions of Self-Assessment*, (Oxford: Clarendon Press, 1985), 54-56.

unlovable.[123] One often has the tacit sensation of existing for another's (malignant) gaze or enjoyment.[124] Shame arises from experiences of dependency during infancy and childhood, and persons' frustration at their deficiency when meeting basic needs.[125] This feeling of resentment at primary weakness is often (erroneously) transferred onto more complex adult experiences.[126]

Shame (and its opposite, pride/honour) is gendered, (hetero)sexist, ableist, and intrinsic to the liberal myth of the public-private distinction. This organizing legal fiction persists despite trenchant criticism from multiple disciplines. One can also use shame and its more severe form, humiliation, as a weapon against others, to enforce moral conformity and common-sense knowledges. Shame is peculiarly intrapsychic. While it affects individuals, it creates collective shame-based subjectivities that often provide tools for resistance. On the other hand, shame is a caustic emotion that is a major cause of depression and rage.[127]

In *The Kantian Imperative*, Paul Saurette attempts to dissect and critique humiliation and common-sense recognition as normative rhetorical strategies within Kantian ethics. He argues that appeals to common-sense have the five following assumptions. First, common-sense is universally shared. Second, it can be distorted. Third, it is possible to remove these distortions and reveal its self-evident nature. Fourth, this recognition justifies common-sense. Fifth, it is,

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[123] Peter Hallberg, "Shame – A Hidden Emotion," *Journal of Analytic Psychology* 33, (1988); 116.

[124] Jean-Paul Sartre, *Being and Nothingness: An Essay in the Phenomenological Ontology*. Special Abridged ed. Hazel E. Barnes, trans. (New York: Citadel Press. 1965). 221, 261.

[125] Darrell C. Greene and Paula J. Britton, "Stage of Sexual Minority Identity Formation: The Impact of Shame, Internalized Homophobia, Ambivalence Over Emotional Expression, and Personal Mastery," *Journal of Gay and Lesbian Mental Health* 16, no. 3, (2012): 191.

[126] Julia Kristeva, *Powers of Horror: An Essay on Abjection.* trans. Leon S. Roudiez. (New York: Columbia University Press, 1982), 8-10.

[127] Sally R. Munt, *Queer Attachments: The Cultural Politics of Shame*, Queer Intervention (London: Ashgate, 2008), 2-3.

therefore, morally binding on all and especially on those wishing to have public trust.[128] Saurette says that humiliation, a primary means of modern control, has three main characteristics: publicity, the correction of someone's pretensions to a position/prerogative he does not possess, and the denunciation of him against a common standard of conduct, especially concerning his official duties.[129] When authors of laws implicitly conceive of them as sources of civic cohesion, failure to comply with both the spirit and the letter of the law places one outside the imagined communities of law by shame.[130] An implicit misogyny feeds this liberal-Kantian conception of common-sense motivated shame. Failure to exercise public reason in the restraint of passion is to act like a woman.

Instinctual affects of repulsion cause the related feeling of disgust at consuming or being near things possibly dangerous to health — for example, certain insects or feces. This feeling is called primary disgust. We attribute such feelings, in turn, to socially maligned groups or behaviour. We call these emotions and behaviours secondary disgust. "Disgust behaviours" are both instinctual and reinforced in early childhood. They are the main way that we mark a boundary between ourselves and the external world.[131] Problems arise when this useful response dehumanizes others.[132]

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[128] Paul Saurette, *The Kantian Imperative: Humiliation, Commonsense, Politics* (Toronto: University of Toronto Press, 2005), 47.

[129] Saurette, 12-14.

[130] Saurette, 10; Benjamin L. Berger, "Belonging to Law: Religious Difference, Secularism, and the Conditions of Civic Inclusion." *Social and Legal Studies* 24, no. 1 (2015): 47-64.at 59; Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983), 4.

[131] Paul Rozin, Brent Haddad, Carol Nemeroff, Paul Slovic, "Psychological Aspects of the Rejection of Recycled Water: Contamination, Purification and Disgust," *Judgment and Decision Making* 10, no. (2015): 51; Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton, NJ: University Press, 2004), 107.

To take an example essential for this thesis, labelling anal sex as inherently dirty because some associate it with excreta is ideological. The penis and vagina are also involved in these processes. Moreover, repeated studies have demonstrated that safer anal sex has no long-term consequences for subjects' sexual and mental health. For example, a properly functioning anus and rectum have fewer bacteria than the mouth. If we thought about it, kissing someone is objectively more disgusting. It is also not reproductive. Nevertheless, few persons find kissing repugnant. It is merely that the mouth is part of the face. A person's countenance gives us glimpses of the immortal soul that is assumed to be "behind" the eyes of the face. Consequently, anal sex becomes more morally repugnant and physically disgusting.[133] Other queer (and straight) sexual practices — such as, cunnilingus, fellatio, digital stimulation, and using sex toys. — are, in fact, safer than penile-vaginal intercourse, yet, penile-vaginal intercourse remains part of the fictive image of sexual health. In the words of Peter Stallybrass and Allan White, "the body cannot be thought separately from the social formation, symbolic topography and the constitution of the subject."[134]

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[132] William Miller: *The Anatomy of Disgust* (Cambridge, MA: Harvard University Press, 1997), xiii.

[133] See the literature contained in Wendy Ness, "Fecal Incontinence: Causes, Assessment and Management," *Nursing Standard* 26, no. 42 (2012) 52-60; Ann Giddens, "How Sweet It Is: Genes Show How Bacteria Colonized Human Teeth," *Science* 339, no. 6122 (2013): 896-97, Though it is difficult to infer a conclusion from a lack of evidence, among the numerous causes of fecal incontinence listed, anal intercourse is not one of them. This is not to deny the historic and ongoing increased risk of HIV, HCV, and HPV transmission among men who have sex with men, and the concomitant risk of anal and rectal cancers, but to suggest that this is both a cause of and caused by historic and ongoing practices of (hetero)sexist social subordination. S.B.J. Rourke. Bacon, F. McGee, and M. Gilbert, "Tackling the Social and Structural Drivers of HIV in Canada," *Canada Communicable Disease Report* 41, no. 12 (2015): 322-26; I also do not intend to deny that heterosexual persons engage in anal intercourse, nor do I intend to exclude the diversity of queer sexual practices, nor the experiences of women who have sex with women. I bring up anal sex because sodomy has a special place in the Christian imaginary. Nussbaum, *Hiding*, 113.

Indignation is a type of anger inflamed by a passion for redressing or preventing an injustice that violates, usually, though not always, (a perceived) injury inflicted upon oneself or another moral agent with whom one shares (or tries to share) a degree of affinity.[135] Fear is a state of distress occasioned by (perceived) threats to oneself and a person, object, idea, or phenomenon, concerning whom one has constructed desires and expectations. In other words, to fear something or the loss of it, we must first become vulnerable to this loss.[136] Last, but perhaps the hardest to define, *ressentiment* is a state of inhibited rage and resentment at being made to feel inferior. We are inclined to engage in (often spiteful) activity, even if such action accomplishes very little, to gain power over our perceived persecutor.

It is crucial to discuss emotions in relation to claims of discrimination. Not only do they cause individual and collective harm in a psychosomatic fashion, thereby contributing to social subordination, they also provide the best explanation for why adding expressive claims of discrimination makes substantive equality more normatively persuasive and empirically sound..[137]Why it is crucial that the state refused to condone the individual and collective harms of discrimination by public actors will become more apparent in chapter 2; and why, in the context of the TWU Law School dispute, the weight of expressive harm weighed against (hetero)sexist Christians will become more apparent in chapter 3. First, however, we must situate these contentions within a discussion of Canadian constitutional culture in greater detail.

COMPROMISE, PRINCIPAL AND CANADIAN CONSTITUTIONAL CULTURE

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[134] Peter Stallybrass and Allon White, *The Politics and Poetics of Transgression*. Ithaca: NY: (Cornell University Press, 1986), 192.

[135] Nussbaum, *Hiding*, 75.
[136] Nussbaum, *Hiding*, 19-22.
[137] Richard H. Pildes, "Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism," *Journal of Legal Studies* 27, no. 52 (1998): 755 .

Cultures emerge from specific practices and shared, (un)acknowledged assumptions arising from those practices. These shared, though frequently incoherent and assumed, practices often give rise to a common language (or ways of understanding both the contours of, and appropriate means for solving, specific problems). All these things blend to give cultures and subcultures an emotional colouring. This is also the subject of continuous struggle. Though some challenge the use of the term, culture captures the self understanding of public actors and legal practitioners. They imagine themselves as bound together by a set of assumptions and interpretive practices concerning a specific text and the tradition that attaches to it — namely, the Constitution of Canada, defined in the broadest possible terms.

Furthermore, we do not need to be constitutional experts or even lawyers to participate in this culture. Its norms suffuse quotidian experience as well. Using the term culture helps to elucidate commonalities between evangelical and constitutional subcultures. Both see themselves as held together by a faithful interpretation of a text, notwithstanding diversity, malleability, and disagreement within their respective and overlapping cultures. Frankly, the Constitution, and especially the *Charter*, is for some legal actors what the Decalogue or Beatitudes may be for some Evangelicals.

For the idea of constitutional culture, I am indebted to the work of Benjamin L. Berger and Paul W. Kahn.[138] After summarizing the protracted debate concerning the meaning of culture within anthropology, Berger writes the following:

> [T]he [utility] of the term culture [when it is applied to legal phenomena] - inheres in asking a different set of questions when analysing the points of interaction between law

[138] Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999) 36, 80-90; *Putting Liberalism in Its Place* (Princeton, NJ: Princeton University Press, 2005), 29.

> and religion, questions [that differ from conventional analyses of legal doctrine] about how law digests the experience of religion and about how religious individuals and communities experience the force of such legal understandings… one that takes as [our] primary focus the particular way that law shapes and gives meaning to experience and, given that particularity, the way that it can itself be experienced... It does so both in the analytic precedence that it gives to lived experience and, in the idea that culture is found in those practices, habits of thought, and organizing commitments that frame that experience and make it meaningful.[139]

Berger advocates using the framework of Kantian philosopher Ernst Cassirer. The latter man argues that space and time are the central concepts and perceptual modalities with which to explain and structure any coherent philosophical anthropology.[140] In keeping with Kahn's research, Berger is interested in the way discourses of the rule of law structure "our understanding of space and time, self and community."[141] Berger goes on to describe his project as an "aesthetics of religious freedom." He means aesthetics in the technical philosophical sense of a detailed inquiry into the criteria that shape perception and render it possible.[142]

My dissertation attempts to extend his aesthetic framework by bringing it in conversation with queer theory. Emotional cues influence legal aesthetics, particularly as these link to the social construction of space and time. Berger goes on to cite the following quotation from Mary Douglas in *Purity and Danger*: "[The term culture means] the public, standardized values of a

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[139] Benjamin L. Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015), 37.

[140] Ernst Cassirer, *An Essay on Man: An Introduction to a Philosophy of Human Culture* (New Haven: Yale University Press, 1944), 42.

[141] Kahn, *The Cultural Study of Law,* 86.

[142] Berger, *Law's Religion*, 40.

community that mediates the experience of individuals. It provides in advance some basic categories, a positive pattern in which ideas and values are tidily ordered."[143] He objects to using the word tidily when describing any culture. It implies that cultures are internally coherent and that there are rigid boundaries between cultures, but Douglas offers a convenient shorthand.

Using culture in this way mitigates some of its conservative effects because it is meant to particularize and historicize the idea of "Law" *in abstracto*. Living and flawed human beings apply Law *in concreto*. It also offers an implicit critique of one of the (hetero)sexist tropes that undergird legal legitimacy. (Masculine) Law maintains "civilization" because it aspires to actualize universalist and rational values, whereas specific (feminine) collectivities, which the state must manage, have culture.[144] Cooperation with the law is a *necessary, but not a sufficient*, condition of full public citizenship and legal personhood.[145]

Because Canadian courts often endeavor to apply universalizable ethical norms, they see law as a substantively moral enterprise. They (implicitly) reject the positivistic conception of rights as interests directly related to human flourishing in an (allegedly) non-metaphysical sense, as described by Joseph Raz and his followers.[146] Notwithstanding sociologist Pierre Bourdieu's

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[143] Mary Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (1966; repr. London: Routledge, 2002), 48.

[144] Claude Lévi-Strauss, *The Elementary Structures of Kinship,* James Harle Bell and John Richard von Sturmer, trans., Rodney Needham, ed. (Boston: Beacon Press, 1949), 1-28, 134-145; Gayle Rubin, "The Traffic in Women: Notes on the Political Economy of Sex," in Gayle Rubin, *Deviations: A Gayle Rubin Reader*, (North Carolina: Duke University Press, 2012). 33-65.

[145] Hart believes that traditional societies have customs, but they cannot be said to have law proper, because they often lack rules explicit rules for the making of rules, or what Hart calls "Power Conferring" and "Secondary Rules." H. L. A. Hart, *The Concept of Law, (*Oxford, Clarendon Press, 1961), 41; Benjamin L. Berger, "Belonging to Law: Religious Difference, Secularism, and the Conditions of Civic Inclusion." *Social and Legal Studies* 24, no. 1 (2015): 47-64.

[146] Joseph Raz, *The Morality of Freedom* (Oxford, Clarendon, 1986) 166.

desire to exchange the term culture for *habitas*, my understanding is consistent with the following one he provides: "[*Habitas* is] a system of acquired dispositions, functioning on the practical level as categories of perception and assessment or as classificatory principles as well as being the organizing principles of action."[147] Berger applies the insight of the above quotation in an article discussing the contours of Canadian constitutional culture. Berger argues that Canadian constitutional culture manages and produce discourse concerning three types of perceived diversity — a substantial and politically active Indigenous presence, a large sub-state Québecois national minority, and many non-Anglo Celtic residents. To this list, I would add a substantial population of persons with disabilities, as well as persons who do not conform to normative ideas concerning sexuality and gender and who are willing to share these experiences publicly.[148]

Berger identifies a tension between Canada's two constitutional instruments. The older 1867 *Constitution Act* (formerly the *British North America Act*) tries to manage (or suppress) diversity using context specific compromises. It aspires to a confederation "similar in principle to that of the United Kingdom" and peace and good government within Canada.[149] Conversely, the 1982 *Constitution Act* is far more ambitious. The amendment enshrined a comprehensive schedule of rights, with provisions to ensure substantive equality, gender parity, and an

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[147] Pierre Bourdieu, *In Other Words: Essays Towards a Reflexive Sociology* (Stanford, CA: Stanford University Press, 1990), 13.

[148] Benjamin L. Berger, " Children of Two Logics: A Way into Canadian Constitutional Culture." *Oxford Journal of International Constitutional Law* 11 (2013): 320-5. "Canadian Multiculturalism in Historical and Comparative Perspective: Is Canada Unique?" *Constitutional Form* 13, no. 1 (2003): 1-9; Lorraine Weinrib, "Canada's Constitutional Revolution: From Legislative to Constitutional State." *Israel Law Review* 33, no. 1 (1999): 13-50.

[149] *The Constitution Act, 1867 [formerly, The British North America Act], being, Schedule B to the Canada Act 1982* (UK), 1982, c 11.

interpretation consistent with the multicultural heritage of Canadians. Berger argues that the *Canadian Charter of Rights and Freedoms* offers a set of purportedly transcultural liberal *Grundnorms*.[150] These include the following, non-exhaustive, list — individualism, autonomy, restraint of governmental power, equality before the law, an impartial judicial process, and clear division. between public and private life.

I recognize that liberal ideals of freedom are inseparable from (settler) colonial violence.[151] It is, nonetheless, a valuable part of Canada's heritage, unlike (hetero)sexism. which has little ethical worth. Further defining liberalism, and Kant's role in contemporary articulations of it, is challenging. It requires one to articulate and render unfamiliar assumptions often taken for granted in contemporary Canada. Historian Ian McKay provides a useful gloss: "A liberal order is one that encourages and seeks to extend across time and space a belief in the epistemological and ontological primacy of the category 'individual.' It is important to make the analytical distinction between the liberal order as a principle of rule and the often-partisan historical forms this principle has taken through 150 years of Canadian history."[152]

Liberalism also prioritizes negative liberty (the freedom from interference in the performance of something that we would be otherwise able to do, according to a normative

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[150] I also acknowledge the continuing existence and utility of Indigenous law for both Indigenous and nonindigenous persons, but it is beyond the scope of this project. John Burroughs observes the following: " Indigenous legal traditions continue to exist. While they have been changed and constrained, they have not been widely extinguished. Though negatively affected by past Canadian actions, Indigenous peoples continue to experience the operation of their legal traditions in such diverse fields as, *inter alia*, family life, land ownership, resource relationships, trade and commerce, and political organization. Indigenous legal traditions are inextricably intertwined with the present-day." John Burroughs, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), 11.

[151] Shannon Winnubst, *Querying Freedom* (Indianapolis: Indiana University Press, 2006), 2.

[152] Ian McKay, "The Liberal Order Framework: A Prospectus for a Reconnaissance of Canadian History," *Canadian Historical Review* 81, no. 4 (2000): 623.

standard of ability, without government interference), and positive liberty (that is, the actual receipt of a good, a benefit, or an ameliorative measure).[153] These aspirations often conflict with the older (more) colonial values of the previous constitutional instrument, such as, (increased) eurocentrism, deference to authority, parliamentary sovereignty, and a shadow religious establishment. There are traces of this conception among those with a more individualist notion of rights.[154]

Kevin Christiano provides a helpful way of conceptualizing the Canadian response to diversity. He says, "The United States encounters diversity straight ahead and attempts effectively to hurdle it. In contrast, Canada seems to enfold and to absorb difference, the better to handle it."[155] One of my implicit contentions will be that the hegemony of rights and the gradual Americanization and conservative influences upon Canadian constitutional culture has weakened this desire to enfold difference in favour of a confrontational ethos that tackles diversity directly.[156]

The individual in Canadian constitutional culture remains ontologically primary, and the collective rights that exist in the *Charter* are said to be born of the aggregate rights of associated natural and corporate persons. For instance, though the influential work of Will Kymlicka is

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[153] Good examples of positive liberties are language rights for minority groups, and employment accommodations for persons with disabilities.

[154] Allen Brudner, *Constitutional Goods* (New York: Oxford University Press, 2004), 297-324, 355-88; Robert Meynell, *Canadian Idealism and the Philosophy of Freedom* (Montréal; Ithaca: McGill-Queen's University Press, 2011) 27-60,163-188; Charles Taylor. "The Politics of Recognition," in *Multiculturalism*, ed. Amy Gutmann, (Princeton, NJ: Princeton University Press, 1994), 25-73.

[155] Kevin Christiano, "Church and State in Institutional Flux: Canada and the United States," In *Rethinking Church, State and Modernity: Canada between Europe and America,* edited by D. Lyon and M. van Die (Toronto: University of Toronto Press, 2000), 74.

[156]David Schneiderman, *Red, White, and Kind of Blue?: The Conservatives and the Americanization of Canadian Constitution* (Toronto: University of Toronto Press, 2015), 23.

thought to endorse collective rights, he argues for differentiated individually-based rights. He sees "culture" as central to the liberal aspiration of autonomy and equality between (largely atomistic) citizens.[157] For similar reasons, prominent human rights theorist James Griffin questions the very logical coherence of a "group right."[158] Moreover, international law scholar Alan Buchanan chooses to ground the self-determination right in international law, a collective right if ever there were one, in individual autonomy.[159] Dwight Newman offers a learned and extremely thought-provoking defence of collective rights. Nevertheless, for better or worse, the idea that collectivities have rights is not a hegemonic view presently.[160] It is useful now to take a closer look at the "universalist values" possibly informing Canadian constitutional culture of which Berger writes.

This chapter has provided a theoretical framework and a practical method for critiquing (hetero)sexism, in addition to the discomfort with femininity and erotic experience that undergirds it. A phenomenological approach to these categories is illuminating because a phenomenological approach accounts for the social construction of them according to an implicitly white, heterosexual, and nondisabled hegemony. It also explains how and why many of us experience such distinctions as natural. Indeed, the proceeding indicates that a phenomenological approach questions the common-sense distinction between nature and culture.

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[157] Will Kymlicka, *Multicultural Citizenship* (Oxford, Clarendon, 1995) 35; Will Kymlicka 'Individual and Community Rights' in *Group Rights*, ed. Janet Baker (Toronto: University of Toronto Press, 1994), 18. Cf. Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon, 1989) 138-39.

[158] James Griffin, *On Human Rights* (Oxford: Oxford University Press, 2008), 270.

[159] Alan Buchanan*, Legitimacy, and Self-Determination: Moral Foundations for International Law* (Oxford University Press, 2003) 255.

[160] Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Oxford: Hart Publishing, 2011). 1133-136.

We can apply the same phenomenological understanding to Canadian constitutional culture to show that it has a tension between universalist Kantian values, on the one hand, and particularist compromises, on the other. Emotions are evaluative judgements. As such, they are at least partially susceptible to rational criticism. We should be suspicious of shame and disgust because they can have objectionable normative content and can further an unjust *status quo*. Feeling rules and cultural scripts entrenched in the legal profession, as well as the public's perception of what law is or should be, frequently maintain unjust hierarchies. Such feeling rules explain enduring debates over competing values within liberal political thought. The Kantian perspective distills these tensions with rare clarity.

Chapter 2:
Kant and the Hetero(Sexual) Social Contract

Feminist theory rooted in female identity may be irreconcilable with the diverse and multiple vectors of power constructing and diversifying identity; however, feminist claims about masculine domination do not thereby disintegrate. The workings of power-producing subjects arc recorded in different stories and require different tools of storytelling than the phenomenon of hegemonic or ubiquitous formations of power…For purposes of developing a feminist critical theory of the contemporary liberal, capitalist, bureaucratic state, this means that the elements of the state identifiable as masculinist correspond not to some property contained within men but to the conventions of power and privilege constitutive of gender within an order of male dominance. Put another way, the masculinism of the state refers to those features of the state that signify, enact, sustain, and represent masculine power as a form of dominance. This dominance expresses itself as the power to describe and run the world and the power of access to women; it entails both a general claim to territory and claims to, about, and against specific "others." — Wendy Brown[1]

[T]he dimensions of life in which the freedoms of individuals can be manifested and women's sphere of caring for the family, are covered by one and the same concept: privacy… although liberal theories have provided a justification of the equality of every human being and supported establishing the same right to the freedoms of the individual for all of the state's citizens, nonetheless these theories have granted such a right only to adult men. And they have done so for the reason that the distinction drawn between a private, familial and domestic, prepolitical realm and a public, political realm also represents a distinction between the realms of women and of men, and therefore cannot open the same spaces of freedom for both. At a fundamental level, therefore, the dilemma with which Harriet Vane is confronted [the impossible choice between our hearts or our heads] indicates the inconsistency in the liberal idea from [John] Locke [and Kant] all the way to [John] Rawls [and Ronald Dworkin]: the very idea of liberalism has been to secure and establish the same rights to individual freedom for all the members of society—that is, equal rights to live as one chooses with regard to the entire range of options possible in a given society, without any prior decision as to how these options are to be allotted. — Beate Rössler[2]

The last chapter described ubiquitous negative emotions and attempted to link them to (unacknowledged assumptions and normative practices of Canadian constitutional culture. In this chapter, we will examine some of these assumptions in detail to explain the summary of Kant

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[1] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton, NJ: Princeton University Press, 1995), 166-7.

[2] Beate Rössler, "Gender and Privacy: A Critique of the Liberal Tradition," in *Privacies: Philosophical Evaluations*, ed. Beate Rössler, Cultural Memory in the Present (Stanford, CA: Stanford University Press, 2004), 56.

provided in the introduction at greater length. Analysing Kant and his followers will show us four things. First, his philosophy illustrates ambivalence concerning emotion in law, in addition to the reasons causing it. Second, the chapter demonstrates that the liberal ideal of freedom is inextricable from shame, even as shame also is parasitic upon liberty. Third, it exposes the aspiration to rational agency as often gendered, even in Kant's contemporary heirs. This masculinist conception of reason, in turn, helps to create a (hetero)sexist conception of erotic experience, religious freedom, and the judicial role.

Fourth, it further scrutinizes the liberal metaphor of the public and the private spheres. The chapter also considers how and why this project departs from a *modus vivendi* liberalism and defends a more substantive version of it. While there is much to criticize in Kantians, their insights provide an essential puzzle piece in a phenomenologically based critique and analysis of heterosexual hegemony. The chapter establishes the foundation required for the following argument that (re)orienting rational beings to produce a straight sexual orientation is immoral. The section also sets the groundwork from which we will analyse and critique naturalistic arguments concerning sexuality and gender. Kant is useful for this project because he provides a sophisticated justification for our moral and emotional intuition that we should treat others how we would like them to treat us.[3] This axiom is often termed the Golden Rule and is a central tenet of Christian theology (Matt. 7:12; Lk. 6:31; Lev. 19:18).[4]

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[3] Daniel McDermott, "Analytical Political Philosophy," in *Political Theory: Methods and Approaches*, eds. David Leopold and Marc Stears, (Oxford: Oxford University Press, 2008), 11.

[4] I, of course, do not mean to imply that the Golden Rule is somehow unique to be ideological construction styled "Judeo-Christian Civilization:" it is found in almost every culture. Joyce Hertzler, "The Golden Rule and Society," in *Ethics: Contemporary Readings*, Routledge Readings in Contemporary Philosophy, eds. Harry J. Gensler, Earl W. Spurgin, and James C. Swindal (New York: Routledge, 2005), 158-67. All scriptural citations are from The New Revised Standard Version.

We can easily extend Kant's preoccupation with the inherent dignity of rational agency, and the attending entitlement of every rational being to equal concern and respect, to argue that enforceable restrictions placed upon homoerotic behaviour and, by extension, queer gender identity and expression, violate the Golden Rule. It allows a straight and cisgender majority group to treat queers in a paternalistic manner it would be unlikely to like, were the position of the parties reversed. This is especially true considering that Canadian constitutional culture prizes development of personal identity and autonomy over our (sexual) bodies. From a Kantian perspective, persons ought to be entitled to persuade others of the wrongfulness of homoerotic conduct, yet it is ultimately a question of conscience that should be left in the hands of a mature adult. This is like the position that we should be free to debate matters of religion, while also respecting the moral right of others to decide matters of ultimate concern for themselves.

The Equal Dignity of Persons

Many dissertations begin with a reference to critical theory while begging the question of what they precisely mean by the term "critical." I agree with Foucault that Kant promotes "[a]n ethos, a philosophical life in which the critique of who we are is at one and the same time the historical analysis of the limits that are imposed on us and an experiment with the possibility of going beyond them."[5] As Andrew Reath clarifies in his introduction to Kant's *Critique of Practical Reason*, "a critique is a critical examination of reason by itself, whose purpose is to establish the powers and limits of a use of reason, and in particular to establish the validity and legitimate employment of those *a priori* concepts and principles which structure a domain of rational

[5] Michel Foucault, "What is Enlightenment?" trans. Paul Rabinow, in Paul Rabinow, ed. *The Foucault Reader* (Pantheon Books, New York, 1984), 50.

activity … critique has both a positive, justificatory task and a negative [deconstructive one]." [6] Hence, though it may seem incongruous to combine a modified Kantian approach with feminism and an antifoundationalist framework, it is not. However doctrinaire Kantian philosophy may at times appear, Kant's philosophy inaugurated the project of socially engaged deconstruction that this work continues. By the terms of his own theory, Kant would be obliged to amend his understanding of emotion, sexuality, and gender, considering our increased knowledge and experience regarding those topics. We must go through a brief overview of Kant's ethics to understand why this is so.

To rescue freedom and ethics from "religious dogmatism" on the one hand, and David Hume's empiricist scepticism, on the other, Kant creates a difference between human beings as natural creatures and how we exist in the noumenal realm. He suggests that we are determined in the former while free in the latter.[7] As Christine M. Korsgaard suggests, this is not (primarily) a doctrine concerning ontology and metaphysics. It is one that tries to explain a frequent experience. Experience tells us that human beings are constrained animals who, despite existing in the natural world, can take self-reflexive positions concerning it and are not entirely subject to natural laws. Thus, whether this is "ontologically true" is beside the point. The noumenal realm is a counterfactual placeholder in a useful thought experiment. Kant provides an account of ethics that honours our fundamental intuitions respecting the uniqueness of (rational) human

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[6] Andrew Reath, "Introduction," in Immanuel Kant, *Critique of Practical Reason*, rev. ed., trans. Mary Gregor, Cambridge Texts in the History of Philosophy (1788; repr., Cambridge: Cambridge University Press, 2015), xiv.

[7] Guyer, *Kant*, 12-15; Henry E. Allison, *Kant's Theory of Freedom* (Cambridge: Cambridge University Press, 1990), 11-28.

being-in-the-world. He suggests that acting rationally is a self constraining primary criterion through which we respect what is dignified in us, as well as other rational creatures.[8]

Notwithstanding appearances, human beings have free will, owing to their consciousness of morality's purportedly rational and universal requirements. We can derive all these demands from one law that Kant formulates in three different ways. First, act so that the principle of our conduct can become also a universal law (the word also is pivotal; there are other considerations that make human conduct flitting in particular situations).[9] Second, act treating the humanity in ourselves and others, not only as a means, but also as an end.[10] Third, act as though we were participating in a realm of persons, each of whom legislates for himself consistent with the first two precepts and compatible with the freedom of his fellows who also so legislate.[11]

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[8] Korsgaard explains this very well in the following way. We can consider ourselves, in the language of the Critiques, as noumena or as phenomena. This view is not, as so many have supposed, an ontological or metaphysical theory according to which we exist simultaneously in two different "worlds," one somehow more real than the other. other. As I understand it, it goes like this: In one sense the world is given to us, it appears to us, and we are passive in the face of it. We must therefore think of the world as generating the appearances, as giving them to us. The world insofar as it appears to us is phenomenal; the world insofar as it generates the appearances is noumenal. We can only know the world as phenomenal, that is, insofar as it is given to sense, but we can think of it as noumenal. So there are not "two worlds," but rather one world which must be conceived in two different ways. And all of these points apply above all to ourselves. When we view ourselves as phenomena, we regard everything about ourselves, including inner appearances such as thoughts and choices, as parts of the natural world, and therefore as governed by its laws. But insofar as we are rational, we also regard ourselves as active beings, who are the authors of our thoughts and choices. We do not regard our thoughts and choices merely as things that happen to us; rather, thinking and choosing are things that we do. To this extent, we must view ourselves as noumena. And from this standpoint, we recognize laws that govern our mental powers in a different way than the laws of nature do: laws for the employment, for the use. of these powers; laws that show us how thinking and choosing must be done. Christine M. Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996), viii-ix.

[9] Immanuel Kant, *Groundwork for the Metaphysics of Morals,* trans. Allen W. Wood, Rethinking the Western Tradition (1797; repr., New York: Yale University Press, 2002), 18 [Ak.: 4: 410].

[10] Kant, *Groundwork*, trans. Wood, 46 [Ak.: 4:429].

[11] Kant, *Groundwork*, trans. Wood, 52 [Ak.: 4:34]

Paul Guyer clarifies that freedom is preeminent over the virtue of rationality. The latter is a mere means to the exercise of the former. Nevertheless, the idea of the rational (presumed masculine) agent is central to Kant's system, owing to the link between rationality and autonomy. Autonomy's etymology derives from the Greek words "self" and "law." Kant's definition of autonomy is not synonymous with freedom in the ordinary sense.[12] Instead, because it is by following the dictates of the moral law that rational beings demonstrate their independence from nature, only by following the moral law do rational beings evidence their capacity for authentic freedom within the bounds of reason.[13]

There are two key principles in the Kantian ethical vision. First, freedom is subordinate to nature.[14] Second, duty must always prevail over happiness, except insofar as the pursuit of our own or another's happiness can be shown to be a consequence of moral duty.[15] Because an action's moral worth comes from adhering to duty and not the consequences of it, Kant is opposed to consequentialism. Indeed, one of the distinguishing features of the noble way of human being in the world is acting from and obeying the principles we rationally create for

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[12] Guyer, *Kant*, 220.

[13] Kant, *Groundwork*, trans. Wood, 5 [Ak.: 4: 389]; Guyer, *Kant*, 220.

[14] Alastair McIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: IN: Notre Dame University Press, 2004), 64-70. I am, of course, aware that Kant's ethics employed teleological arguments. Yet I agree with Allen W. Wood, when he argues that this theology differs from the Aristotelian-Thomistic conception because this teleology is something created by human reason and not given by nature or God. A different interpretation is not persuasive; for it would violate the fundamental assumptions of Copernican revolution. Moreover, Kant was forever revising his opinions considering be available empirical evidence. It would seem that evolutionary theory provides a strong case against the idea that every human faculty as a primary purpose, and that is now difficult to discern a moral purpose in the contingent circumstances that led to "human nature". Allen W Wood, *Kant's Ethical Thought*, Modern European Philosophy (New York: Cambridge University Press, 1999), 220-5. For more discussion of the appeal to nature fallacy in ethics see Chapter 2.

[15] Kant, *Groundwork*, trans. Wood, 16, [Ak.: 4:400]; Paton, *Imperative*, 48-56.

ourselves.[16] For Kant, and, arguably, many of his admirers, *universality is the **essential** characteristic of law*.[17]

H.J. Patton neatly encapsulates this idea by saying, "A good man aims at consequences because of the law: he does not obey the law merely because of the consequences.[18] Having said this, Kant was neither unfeeling nor impractical. As Allen W. Wood reminds us, even for Kant, no simple formula can merely substitute for situated judgement.[19] Kant's formulas arguably proceed in a developmental pattern, and their different emphases are meant to complement each other. Though at times these imperatives are rather severe, we should think of them as counterfactual ideals against which we ought to behave. Their absolute character corrects the defects that Kant perceived in human nature.[20]

For Kant, obedience to the moral law is the highest expression of what is noble in our character. To deviate from it owing to our strong, but controllable, passions (particularly selfishness) is to make the seemingly free yet inauthentic choice of evil over that which is good.[21] Influenced by his German Pietist heritage, Kant believes a dichotomous struggle between our duty (the purportedly *sui generis* obligation that perception of the moral law generates) and

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[16] Paton, *Imperative*, 57-61.

[17] Paton, *Imperative*, 70.

[18] Paton, *Imperative*, 76.

[19] Wood, *Ethical Thought*, 107.

[20] Wood, *Ethical Thought*, 181.

[21]Kant, *Groundwork*, trans. Wood, 9 [Ak.: 4:393]; Guyer, *Kant*, 228; Paton, *Imperative*, 24-6.

particular inclinations, defines our existence .[22] Indeed, Paton argues that the proper attitude to the moral law is reverential.[23]

It is worth quoting the following excerpt from Kant's *Critique of Practical Reason* at length; for it provides a helpful summary, in addition to letting us examine many of the emotions that fuel Kant's seemingly austere ethical outlook:

> The moral law is holy (inviolable). A human being is indeed unholy enough but the humanity in his person must be holy to him. In the whole of creation everything one wants and over which one has any power can also be used merely as a means; a human being alone, and with him every rational creature, is an end in itself, by virtue of the autonomy of his freedom he is the subject of the moral law, which is holy. Just because of this every will, even every person's own will directed to himself, is restricted to the condition of agreement with the autonomy of the rational being, that is to say, such a being is not to be subjected to any purpose that is not possible in accordance with a law that could arise from the will of the affected subject himself; hence this subject is to be used never merely as a means but as at the same time an end…. This idea of personality, awakening respect by setting before our eyes the sublimity of our nature (in its vocation) while at the same time showing us the lack of accord of our conduct with respect to it and thus striking down self-conceit, is natural even to the most common human reason and is easily observed. Has not every even moderately honorable man sometimes found that he has abstained from an otherwise harmless lie by which he could either have extricated

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[22] Kant, *Groundwork*, trans. Wood, 13-6 [Ak.: 4:394-99]. Immanuel Kant, *Religion Within the Bounds of Bare Reason*, trans. Werner S. Pluhar. (1793; repr., Cambridge: Hackett Publishing Company, 2009), 20-58.

[23] Paton, *Imperative*, 62-7.

> himself from a troublesome affair or even procured some advantage for a beloved and deserving friend, solely in order not to have to despise himself secretly in his own eyes? When an upright man is in the greatest distress, which he could have avoided if he could only have disregarded duty, is he not sustained by the consciousness that he has maintained humanity in its proper dignity in his own person and honored it, that he has no cause to shame himself in his own eyes and to dread the inward view of self-examination.[24]

Observe how Kant connects corporeal straightness, masculinity, ability, virtue, and pride. In addition, notice how a typically Protestant conception of conscience grasps the moral law, the perception of which is both a cause for a hubristic peon to the virtues of rational men and the devastating occasion for our embarrassment and self-contempt. Kant is here writing in the allegedly objective style of traditional philosophy.

Underneath such detachment, though, he uses stirring imagery and persuasion. Kant must rely on metaphors to describe the moral law, as well as the valiant persons who attempt to follow its dictates, because even he recognizes that if this ideal is to have practical and positive consequences in the world, something in addition to our reason must reinforce it. When he describes the moral law in images, Kant implicitly grants that the moral law, at least as it applies to human beings, has a vital aesthetic and phenomenological aspect. As we shall see shortly, Kant did not desire that his ethical writings be used as a list of disparate formalistic principles. Instead, he intended to create a morally attractive worldview for an integrated and balanced life. His vision would answer both the most complex and the most mundane moral questions. This perspective, however, as we can infer from the quotation cited above, is far more attractive, if we

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[24] Kant, *Critique of Practical Reason*, rev. ed., trans. Gregor, 72 [5:88).

adopt a conventionally masculine perspective, as well as assume the traditional liberal distinction between private virtue and public duty.

Kant fashions an ethical system that he divides first into duties of right (public obligations or criminal prohibitions, for which we can use legal coercion) and responsibilities of virtue (moral obligations principally concerned with interpersonal and familial relations, for which we cannot use legal coercion).[25] Kant also splits obligations into duties owed to oneself, because of the humanity inherent in our person, and the duties owed to others, because of the recognition of the humanity that exists within them. Kant further groups these duties into perfect (those with a determinate object and total injunctive force) and imperfect duties (those with a general object, thereby allowing for some subject-dependent discretion). It is impossible to have imperfect responsibilities of right. These are general obligations that law cannot enforce.

Four instances suffice. An example of a perfect duty of right would be the obligation to fulfil a legally binding (that is, positively and morally valid) contract. Contract law has transformed the perfect duty of virtue not to make a deliberately false promise — this action contravenes all three formulations of the categorical imperative— into a publicly enforceable right.[26] We have an imperfect duty to cultivate benevolence and sympathy toward others. Treating others kindly is the main way we honour the humanity within them.[27] We have a perfect duty to ourselves to abstain from acting in a servile fashion and avoid degrading treatment. Such treatment tarnishes the inherent dignity of our moral personality.[28] We have an imperfect

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[25] Immanuel Kant, *The Metaphysics of Morals*, trans Mary Gregor, Texts in German Philosophy (1797; repr., New York: Cambridge University Press, 1991), 55-67.

[26] Kant, *Morals*, trans Gregor, 82-90, 113-22.

[27] Kant, *Morals*, trans Gregor, 241-53.

[28] Kant, *Morals*, trans Gregor, 62.

obligation to develop our natural capacities and talents. They manifest our freedom. They also further realize the equally important goal of contributing to the overall actualization of Kant's counterfactual postulate of a noumenal realm, in which cogitating subjects live according to the dictates of rationality.[29] Hence, Kant's ethics prioritizes right (that is, what justice requires), over the good (that is, consequences or the order of nature).

Kant's subject does not have absolute freedom. The mutual and equal liberty of others constrain him. He holds rights as possessions flowing from his innate worth. He merely enters civil society to make these rights, especially those concerning property, actual. Bluntly, we engage in a social contract to enforce contracts.[30] Kantian ethics discourages comparison between persons based on moral worth. Subjects do not have to earn respect. They deserve absolute respect as of right. Instead of externally derived worth, a person ought to cultivate his worth by comparing himself to the moral law.

The constraints of right stop us from sanctioning those who poorly manifest the moral law, so long as their actions do not impede the liberty of others.[31] With humankind's capacity for radical freedom comes the ability for radical evil. We are both rational and disquietingly passionate. Because of these circumstances, Kant reluctantly tolerates religious difference, but ultimately believes it should be subordinate to reason. Popular religion is replete with intense devotion. This emotionality causes persons to blind themselves to what Kant perceived as humankind's principal and most noble quest — the endeavour to emerge from our "self incurred immaturity" by the free exercise of reason. He thereby challenges all epistemological claims

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[29] Kant *Morals*, trans Gregor, 241-2.

[30] Kant, *Morals*, trans Gregor, 68-80.

[31] Wood, *Ethical Thought*, 132-4.

predicated on tradition and revelatory experience. As William Connolly observes, Kant makes this very clear in his work entitled *On the Conflict of the Faculties*. In this essay, Kant argues that moral philosophy, and not theology, ought to be the new pre-eminent discipline of universities. The latter causes division and retards progress. The former will make the dictates of justice (that is principles reached by moral reflection) prevail over the vicissitudes of politics.[32]

Kant's philosophy may appear toxically Spartan, but this is a partial misreading of his work. As Diane Williamson argues, it is vital to distinguish Kant's actual views from what I shall mainly be discussing, which is emotional stoicism, or vulgar Kantianism. For Kant, the practical will was not some simplistic faculty of force and emotional suppression. Instead, a preferable translation would be moral personality, mind, or practical cognition. When Kant discusses a "good will," it is better to think of an overall good character.[33] Moreover, as Williamson also argues, he did not seek to supress all emotions. Indeed, Kant thinks moral emotions like empathy and compassion are essential for the rightness of action. He merely wishes to subject our feelings to cognitive appraisal.[34] Making this point crystal-clear, Williamson states the following:

> Oftentimes readers of Kant mistakenly take him to be arguing that emotions are the problem and reason is the solution. That is not the case. It would be more accurate to summarize him as saying that selfishness or vice is the problem and moral consciousness is the solution. Emotions occupy both sides of this moral divide: there are selfish and

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[32] William Connolly, *Secularist,* 30*;* Immanuel Kant, *The Conflict of the Faculties*, trans. Mary J. Gregor (1798; repr., Lincoln: University of Nebraska Press, 1979), 89; Ian Hunter, "Conflicting Enlightenments: Kant's True Rational Religion," *Political Theory Newsletter* (December 1995): 20-35; Mark Witten, "Rationalist Influences in the Adjudication of Religious Freedoms in Canada," 32; *Windsor Review. Legal and Social. Issues 91*, No. 1 (2012): 91-122.

[33] Diane Williamson, *Kant's Theory of Emotion: Emotional Universalism* (New York: Palgrave Macmillan, 2015), 6.

[34] Williamson, 4.

> vicious emotions, and there are moral emotions. Kant might think that there are quantitatively more selfish emotions than there are moral emotions, but that is only if he is considering a particularly selfish person.[35]

Or as John Rawls clarifies in the following passage:

> What is of moment is the kinds of desires from which we act and how they are ordered; that is, how these desires originate within and are related to the self, and the way their structure and priority are determined by principles of justice connected with the conception of the person we affirm… Given this connection, an effective sense of justice, the desire to act from the principles of justice, is not a desire on the same footing with natural inclinations; it is an executive and regulative highest-order desire to act from certain principles of justice in view of their connection with a conception of the person as free and equal. And that desire is not heteronomous: for whether a desire is heteronomous is settled by its mode of origin and role within the self and by what it is a desire for. In this case the desire is to be a certain kind of person specified by the conception of fully autonomous citizens of a well-ordered society.[36]

Nevertheless, Kant and simplistic interpretations of liberal theories arising from this erroneous understanding, are taken to argue for total apathy when performing our duties. A correct understanding of Kant has much to offer to contemporary debates regarding religious freedom and sexual orientation. Kant's philosophy is nuanced and much more in keeping with contemporary writings concerning emotional psychology than we often suppose. The difficulty

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[35] Williamson, 9; Kant, *Critique of Practical Reason*, rev. ed., trans. Mary Gregor, 62-72 [5:76-88].

[36] Rawls, "Kantian Constructivism," 533.

is, as Williamson observes, that stoicism has been the predominant emotional orientation in the West. Consequently, we often read Kant against stereotypes concerning emotional stoicism.

Feminist Critiques of Kant

The last chapter argued that Canadian constitutional culture has a Kantian orientation towards emotion, sexuality, temporality and how we divide public from private space. These newer universalist values conflict with an older more pragmatic perspective, which tends to be suspicious of claims predicated on social justice. Such suspicion also influences how we divide public from private space, as well as our scepticism concerning some arguments concerning substantive equality, relates to the changing feeling rules within Canadian constitutional culture, in addition to how certain aspects of Kantian philosophy have shaped our perceptions of emotions' merit. These comments built on Benjamin L. Berger's research.[37] The Kantian concept of aesthetics (that is, the systematic description of mental categories that organize our perceptions of the world) can help us to analyse religious freedom disagreements more productively. As well, many within Canadian constitutional culture have adopted a Kantian aesthetics of religious freedom.[38] We also understand religious freedom conflicts better. if we understand how such aesthetics are highly gendered and sexualized. For this reason, we need to undertake a brief analysis of Kantian (hetero)sexism. Afterword, we shall see that Kant's general approach is instructive for us as persons conditioned by, but wanting to mitigate the effects of, (hetero)sexism. We can use the concept of orientation again to suggest that Kantian philosophy

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[37] Benjamin L. Berger, "Children of Two Logics: A Way into Canadian Constitutional Culture," *Oxford Journal of International Constitutional Law* 11 (2013): 320-5. "Canadian Multiculturalism in Historical and Comparative Perspective: Is Canada Unique?" *Constitutional Form* 13, no. 1 (2003): 1-9; Lorraine Weinrib, "Canada's Constitutional Revolution: From Legislative to Constitutional State." *Israel Law Review* 33, no. 1 (1999): 13-50.

[38] Benjamin L. Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015), 59.

has produced a phenomenological orientation to the world. This orientation has tended to create a path of least resistance for cisgender men in a position of privilege [39]

Simone de Beauvoir is justly famous for her comment that, "one is not born a woman; one becomes one."[40] I do not deny the possible biological differences between men and women, yet such differences only become significant to reinforce a given set of power relationships.[41] If gender and sex are functions of power and not biology, we cannot confidently assign masculinity and femininity to men and women respectively.[42] It also follows that we cannot parse our sexual orientations from (hetero)sexist ideas of gender and power.[43] Under (hetero)sexism, to be actually or symbolically penetrated — whether one is 'biologically' male or female — is to assume a feminized role. Kant deploys this logic by using metaphors of private citizens being (sexually) subjected to his universal and masculine will. As I intimated in the last chapter, therefore, both the law and Kantian philosophy, for better or worse, are "vicariously kinky."[44] They are masculine homosocial enterprises, which are erotically invested in (contractual) bondage, submission and domination.

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[39] Sara Ahmed, *Queer Phenomenology: Orientations, Objects, Others* (Durham, NC: Duke University Press, 2006), 69; Allan G. Johnson. *Forest and the Trees: Sociology as Life, Practice, and Promise* (Philadelphia: Temple University Press 1997) 27-54.

[40] Simone de Beauvoir, *The Second Sex*, trans. H. M. Parshley (1946, repr. New York: Vintage Books, 1989), 301.

[41] Judith Butler, *Bodies That Matter: On the Discursive Limits of Sex* (New York: Routledge, 2011) 115-135.

[42] Judith Halberstam, *Female Masculinity* (Durham, NC: Duke University Press, 1998), 9-20, 231-96. Jack Halberstam is a transgender man who also sometimes uses this name. Yet, they are inconsistent in their use of nomination and pronoun as a way of living out their commitment to queer praxis.

[43] Leo Bersani, *Is the Rectum a Grave? And Other Essays* (Chicago: Chicago University Press, 2010), 18.

[44] Ummni Khan, *Vicarious Kinks: S/M in the Socio-Legal Imaginary* (Toronto: University of Toronto Press, 2014), 304-314.

Though their case is overstated, there is some uncomfortable insight to the contention of Theodor Adorno and Max Horkheimer that without Kant's conception of the good will, there are similarities between his ethical formalism and reliance upon shame and the libertine philosophy of the Marquis de Sade.[45] We can link this Kantian preoccupation with bondage, emasculation and mortification of the flesh, at least in part, to sadomasochistic motives of discipline and shame within Christianity.[46] Unfortunately, Kant is extremely sexist on an explicit and implicit level. In his text of 1798, *Anthropology from a Pragmatic Point of View,* he holds that women's feminine nature is such that it is inappropriate to attribute true virtue to them. Their virtues come from inclination, not reason. Reason is the only source of virtue.[47] He argues that the female mind is narrower in scope, thereby disqualifying women as enlightened agents.[48] He holds that there must be sexual complementarity in marriage, and that a wife must be subordinate to the will of her husband for marriage to function properly.[49] He offers the following observation that distills his position regarding feminine characteristics: "Feminine traits are called weaknesses.

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[45] Theodor Adorno and Max Horkheimer, *The Dialectic of Enlightenment: Philosophical Fragments,* trans. Edmund Jephcott, ed. Gunzelin Schmid Noerr, Cultural Memory in the Present (1987; repr., Stanford, CA: Stanford University Press, 2002), 63-94; Andrew Cutrofello, *Discipline and Critique: Kant, Poststructuralism, and The Problem of Resistance* (New York: State University of New York Press, 1994), 33-47.

[46] Nicholas Laccetti*, "*Calvary and the Dungeon: Theologizing BDSM," in *Queer Christianites: Lived Religion and Transgressive Forms*, ed. Kathleen T. Talvacchia (New York: New York University Press, 2014), 149-59. Indeed, the ritual, a crucial to many Christian denominations, the Eucharist, and the alleged resurrection of Jesus associated with it can be interpreted as a sadomasochistic drama of masculine martyrdom, catharsis, and redemption.

[47] Immanuel Kant, *Anthropology from a Pragmatic Point of View*, trans. V L. Dowdell, ed. Frederick Van de Pitte (1798; repr. Carbondale, IL, Southern Illinois University Press, 1976), 222; Andrea Nye, *Feminism and Modern Philosophy: An Introduction*, Understanding Feminist Philosophy (London: Routledge, 2004), 14.

[48] Kant, *Anthropology,* trans. Dowdell 221.
[49] Kant, *Anthropology*, trans. Dowdell, 216.

People joke about them; fools ridicule them; but reasonable persons see very well that those traits are just the tools for the management of men, and for the use of men for female designs."[50] It may be tempting to dismiss these chauvinistic arguments as mere anachronisms, stemming from Kant's culture and religious beliefs.

There are two reasons why we should not do this. First, Kant's naturalistic arguments concerning gender either contradict his assertion that human beings act from freedom and can transcend instinct, which he makes 20 pages before his arguments regarding women, or he excludes women from the category of full human being altogether.[51] Second, there were proto-feminist movements and authors during the Enlightenment. In some cases, these movements fed on the very ideals Kant cherished. Because Kant was a cosmopolitan man of letters, who consumed literature in foreign languages such as French and English, he could have read Mary Wollstonecraft. She has similar rationalist convictions. In her *A Vindication of the Rights of Women*, published in 1792, six years before Kant's *Anthropology,* she states the following:

> But should it be proved that woman is naturally weaker than man, whence does it follow that it is natural for her to labour to become still weaker than nature intended her to be? Arguments of this cast are an insult to common sense, and savour of passion. The divine right of husbands, like the divine right of kings, may, it is to be hoped, in this enlightened age, be contested without danger, and, though conviction may not silence many boisterous disputants, yet, when any prevailing prejudice is attacked, the wise will

[50] Kant, *Anthropology*, trans. Dowdell, 217.

[51] Kant, *Anthropology*, trans. Dowdell, 195.

> consider, and leave the narrow-minded to rail with thoughtless vehemence at innovation.[52]

Kant famously described Enlightenment as the process of Man emerging from his self incurred immaturity and the motto of the Enlightenment as "dare to know by your own understanding," which is free from influence by dogmas of the past.[53] Would that he had applied this useful axiom to his immaturity concerning women and, by extension, homoerotic behaviour. This passage from Wollstonecraft is closer to the substantive principles of Kant's philosophy than the implications he himself draws from his reasoning. Beyond these superficial criticisms, a deeper sexism fuels Kantianism. We can trace this to shame owing to humankind's animality.

Even if Kant's separation between the noumenal and the phenomenal realm is better described as a methodological distinction then an ontological one, it is sexist in two ways. First, it holds that we access the realm of freedom through cognition, whereas phenomenal matter simply limits us. Second, it is methodologically suspicious of experience as a valid ground for knowledge and ethical claims.

One of Kant's essential concerns is humankind's emancipation from nature. A related preoccupation of his is freedom from the tyranny of our bodies and their attending weaknesses. Whatever the other merits of Kantian theory, it finds roots in a tradition of philosophical rationalism that seeks to negate all things feminine and assert dominance over nature.[54] Kantian rationalism constructs the mind as a masculine (possibly supernatural) force which must rule the

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[52] Mary Wollstonecraft, *A Vindication of the Rights of Women*, Dover Thrift Editions (1792; repr., New York: Dover Publications, 1996), 40.

[53] Kant, "Enlightenment," trans. Nisbet, 49.

[54] Genevieve Lloyd, *The Man of Reason: "Male" and "Female" In Western Philosophy*, 2nd ed., Routledge Idea Series (1984, repr. London: Routledge, 2004) 1-10. Sally Haslanger, *Resisting Reality: Social Construction and Social Critique* (Oxford: Oxford University Press, 2012), 74.

feminine body. According to Kant, the body has an agonistic and subordinate relationship with reason. As an extension of the desire to master the body and its passions, this rational mind must dominate its environment.[55] This allegedly secular philosophical position has a long genealogy, traceable to strands of dominionism within Christian, and specifically protestant, theology.[56]

Given the historical connotations of nature, it is challenging not to see a dualistic conception of human-being-in-the-world as patriarchal. Rationalist epistemology has a misogynist sexual script, in which the knowing mind attempts to penetrate the unknown, imposing masculine form upon feminine inert matter.[57] When mind and body work together as they should, the latter being the obedient handmade of the former, bounded selves do not impact each other in interdependent and messy ways.[58]

As well as the exclusion of some traditionally feminist claims and relational practices, a serious flaw in a Kantian ethical perspective is the difficulty it has when trying to reconcile the

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[55] Martin Heidegger, "The Question Concerning Technology," trans. William Lovett, in *Basic Writings*, ed. David Krell (New York, NY: Harper Collins, 1993), 320; Tom Darby, "On Spiritual Crisis, Globalization, and Planetary Rule," in *Faith, Reason, and Political Life Today,* ed. Peter Augustine Lawley and Dale McConkey, (Lanham, Md: Lexington Books, 2001), 35.

[56] Lynn White Jr., "The Historical Roots of Our Ecological Crisis," *Science* 55, no. 3767 (1967): 1203-7; Paul H. Santmire, *The Travail* of nature *The Ambiguous Ecological Promise of Christian Theology*, Theology and the Sciences (Philadelphia: Fortress Press, 1985), esp. 121-33. There are as many contemporary "Christian" responses to the environment as there are Christian environmentalists. I am here only concerned with the dominant historical view and, especially, the Protestant one, because that is the one that influenced the philosophy of Kant. For a fascinating, if heterodox, feminist alternative to traditional Christian and secular beliefs about humankind's right to dominate nature see: Sallie McFague*, Super, Natural Christians: How we should love Nature* (Minneapolis, MN: Forest Press, 1997), esp. 11-20, 90-100.

[57] Mary Ellman writes, "The male mind ... is assumed to function primarily like a penis. Its fundamental character is seen to be aggression, and this quality is held essential to the highest or best working of the intellect." Mary Ellman, *Thinking about Women* ([New York: Harcourt, Brace, Jovanovich, 1968), 23; Evelyn Fox Keller, "Gender and Science," *Psychoanalysis and Contemporary Thought* 1, no. 3 (1978): 409-33, esp. 413; these references are cited with approval in: Catharine A. MacKinnon, "Feminism, Marxism, Method, and the State: toward Feminist Jurisprudence," *Signs*, 8, no. 4 (1983): 636 (no. 4).

[58] Joan C. Tronto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993) 79.

equal dignity of persons who have (intellectual) disabilities with its contention that rational agency is the *sine qua non* of dignity and ethical consciousness. While some persons with (intellectual) disabilities undoubtedly satisfy the minimum standard of rationality for Kant's moral agent, some will never emerge from immaturity. In no way are they to blame. Their immaturity is a consequence of value neutral nature. It is not self-incurred.[59] The challenges persons with (intellectual) disabilities pose to Kantian theory is merely a poignant example, demonstrating that for Kant and his followers, difference and vulnerability are anomalous cases for which special provisions can be made as an afterthought.

If a good theory is supposed to reflect how we experience the world, it should acknowledge that diversity of ability, perception, and (susceptibility to) injury are intrinsic to the human condition.[60] They are not extrinsic to the normal, reasonable, and atomistic man. Thus, I placed the word intellectual in brackets. Though persons with physical disabilities may reach Kantian standards of agency with fewer hardships, it is not easy to parse intellectual impairments from physical forms of disability. For example, I have a visual-spatial learning disability on the second percentile (one percentile above a developmental delay) caused by my inability to crawl and manipulate objects at a young age. My resulting topographical disorientation and depth perception difficulties worsened because I use a wheelchair and do not walk. Cognition, and deficiencies thereof, also do not operate in a binary way, as the Enlightenment model of rationality suggests. I am gifted with language and writing but cannot understand and use basic quadratic functions or mentally rotate an image of a triangle. Were we able to separate physical

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[59] Stacy Clifford Simplican, *The Capacity Contract: Intellectual Disability and the Question of Citizenship* (Minneapolis, MN: University of Minnesota Press, 2015), 71-93.

[60] Julia Kristeva, "Liberty, Equality, Fraternity, and Vulnerability," *Women's Studies Quarterly* 38, no. 1 (2010): 250-6; Minae Inahara, "The Body Which Is Not One: Body, Femininity and Disability," *Body and Society* 15, no. 1 (2009): 55.

and intellectual disabilities, Kant still assumes statistically normal levels of mobility, emotional regulation, and perception.

Despite our need of society to survive, Kant's masculine self is an autonomous cogitating agent. Kant's three formulations of the categorical imperative are not derived from crucial empirical facts, such as our need for caring relationships, which stems from the even more primary fact of our vulnerability. Instead, the conclusions we draw from the categorical imperative are products of reason alone. Critically, Kant believes that they are laws that apply to all rational beings. They would exist as laws discernible from basic and unchanging features of reasoning, whether human beings existed or not.

For Kant, the formulations of the categorical imperative resemble how we often conceive of and deploy the formula $E=MC^2$. He wants human beings to apprehend indubitable truth concerning ethics that has transhistorical and transcultural bases. A pre-given natural feminine order cannot ground it. The very laws that structure rational cognition must be our ultimate justification. Though Kant's moral agent is entitled to consider context when making an ethical decision, the conclusions we ought to derive from moral deliberation should be abstracted from our specific genders, sexualities, religions, classes, and embodiments.

Indeed, Kant, notwithstanding his more nuanced conception of emotion than we often believe, thinks that the process of enlightenment is also a process of progressive disembodiment and masculinization.[61] This linear narrative of moral development accomplishes an educastration.[62] We must integrate shame into our psyche and channel it toward beneficial goals

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[61] Eric O. Clarke, *Virtuous Vice: Homoeroticism and the Public Sphere*, Series Q (Durham, N.C.: Duke University Press, 2000), 1-20. Lloyd 65-71.

[62] Mario Mieli, *Homosexuality and Liberation: Elements of a Gay Critique*, trans. David Fernbach (London: Gay Men's Press, 1980), 24.

to accomplish this aspiration. An integral and unstable antinomy in Kantian ethics, therefore, is that between its pervasive use of retribution and coercion upon the self as well as others, up to and including physical violence, and the intention to respect ourselves and others as autonomous moral agents. Such an intention provides a strong reason against the use of violence or shame.

Our shame when we measure our selves against the phallic power of the moral law is the symbolically castrating process that produces moral consciousness.[63] Kant even describes our consciousness of the moral law as humiliating in the following passage:

> As the effect of consciousness of the moral law, and consequently in relation to an intelligible cause, namely the subject of pure practical reason as the supreme lawgiver, this feeling of a rational subject affected by inclinations is indeed called humiliation (intellectual contempt); but in relation to its positive ground, the law, it is at the same time called respect for the law; there is indeed no feeling for this law, but inasmuch as it moves resistance out of the way, in the judgment of reason this removal of a hindrance is esteemed equivalent to a positive furthering of its causality. Because of this, this feeling can now also be called a feeling of respect for the moral law, while on both grounds together it can be called a moral feeling.[64]

Looking forward, we should ponder how close this dichotomous conception of humankind's purity and corruption reflects the Christian doctrine of Original Sin as well as The Fall and the

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[63] Kant and Sigmund Freud share many of the same modernist patriarchal assumption. Though castration anxiety in relation to the moral law is implicit in Kant and St. Paul, Freud makes an explicit connection between castration and moral consciousness. Sigmund Freud, " "Some Psychical Consequences of the Anatomical Distinction Between the Sexes," 1925, repr. In *The Standard Edition of the Complete Psychological Works of Sigmund Freud, vol. XIX*, trans. and ed. James Strachey. London: The Hogarth Press, 1981), 243-8.

[64] Kant, *Critique of Practical Reason*, rev. ed., trans. Gregor, 63 [5:75].

shame caused thereby. For example, many Christians cite this passage from St. Paul as support for these doctrines:

> I do not understand my own actions. For I do not do what I want, but I do the very thing I hate. Now if I do what I do not want, I agree that the law is good. But in fact, it is no longer I that do it, but sin that dwells within me. For I know that nothing good dwells within me, that is, in my flesh. I can will what is right, but I cannot do it. For I do not do the good I want, but the evil I do not want is what I do. Now if I do what I do not want, it is no longer I that do it, but sin that dwells within me (Rom. 7:50-20).

Compare this to what we have seen in Kant's ethics. Man is first among natural rational creatures, because he grasps the moral law. Nonetheless, he is also aware of his own ignominy, after he reflects upon what the moral law demands of him and how he dishonours himself when he falls short of its proscriptions.

This explication of Kantian rationalism has been more than an exercise in stating the obvious. Once we premise the fundamental criteria for humanity upon rationality and freedom, we inevitably open a space for inhuman activity and possibly create great anger against persons whom we believe have irrationally transgressed the boundaries of their freedom. Other species cannot act immorally. Only human beings have freedom. This is a shameful blessing. Only we, as far as we know from our experience, can be inhumanly evil. We become inhuman when we *exceed what is natural*. This will become more noteworthy when we examine St. Paul's letter to the Romans, especially when St. Paul says that homoerotic sexual activity goes beyond what is natural. For now, we can edifyingly distinguish between what is unhuman (that is, simply not

human but something else) and inhuman (that is, vicious behaviour that stems from the uniquely human capacity to wilfully transcend our human limits).[65]

Consequently, if it is not balanced with other considerations, Kantian ethics can become irascible quickly. As Talal Asad observes, the project of secular human rights discourse is often inseparable from sadistic cruelty. Once we embark upon the process of universal justification, there will inevitably be elements of humanity that must be negated or excluded.[66] H.L.A. Hart nicely captures the flaws in an overly draconian approach to morality, particularly regarding the conduct of other persons, when he quips, "morality, what crimes have been committed in thy name"[67] One of the ways that Kantian rationalism removes persons or traits from the category of full and equal humanity is by the public-private distinction. This distinction predominately promotes shame and marginalizes disenfranchised subjects according to implicit gender stereotypes. As Carol Pateman summarizes in the following quotation:

> Political right originates in sex-right or conjugal right. Paternal right is only one, and not the original, dimension of patriarchal power. A man's power as a father comes after he has exercised the patriarchal right of a man (a husband) over a woman (wife). The Contract theorists had no wish to challenge the original patriarchal right in their onslaught on paternal right. Instead, they incorporated conjugal right into their theories and, in so doing, transformed the law of male sex-right into its modem contractual form.

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[65] Slavoj Zižek, *Tarrying with The Negative: Kant, Hegel, and the Critique of Ideology* (Durham: Duke University Press, 1993), 119.

[66] Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity,* Cultural Memory in the Present (Stanford, CA: Stanford University Press, 2003) 100-158.

[67] H.LA. Hart, ''Immorality and Treason" *The Listener* July 30, 1959, 13, in *Canadian Criminal Law: Cases and Materials*, eds. Kent Roach, Emma Cunliffe, James Stribopoulos, and Benjamin L. Berger (Toronto: Edmund-Montgomery, 2015), 61.

> Patriarchy ceased to be paternal long ago. Modem civil society is not structured by kinship and the power of fathers; in the modern world, women are subordinated to men as men, or to men as a fraternity. The 'original' contract takes place after the political defeat of the father and creates modem fraternal patriarchy. Another reason for the omission of the story of the sexual contract is that conventional approaches to the classic texts, whether those of mainstream political theorists or their socialist critics, give a misleading picture of a distinctive feature of the civil society created through the original pact. Patriarchal civil society is divided into two Spheres, but attention is directed to one sphere only. The story of the Social contract is treated as an account of the creation of the public sphere of civil freedom. The other, private, sphere is not seen as politically relevant. Marriage and the marriage contract are, therefore, also deemed politically irrelevant. To ignore the marriage Contract is to ignore half the original contract.[68]

Because we can level such powerful criticisms against Kant and the liberal theory he represents, readers may ask, why use this theoretical framework?

A Constructivist Rejoinder

First, my use of Kant is just as much phenomenologically descriptive as it is prescriptive. Though most of us may have discarded Kant's metaphysics and chauvinism, the underlying structures that inform his beliefs persist. Second, as imperfect as it may be, surrendering some commitment to the ideal of rational discourse would have unfortunate consequences, especially for the emancipation of women and other marginalized groups. Abandoning the ideal of reason would leave us fewer resources with which to critique ingrained cultural biases. Such critiques are daunting undertakings already. Third, Kant demonstrates the purported secular and gender-

[68] Carol Pateman, *The Sexual Contract* (Stanford, CA: Stanford University Press, 1988), 3-4.

neutral character of liberal theory is still deeply Christian and sexist. Fourth, though there may be seeming contradictions between justice and a feminist ethic of care,[69] the best interpretation of care ethics sees care and justice as reciprocally dependent. For example, Joan Tronto contends that the mature caregiver honours interdependent autonomy out of concern for others' well-being and the relationships we form with them.[70]

John Rawls is insightful when he says the following:

> [T]he adjective 'Kantian' expresses analogy and not identity; it means roughly that a doctrine sufficiently resembles Kant's in enough fundamental respects so that it is far closer to his view than to the other traditional moral conceptions that are appropriate for use as benchmarks of comparison…. To justify a Kantian conception within a democratic society is not merely to reason correctly from given premises, or even from publicly shared and mutually recognized premises. The real task is to formulate the deeper bases of agreement which one hopes are embedded in common sense, or even to originate and fashion starting points for common understanding by expressing in a new form the convictions found in the historical tradition by connecting them with a wide range of people's considered convictions: those which stand up to critical reflection…[71]

The primary aim of this dissertation is not to present a perfectly coherent account of discrimination in democratic societies. It is to expose the tension that shame causes within

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[69] Axel Honneth, "Between Justice and Affection: The Family as a Field of Moral Disputes," *Privacies: Philosophical Evaluations*, ed. Beate Rössler. Cultural Memory in the Present (Stanford, CA: Stanford University Press, 2004), 142-162; Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1993, repr. Cambridge, MA: Harvard University Press, 2003), esp. 1-20, 151-176.

[70] Tronto, 127-57.

[71] John Rawls, "Kantian Constructivism in Moral Theory," *Journal of Philosophy* 77, no. 9 (1980): 518.

Canadian constitutional culture. This is consistent with queer theory. As Judith Halberstam notes in *The Queer Art of Failure*, to be queer is, at least in some circumstances, to fail.[72] We need not consider failure as entirely negative, however. If we can learn to live with it, and the uncomfortable tension it creates, it can foster greater intellectual development and malleability. We should regard Kantian philosophy in this way. On the one hand, it provides the most compelling defence for queer equality, as we shall see in the next section. On the other hand, the shame that is also at its core obscures its emancipatory kernel.

We can, of course, reconfigure Canadian constitutional culture according to more feminist principles, like we have done with Kant's philosophy, and we will see this process occurring in subsequent chapters. The point remains, though, that, as historically situated beings, Kantian philosophy is part of our phenomenological horizon and particularly orients how many legal actors perceive the world. This sexism is unlikely to disappear soon, if ever. We cannot, however, escape engagement with our culture. We should use both imminent and external methods of criticism.

Because, to quote Marx again, "The tradition of all the dead generations weighs like a nightmare on the brain of the living," [73] it is important to assess Canadian constitutional culture not only according to its abstract principles, but also how these principles change the way that we live with one another for good or ill. Hence, Benjamin L Berger cites Maurice Merleau-Ponty. Merleau-Ponty was both a committed Marxist and phenomenologist who meditated upon

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[72] Judith Halberstam, *The Queer Art of Failur*e (London, Duke University Press, 2011), 87-98. Jack Halberstam is a transgender man who also sometimes uses this name. Yet, they are inconsistent in their use of nomination and pronoun as a way of living out their commitment to queer praxis.

[73] Karl Marx, "The Eighteenth Brumaire of Louis Bonaparte," in *The Marx-Engels Reader*, 2nd ed., ed, Robert C. Tucker (1869, repr. New York: W. W. Norton and Company, 1978), 595.

the atrocity of the Stalinist show trials to demonstrate both the excesses of liberalism and Marxism. Merleau-Ponty attributes the failures in these ideologies to disregard for concrete relationships, which he correctly identifies as the true insight of Marx, in the following excerpt:

> In refusing to judge liberalism in terms of the ideas it espouses and inscribes in constitutions and in demanding that these ideas be compared with the prevailing relations between men in a liberal state, Marx is not simply speaking in the name of a debatable materialist philosophy-he is providing a formula for the concrete study of society which cannot be refuted by idealist arguments. Whatever one's philosophical or even theological position, a society is not the temple of value-idols that figure on the front of its monuments or in its constitutional scrolls; the value of a society is the value it places upon man's relation to man. It is not just a question of knowing what the liberals have in mind but what in reality is done by the liberal state within and beyond its frontiers. Where it is clear that the purity of principles is not put into practice, it merits condemnation rather than absolution.[74]

Consequently, the phenomenology of shame is indispensable for a holistic critique of Canadian constitutional culture. It allows us to assess our value idols, with the compelling philosophical framework that is also rooted in empirical research.

For greater certainty, I shall reiterate my central contention apropos of shame's relationship with human dignity. It should be clearer now that we have discussed Kant's distinction between the noumenal and phenomenal realm. shame is the biological and material manifestation of a metaphysical postulate (that is, human dignity). This separation between dignity and shame, corresponds to the Kantian dichotomy between the noumenal and

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[74] Maurice Merleau-Ponty, *Humanism and Terror: An essay on the Communist Problem*, trans. John O'Neill (1947, repr. Boston: Beacon Press, 1969), xiv. Berger, *Law's Religion*, 105.

phenomenal realm of experience. Because Kant is astute when he says that human subjectivity cannot access the noumenal realm (or, "things-in-themselves") our analysis is on firmer epistemological ground if we focus our attention on reactions and behaviours that manifest the absence or presence of an ontological assumption, rather than trying to define this supposition a priori, based on abstract and often ahistorical and decontextualized criteria.

Focusing on shame allows us to start with the phenomenology and ethics that come from interactions between specific persons existing in a defined location, role, and time. Moreover, because shame is often a protean emotion with unpredictable affects, which deposit conflicting desires within subjects, focusing on shame helps us remember that we are not frequently the products of rational and purposeful development. We must make ethical and political claims, being always already incomplete, ashamed, and flawed.

Kant's philosophy is not a panacea for ethical responsibility, but it can provide strong presumptive reasons (not) to act. These reasons, however persuasive they may be, are not absolute. They must rely on nothing more than situated judgement for support. As Allen C. Hutchinson observes:

> Like general ethics, legal ethics is contextual, in the sense that it involves particular people in particular situations making difficult decisions, with particular time constraints and imperfect information, and with particular consequences for particular people. And, of course, there is no context that allows people to fix once and for all their obligations and actions when acting in personal or professional roles. There are few right answers that stand outside any context or debate.[75]

[75] Alan C. Hutchinson, *Legal Ethics and Professional Responsibility*, 2nd ed. (Toronto: Irwin Law, 2006), 43-44.

As Simone de Beauvoir states, “Since we do not succeed in fleeing it, let us therefore try to look the truth in the face. Let us try to assume our fundamental ambiguity. It is in the knowledge of the genuine conditions of our life that we must draw our strength to live and our reason for acting.”[76] Hannah Arendt offers the following observation that demonstrates how existing in this existential ambiguity can accord with our intuitive responsibility to our past and future:

> [E]ach new generation, indeed every new human being as he inserts himself between an infinite past and an infinite future, must discover and ploddingly pave it anew. The trouble, however, is that we seem to be neither equipped nor prepared for this activity of thinking, of settling down in the gap between past and future.[77]

An understanding of human existence that places us in the uncomfortable liminal space between our past and our future is crucial for my argument.

Nonetheless, Arendt errs when she holds that it is possible and desirable for us to think and to act without (ontological) “banisters.”[78] We require some view of the world, even if provisional and contestable, to grasp as we attempt to climb over life’s challenges. Ethics are as ubiquitous and indispensable to a meaningful human life as is communication. Almost all persons use some form of language. Few persons would suggest that the diversity of languages, as well as the multiplicity of styles within specific languages, precludes us from making contextual judgements regarding prescriptive grammar. Grammar is like ethics. Though context matters, “I reckon some things just ain’t never right for nobody to do” when writing 21st-century

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[76] Simone de Beauvoir, *The Ethics of Ambiguity*, Paperback ed., trans. Bernard Frechtman (1948, repr. New York: The Citadel Press, 1962), 9.

[77] Hannah Arendt, *Between Past and Future: Six Exercises in Political Thought* (1954, repr. New York: The Viking Press, 1961), 13.

[78] Hannah Arendt, "On Hannah Arendt," in *Hannah Arendt: The Recovery of the Public World*, ed. Marilyn A. Hill (New York: St Martin's Press, 1979), 314.

Canadian academic English. We make such judgements regarding grammar easily, even though there is little dispute that it is largely a human invention and not the child of a transhistorical idea of Reason. The same holds true for ethics. A vital part of such contextual determination is a dialogical engagement with tradition as we consider our present circumstances.

Hence, Michael Oakeshott is perceptive when he says that ethics is not properly described as an attempt to internalize a series of abstract principles that will surely give us infallible answers, though such maxims can be a useful corrective to regrettable weaknesses. Instead, it involves learning an ethical vocabulary and *habitus*, which is manifested and taught through social institutions.[79] J.H. Merryman provides the following definition of a legal tradition: "A legal tradition ... is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the ways law is or should be made, applied, studied, perfected, and taught." [80] Kantian ideals are a vital part of Canada's constitutional tradition.

As historically conditioned beings — having both benefited from and suffered under this language and these institutions to varying degrees — we have an obligation to preserve what is good in them, while we are vigilant regarding their shortcomings.[81] As distasteful as aspects of it may be, we have a duty to Kant's philosophy, as well as to some Enlightenment ideals generally.

They have shaped and continue to inform the contours of our phenomenological horizon. It would be both ungrateful to the good they have done and dismissive of the horrendous

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[79] Michael Oakeshott, *Of Human Conduct* (Oxford: Oxford University Press, 1975), 78-79.

[80] J. H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*. 2nd ed. (Stanford, CA: Stanford University Press, 1985), 1.

[81] Hans-Georg Gadamer, *Truth and Method*, trans. Joel Weinsheimer and Donald G. Marshall (New York: Continuum Publishing Group, 2004), 150-160.; Hans-Georg Gadamer, *Philosophical Hermeneutics*, trans. and ed. David E. Linge (Berkeley: University of California Press, 1976), 80.

violence they have caused, to decry, praise, or ignore them entirely. Healthy traditions change to keep pace with the particular moral questions contemporary life poses, while also resisting change where appropriate, and they have insights that point beyond themselves.[82] If there is one thing concerning which Kant is correct, it is the value in thinking for ourselves. To either blindly obey or reject tradition, simply because it is tradition, is to abdicate the task of thinking for ourselves. There are many things we should cherish in Evangelicalism, Kantianism, and Canadian constitutional culture. Institutionalized (hetero)sexism is not one of them. It causes shame and violates human dignity.

We can still defend a pragmatic conception of dignity on antifoundationalist grounds. My endorsement of an updated Kantianism has three main antifoundationalist grounds. First, I agree with Shelley Kagan that respecting human dignity as nearly inviolable is justified upon consequentialist terms. Such treatment prevents actions that create aggregate disutility. So too does considering if we may generalize an act. We often carve out exceptions for ourselves from a rule of general application owing to personal arrogance and selfishness.[83] Specifically, treating every person as an end in herself is a bulwark against coercion as well as acute and systemic violence.

Second, respecting the moral equality of all rational beings conveys epistemic humility. Because making decisions requires countless facts and sub-decisions that our personal idiosyncrasies influence, considering every person as an end in herself is sensible. We are self-

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[82] Jaroslav Pelikan, *The Vindication of Tradition* (New Haven, CT: Yale University Press, 1984), 54; Catherine T Bartlett, Tradition, Change, and the Idea of Progress in Feminist Legal Thought," *Wisconsin Law Review* 1995, no. 2 (1995): 333.

[83] Shelley Kagan, "Kantianism for Consequentialists," in Immanuel Kant. *Groundwork for the Metaphysics of Morals*. ed. and trans. Allen W. Wood. Rethinking the Western Tradition. (New Haven, CT: Yale University Press, 2002). 143.

protecting and shaped by our experience. Consequently, in most cases, (when we are mentally competent adults), we are in the best position to make judgements concerning our lives. Usually, we possess the most evidence from which to render such judgements. There is truth in the saying "no one has walked in my shoes," or in some cases, "driven in my wheelchair."[84] Third, treating every rational being as an end in herself is more likely to express the kind of values that are in accord with our shared political commitments and experience in 21st century Canada, especially within the legal profession.

Nevertheless, what does this rather abstract meditation upon Kantian philosophy explain in the language and practices of Canadian constitutional culture? The answer lies in the distinction between persuasion and justification. Bryan Gersten argues that modern liberal, and especially Kantian, discourses employ justification. This is a supposedly dispassionate mode of discourse in which deductions from universally perceivable premises and the strength of our deductions tries to gain the submission of our interlocutor. Indeed, failure to submit to the laws of rational argument can be a profound occasion of shame.[85] Conversely, persuasion — a method of discourse that starts from the position of our adversary and employs various emotional techniques to lead her to the desired conclusion — is suspect in traditional liberal political theory. It is thought to undermine the good of autonomy. Also, it makes those who use it impermissibly duplicitous.[86]

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[84] Perception metaphors are, unfortunately, always discriminating according to ability. I would like to again acknowledge my privilege with respect to other forms of disability. I have not "seen" with the hands of a blind man, nor have I "listened" with the eyes a woman who is Deaf/deaf.

[85] Bryan Gersten, *Saving Persuasion: A Defence of Rhetoric and Judgement* (Cambridge: Mass. Harvard University Press, 2006), 4-6.

[86] Gersten, 2-3.

Political theorists have traditionally gendered persuasion as feminine and justification as masculine. Gersten argues that we should revive persuasion on three grounds. First, discourse, whether justificatory or otherwise, has emotional content. Emotions are discursively mediated judgements. Second, it is good for subjects to manipulate better, regulate, temper, and channel, such judgements towards socially salutary goals. Third, discourses of justification, by their very nature unyielding, create impasses among interlocutors and resentment from the losing party when the victor successfully achieves "logical submission".[87] Not least because justice and justification share an etymology, justification is allegedly the primary discursive mode in which the legal profession operates. This means compromise is tricky, though not impossible, to achieve. When such balancing is attempted, it often masks (emotional) tensions that are never truly resolved. Though John Rawls and Ronald Dworkin use metaphors, and this implies that persuasion operates in their writing, its primary mode, and, thereby, the style of the members of Canada's constitutional culture who adopt this perspective, is justificatory. We must examine Kantian criticisms and defences of homoerotic conduct to appraise the significance of this worldview apropos of TWU law school properly.

Kantian Defences of Homoerotic Conduct

Kant has an extremely bestial conception of sex. He believes that the sexual impulse is so strong that it is impossible for persons engaged in intercourse to regard one another as ends in themselves. Cross-sex marriage is the only way to reconcile this problem with our seemingly contradicting duty to propagate the human species. For Kant, only in cross-sex marriage do both partners respect each other's dignity. Although they often treat each other as means and not ends, marriage is a free contract in which both partners surrender their rights to the other with the

[87] Gersten, 170-200.

promise of faithfulness. Nevertheless, we require the state to make this bond legally enforceable.[88]

The marriage contract turns an imperfect obligation of benevolence into a perfect duty of right by a legally enforceable agreement. It, thereby, mitigates dehumanizing aspects of intercourse and ensures our society continues.[89] Same-sex sexual acts are unnatural because they can never lead to procreation. As well, they cannot engender the selflessness required for the recuperation of humanity lost during copulation. Finally, same-sex sex is evil because we cannot universalize it. We can respond to these concerns in the following way.

First, Kant's reliance upon nature violates a fundamental precept of his theory. Second, the generation of biological children, or children whatsoever, does not exhaust the procreative potential of relationships. There is little reason why we could not consider artistic or charitable endeavours stemming from relationships as products of those bonds that maintain a community. Third, willing that every human being has same-sex sexual activity does not prohibit cross-sex sex and the maintenance of the species. Kant's moral agent is entitled to consider the context in which she makes a moral choice. Because it seems unlikely that a majority will ever have an exclusively homoerotic sexual orientation, there is no danger in a small number of persons by and large choosing same-sex sexual and romantic partners. Fourth, even if there were something unique emerging from relationships structured on dyadic gender polarity, same-sex relationships can engender the kind of love and fidelity required to compensate for the alleged problem of alienation and objectification arising from non-heterosexual and non-matrimonial sexual

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[88] Immanuel Kant, *Lectures on Ethics,* trans. Peter Heath, eds. Peter Heath and JB. Schneewind (1781, repr., Cambridge: Cambridge University Press, 1997) 160 [27:390-2].

[89] Kant, *Morals*, trans Gregor, 95-101.

relations.[90] Indeed, in addition to providing support for the arguments above, Matthew C. Altman contends that the contractual obligations attending marriage (or, in some Canadian provinces, common-law relationships) are the only way to render sexual expression (whether same-sex or-cross-sex) morally permissible from a Kantian view.[91]

The famous Society of Friends pamphlet cited in the introduction provides a useful distillation of the proper Kantian position. It is also helpfully expressed in Christian terms, which belies the dichotomy (hetero)sexist persons often construct between (true) Christianity and queerness. It states the following:

> Homosexual affection may of course be an emotion which some find aesthetically disgusting, but one cannot base Christian morality on a capacity for disgust. Neither are we happy with the thought that all homosexual behaviour is sinful: motive and circumstances degrade or ennoble any act, and we feel that to list sexual acts as sins is to follow the letter rather than the spirit, to kill rather than to give life. Further, we see no reason why the physical nature of a sexual act should be the criterion by which the question whether or not it is moral should be decided. An act which expresses true affection between two individuals and gives pleasure to them both, does not seem to us to be sinful by reason alone of the fact that it is homosexual. The same criteria [for ethical

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[90] "Homosexuality cannot similarly be classed as a perversion on phenomenological grounds. Nothing rules out the full range of interpersonal perceptions between persons of the same sex. The issue then depends on whether homosexuality is produced by distorting influences that block or displace a natural tendency to heterosexual development. And the influences must be more distorting than those which lead to a taste for large breasts or fair hair or dark eyes. These also are contingencies of sexual preference in which people differ, without being perverted." Thomas Nagel, "Sexual Perversion," in Theology and Sexuality: Classic and Contemporary Readings, ed Eugene F. Rogers, Blackwell Readings in Modern Theology (Oxford: Blackwell Publishing, 2002), 34.

[91] Matthew C. Altman, "Kant on Sex and Marriage: The Implications for the Same-Sex Marriage Debate," *Kant-Studien* 101, no. 3 (2010): esp. 320-30.

> erotic interactions] seem to us to apply whether a relationship is heterosexual or homosexual. [92]

The essential criterion for an ethical (sex) life is respect and compassion for others as our equals. Respect, compassion, and a commitment to equality mandates that we treat others not only as a means but also as an end. Far from upholding this Kantian maxim, as Kant himself believes it does, (hetero)sexism is an egregious violation of it.

Proscriptions against homoerotic behaviour (and especially identity) are troubling to many academic and (un)conscious contemporary Kantians. If there is no compelling reason to prohibit human beings from engaging in homoerotic activity — based on an application of the three formulas of the categorical imperative — it is immoral to curtail it. Dignity arises from the respect human beings are due because they are choosing (rational) agents. To (in)voluntarily sacrifice our right to choose ethically viable possibilities — except by a just prohibition or command — is an occasion for shame and regret.

We do not have to accept a fixed version of human rights or moral personality to defend this proposition. Indeed, as Wilfrid J. Waluchow argues, it is possible to hold that our understanding of rights and what constitutes human dignity can change over time. We can, however, believe that general prohibitions on governments or government actors making

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[92] Alastair Heron, ed, *A Quaker View of Sex: An Essay by a Group of Friends*, rev. ed. (London: Friends Home Service Committee, 1963), 42. Though published with the help of The Friends Home Service Committee, this historic pamphlet was not officially promulgated as the doctrinal position of the British Society of Friends. Nevertheless, many within various Societies of Friends (a Christian denomination) have long advocated for queer rights. Quakers generally lack the organizational mechanisms, as well as attending belief in centralized authority, to produce official doctrinal statements. As we shall see later, I partially object to the division the pamphlet makes between status and conduct (or act and identity).

choices, which have historically infringed (or have been understood later as infringing) upon fundamental aspects of what it means to be a dignified and free agent, is a good idea.[93]

In part because of the contingent historical events and theological discourses discussed above and below, Canadian constitutional culture has come to recognize choices regarding sexual orientation and gender as part of an integrated moral personality. One is not human in addition to having a sexual orientation or gender. Instead, one *expresses humanity in and through these characteristics*. Through this conduct, we communicate the truth of our autobiography to others.

Mariana Valverde reminds us that "sexual orientation" was originally a psychological and legal "term of art."[94] Nevertheless, social constructions have an existence. We act as though they exist, and their existence conditions our possibilities on every level of our experience from the international to the psychosomatic. As Judith Butler comments, "[o]n the level of discourse, certain lives are not considered lives at all, they cannot be humanized; they fit no dominant frame for the human, and their dehumanization occurs first, at this level."[95] For some time, as argued more fully in the next chapter, queers have been dehumanized at this first level of language, effectively labeled as subhuman criminals. Such criminals had to make a choice between their queerness and enjoying the rights attending full legal personhood. Philosophic defences of sexual orientation rights, in conjunction with protections afforded to gender, are

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[93] Wilfrid J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree*. (Cambridge: Cambridge University Press, 2007), 246.

[94] Mariana Valverde, *Law's Dream of Common Knowledge* (Princeton, NJ: Princeton University Press, 2003), 113-114.

[95] Judith Butler, *Undoing Gender* (New York: Routledge, 2004), 25.

intended to guard against, as well as compensate for, this history of depersonalization and criminalization.

Sexual orientation equality satisfies our desire to be seen as full and equal human beings. Though the ideal of recognition may not be attainable in all circumstances, it is not ground-breaking to suppose that believing we are equal to others, despite differences from them, which may be undervalued, but that we may consider vital to our personal narrative, fosters greater self-esteem and, therewith, contributes to well-being.

We should see the injunction to be truthful to our autobiographical cores, especially from a Kantian perspective, tutoring the Christian discourses of silence and censorship regarding sodomy. To be deceitful concerning our sexual orientations and gender identities is to violate the formulations of the categorical imperative. To experience unjust shame is to have a feeling of moral failure for an invalid reason. To come out and perform our sexual and gender identities is to affirm our dignity as optative contemplative agents.[96] Persons should not be able to restrict this choice to preserve their own conception of the common good.

Were we to concede that homoerotic behaviour and nonnormative gender expression are vices, and that we have a duty to dissuade others from indulging such vices, actions performed under compulsion are, at best, value neutral and, at worst, immoral. One of Kant's Stoic progenitors puts it this way: "[n]o action is honorable when performed by one who is unwilling or under compulsion. Everything that is honorable is voluntary. Mingle with it any reluctance, any complaint, any second thoughts, any fear, and it loses its best feature: it is no longer self-

[96] Steven Seidman, *Beyond the Closet: The Transformation of Gay and Lesbian Life*. (New York: Routledge, 2002), 22; Didier Eribon, *Insult and the Making of the Gay Self,* trans. Michael Lucey (Durham, NC: Duke University Press, 2004), 16.

determined. Timorousness implies slavishness, and that which is unfree cannot be honorable."[97] Though we may criticize Lucius Annaeus Seneca's implicit misogyny in this quotation, regardless of gender, most of us expect to be treated as mature adults. We feel shame and self-reproach when we become involuntary patients of another's will, as opposed to the autonomous agents most of us, most of the time, aspire to be. Though we should reject his extreme position, his suggestion that involuntary deeds performed owing to fear or discomfort are frequently ignominious is intuitively sound.

As Kant states, "No-one can compel me to be happy in accordance with his conception of the welfare of others, for each may seek his happiness in whatever way he sees fit, so long as he does not infringe upon the freedom of others to purse a similar end ... he must accord others the same right as he enjoys himself."[98] Updating this Kantian autonomy-based argument, Tom Scanlon observes the following:

> We cannot respond to all the reasons that every human creature has for wanting his or her life to go well; so, we must select among these reasons; and we should do this in a way that recognizes the capacity of human beings, as [imperfectly] rational creatures, to assess reasons and to govern their lives according to this assessment. In my view the best response to these two considerations is this: respecting the value of human [imperfectly] (rational) life requires us to treat [imperfectly] rational creatures only in ways that would

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[97] Lucius Annaeus Seneca, "All Goods Are Equal (letter 66)," in *Letters on Ethics to Lucilius*, trans. Margaret Graver and A. A. Long, eds. Elizabeth Asmis, Shadi Bartsch, and Martha C. Nussbaum, The Complete Works of Lucius Annaeus Seneca (circa. 45-60 CE; repr. Chicago: University of Chicago Press, 2015), 193, para. 16.

[98] Immanuel Kant, "On the Relationship of Theory to Practice in Morality in General," trans. H. S. Reiss, in *Immanuel Kant: Political Writings*, ed. H. S. Reiss, Cambridge Texts in the History of Political Thought (New York: Cambridge University Press, 1991), 74.

> be allowed by principles that they could not reasonably reject insofar as they, too, were seeking principles of mutual governance.[99]

Christine M. Korsgaard further clarifies as follows:

> Treating others as ends-in-themselves is not a matter of discovering a metaphysical fact about them - that they are free and rational, and so have value - and then acting accordingly. When you respect the humanity of others you do not regard them as the objects of knowledge - as phenomena - at all. Instead you regard them as active beings, as the authors of their thoughts and choices, as noumena. To respect others as ends-in-themselves is to meet them as fellow inhabitants of the standpoint of practical reason. therefore to make your choices with them or at least in a way that is acceptable from their point of view-that is, to choose maxims which can serve as universal laws. To respect the humanity of others is to think and act as a legislative citizen in the Kingdom of Ends.[100]

In short, we cannot morally or empirically be responsible for another's (moral) salvation, and it is prudent to stop such attempts at the point of institutionalized coercion, at least with respect to self regarding conduct, lest we put others through hell attempting to get them to heaven.

In this section, we have seen the Kantian preoccupation with autonomy and personal identity. We have observed how Kant links these concepts to shame and masculinity but also how a Kantian approach can defend the rightness of homoerotic conduct. In the following sections, we will see how John Rawls and Ronald Dworkin use similar concepts. Taken together, these thinkers provide the scaffolding we require to understand the ideological structure of Canadian constitutional culture and some of the challenges it faces.

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[99] Scanlon, 106.

[100] Christine M. Korsgaard, *Creating the Kingdom of Ends* (Cambridge: Cambridge University Press, 1996), xi.

MASCULINITY, INTEGRITY, AND RONALD DWORKIN JOHN RAWLS

Kant has influenced the work of American legal theorist Ronald Dworkin and American political theorist John Rawls. These men provide a window into the Canadian constitutional *Zeitgeist*, particularly apropos of jurisprudence concerning phenomena often categorized as religious. Dworkin's central preoccupation is that everyone in a polity receive equal concern and respect.[101] From his attachment to this fundamental principle, he derives the idea of rights as trumps (another way of expressing the priority of right over the good or priority of justice over consequences). Democracy's primary aim is not to ensure specific procedural outcomes, for example, fair voting rules and so forth. It is intended to provide conditions of equal concern and respect.[102] While democracy is frequently effective at accomplishing this aim, we need to place certain entitlements, perhaps even goods, beyond the vicissitudes of politics. Judicial review is particularly needed when a majority withholds rights from marginalized groups. These groups are often underrepresented in the political process, owing to insufficient numbers or little clout.[103] Such underrepresentation has been a reality for queers. They live in a straight and cisgender majority.[104]

Adjudicators must rely on principles of political morality. Dworkin believes these provide the ethical foundation of civic life. Courts must be fora of principle. These fora must maintain a healthy constitutional culture, in cooperation with, but, (un)fortunately, sometimes in

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[101] Ronald Dworkin, *Sovereign Virtue*: *The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2000), esp. 1-11, 184-285.

[102] Dworkin, *Equality* 409-27.

[103] Dworkin, *Equality*, 206-9. See also John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), 73-104.

[104] *Egan v Canada,* [1995] 2 SCR 513, 516-17, 124 DLR (4th) 609 (CanLII).

opposition to, the policy choices of the legislative and executive branches of government. Phrased differently, positive law (that is, the rules enacted in statute books and how courts interpret such rules) do not exhaust the rules that a judge must consider when she decides a case. Instead, Dworkin's ideal is one in which the jurisprudential enterprise, and especially constitutional law, is a story of progressive and rational development. This story articulates a political community's underlying principles very well, while clearing away the ideological underbrush that prevented the community from seeing them and their proper application to cases.[105]

According to Dworkin, judicial review is not justified because of the erroneous assumption that judges are more morally courageous or cleverer than the public. They merely have specific skills allowing them to resolve legal problems. If judicial review works correctly, then judges are insulated from political pressure. This insulation helps to ensure their impartiality.

Followers of Dworkin conceive of the legal enterprise as hermeneutic. This supposedly hermeneutic posture has the two following implications. First, we must interpret the whole of a text or tradition in relation to its parts and the parts in relation to the whole. Second, we must conceive of ourselves as an heir to this tradition(s), primarily based on texts, which past practice strengthens. They are also flexible enough to accommodate themselves to the unforeseen circumstances of contemporary life.[106]

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[105] Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), esp. 400-18.

[106] Hans-Georg Gadamer, *Truth and Method*, trans. Joel Weinsheimer and Donald G. Marshall (New York: Continuum Publishing Group, 2004), 150-160.; Hans-Georg Gadamer, *Philosophical Hermeneutics*, trans. and ed. David E. Linge (Berkeley: University of California Press, 1976), 80.

Trying to describe this ideal, Dworkin devises a thought experiment. The judge ought to imagine herself as authoring a very long chain-novel for which she has read all the antecedent chapters. In the decision at hand, she must write like the chapter, and though it may be a hard case, must author what she believes to be the best fit with the overall story. She must keep in mind principles when penning her chapter. Her chapter does not necessarily have to (and, indeed, in most cases, cannot) trump positive law. Dworkin believes that hermeneutics are necessary to safeguard the legal system.[107] Having an integral legal system — both in the sense of internally coherent (that is, rational) and possessed of moral worth — is critical. By this criterion, the legitimacy of law is made far more likely. It becomes an enterprise in which we are all engaged, and to which our consent may be assumed. Consent is assumed because lawmakers have paid us the respect that they owe us.[108] They owe us this respect because they and we are equally dignified moral agents. Dworkin's theory is useful because it supports a common argument for queer equality in something like the following statement: "the law should protect queer equality and allow same-sex marriage. It best reflects the rational development of common-law principles and our society's overarching commitment to the equal worth of all persons."

Unless we reject judicial review entirely, Dworkin's method seems unobjectionable. The problem is the counterfactual thought experiment that he employs. Dworkin's theory is only attractive if we accept his counterfactual postulate of Judge Hercules (the name he gives his judicial paragon). We should notice the masculine connotations of his mythological invocation. These are not inconsequential to the correct interpretive posture. Through a titanic effort of physical endurance and academic acumen, Judge Hercules, admittedly as an ideal, is supposed to decide all the cases before him with unlimited time, gargantuan amounts of research,

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[107] Dworkin, *Empire*, 235-57.

[108] Dworkin, *Empire*, 190-212; Dworkin, *Rights*, 180.

labyrinthine investigations into relevant legal precedents, and an impartial, yet empathetic, dispassion.[109]

Dworkin frankly acknowledges that no Justice, both because of limitations of human ability and institutional constraints, can achieve this ideal. My claim is not that Dworkin consciously holds others to the standard of Judge Hercules (who resembles the Kantian moral agent). It is merely that Judge Hercules points to specific benchmarks. The implication that is most important for my argument is the connection between judicial reasoning, heroism, and masculine strength. Dworkin chooses the epitome of virility to represent his judicial hero. Though this connotation was likely unconscious, his choice invokes the specter of the irrational. Notwithstanding his prowess, the mythological Hercules had frequent paroxysms of madness and rage, as well as vengeance, arrogance, and resentment.[110]

Were this not a sexist metaphor, Athena is a better choice. We associate Athena with philosophy, reason and "Western civilization." Despite occasional vengeance, classical literature portrays her as more rational than Hercules. She often displays a balance of feminine and masculine attributes. She is both strong and pure of heart: one of her preoccupations is justice.[111] Most importantly, Athena sprang from Zeus' head,[112] that is, the divine mind. By contrast, Hercules was a bastard child of Zeus' prurient and philandering loins. Though mortal, the long and illustrious career of former Chief Justice Mclachlin demonstrates that it is possible to reach a state that approximates this Athenian metaphor. Nevertheless, whatever character one uses,

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[109] Dworkin, *Empire*, 250-75.

[110] Northrop Frye, Jay MacPherson, *Biblical and Classical Myths: The Mythological Frame of Western Culture*, Toronto: University of Toronto Press, 2004), 324.

[111] Frye and MacPherson, *Myths,* 155.

[112] Frye and MacPherson, *Myths,* 370.

Justices are neither deities nor demigods. Though there is much to admire in Dworkin's theory, it has two fundamental problems — sexism and abstraction. These two flaws can be traced back, at least in part, to Dworkin's Kantian sympathies. We will see the same problems in Rawls' works because they have the same Kantian origin.

He like reading will re is a sketch of several features from John Rawls' earliest major book, *A Theory of Justice,* and his last major work (in which he clarifies what he sees as many of the misunderstandings and errors of the first work), *Political Liberalism*. Catherine Audard reminds us that Rawls was a contemporary of the post-World War II human rights revolution as well as the ascendance of consumer culture. As such, his major concern is "democratic citizenship." Equality encompasses both the right to equal participation in social institutions, and the idea that every citizen is worthy of equal respect and concern.[113] In *A Theory of Justice*, Rawls attempts to explain and defend a non-consequentialist argument for rights, in which he purports to eschew Kant's metaphysical assumptions. The following quotation is a good encapsulation of how Rawls sees himself as differing from the metaphysics of Kant:

> What justifies a conception of justice is not its being true to an order antecedent and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine for us.[114]

In other words, Rawls tries to provide the best articulation of contemporary practice in theoretical terms against which we must measure current affairs. Rawls does not conceive of

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[113] Catherine Audard, *John Rawls*, Philosophy Now (New York: Routledge, 2007), 2-3; John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: Harvard University Press, 2001), 143.

[114] John Rawls, "Kantian Constructivism in Moral Theory," *Journal of Philosophy* 77, no. 9 (1980): 519.

society as an organic whole. For him, society is an aggregate of individuals who cooperate for mutual advantage.[115]

In brief, he purports to discard Kant's metaphysics by devising a thought experiment in which persons deliberate upon conditions required for a just society from an original position. He puts them behind a veil of ignorance concerning their actual statuses. These persons (and this is a crucial point for understanding criticisms of Kantianism) do not possess determinant genders, classes, levels of ability, sexual orientations, racialized statuses, religions, learned behaviours, personal traumas, and so forth).[116]

All that matters at this stage of the thought experiment, which is the only portion that must concern us, is a subject's ability to choose among a given set of goals. From these, it will construct a coherent life plan, once it has left the original position.[117] He then assumes that these abstracted subjects will rationally deliberate about the criteria which will ensure the maximum liberty and justice for all that is consistent with the equal liberty and equality of each.[118] Given Rawls' stated intention to provide the best articulation of contemporary practice, it is

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[115] John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press 1999), 4.

[116] He states: "My aim is to present a conception of justice which generalizes and carries to a high level of abstraction the familiar theory of the social contract as found in Locke, Rousseau and Kant... the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association ... This way of regarding the principles of justice I shall call justice as fairness ... Imagine that those who engage in social cooperation choose together, in one joint act, the principles which are to assign basic rights and duties and to determine the division of social benefits ... The choice which rational men would make in this hypothetical situation of equal liberty, assuming to the present that this choice problem has a solution, determines the principles of justice. Rawls, *Theory*, 10-11.

[117] Rawls, *Theory,* 5-6.

[118] Rawls, *Theory,* 53-4.

unsurprising that the list of primary rights and goods upon which his rational deliberators allegedly agree largely resembles the goods and rights prized in most liberal democracies.[119]

Though Rawls does not include sexual orientation protection or gender identity/expression as primary goods/rights to which every person is entitled, we can infer from his decision procedure that they should have been included. Persons in the original position would desire protection for queer rights because this maximizes the life plans that their future selves will be able to pursue, once they leave the original position.

Such attempts to create "a view from nowhere" may seem fanciful. In fairness to Rawls, however, he does not think such "philosophical disemboweling" is possible or desirable. He wants us to achieve what he calls "reflective equilibrium" between this position and the judgements we make in the actual situations that create politics.[120] Rawls uses the helpful example of grammar. As native speakers of a language, we often have a sense of what is and what is not grammatical. It is, however, useful to consult a grammar guide occasionally to know that "however" is a post-positive word that ought not to begin a sentence.[121]

Moreover, as even one of Rawls' strongest critics, Michael J. Sandel, explains, the postulate of bargaining in the original position is not meant to impute calculating selfishness to actors occupying it. Such selfishness would defeat its purpose by imputing historically specific cultural values into his counterfactual notion of disembodied subjectivity.[122] Instead, the criterion of mutual self-interest, combined with the aspiration to abstraction, is merely meant to ensure

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[119] Rawls, *Theory,* 54.

[120] Rawls, *Theory* 17.

[121] Rawls, *Theory* 41-2; Audard, 32-5.

[122] Rawls, *Theory*, 12, 118-23.

that agents comply with the Kantian criterion of prioritizing the right over the good.[123] The lexical priority of justice is required to consider each person, who defines herself by the choices she makes — and not the context from which she hails — as an end in herself. As freedom is a central concern for Kant, it is also a concern for Rawls.[124]

Before considering *Political Liberalism*, we need to understand shame in human rights and Rawls' thought. Particularly noteworthy is Rawls's inclusion of self-respect among his enumerated list of primary goods/rights. Primary goods are not subject to political negotiation. All rational actors would agree that a valuable life requires these goods. Rawls' analysis of shame corresponds to Kant's discussion of the duty to avoid a servile disposition. Rawls' includes it in his schedule of goods for the same reason. To act in a servile manner, which often flows from a lack of self-respect, diminishes the moral personality we possess.[125] The wrong use of emotions such as shame, disgust, humiliation, and other passions of negative normative assessment, is troublesome for liberal political culture. These emotions, often still gendered as feminine, are believed to restrict the freedom and authenticity liberalism desires to foster and from which it derives its principal justification.

The focus on self-respect as a primary good has an oblique connection to the (hetero)sexist nature of Rawls' analysis. Though he includes the family as part of the basic structure of society (at least in *A Theory of Justice*), thereby questioning the public-private distinction, he does not acknowledge that contemporary life is pervasively gendered. These

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[123] Michael J. Sandel, *Liberalism and the Limits of Justice* (New York: Cambridge University Press, 1989), 40-7.

[124] Rawls, *Theory*, 24-6., 109-18.

[125] Rawls, *Theory*, 386-92.

assumptions cause him to remove questions of gender from political justice.[126] He does not give adequate weight to the (possible) physical and psychological differences between men and women, as well as the disproportionate amount of domestic labour that falls on the latter group. Such power differentials may cause women to bargain differently in the original position.

The liberal conception of justice would, therefore, be transformed, perhaps even unrecognizable, if it gave equal recognition to (feminized) domestic labour.[127] The individualistic conception of bargaining, some may argue, is inherently patriarchal. It does not adequately consider the interests that disadvantaged groups, specifically women, have in collective action. [128] Moreover, attempting to solve the problem of intergenerational responsibility, Rawls makes parties to the original position (implied male) heads of households.[129] Rawls also appears to assume the naturalness of heterosexual hegemony. For Rawls, the family is primarily a site of love and caring rather than justice.[130]

Hence, this dissertation argues for tension at the heart of Canadian constitutional culture. A principal purpose of human rights is protecting subjects from negative emotion (whether perpetrated on themselves or by others, which flows from and is a consequence of stereotyping and morally unjustified treatment). Repeated and severe experiences of negative emotion undermine autonomy; yet, it would appear from the discussion of Dworkin, Kant, and Rawls that

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[126] Susan Moller Okin, *Justice, Gender, and the Family* (New York: Basic Books, 1989), 22, 94-97, 108.

[127] Karen Green, "Rawls, Women and the Priority of Liberty," *Australian Journal of Philosophy* 64 (Supplement 1986): 26-36.

[128] Linda R. Hirschman, "Is the Original Position Inherently Male Superior?" *Columbia Law Review* 94, no. 6 (1994): 1885-6.

[129] Jane English, "Justice between Generations." *Philosophical Studies* 31, no. 1 (1977): 91-100.

[130] Deborah Karens, "A Theory of Justice — and Love: Rawls on the Family," *Politics: Australian Journal of Political Science* 18, no. 2 (1983): 36-40.

shame, guilt, *ressentiment*, disgust, and humiliation, are necessary to enforce this type of liberal culture. Failure to perceive the dictates of the moral law (or what is often the same thing, constraints of rationality), is a justified reason for self and externally imposed moral sanction.[131]

In *Political Liberalism,* Rawls attempts to curb his earlier Kantian enthusiasm by focusing on the actual circumstances of politics, as opposed to a counterfactual thought experiment. Invoking the retelling of the so-called Wars of Religion, he argues that societies since that time have gradually come to accept profound differences concerning what he terms "comprehensive doctrines" as an inescapable fact of life. This fact has only become more apparent in the age of multiculturalism.[132] Such circumstances ought not to trouble us, however. Because respect for difference is still a necessary implication of equal respect and concern for persons, many comprehensive doctrines can coexist in relative harmony, if they are reasonable. The weakness of earlier forms of liberalism, among which he includes a strict interpretation of Kantian philosophy, was their monistic conception of the good life.[133]

In fact, with the benefit of hindsight and much (un)warranted criticism, he claims that detractors of *A Theory of Justice* often construe it in this way. What is crucial for Rawls in this new work is the idea that human beings have inescapable "burdens of judgement" (that is, biases constraining and giving shape to our subjectivity)[134] Nevertheless, despite these burdens, we can come to "an overlapping consensus" concerning fundamental rules, duties, and entitlements imposed by our shared political life. Reasonableness is a key idea for Rawls. Nevertheless, it is

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[131] Paul Saurette, *The Kantian Imperative: Humiliation, Commonsense, Politics* (Toronto: University of Toronto Press, 2005) 47.

[132] John Rawls, *Political Liberalism,* Expanded Edition, Columbia Classics in Philosophy each York: Columbia University Press, 2005), 303.

[133] Rawls, *Liberalism*, 58-66.

[134] Rawls, *Liberalism,* 54-8.

distinct from the formal and allegedly universal requirements of rational thought. Reasonableness denotes a cordial willingness to engage with others, listening to their convictions, and changing our own accordingly.[135] A reasonable overlapping consensus is possible because Rawls believes that what is important is the conviction at which persons arrive. It is not (usually) the premises that they used to support their conclusions that are essential.[136]

Different reasons support, among other basic constitutional values, the principle of *habeas corpus*, the prohibition of cruel and unusual punishment, the moral equality of human beings, the right to participate in the political process, protections for freedom of conscience and religion, and so forth. While individuals may have a plethora of reasons for coming to a decision, concerning constitutional matters, they must argue for adopting a policy choice using so-called "public reasons." Put differently, they must provide a justification that all are most likely to accept. Again, this follows from Rawls' basic requirement that we respect the moral personality of our fellow citizens. We actualize ourselves in the activities that we pursue. Hence, for a doctrine to be considered reasonable, it must not seek to impose its views on others by force. [137] Most religious and philosophical doctrines/practices use some degree of coercion and force, so persons understandably differ regarding in what contexts and to what degree this is acceptable.

If a Brahman Hindu argues that the state ought to prohibit (or severely curtail) the consumption of beef solely because it offends an injunction of her specific worldview, her claim cannot succeed on Rawls' account. No one who does not believe in this worldview can accept this claim. He has not had the experience required to regard cows as sacred. Consequently, to

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[135] Rawls, *Liberalism*, 47.

[136] Rawls, *Liberalism* 140-68.

[137] Rawls, *Liberalism*, 421-8.

restrict his freedom, based on a justification he cannot accept, only to assuage another person's religious scruples, is to treat him merely as a means to that other person's happiness and not as an end in his own right. Rawls makes his demand particularly stringent on officials who are constructed as public (and thereby masculine) because they represent the state. He expects them to maintain his overlapping consensus. The problem is that few persons can perform the cognitive dissonance necessary to give such "public reasons."[138]

Further, it is questionable, as William Connolly contends, whether it is even desirable that they do so. Surely public debate is better served by an honest account of why our interlocutors reached their specific (opposing) conclusions.[139] The above example is a deliberately easy one. Moreover, despite, or perhaps because of, greater interest in pluralism, *Political Liberalism* seems to remove the family from the basic structure and questions of justice, further reifying the false distinction between public and private, which was (implicitly) challenged in *A Theory of Justice*.[140]

To come right to the heart of this dissertation — it is not easy to separate public reasons causing moral objection to homoerotic behaviour and the legal recognition of same-sex marriage from the "religious content" of objections. What constitutes a so-called "reasonable" comprehensive doctrine is a matter of considerable dispute. The construction of the TWU community as reasonable or unreasonable is particularly pertinent. Is acceptance of gender and sexual diversity part of Canada's alleged "overlapping consensus," simply by the protections enshrined in the *Charter* and human rights codes? And, if so, how ought we to treat those

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[138] Rawls, *Liberalism*, 430-48.

[139] Connolly, *Secularist,* 3.

[140] Susan Moller Okin, "Political Liberalism, Justice, and Gender" *Ethics* 105, no. 1 (1994): 33-77.

individuals who oppose such identity and conduct for religious reasons in a manner that affords objectors equal concern and respect?[141] I have already stated that I am not a *modus vivendi* liberal. (Liberal) feminism requires a commitment to (gender) equality as a master value.[142]

Nevertheless, these are complicated questions that do not easily conform to the application of principles and drawing of bright-line distinctions upon which Kantians pride themselves. Isaiah Berlin notes, "[There is] a multiplicity of values, some of which conflict, or are incompatible with each other, pursued by different societies, different individuals, and different cultures; so that the notion of one world, one humanity moving in one single march of the faithful, *laeti triumphantes*, is unreal."[143]

Commenting on Berlin, John Grey argues that the human generation of virtues is no reason to expect agreement among subjects.[144] *Modus vivendi* liberalism also requires an emotional posture of adherents. It imagines a masculine and emotionally unencumbered self who is autonomous, and who can withstand the criticism of his fellows. In the *modus vivendi* liberal imagination, laws do not produce social consensus. They merely protect autonomous individuals from physical harm.[145] In other words, *modus vivendi* liberalism is suspicious of the expressive

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[141] Jocelyn MacLure and Charles Taylor, *Secularism and Freedom of Conscience* (Cambridge, MA: Harvard University Press, 2011), 73.

[142] Kimberly A. Yuracko, "Towards Feminist Perfectionism: A Radical Critique of Rawlsian Liberalism." *UCLA Women's Law Journal* 6 (1995): 3-4, 40-8. Consequently, John Exdell is correct when he criticizes *Political Liberalism* for antifeminist implications, specifically the latitude it allows "religious fundamentalism" in the private sphere, at the (possible) expense of gender equality for current and future subjects. John Exdell, "Feminism, Fundamentalism, and Liberal Legitimacy." *Canadian Journal of Philosophy* 24, no, 3 (1994): 442-9, a theory

[143] Isaiah Berlin, "Introduction," in *Philosophy in an Age of Pluralism: The Philosophy of Charles Taylor in Question*, eds. James Tully and Daniel M. Weinstock (Cambridge: Cambridge University Press, 1994), 3.

[144] John Gray, *Isaiah Berlin* (Princeton, NJ: Princeton University Press, 1996), 43.

[145] John Stuart Mill, *On Liberty* (Kitchener: Ont.: Batoche Books, 2001), 13-16.

harms caused by discrimination, and generally believes that it is often either impossible or undesirable for a state to adopt a substantive equality approach to social justice issues. Wendy Brown astutely explains why feminists should reject this perspective in the following quotation:

> [L]ike the so-called new [seemingly feminist] man, the late modern state also represents itself as pervasively hamstrung, quasi-impotent, unable to come through on many of its commitments, because it is decentralizing (decentring)…. because "it is no longer the solution to social problems,"… The central paradox of the late modem state thus resembles a central paradox of late modern masculinity: its power and privilege operate increasingly through disavowal of potency…[146]

Respect for persons entails a concern for, and an attempt to redress, the imbalances of power engendered by the proprietary nature of the liberal system. Consequently, the dispute over TWU's proposed law school can be characterized as one involving a debate over what respect for persons and the institutions that they form requires of us. Additionally, the dispute invites us to ponder to what extent laws should redress historical inequalities.

This chapter used Kant to explore a prominent form of liberalism and some of its problems. Kant's work is a useful heuristic with which to uncover the common-sense knowledge that maintains heterosexual hegemony. The historical ambivalence concerning emotion, which causes suspicion toward religion and (queer) sex, is a crucial facet of this dominance. Though Dworkin and Rawls update Kant and provide fertile material for critiquing (hetero)sexism, like Kant, they are preoccupied with the conflict between public duty and private emotion. This conflict means that they require a masculinist conception of shame to sustain their theories, even

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[146] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton, NJ: Princeton University Press, 1995), 194.

as their mutual commitment to an equal and just society is in tension with their implicit shaming practices.

Kantian philosophy tends to focus on abstraction and principle. While such emphasis is helpful, it frequently obscures the unequal power relations that inform our embodied and particularize lives. To have a complete analysis we need a historical discussion of the theology and the social conditions that have created our current (hetero)sexist culture. This context will support the contention that the sodomite continues to be a specter of some importance in Canadian constitutional culture and corroborate the related argument that we cannot hold anti-queer bias without endorsing an equally objectionable cluster of beliefs regarding white, male, and nondisabled superiority. History helps us to appreciate why Canadian constitutional culture ought to denounce this matrix of oppressive beliefs and practices. Moreover, this analysis allows us to preserve what is priceless in Kant. Namely, we should aspire to a society free of unjust shame, which cherishes the inalienable dignity of every imperfectly rational being.

Chapter 3:
TWU in Context

Precisely because we live in a time where the idea of individual responsibility reigns supreme, the vocation of sociology remains vital. In the same way that at the end of the nineteenth century it was radical to claim that poverty was the result not of dubious morality or weak character, but of systematic economic exploitation, it is now urgent to claim not that the failures of our private lives are the result of weak psyches, but rather that the vagaries and miseries of our emotional life are shaped by institutional arrangements… What is wrong are not dysfunctional childhoods or insufficiently self-aware psyches, but the set of social and cultural tensions and contradictions that have come to structure modern selves and identities — Eva Illouz [1]

Through the arm of Christian empire, ecclesiastical sexual principles began to regulate the way to live, make love, and be religious in the lands of the later Roman Empire. A millennium later, Christian sexual morality set forth on an even more ambitious venture into the world, hand in hand with European colonialism. Through this wide-ranging movement of Catholic and Protestant empire, the ecclesiastical sexual reforms that began to take shape by the second century i.e. have informed the sexual basis of Western culture. The inhabitants of Europe, the Americas, and various other regions live and make love in the domains of these religious sexual rules. This holds true even for the many persons, Christians and non-Christians alike, who resist Christian sexual morality and its predominantly marital orientation. The Christian pattern of family values remains powerful in the United States and elsewhere, even though its grip has slackened somewhat in major cities and is increasingly more open to challenge. Still, we should entertain no fantasies that we live in a society of post-Christian and genuinely pluralistic sexual rules. — Kathy L. Graeca [2]

We concluded Chapter 1 with a typology of emotions linked to normative judgements. Chapter 2 discussed how these emotions connect to the Kantian ideal of freedom and its troubling relationship to shame. This chapter uses that discussion of emotions to explain and contextualize the history of Christian theology concerning women and homoerotic behaviour. It is crucial to understand the Bible, the development of Christian sexual ethics, and the legal attitudes arising thereby. Considering this history helps us understand what the Kantian subject takes from Christian sexual morality and gender. Additionally, it helps us know how it differs from this

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[1] Eva Illouz, *Why Love Hurts: A Sociological Analysis* (Cambridge, MA: Polity Press, 2012), 4.

[2] Kathy L. Gaea, *The Making of Fornication: Eros, Ethics, and Political Reform in Greek Philosophy and Early Christianity,* Hellenistic Culture and Society (Berkeley: University of California Press, 2003), 3-4.

conception, while still using shame, disgust, and indignation as central disciplinary tools. Returning to my central idea — the dispute over TWU's proposed law school concerns the (rejection of) sodomites as a patriarchal theological and juridical category. As such, (Christian) shame is pivotal in the formation of Canadian queer subjectivity. We require this contextual analysis because discrimination is meaningless without proper context. Without understanding the history and theology behind anti-queer bias, as well as efforts to resist this oppression, one cannot appreciate why TWU's mandatory CCA was demeaning to queers and especially inappropriate within the context of legal education.

As we undertake this history, which will lay the groundwork for a critique, it is helpful to contemplate how our four protagonists may have different perspectives on this history owing to their (dis)advantages, in addition to how they believe society ought to redress shame based on gender and sexual orientation. Continuing our basic methodological approach, a socio-historical analysis strengthens our fundamental intuition that all persons are morally equal — and, consequently, they should be free from unjust shame — to argue that Christian (hetero)sexism is often not the loving response that it claims to be. Persons cannot respect queers as equals while seeking to restrict their sexual or gender variance through coercive means. Such restrictions further a legacy of misogynist shaming that has constructed them as subhuman. The ever present/absent specter of the sodomite neatly crystallizes this history of dehumanization, while not entirely circumscribing its limits.

Peter Beyer writes of the constitutional privileging of Protestantism in international law and North America specifically.[3] Janet Jakobsen and Ann Pellegrini[4], Heather Shipley[5], Pamela

[3] Peter Beyer, "Constitutional Privilege and Constituting Pluralism: Religious Freedom in National, Global, and Legal Context." *Journal for the Scientific Study of Religion,* 42, no. 3, 2003, 333-339.

Dickey Young[6], and Lori G. Beaman echo this sentiment. These authors endorse the idea of a "shadow establishment" of Christianity within Canada, as David Lyon phrases it.[7] Protestant hegemony is particularly evident when discussing Christian ideals of sexual and familial relations. Beaman reminds us that Catholicism has shaped Canadian (constitutional) culture, and in many cases, must be considered separately from Protestantism. Nevertheless, because Protestantism and Catholicism are historically nearly unanimous in their condemnation of homoerotic behaviour, though for slightly different reasons, they can be taken together as perpetuating an erstwhile hegemonic tradition of moral censure regarding same-sex sexual acts, which is now at odds with the Constitution and state policy.

Indeed, we will see that queer sexual acts received such opprobrium because they transgress several ideals which (used to) form the Christian mythos. Jamake Highwater notes that, "[T]here is [no act] as strongly prohibited as transcending a society's religious mythology and thereby calling into question its most tenaciously held attitudes concerning divinity, morality, normality, and the ultimate nature of reality."[8] In her book, *Fighting Over God: A Legal and Political History of Religious Freedom in Canada*, Janet Epp-Buckingham claims, "[t]he state views marriage as a social construct, but religious adherents view it as a covenantal

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[4] Ann Pellegrini and Janet Jakobsen, *Love the Sin: Sexual Regulation and the Limits of Religious Tolerance* (New York: Beacon Press, 2004), 55–9.

[5] Shipley, Heather. "Religious Freedom and Sexual Orientation: Equality Jurisprudence and Intersecting Identities." *Canadian Journal of Women and the Law,* 27, no. 2 (2015), 248-83.

[6] Pamela Dickey Young, *Christian Churches and Same Sex Marriage in Canada*, (Halifax and Winnipeg; Fernwood Publishing, 2012).

[7] David Lyon, Introduction in *Rethinking Church, State and Modernity: Canada between Europe and America,* ed. David Lyon and Marguerite Van Die. (Toronto: University of Toronto Press, 2000), 4.

[8] Jamake Highwater, *The Mythology of Transgression: Homosexuality s Metaphor*. (New York: Oxford University Press, 1997), 54.

relationship established by God. It is challenging for the state, and for the courts, to give full weight to religious beliefs because they cannot understand them."[9]. Based on my careful reading of court cases and submissions concerning TWU's proposed law school, she is, for the most part, factually correct. Nevertheless, Buckingham misses the point. The reasons the state has difficulty giving these claims full weight go far beyond a lack of understanding: they transgress entrenched constitutional assumptions. They are also, frankly, unethical.

It is true that many Evangelicals opposed to same-sex marriage based their opposition on epistemic faith in the divinely inspired character of Scripture. At least according to traditional Evangelical logic, their convictions cannot be subject to rational proof in the same way that empirical beliefs concerning the "natural world" can. Of course, from a phenomenological perspective, one can never appreciate what it is like to be a Buddhist or an evangelical Christian as an outsider. Nevertheless, it is necessary to comprehend opposition to same-sex marriage and present those arguments in their best form for evaluation and further dialogue. If persons ground their absolute opposition to homoerotic behaviour on a subjective and inaccessible experience of the divine, there is little we may write to persuade them. Consequently, we must look at discursive arguments in their theological and historical context.

The debate over same-sex marriage boils down to the following: is marriage — and proper erotic activity generally — in substance or essence a sexually dimorphic lifelong union between one man and one woman ordained by God since humankind's state of perfect grace;[10] or

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[9] Janet Epp-Buckingham, *Fighting Over God: A Legal and Political History of Religious Freedom in Canada* (Montreal: McGill-Queen's University Press, 2014). 218.

[10]John Paul II, *Man and Woman He Created Them: A Theology of the Body,* trans. Michael Waldstein (Toronto: Pauline Books and Media, 2006). For example, Patrick Lee and Robert P. George, *Conjugal Union: What Marriage Is and Why It Matters* (Cambridge: Cambridge University Press, 2014); Aristotle, *Metaphysics*, I.7, 1028b22-1030a7, trans. W.D. Ross, in *The Basic Works of Aristotle,* ed. R. McKeon (New York: Random House, 1941), 784-787.

are some, perhaps even all, of these features accidental to it and susceptible to redefinition by Kantian constitutional culture? Using more sociological language, is marriage a primarily procreative functional union in the Parsonian sense aimed at social stability[11] or is it a self-reflexive partnership of two persons to cultivate intimacy and foster satisfaction?[12] Furthermore, to what extent is the religious adherent obliged to submit to Kantian ideas of justice?

Understanding the theology and history that supports a (hetero)sexist and (cis)sexist definition of familial and sexual relations should lessen our appreciation of this tradition. This is true both on grounds internal to it and historical considerations. Ideas of nature help those in power gain and maintain it. Nature makes hierarchical relationships of privilege appear inevitable.[13] Particularly considering the historical context, (hetero)sexism is morally wrong for two reasons. First, it is liable to cause unjustified shame. Second, and relatedly, it treats persons as objects and not self-determining moral agents.

To review, (hetero)sexism is "a reasoned system of bias regarding sexual orientation. It denotes prejudice in favor of heterosexual people and connotes prejudice against bisexual and, especially, homosexual people. ... It is rooted in a largely cognitive [and I would argue, emotional] constellation of beliefs about human sexuality." (Hetero)sexism maintains "heterosexuality is the normative form of human sexuality. It is the measure by which all other

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[11] Robert Bellah, *The Good Society* (New York: Random House, 1991), 45-49.

[12] Anthony Giddens, *The Transformation of Intimacy: Sexuality, Love and Eroticism in Modern Societies* (Cambridge, MA: Polity Press, 1992), 62.

[13] Raymond Williams, "Ideas of Nature," in *Problems in Materialism and Culture* (London: Verso, 1980), 68; Noel Castree, "Socializing Nature: Theory, Practice, and Politics," in *Social Nature: Theory, Practice, and Politics*, eds. Noel Castree and Bruce Braun, (Malden, MA Blackwell Publishers, 2001), 20-33.

sexual orientations are judged."[14] I also noted in Chapter 1 how anti-queer bias is inseparable from objectionable misogyny, positions on emotional comportment, and (un)conscious opinions concerning persons with disabilities. Hence, heterosexism endorses an interconnected network of hierarchies. These views, especially considering the *Charter of Rights*' overarching commitment to gender equality,[15] ought to make us regard religious doctrines of (hetero)sexism with similar levels of suspicion with which we now view the doctrines of *terra nullius*,[16] racist theology, [17] and anti-Semitism.[18]

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[14] Patricia Beattie Jung and Ralph F. Smith, *Heterosexism: An Ethical Challenge* (Albany: SUNY Press, 1993), 13-4.

[15] Lorraine E Weinrib, "Ontario's Sharia Law Debate: Law and Politics under the Charter." *Law and Religious Pluralism in Canada,* ed. Richard Moon (Vancouver: UBC Press, 2008) 239-45, 261.

[16] Canadian Conference of Catholic Bishops, *The 'Doctrine of Discovery' and Terra Nullius: A Catholic Response,* Canadian Conference of Catholic Bishops*,* published May 16, 2016, accessed July 12, 2018 at http://www.cccb.ca/site/images/stories/pdf/catholic%20response%20to%20doctrine%20of%20discovery%20and%20tn.pdf; Andrew Fitzmaurice, "The Genealogy of Terra Nullius," in *Australian Historical Studies* 129 (2007), 13.

[17] Racism was also once justified by sincerely held religious beliefs. In particular, God marked Cain for the murder of his brother Abel (Gen. 4:15), and this mark was interpreted as describing the skin colour and features of nonwhites. Likewise, God curses Ham for seeing his father, Noah, naked (Gen. 9:20). Persons also sometimes believed that light skin was more pure and, thereby, closer to the image of God. George M. Frederickson, *Racism: A Short History* (Princeton, NJ University Press, 2002), 36; 23 For a discussion see David M. Goldenberg, *The Curse of Ham: Race and Slavery in Early Judaism, Christianity, and Islam* (Princeton University Press, 2005).

[18] Anti-Semitism was once justified on sincere religious grounds: namely, that the Jews purported to assume transgenerational responsibility for the crucifixion of Jesus in the Gospel of Matthew (27:5) and certain statements attributed to Jesus in the Gospel of John (8:44). This contributed to the idea that Jewish commercial practices, specifically, the then thought biblically prescribed practice of usury (lending money at interest) (1 Tim. 6:9-10) spread disease. Robert S. Wistrich, *Anti-Semitism: The Longest Hatred* (New York: Pantheon, 1991), 27. The charge of deicide eventually created the persistent and pernicious paranoid fantasy that Jews sacrificed Christian children and use their blood to make Passover food, in a perverse desecration of the Eucharist. (Frederickson, 20; Wistrich, 36). It was only later, after ideas of political enlightenment seemed to challenge the plausibility of using religion as an explicit basis for the imposition of legal disabilities, that anti-Semitism began to take on a racialized and pseudoscientific character. Rather than being corrupted by his religion and having a possible remedy through conversion, the Jew was now intrinsically evil; and his character was

At the same time, it is arguable that (hetero)sexism is more intrinsic to the Christian message than is ableism and anti-Semitic sentiments, and it cannot be dismissed out of hand. Because (hetero)sexist views form part of a coherent perspective, indeed, the one that dominated Euro-American laws for nearly two millennia, the question becomes to what degree may state-made law afford space for an alternative perspective, opposed to recent constitutional developments? One thing (hetero)sexism is not, however, is a diverse view with a value-neutral tradition. It maintains male power and privilege and relocates disgust-anxieties onto minorities who have born the shame of not being proper masculine and able-bodied subjects. We shall examine Paul's letter to the Romans in context. This analysis will help us to understand the historical consequences of Christian misogyny. This misogyny laid the groundwork for the formation of queer subcultures. Hence, we must examine the CCA holistically, specifically as it pertains to Evangelical identity.

SODOMY AND HAUNTOLOGY

Christianity has long fashioned a stained-glass closet around queer sexuality. Queerness is Christianity's open secret. As a (historically) patriarchal religion, centered around very complicated ideas of (male) sexuality and masculinity, it has had a "don't ask, don't tell" policy when it comes to queer sexuality and gender expression. Nevertheless, as several queer-affirmative scholars have noted, there is something "really gay" in Christianity and, by

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purportedly inimical to the supposed values of Western civilization (Frederickson 19). This is not to suggest that Christian anti-Semitism was not also behind the abominable atrocities of World War II and does not persist into the present. Pope Paul VI, *Nostra Aetate: Declaration on the Relation of the Church to Non-Christian Religions*, Vatican, published on October 28, 1965, accessed on July 12, 2018, at http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_nostra-aetate_en .html.

extension, Western philosophy and law. (Male) homoerotic desire seems to be everywhere in Christianity. It is a religion centered around an imagined as beautiful male in the prime of life, whom one is exhorted to love, but not *too much*.[19] Consequently, Sigmund Freud is correct when he argues in *Group Psychology* that one of Christianity's central problems is how to divert (the assumed) cross-sex love of couples onto an ideal male leader, whom both men and women may love, while deferring the libidinal satisfaction of physical union with him. Nevertheless, they must sublimate this passion to receive greater levels of spiritual perfection.[20] This relationship is particularly complicated for Evangelical males. Their faith enjoins them to have a close and personal relationship with fellow Christians, while hegemonic evangelical sexual and gender norms can make this difficult.

Adapting Karl Marx and Frederick Engels' (in)famous quotation at the beginning of the *Communist Manifesto*, a specter hangs over Canadian constitutional culture. That specter is the sodomite. The ghost of the sodomite urges us to analyse Canadian constitutional culture from and intersectional queer-positive perspective. As well, Jacques Derrida's concept of hauntology is crucial for understanding my argument.[21] First, Derrida claims that ontologies haunt even

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[19] Richard Rambuss, *Closet Devotions* (Durham, NC: Duke University Press, 1998); Mark D. Jordan, *The Silence of Sodom: Homosexuality in Modern Catholicism* (Chicago: University of Chicago Press, 2000); Gerard Loughlin, "Introduction," in *Queer Theology: Rethinking the Western Body* (London: Blackwell Publishing, 2007), 1-5; 44; Frederick S. Roden, *Same-sex Desire in Victorian Religious Culture* (Houndmills, Basingstoke, Hampshire; New York: Palgrave Macmillan, 2002).

[20] Sigmund Freud, "Group Psychology and the Analysis of the Ego," trans. James Strachey, in *The Standard Edition of the Complete Psychological Works of Sigmund Freud vol. XVIII*, ed. James Strachey (London: Hogarth Press and The Institute of Psychoanalysis, 1981), 88-93.

[21] Jacques Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning and the New International*, trans. Peggy Kamuf, Routledge Classics (New York: Routledge, 2006), 9-10, 63, 202.

though they no longer have the persuasive force or number of followers they once did. Second, and perhaps more interestingly, hauntology refers to the artificiality of linear temporality. To understand any given moment, we must look to constructions of the past and anticipations of the future simultaneously. Third, the metaphor of haunting describes the dynamics of presence and absence that are essential to this project.

Christian theology makes the basic distinction between *eros*, (animal desire or lust in excess), on the one hand, and *agape* (compassion, selflessness, asexual charity), on the other. Erotic desire is somewhat destructive. It seeks to capture what it does not have. By contrast, *agape* generates community. Thus, Swiss theologian Anders Nygren identifies the emergence of heresy with the perversion of Christian *agape*.[22] Paul of Tarsus says, "[*Agape*] is patient; [*agape*] is kind; [*agape*] is not envious or boastful or arrogant or rude. It does not insist on its own way; it is not irritable or resentful; it does not rejoice in wrongdoing but rejoices in the truth. It bears all things, believes all things, hopes all things, endures all things." (1 Cor. 13:4-7). The historically hegemonic Christian, and later psychoanalytic, view has been that homoerotic relationships are entirely carnal and thus not capable of agapeic love.[23] Evangelicals often support this through a particular reading of biblical passages that purport to condemn homosexuality and enforce rigid gender norms (Rom. 1:16-30, 1 Cor. 9-6, Tim. 1:10, Lev. 18:22, 20:13, Gen. 19, 1:27).[24]

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[22] Anders Nygren, *Agape and Eros*, trans. Watson (New York: Harper and Row, 1969), 51. For the record, I do not agree with this distinction and for criticism of it, see Daniel Boyarin, "What Do We Talk About When We Talk About Platonic Love?," in *Toward a Theology of Eros: Transfiguring Passion at the Limits of Discipline*, eds. Virginia Burrus and Catherine Keller, (New York: Fordham University Press, 2006), 3-6.

[23] Cheshire Calhoun. *Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement* (Oxford: Oxford University Press, 2000), 146, Gregory Vlastos, "The individual as the object of love in Plato's Symposium," in *Platonic Studies* (Princeton, N.J: Princeton University Press, 1973), 25-29.

[24] The picture of the bible and homoerotic behaviour and gender diversity is often considerably more complicated than presented by most Evangelicals. Long, 86; Dale B. Martin,

Though this typology is weakening, the way that our society and, specifically, many religious and legal actors within it, structure erotic and emotional experience still has vestiges of the Ancient Greek distinction between the active (masculine) *erastes* [lover] and the passive (feminine) *eromenos* [beloved]. Consequently, Judith Butler is correct when she observes that it is difficult to parse gender, and I would add religious, performativity from (sexual) desire. She also argues that "Western" metaphysics and law, from Ancient Greece onward, predominately considered desire and emotionality as forms of weakness and lack to be managed and controlled.[25] Legal discourses, especially many of the Kantian and natural law assumptions that conflict within them, rely on (implied metaphors of) procreation and penetration to discipline subjects. These subjects also participate in the generation of law while under its dominion. This focus on reproduction maintains an androcentric bias within Canadian legal discourse.

Eric O. Clarke notes that this phenomenon relates to liberalism's ongoing project of transforming Christian vices into bourgeois virtues. In liberal discourse, greed becomes industriousness; sodomy becomes a marker of privatized and responsible sexual citizenship.[26]

"(Hetero)sexism and the Interpretation of Romans 1:18-32," in, *The Boswell Thesis: Essays on Christianity, Homosexuality, and Social Tolerance*, ed. Matthew Kuefler (Chicago: University of Chicago press, 2006), 133-140; John Boswell, *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century*. (Chicago: University of Chicago Press, 1980), 106, Brian Malley, *How the Bible Works: An Anthropological Study of Evangelical Biblicism* (New York: Altamira Press, 2004), 73-105, Roy Bowhen Ward, "Why Unnatural? The Tradition behind Romans 1:26-27," *Harvard Theological Review*, 90, 3, (1997): 267-73, Stephen D. Moore, *God's Gym: Divine Male Bodies of the Bible*. New York: Routledge, (1996). Bernadette J. Brooten, *Love between Women: Early Christian Responses to Female Homoeroticism*. Chicago Series on Sexuality, History, and Society (Chicago: University of Chicago Press, 1996), 216-46.

[25] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* Feminism/Postmodernism (New York: Routledge, 1990) 1-13, 35-38.

[26] Eric O. Clarke, *Virtuous Vice: Homoeroticism and the Public Sphere*, Series Q (Durham, N.C.: Duke University Press, 2000), 2.

Non-phallic sexuality remains mostly unintelligible in Canadian legal discourse.[27] Much to the impoverishment of other queerer possibilities, sodomy remains the hegemonic construction through which we must understand the juridical regulation of nonnormative (phallocentric) sex. This preoccupation with sodomy, and its ever present/absent disavowal, as Alan Bloom correctly observes, is at the core of the Occidental philosophical and legal imagination. Alas, contrary to Cher's 2012 single, ours is not a "Woman's World."[28] The unnatural sodomite allows non-disabled, straight, cisgender, and white men to control it. Consequently, this dissertation challenges both sodomy and religious freedom as intertwined and contestable categories to — in the words of feminist philosopher and theologian Mary Daly — start to imagine a world "beyond God the Father."[29] Disability challenges masculinity, and the related idea of an ordered and pure universe. Consequently, it highlights the fragility and impermanence of existence and the everyday monstrosities we encounter. As Margrit Shildrick explains in the following quotation:

> While it is not difficult to recognize the mechanisms at work in the response to disabled bodies, I want to stress that similar moves operate in relation to all forms of monstrosity.

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[27] My preoccupation with masculinity, specifically sodomy, is not meant to exclude female and, specifically, lesbian experiences. Instead, it is intended to highlight how Canadian law and the forms of Christianity that influence it, are still imagined male homosocial enterprises that use constructions of (disavowed) femininity to strengthen (erotic) bonds between (imagined) masculine actors. Eve Kosofsky Sedgwick, *Between Men: English Literature and Male Homosocial Desire*, 2nd ed., Gender and Culture (York: Columbia University Press, 1993), 1-5.

[28] Cher, vocalist, *Woman's World*, Matt Morris, Paul Oakenfold, Anthony Crawford, Jeff Fenster, Joshua Walker, 2011, Warner's Bros. Records, track 1 on *Closer to the Truth,* 2012, compact disc Warner Bros. Records;

[29] Mary Daly, *Beyond God the Father: Toward a Philosophy of Women's Liberation*, rev, ed. (Boston: Beacon Press, 1985), esp. 98-131.

> It is, above all, the corporeal ambiguity and fluidity, the troublesome lack of fixed definition, that marks the monstrous as a site of disruption.[30]

We should resist the specters of the sodomite and homosexual because they construct "afflicted homosexual persons" as fundamentally diseased or disabled monsters who transgress the acceptable boundaries of gender, and who also possess improper sexual shame. Though Jesus speaks of persons and not concepts in a famous passage from the Gospel of Matthew, Christian (hetero)sexism is a tree which the related poisons of misogyny and shame nourish. This tree brings forth the sodomite as a torturously noxious fruit by which we can know and denounce anti-queer bias (Matt. 7:17-18).

Consequences of Christian Heterosexism

The Catechism of the Catholic Church provides an adequate, if sententious, summary of the Western (Christian) attitude towards (mainly male) homoerotic behaviour. Like many other official ecclesiastical and legal pronouncements, it purports to know of a transhistorical transcultural phenomenon called homosexuality. With the modification that Evangelicalism places much more emphasis on Scripture, this statement could apply to the hegemonic evangelical opinion as well. The *Catechism* states the following:

> Homosexuality refers to relations between men or between women who experience an exclusive or predominant sexual attraction toward persons of the same sex.... Basing itself on Sacred Scripture, which presents homosexual acts as great depravity, tradition has always declared homosexual acts are intrinsically disordered. They are contrary to natural law. They close the sexual act to the gift of life. They do not proceed from a

[30] Margrit Shildrick, *Embodying the Monster: Encounters with the Vulnerable Self* (London: SAGE, 2002), 80.

> genuine affective and sexual complementarity. Under no circumstance can they be approved.[31]

In addition, though disagreeing with the Congregation for the Doctrine of the Faith, it is correct when it states that, if we disapprove of homoerotic activity, we must also, at best, have an ambivalent attitude towards those who possess homoerotic sexual orientations. These orientations inclined us toward unethical behaviour, in the same way that kleptomania is, at best, morally suspect. It may encourage behavioural expression in the activity of shoplifting.[32]

The purpose of this section is to show that we can link anti-queer bias in hegemonic evangelical culture and Canadian law to the patriarchal structure that undergirds Christian theology. Though I recognize that many Evangelicals value sex and that there is a robust literature concerning Evangelical sex lives, the theology that undergirds these hegemonic conceptions is highly gendered. This theology, for better or worse, means that hegemonic Evangelical conceptions of sex are in tension with many tenants of the Kantian framework.[33] As Pamela Dickey Young observes "[I]t is not an accident that the churches most opposed to same-sex marriage are also those in which women's roles are seen as vastly different from men's."[34]

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[31] Catholic Church, "Chastity and Homosexuality," in *The Catechism of the Catholic Church*, 2nd ed. (Vatican: Libreria Editrice Vaticana, 2012), §2237.

[32] Congregation of the Doctrine of Faith, "Letter to the Bishops of the Catholic Church on the Pastoral Care of Homosexual Persons." Accessed on June 27, 2018, http://www.doctrinafidei.va/documents/rc_con_cfaith_ doc_l 986100 l_homosexual-persons_en.html.

[33] Kelsy Burke, *Christians Under the Covers: Evangelicals and Sexual Pleasure on the Internet* (Berkeley: University of California Press), 2016.

[34] Pamela Dickey Young, "It's All about Sex: The Roots of Opposition to Gay and Lesbian Marriages in Some Christian Churches" in *Faith Politics and Sexual Diversity in Canada and the United States,* ed. David Rayside and Clide Wilcox (Victoria: UBC Press, 2011).

Thus, the patriarchal control over women's bodies and the conceptual framework that feeds heterosexism have much in common.

Early Church Fathers criticized homoerotic activity. Though some Greco-Roman moralists criticized some aspects of homoerotic sex, Christian Emperors Theodosius and Justinian promulgated the first laws against (male) homoerotic activity requiring capital punishment.[35] Various European countries adopted versions of these laws, but they suffered sporadic enforcement. In some cases, this indulgence permitted thriving queer subcultures.[36] Numerous factors influenced queer persecution. Many of these were only tangentially related to theology.[37] Nevertheless, Mark Jordan informs us that, however much this may have translated into actual punishment, from the middle of the 11th century, there was a sustained theological attack against sodomy, even though this term sometimes referred to a broader range of activity than male-male anal sex. It was a grave "sin against nature."[38] Sodomy was an insult to God because it blasphemed the ordained masculine hierarchy within God's creation. This blasphemy, in turn, defiled the relationship between the passive human creature and an active divine creator. John Boswell notes that this first required a popular conception of "nature," as well as the belief that non-procreative sexual activity deliberately subverts this supposed order of nature.[39] During

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[35] Derek Sherwin Bailey, *Homosexuality and the Western Christian Tradition*. (Hamden, CT: Archon Books, 1975) 70-81.

[36] Alan Bray, *Homosexuality in Renaissance England*, Between Men and Women: Lesbian and Gay Studies (New York Columbia University Press, 1996), esp. 81-113.

[37] John Boswell. *Christianity, Social Tolerance, and Homosexuality: Gay People in Western Europe from the Beginning of the Christian Era to the Fourteenth Century*. (Chicago: University of Chicago Press, 1980), 243-68.

[38] Mark D. Jordan, *The Invention of Sodomy in Christian Theology*, Chicago Series on History, Sexuality, and Society (Chicago: University of Chicago Press, 1997), 45-67, 92-159.

the late medieval period, persons became more preoccupied with the gender roles ascribed to men and women.[40] Lest I exclude transgender, intersex, and two-spirit persons, this preoccupation with proper gender roles caused anxiety concerning cross-dressing and other forms of gender nonconforming behaviour.[41] Late medieval intellectuals increasingly called homoerotic activity unnatural. While fornication *simpliciter* uses sex in the wrong way, sodomy, bestiality, and masturbation are grouped and are equally evil.

Thomas Aquinas offers the most coherent exposition of traditional Christian sexual theology and anti-queer animus. He says the following regarding communitarian human nature: "Since one human being is a part of the multitude, any human being, with all that he is and has, belongs to the community, just as any part, with all that it is, belongs to the whole. Hence, too, nature inflicts a loss on the part in order to preserve the whole."[42]

The first thing to note here is that Aquinas is not a liberal thinker. He prizes the collective over the individual.[43] Second, the traditional conception of Aquinas says that he assumed a monarchical and patriarchal structure.[44] God issues laws that are preeminent. These laws are, in turn, understood through our interaction with nature and our ability to exercise practical reason.

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[39] John Boswell, "Concepts, Experience, and Sexuality," in *Que(e)rying Religion: A Critical Anthology*, eds. Gary David Comstock and Susan Henking (New York: Continuum, 1999), 123.

[40]Mary Wiesner-Hanks, *Christianity and Sexuality in the Early Modern World: Regulating Desire, Reforming Practice*. Christianity and Society in the Modern World. (New York: Routledge, 2000), 38.

[41] Marjorie Garber, *Vested Interests: Cross-Dressing and Cultural Anxiety* (New York: Routledge, 1991), esp. 1-40.

[42] Thomas Aquinas, *Summa Theologiae*, trans Dominican Fathers the English Province [1920], ed. Kevin Knight [2016], I—II. 96.4, resp. Available from New Advent http://www.newadvent.org/summa/5092.htm Accessed June 24, 2018.

[43] *ST,* I-II.90.1-2; 94.3, ad 1.

[44] *ST*, I-II.90.4, resp.

Positive law (of monarchs) is righteous, so long as it corresponds with divine scriptural law and purportedly eternal truths deduced from prudent reflection upon nature. Individual liberty is permitted only insofar as it does not hinder these three forms of law. Each of these three laws has lexical priority over one another.

As Phillip Reynolds states, "divine law both makes up for the deficiencies of human reason and volition and guides human beings to their ultimate end, which is union with God."[45] As he is traditionally understood, Thomas Aquinas developed matrimonial theology, sex, and law that remains highly influential, both at the level of popular morality and official (mostly Catholic) theology. Aquinas held that the Fall did not entirely corrupt human nature and that some natural impulses were good. Nonetheless, the Fall severely impaired our perception of what is good.

Marriage helps us realize one primary and one secondary good. The primary good is the propagation and rearing of children. The secondary good is friendship (between the two cross-sex spouses), under which he subsumes gender complementarity, support, household management, (sexual) pleasure, avoidance of fornication, and social stability.[46] For Aquinas, and those following him, nature is an interconnected system of objects and creatures with rationally discernible ends. This process of inferential reasoning supports Aquinas' contention that homoerotic behaviour is wrong. Reynolds notes the following:

> Thomas predicated three kinds of arguments on what was natural. First, to show that something is natural, one may show that it meets basic natural needs in a manner

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[45] Philip L. Reynolds, "St. Thomas Aquinas," in *Christianity and Family Law: An Introduction*, eds, John Witte, Jr. and Gary S. Hauk, Cambridge Series on Christianity and the Law (Cambridge: Cambridge University Press, 2007), 183; *ST*, I—II.91.1-4.

[46] Reynolds, 183.

> congruent with human nature. Second, inasmuch as fulfilling such needs is a thing's purpose, one may argue that it is wrong to thwart that purpose by using the thing for some other, incompatible. End. Third, one may argue that certain actions, regardless of their consequences, do not befit human nature or the human species. The first consideration, from need, is most akin to innate natural law, since it posits goods that fulfill natural inclinations. In the field of sexual ethics, it is difficult to derive prohibitions from innate natural law or need, but easy to derive them from function and fittingness.[47]

To engage in cross-sex intercourse whose primary aim is not conception (that is, fornication, adultery, rape, or marital sex that is too passionate) is to circumvent the primary purpose of sexual organs, and is, thereby, to act immorally and irrationally.[48] From these premises, he also abhors contraceptive methods and sex outside the missionary position. For Aquinas, sexual acts not oriented to conception are particularly grievous sins. Sex, and the attendant propagation of the human species, is essential to the common good. The more crucial an activity is to the common good, the more imperative it is that this activity be properly ordered toward its essential function. [49] Homoerotic conduct is abhorrent; for there is nothing natural or loving in it. Were this insufficient for any reasonable and decent person, it also demonstrates unbridled passion. Thus, homoerotic behaviour is a grave threat to the common good. Sodomy was abominable because Aquinas believed it alienated the affection between the sexes required for social stability and the common good.[50] Aquinas thinks homoerotic activity perverts a God-made pyramid in which a man is actually and metaphorically atop his wife.

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[47] Reynolds, 184.

[48] ST, II—II. 154.1.

[49] Aquinas, *ST* II—II.153.3, resp.

It is critical to note that the harm of rape is the perversion of sexual desire away from its natural aim of harmonious copulation, not principally the injury done to the woman (or man). This reflects Aquinas' upper-class and sexist worldview. The primary harm of adultery, both in Aquinas and at common law, was that a man could not be sure of his progeny's origin with an unfaithful wife.[51] For Aquinas, women were not fully rational; ergo, they were not fully human. The role for which they were ideally suited was that of helpmate to their husband.[52] Also, non-procreative cross-sex intercourse is a sin because it disrespects the alleged sacramental quality of marriage (Eph, 5:32).[53] Though Thomistic natural law grants some room for moral freedom, because it legally proscribes only the gravest sins, this concession is prudential. It would impose its moral prescriptions in secular life, were such an aspiration attainable.[54]

The Protestant Reformation continued the (hetero)sexist vices of Aquinas.[55] It is true that the Protestant Reformation gave greater stature to the institution of matrimony and domestic life.[56] Nonetheless, Luther and his fellow *men* still considered (female) sexuality as a primary vehicle of sin and social disorder.[57] John Calvin, another protestant reformer and progenitor of

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[50] *ST,* (I-II.94.3, ad 2).

[51] Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford, CA: Stanford University Press, 2007), 75-80; Reynolds, 187-90.

[52] Genevieve Lloyd, *The Man of Reason: "Male" and "Female" In Western Philosophy*, 2nd ed., Routledge Idea Series (1984, repr. London: Routledge, 2004), 34-9.

[53] Reynolds, 185.; See Rev. Ronald. Lowler, Joseph Boyle, Jr., William E. May, *Catholic Sexual Ethic*s (Huntington: Our Sunday Visitor, 1985), 42-51.

[54] Lowler, Boyle, and Mary, 200.

[55] *ST* 1.18, 2 resp.

[56] Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, MA: Harvard University Press, 1989), 218.

contemporary Evangelical theology, thought it was the state's absolute duty to regulate sexual conduct. For Calvin, the Fall destroyed the human will. This corrupted will, in turn, required absolute discipline, especially regarding lust.[58]

Canada is an heir to the British tradition, which combined the jurisdiction of the Ecclesiastical and common law courts under Henry VIII. This meant that the theology undergirding the prosecution of Ecclesiastical (sexual) offences became incorporated into the common law. [59] Echoing the theology of earlier generations, the ever progressive Sir William Blackstone offers the following charming description of sodomy as "more detestable than rape… a still deeper malignity; the infamous crime against nature, committed either with man or beast… it is an offense of so dark a nature…[that it] is a disgrace….[a] "*peccatum illud horribile, inter christianos non nominandum*" ["infamous and horrible crime not to be named among Christians"]."[60] This injunction to silence — notice Blackstone's use of Latin to avoid speaking about sodomy while having an insatiable desire to speak concerning it, carried over into Canada's Christian colonial origins. White monogamous, cross-sex, procreative, and civilized

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[57] Stephen Ozmant and John Witte Jr., "Martin Luther," in *Christianity and Family Law: An Introduction*, eds. John Witte, Jr. and Gary S. Hauk, Cambridge Series on Christianity and the (Cambridge: Cambridge University Press, 2007), 197-199.

[58] Barbara Piktin, "John Calvin," in *Christianity and Family Law: An Introduction*, eds. John Witte, Jr. and Gary S. Hauk, Cambridge Series on Christianity and the (Cambridge: Cambridge University Press, 2007), 223-225.

[59] Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge, MA: The Belknap Press of Harvard University Press), 309; *An Acte for the punysshement of the vice of Buggerie (Eng.), 25 Hen. 8, c. 6.* (1533); Sir Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown, and Criminal Causes* (London: E. and R. Brooke, 1797), 49 [originally published 1644; cited in R. *v.* D.L.W., 2016 SCC 22, para. 27, [2016] 1 SCR. 402.

[60] Sir William Blackstone, "Commentaries on the Laws of England." Book 4, Chapter 15. LONANG Institute, accessed April 6, 2018. Https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-415/; originally published (Oxford: Clarendon Press, 1765-69).

sexuality and gender became essential to the new nationalist project.[61] This infamous heritage meant that an updated sodomy statute, albeit with lesser penalties, became incorporated into the *Canadian Criminal Code*..[62] Increased emphasis on the control of sexual behaviour was in keeping with the Victorian and early 20th century social purity movement. This movement shaped Canadian law and public policy, by emphasizing sexual hygiene, urban housing reform, and harmonious domestic life.[63]

Lest one has an excessively laudatory notion of "traditional marriage's" sacramental pedigree, one must recall that the paternalism and male chauvinism characteristic of this brief survey of "Western" theologians informed the English common law doctrine of coverture. Sir William Blackstone described this legal doctrine as follows:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs every thing; and is therefore called in our law *femme-covert, foemina viro co-operta*; is said to be covert-baron, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her coverture. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties, and disabilities, that either of them acquire by the marriage.[64]

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[61] Wiesner-Hanks, 213-50; Martin Cannon, "The Regulation of First Nations Sexuality," in *Queerly Canadian: An Introductory Reader in Sexuality Studies*, eds. Maureen FitzGerald, Scott Rayter (Toronto: Canadian Scholars Press, 2012); Sarah Carter, *The Importance of Being Monogamous: Marriage and Nation Building in Western Canada to 1915*. 1st ed. West Unbound. Edmonton: University of Alberta Press, 2008. 25-102.

[62] *DLW*, para. 35.

[63] Mariana Valverde, *The Age of Light, Soap and Water: Moral Reform in English Canada, 1885-1925*, 2nd ed. (Toronto: University of Toronto Press, 2008), 1-20.

The doctrine of coverture has not had legal effect for some time. I raise it only to challenge the implied politics of patriarchal nostalgia that inform appeals to "traditional family values." One wonders whether marital rape is a traditional family value. As Judith Herman notes in the following quotation:

> Not until the women's liberation movement of the 1970s was it recognized that the most common post-traumatic disorders are those not of men in war but of women in civilian life. The real conditions of women's lives were hidden in the sphere of the personal, in private life. The cherished value of privacy created a powerful barrier to consciousness and rendered women's reality practically invisible. To speak about experiences in sexual or domestic life was to invite public humiliation, ridicule, and disbelief. Women were silenced by fear and shame, and the silence of women gave license to every form of sexual and domestic exploitation. Women did not have a name for the tyranny of private life. It was difficult to recognize that a well-established democracy in the public sphere could coexist with conditions of primitive autocracy or advanced dictatorship in the home.[65]

Herman's astute discussion of shame allows us to comprehend the link between misogyny and anti-queer bias more clearly and to posit a strong link between the sodomite, as a legal and theological caricature of queer experience, and the doctrine of coverture. If we repudiate one, we ought to repudiate the other. Furthermore, we should question the dubious distinction between

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[64] Sir William Blackstone, "Commentaries on the Laws of England," vol. 1. LONANG Institute, accessed April 6, 2018. Https://lonang.com/library/reference/blackstone-commentaries-law-england/bla-415/; originally published (Oxford: Clarendon Press, 1765-69), 442.

[65] Judith Herman, *Trauma and Recovery: The Aftermath of Violence — From Domestic Abuse to Political Terror* rev. ed. (New York: Basic Books, 1997), 28.

public and private life that nourishes these concepts, while we also continually question who benefits from this imagined partition.

The doctrine of coverture permitted marital rape, owing to (married) women's legal death and the concomitant near absolute power of the (Christian) male head of household.[66] Women have exercised considerable power while (theoretically) under patriarchal legal control, and liberal political philosophy has not ended systemic (hetero)sexism. Nevertheless, liberalism's aspirations to personal autonomy and (eventually) gender equality, have seriously undercut many of the religious presuppositions that have justified male chauvinism.

Simone de Beauvoir elegantly distills the harms of even benevolent and loving male chauvinism in the following passage. This passage can also help us to understand the psychological and social harms of anti-queer bias:

In summary, the dominant Christian, and, therefore, hegemonic, attitude within Euro-American, legal systems towards sex has been *do not do it*! If one must do it, do not enjoy it *too much*; and only do it if one's intercourse is within the context of a cross-sex, "racially pure," state and church sanctioned, monogamous, lifelong, (potentially), procreative, and matrimonial union. This is a union in which the two sexes of male and female (and it is critical to observe that in addition to excluding queer sexuality, this definition also prohibits non-binary genders) become historically uneven partners of an indivisible union, or — to employ the words attributed to Jesus — "one flesh" (Mar.: 10:8). As Marvin M. Ellison observes, this amounts to a rules-based approach to sexual morality that proscribes specific sexual acts with certain partners, as opposed

[66] Kathleen A. Lahey, *Are We 'Persons' Yet?: Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999), 114-25; Elliot N. Dorf, "Moses, The Prophets, and the Rabbis" in ," in *Christianity and Family Law: An Introduction*, eds. John Witte, Jr. and Gary S. Hauk, Cambridge Series on Christianity and the (Cambridge: Cambridge University Press, 2007), 25.

to one that places greater emphasis upon creating ethical relationships and (gender-neutral) principles for situated judgement concerning (il)licit sexual activity.[67]

This preoccupation stems from the general Christian denigration of the body and, by extension, the feminine, as well as the related fear that concupiscence will compromise our (masculine) self-control (read excess emotion).[68] Sexual and gender minorities have provided a convenient target for the disgust-fears concerning sex and the related misogyny arising from a fear of death.[69]

Queer Liberation and Constraint

While not replacing earlier forms of religious and legal disapproval, the development of sexology and psychoanalysis shifted the condemnation of homoerotic behaviour from a discourse of juridical and theological sanction to one of psychophysiological pathology. Whereas the sodomite had committed (or had a propensity to commit) certain proscribed acts, the homosexual was a character type. His (maladaptive) mannerisms and physiology demonstrated his diagnosis.[70] The transformation had three main consequences. First, the discourse of an

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[67] Marvin M. Ellison, "Common Decency: A New Christian Sexual Ethics," in *Sexuality and the Sacred: Sources for Theological Reflection*, eds. James B. Nelson and Sandra P. Longfellow (Louisville, KY: John Knox Press, 1994), 236.

[68] Pamela Dickey Young, *Christian Churches and Same Sex Marriage in Canada*, (Halifax and Winnipeg; Fernwood Publishing, 2012). 29.

[69] Leo Bersani*, Is the Rectum a Grave? And Other Essays* (Chicago: Chicago University Press, 2010), 18; Julia Kristeva, *Powers of Horror: An Essay on Abjection.* trans. Leon S. Roudiez. (New York: Columbia University Press, 1982), 8-10; Georges Bataille, *Death and Sensuality: A Study of Eroticism and the Taboo*, trans. Mary Dalwood, The Literature of Death and Dying (New York: Amo Press, 1977), 8.

[70] Michel Foucault*, The History of Sexuality: An Introduction*, trans. Robert Hurley. (New York: Penguin Books., 1997), 17-18; Jennifer Terry, *An American Obsession: Science, Medicine, and Homosexuality in Modern Society,* (Chicago: University of Chicago Press, 1999), 120-131.

essentialized but (possibly) pathological homosexual, made him a more sympathetic character than the obdurate sodomite who defied the law and nature. This new discursive shift elicited "compassion" from many religious and philanthropic organizations.[71] Second, it constructed him as a dangerous stranger within Canadian borders, whose desires threatened society and national security.[72] Specifically, (male) homosexuals threatened the well-being of children; for (male) homoerotic desire and orientation were often falsely equated with pedophilia. As well, police officers routinely raped and abused those identifying as lesbian into the 1980s. Queers were also considered threats to national security because state officials believed they were uniquely susceptible to blackmail.[73] Police officers were systematically negligent responding to systemic violence against queers as part of a semi-organized program of repression.[74] Third, as repressive as these stereotypes, diagnoses, laws, medical as well as psychiatric techniques, and state surveillance mechanisms, may have been and still are, they provide some resources for forming a positive self-conception and challenging the so-called closeted lives that went along with this regime of compulsory heterosexuality.[75]

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[71] David M. Halperin. "Forgetting Foucault: Acts, Identities and the History of Sexuality." In *Sexualities in History: A Reader*, Kim M. Phillips and Barry Reay (eds.) (New York: Routledge, 2002), 57; Jeffrey Weeks, *Sex, Politics and Society: The Regulation of Sexuality Since 1800*. (London: Longman. 1989), 99.

[72] Elise Chenier*, Strangers in Our Midst: Sexual Deviancy in Postwar Ontario* (Toronto: University of Toronto Press, 2008), 17-42; Tom Warner, *Never Going Back: A History of Queer Activism in Canada* (Toronto: Toronto University Press, 2002), 40.

[73] Gary Kinsman and Patrizia Gentile, *The Canadian War on Queers: National Security as Sexual Regulation*, Sexuality Studies (Vancouver: UBC Press, 2010).

[74] Victor Janoff, *Pink Blood: Homophobic Violence in Canada* (Toronto: University of Toronto Press, 2005).

[75] Warner, 7.

The threat of blackmail and semi-organized police violence did not stop with partial decriminalization. Nonetheless, in keeping with the general trend toward sexual liberalization, (that is, a slight weakening of the previous Christian sexual morality), in 1969 the government of Pierre Elliot Trudeau passed an omnibus crime reform bill (as a response to a British parliamentary report concerning male-male sex and sex work, released nearly a decade earlier).[76] This Act partially decriminalized anal sex between consenting adults regardless of gender, based principally on the liberal distinction between public and private. In the same year, the famous events at the Stonewall Inn in New York occurred. Some have claimed that this riot inaugurated the Gay Liberation movement. Despite its regrettable tendency to represent the interests of non-disabled cisgender affluent white men, the Gay Liberation movement popularized queer pride. Unfortunately, the campaign downplayed the influence of lesbian feminist organizing, as well as the efforts of transgender and intersex persons, and excluded both groups from leadership positions.

Along with similar goals in the Black Power movement and Decolonization Movements (concerning race) and the feminist movement (about gender), Gay Liberation formulated its critique of (hetero)sexism in the context of larger socio-structural causes and advocated a program of transformative political change.[77] Even though modern historians dispute the significance of the Stonewall Riots, citing other significant riots now long forgotten, this event

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[76] Stuart Chambers, "Pierre Elliott Trudeau and Bill C-150: A Rational Approach to Homosexual Acts, 1968–69." *Journal of Homosexuality* 57, no. 2 (2010): 252-55; *Criminal Law Amendment Act, 1968–69* (SC 1968–69, c 380).

[77] Terence Kissack, "Freaky Fag Reactionaries: New York's Gay Liberation Front, 1969-1971," *Radical History Review* no. 62 (1995) 104-34.

has achieved mythic stature in the queer collective consciousness.[78] The slogans "the personal is political" and "gay is good" encapsulate the ethos of that time.

The HIV-AIDS crisis, combined with the neoliberal restructuring of the Keynesian welfare state, tempered the enthusiasm of Gay Liberation and promoted a change in tactics to identity-based rights politics. This transformation strategy emphasized individual freedom and recognition. These offered fewer direct challenges to the *status quo*. Though not as damaging in Canada than in the United States, the conservative attempt to re-establish traditional family values (in which many Evangelicals participated), itself a response to the HIV-AIDS crisis and economic restructuring, was a contributing factor.[79] Despite empathetic members of the public, who loathed the portrayal of HIV-AIDS as God's punishment for the sin of sodomy, sexual conformity seemed like the only viable option. Critiques of safer sex and monogamy, because safer sex and monogamy reproduce (hetero)sexism, were, and remain, largely unheard.[80] The contemporaneous enactment of the Canadian *Charter of Rights and Freedoms* assisted this process. Relatedly, queer life has changed owing to the gentrification of major urban centres, like

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[78] Elizabeth A. Armstrong, and Suzanna M Crage. "Movements and Memory: The Making of the Stonewall Myth." *American Sociological Review* 71, no. 5 (2006): 724.

[79] Simon Watney, *Policing Desire: Pornography, AIDS, and the Media*, 3rd ed., (Minneapolis: University of Minnesota Press, 1997), 43; Warner, 132-140, 305-352; Brenda Cossman, "Lesbians, Gay Men, and the Canadian Charter of Rights and Freedoms." (Osgoode Hall Law Journal 40 224, 2002), 241.

[80] Douglas Crimp, "How to Have Promiscuity in an Epidemic," *October* 43 (December 1987): 237-71; David J.A. Richards, Human Rights, Public Health, and the Idea of Moral Plague" *Social Research* 53, no 3 (1988): 491-528; Cindy Patton, *Fatal Advice: How Safe Sex Education Went Wrong* (Durham, N.C: Duke University Press, 1996), esp. 35-63, 95-118.

Toronto, Vancouver, and New York, in addition to the reconfiguration and disappearance of (visibly) queer and public sexual spaces.[81]

Notwithstanding the devastation to queer communities, the HIV-AIDS crisis helped to humanize queers (especially gay men) as suffering victims. These victims could secure a place at the multicultural table, so long as they used their suffering to become responsible citizens. It often strengthened the weak ties between queer men and women. Many lesbian women cared for gay men battling the virus. HIV-AIDS also illuminated the need for partnership benefits. Queer men faced grief and dependency on an unprecedented scale, while the state refused to recognize their relationships. There was a concomitant rise in gay and lesbian parenting.[82] Certain (partial representations of) queer cultures went mainstream with the increase of hit musicals like *Rent*, sitcoms such as *Friends, Mad about You, Ellen,* as well as *Will and Grace,* or critically acclaimed films like *Philadelphia*. These media portrayed persons with HIV as innocent and partially ordinary victims, and queers as psychologically healthy and mundane.[83] The rise of the "Gay 90s" and 2000s slowly replaced the (nearly) uniform poor, sensational, and censorious treatment that was normal previously. Vito Russo, an early gay activist and amateur film scholar, who died of AIDS related complications, encapsulates the "celluloid closet" as follows: "The big lie about lesbians and gay men [in 20th century American film] is that we do not exist. The story

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[81] Samuel Delany, *Times Square Red Times Square Blue*, Sexual Cultures: New Directions from the Centre for Lesbian and Gay Studies (New York, New York University Press, 1999), 121-22.

[82] David M. Rayside, *Queer Inclusions, Continental Divisions: Public Recognition of Sexual Diversity in Canada and the United States* (Toronto: University of Toronto Press, 2008), 60-80.

[83] Brenda Cossman, *Sexual Citizens: The Legal and Cultural Regulation of Sex and Belonging* (Stanford, CA: Stanford University Press, 2007), 25.

of how gayness has been defined in American film is the story of how we have been defined in America."[84]

Heather Shipley is right to remind us not to focus exclusively on conservative Christian actors and theological beliefs. She is also right to argue that the exclusion of Christians who have tirelessly supported queer equality and social justice presents a distorted picture.[85] This much is clear, however. Even though their influence may be diminishing (conservative) Christian denominations' sex-negative beliefs, and, especially negative estimations of queer (mostly male) erotic activity, have shaped, and continue to influence, the general Christian sexual ethos of Canadian law in this area. This moulding, in turn, has affected the trajectory of queer histories and the presentation of queer subjects in and by courts. It has also been a significant source of the pervasive (hetero)sexism in our society. Only by understanding this may we come to a proper discursive and ethical evaluation of the TWU law school dispute. As William Faulkner notes, "the past is never dead; it is not even past."[86]We must resist the urge to decontextualize discrimination claims. When we do this, we obscure the harm that they cause owing to their specific social meaning.

As Lawrence Lessig observes in the following passage:

> Actions have meaning, even if their meaning differs across individuals. Even if there is no single meaning, there is a range or distribution of meanings, and the question we ask here is how that range gets made, and, more importantly, changed…If social meanings exist, they are also used. They not only constitute, or guide, or constrain; they are also

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[84] Vito Russo, *The Celluloid Closet: Homosexuality in the Movies*, rev. ed. (New York: Harper and Row, 1987), 2.

[85] Heather Shipley, "Religious Freedom and Sexual Orientation: Equality Jurisprudence and Intersecting Identities." *Canadian Journal of Women and the Law* 27, no. 2 (2015): 248-83.

[86] William Faulkner, *Requiem for a Nun,* (London: Chatto and Wallace, 1919), 85.

> tools—means to a chosen end, whether an individually or collectively chosen end. They are a resource—a semiotic resource—that society provides to all if it provides to any.[87]

While traditional Christians have held a range of beliefs concerning queer sexual practices and genders, few of them have been positive, and most relate to the belief in male supremacy over women. Consequently, the problem with Christian (sexual) hegemony is that it has predominantly shown legal respect and compassion to those who act differently, in some cases even seeking to repress difference through violence. Vasily Grossman, a Jewish man and a Soviet dissident author, who wrote one of the most poignant depictions of World War II's dehumanizing atrocities, notes, "Everything that lives is unique. It is unimaginable that two people, or two briar-roses, should be identical. . . If you attempt to erase the peculiarities and individuality of life by violence, then life itself must suffocate.[88]

Building upon this analogy, therefore, it may be only a slight exaggeration contend that many queers have experienced the violence of traditional Christian sexual morality as an un-erotic asphyxiation of the self, whose devastating effects on the diversity of our society we are only beginning to process.

Some Historically Based Academic Defences of TWU

Thus, I question Dwight Newman's representation of Christians and queers as equally empowered groups. He says the following to introduce an essay collection that has many pieces defending TWU's proposed law school:

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[87] Lawrence Lessig, "The Regulation of Social Meaning," *University of Chicago Law Review* 62, no. 3 (1995): 595-6.

[88] Vasily Grossman, *Life and Fate*, trans. Robert Chandler (New York: Harper and Rowe, 1985), 19.

> The recent tensions between the claims of some religious communities and those making certain claims on behalf of the LGBT community are just one recent face of a complex history of interaction between these communities… Some complex facets of the historical interaction discussed in this scholarship include: early gay liberation activists holding strong views against religion more broadly; the development over several decades of significant support for LGBT causes in mainline Protestant denominations; polarized and polarizing reactions within the Christian community to the emergence of HIV/AIDS and its initially devastating effects within the gay community; the actual disruption of religious worship and desecration of religious articles as a protest tactic by some HIV/AIDS activists. [89]

This is the incident to which he is referring. In 1989, the activist group AIDS Coalition to Unleash Power (ACT UP) disagreed with New York Cardinal O'Connor's public stand against safe sex education, abortion, effective treatment for HIV/AIDS, and queerness in general. Approximately 4.500 protestors mobilized outside the cathedral, under 50 entered the cathedral, and one demonstrator split a communion wafer and threw it to the ground.[90] This incident pales in comparison to the organized repression of queers, not solely caused, but aided by, Christian theology. Queer liberationist ideas, though extreme to many, have not influenced the criminalization of religious observance. Nor have queer groups mobilized to restrict religious conduct with anything resembling the effectiveness or tenacity of groups such as The Evangelical Fellowship or Focus on the Family Canada.

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[89] Dwight Newman, "Introduction," in *Religious Freedom and Communities*, ed. Dwight Newman (Markham, ON: LEXIS-NEXIS, 2016), 6.

[90] Peter L. Allen, *The Wages of Sin: Sex and Disease, Past and Present*. (Chicago: University of Chicago Press, 2000), 143.

It is a small wonder, as Newman correctly claims, that many gay liberation activists and, indeed, queers to this day, hold anti-Christian sentiment. Hegemonic Christian theology, though admittedly expressed through the organs of the state, has subjugated us for the past two millennia. Though state-enforced prosecutions of queer persons have been sporadic, there is a very tragic reason why faggot is both an anti-queer slur and a bundle of sticks. It suggests the target of this hate speech ought to be burned at the stake. To quote H. L.A Hart again. "morality, what crimes have been committed to thy name"[91] Newman's selection, presentation, and interpretation of the historical interaction between Christians and queers is wanting at best.

Mary Ann Waldron uses similar specious reasoning. In a chapter of Newman's book that supports the law school, she critiques analogies between the decision the Law Societies faced and the one the United States Supreme Court confronted in *Bob Jones University*. The case concerned whether to give Bob Jones University a tax exemption, despite its anti-miscegenation policy, owing to the free exercise clause of the United States Constitution. She argues that the analogy is inapt for three reasons. First, queers have not faced equivalent degrees of discrimination within the context of legal education as have African Americans. Moreover, they are not as socioeconomically disadvantaged. Second, racism does not have a credible theological pedigree, whereas beliefs concerning traditional marriage and healthy (hetero)sexuality do. Apparently, Waldron does not consider St. Augustine and Martin Luther, who had racist theologies, to be credible theologians. Third, TWU feels compelled to open a law school in its

[91] H.LA. Hart, ''Immorality and Treason" *The Listener* July 30, 1959, 13, in *Canadian Criminal Law: Cases and Materials*, eds. Kent Roach, Emma Cunliffe, James Stribopoulos, and Benjamin L. Berger (Toronto: Edmund-Montgomery, 2015), 61.

current form. As such, the denial of this proposal is a more severe disability than the removal of tax-exempt status.[92]

Her interpretation of history and philosophy is, however, wrong. This contention will become clear shortly, as we critique the contemporary philosophical and sociological arguments against homoerotic conduct and same-sex unions. Christian theology has been used to stigmatize many morally neutral characteristics, including left-handedness. Though queerness has assumed greater significance than left-handedness, no credible theology can justify discrimination against queers in the context of legal education, just as no credible theology can justify discrimination against those who are left-handed.[93] Granting, for the sake of argument, that God prohibits homoerotic conduct and gender diversity, expulsion for this, within the context of *Canadian legal education,* is a different order of magnitude.

Similarly, Barry W. Bussey calls the opposition to TWU's proposed law school a legal revolution and suggests in utter sincerity that if TWU is unsuccessful in its claim, liberal democracy, as we know it in Canada, will be irreparably damaged:

> The present legal revolution [against TWU, which exemplifies efforts] to strip religion of its favored legal status puts liberal democracy in a precarious position. There is a need among legal practitioners, academics, and judiciary alike for a deeper appreciation of religion and how its protection stabilizes democracies and keeps in check the state's tendency to demand ultimate allegiance at the expense of individual conscience. Through exploring TWU law school proposal and the opposition to it by the legal profession, this

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[92] Mary Ann Waldron, "Analogy and Neutrality: Thinking *about* Freedom of Religion," in *Religious Freedom and Communities*, ed. Dwight Newman (Markham, ON: LEXIS-NEXIS, 2016), 253-5.

[93] Robert Hertz, The Pre-Eminence of the Right Hand: A Study in Religious Polarity," trans. Needham and Needham, *Journal of Ethnographic Theory*, 3

> Article seeks to demonstrate the practical application of its contention that opposition to religion's legal protection is revolutionary and, if successful, foreshadows a denial of democratic values and principles. Instead of an expansion of human rights, this opposition to religious freedom leads to a degradation of those rights, both institutionally and individually.[94]

One should observe the emotional connotations of revolution and how Christianity, indeed a particular interpretation of it, represents the taxon Religion.

In an online article published in response to the Supreme Court's decision against TWU's proposed law school, its website provides this rosy gloss on Canada's history of inclusion, "until now, [with the decision against TWU] Canada has always encouraged the rich mosaic created by the diversity of views, race, gender and belief systems in this country. Regrettably, the Supreme Court's decision limits the contribution of faith communities to Canadian society."[95] Interwoven with the Christian (hetero)sexism I discussed in Chapter 2, it is always important to recognize that Canada is a settler-colonial nation, predicated on an act of (disavowed) founding violence.[96] J. R. Miller documents with painstaking and poignant detail the tragic genocide and exclusion of Indigenous peoples that continues into the present.[97] Constance Backhouse notes that until relatively recently, Canadian law has had many instances of explicit racism and religious

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[94] Barry W. Bussey, "The Legal Revolution Against the Place of Religion: The Case of Trinity Western University Law School," *Brigham Young University Law Review*, no. 4 (2016), 1129.

[95] Trinity Western University, "Trinity Western University Disappointed with Supreme Court Decision Signalling Loss of Support for Diversity in Canada," Trinity Western University. Published June 15, 2018. Accessed on August 8, 2018. https://www.twu.ca/news-events/news/trinity-western-university-disappointed-supreme-court-decision-signalling-loss.

[96] Lorenzo Veracini, "Settler Collective, Founding Violence and Disavowal: The Settler Colonial Situation," *Journal of Intercultural Studies* 29, no. 4, (2003): 363-379.

[97] J.R.R. Miller. *Skyscrapers Hide the Heavens: A History of Indian-white Relations in Canada*. 3rd ed. (Toronto: University of Toronto Press, 2000).

intolerance.[98] Backhouse describes the legal barriers persons of colour faced, notable examples of which included the *Chinese Exclusion* (re-labelled *Immigration Act*), the interment of Japanese Canadians during World War II, and the restrictions placed on the economic lives of those labelled "orientals." Allison Marshall provides a particularly interesting example when she analyzes how Chinese Canadians struggled to make a life for themselves in turn of the century rural Manitoba.[99] Ninette Kelley and Michael Trebilcock provide a lengthy analysis of how such racist ideas played out in the context of immigration.[100]

Irving Abella and Harold Troper describe the anti-Semitism that led to the denial of Jewish Holocaust refugees.[101] Haideh Moghissi, Saeed Rahnema, and Mark J. Goodman describe the marginalization and frustration many Muslims feel owing to implicit Christian and white privilege.[102] G. S. Basran and B. Singh Bolaria make similar observations concerning Sikhs.[103] Himani Banerji and Sunera Thobani criticize the struggles women of colour face. We often give these struggles a multicultural sheen.[104] Lastly, Phil Ryan notes a racist politics in literature

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[98] Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada 1900-1950.* (Toronto: University of Toronto Press, 1999), 140-160.

[99] Marshall, Alison R. *The Way of the Bachelor: Early Chinese Settlement in Manitoba*. Asian Religions and Society Series, (Vancouver: UBC Press, 2011)

[100] Ninette Kelly, and Michael Trebilcock, *The Making of the Mosaic: A History of Canadian Immigration Policy*. 2nd ed. (Toronto: University of Toronto Press. 2010).

[101] Irving Abella and Harold Troper, *None is Too Many: Canada and the Jews of Europe 1933-1948*, (Toronto: University of Toronto Press, 2012).

[102] Haideh Moghissi, Saeed Rahnema, and Mark J. Goodman. *Diaspora by Design: Muslims in Canada and Beyond*. (Toronto, Buffalo, N.Y.: University of Toronto Press, 2006.)

[103] G. S. Basran and B. Singh Bolaria, *The Sikhs in Canada: Migration, Race, Class, and Gender* (New Delhi; New York: Oxford University Press, 2003).

[104] Himani Banerji. *The Dark Side of the Nation: Essays on Multiculturalism, Nationalism and Gender*, (Toronto: Canadian Scholars' Press, 2000).; Sunera Thobani, *Exalted Subjects: Studies in the Making of Race and Nation in Canada*. (Toronto: University of Toronto Press. 2007), 75.

critical of multiculturalism as an abstract concept that he calls "multicultiphobia." He analyzes how this discourse makes racism respectable, and how it has gained intellectual, as well as popular, support.[105] Howard Palmer provides an understated summary of the Anglo-Canadian attitude towards difference as being one of "reluctant host." He says, " No matter how one understands the notions of 'diversity' and 'multiculturalism,' they must be situated in the context of stages of 'Anglo-conformity' and 'melting pot assimilation'."[106] Thus, for TWU's administration to claim that, until now, Canada has accepted diversity; and that they are the implied first persons to experience religious discrimination, would be humorous, were it not so disheartening that they believe that this is an accurate reflection of either the historical record or contemporary life.

Culture and diversity are often used to maintain the hegemonic status of the powerful, or at least reverse their loss of status. Lori G. Beaman notes that this is because culture can appear universal and value neutral. Conversely, religion is a concept often associated with sectarian beliefs. Beaman also notes how Protestant/Catholic Christianity attempts to maintain a position of privilege by claiming cultural equality. Though there are differences between the dominant Catholic culture within Italy and Quebec, which Beaman discusses, and Evangelical Christians in English Canada, a similar process is occurring in statements that supporters of the law school make. The following skeptical comments Beaman offers concerning religious diversity in Canada should make us suspicious of claims that enforced (hetero)sexism is somehow a

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[105] Phil Ryan, *Multicultiphobia* (Toronto: University of Toronto Press, 2010).

[106] Howard Palmer, "Reluctant Hosts: Anglo-Canadian Views towards Multiculturalism in the Twentieth-Century," in *Immigration in Canada: Historical Perspectives*, ed. Gerald Tulchinsky (Toronto: Copp Clark Longman, 1994), 297.

countercultural philosophical position, rather than an attempt to maintain the bigoted *status quo*, albeit within a religious community.[107]

> It is my contention that religious choice exists only within a narrow range of products. Store approach, the buffet of choices, or the religious marketplace should not be confused with religious diversity. The offering of communion on the first Sunday of each month [that is, a common practice of mainline churches] as opposed to the last reflects religious diversity like the diversity faced when choosing orange juice— from concentrate, or not? With pulp, or without? —ultimately, though, the choice is still orange juice. The very existence of religions outside the mainstream is sometimes taken as evidence of diversity, of a flourishing margin that is eroding the hegemony of mainstream Protestantism and that represents the positive effects of a constitutional regime that officially separates church and state. In fact, there has been little erosion of the hegemony of the religious mainstream. Diversity is diversity of "brands" or style and represents a shift in religious form that remains true to Protestant substance.[108]

Like Beaman's orange juice analogy, whether a man or a woman, or two women, are in a legally condoned, monogamous, codependent, and intended lifelong relationship, which orients itself toward (social) reproduction, it is still a legally condoned, monogamous, co-dependent, and intended lifelong relationship, which orients itself toward (social) reproduction. Though Christian sexual hegemony may be weakening, Beaman's insights concerning religious diversity can also apply well to the idea of sexual diversity. The mere existence of queer subjects does not

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[107] Lori G. Beaman, "Battle over Symbols: The Culture of the Majority Versus the Religion of the Minority," *Journal of Religion and Law* 28, no. 1 (2012): 78-99.

[108] Lori G. Beaman, "The Myth of Religious Pluralism, Diversity and Vigour: The Constitutional Privileging of Protestantism in the United States and Canada," *Journal for the Scientific Study of Religion* 43, no. 3 (2003): 312-17.

imply an end to (hetero)sexism or a dramatic change of sexual morality. If anything, increased legal acceptance of queer sexuality has strengthened the hegemony of certain Christian sexual values in legal discourse.[109] To take just one example, the existence of same-sex marriage, as a new Canadian social institution and source of national pride, justified the criminalization of polygamy.[110]

Consequently, we should regard Christian assertions of (sexual) privilege with suspicion. They are analogous to white heterosexual male discontent with affirmative action programs to assist marginalized persons. The following comments by queer black studies scholar Dwight A. McBride are helpful. We can apply them to heterosexual as well as Christian privilege, and they should also be in the back of our minds as we contemplate supporters of TWU:

> The quests by those on the political right to reverse—legally, rhetorically, and politically—the small gains afforded by affirmative action to women and people of color has fostered an important by-product. That by-product is nothing other than a culture of righteous anger among white men… And in a world in which racial minorities have always been defined by their difference from whites, and in which whites have always defined themselves by the negation of racial minorities (that is, cultural whiteness as an

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[109] Brenda Cossman, *Sexual Citizens: The Legal And Cultural Regulation of Sex and Belonging* (Stanford, CA: Stanford University Press, 2007), 2; Lisa Duggan, "The New Homonormativity: The Sexual Politics of Neoliberalism," in *Materializing Democracy: Toward a Revitalized Cultural Politics*, eds. Russ Castronovo and Dana D Nelson, (Durham, N Duke University Press, 2002) 175; Mariana Valverde, "A New Entity in the History of Sexuality: The Respectable Same-Sex Couple," in *Queerly Canadian: An Introductory Reader in Sexuality Studies*, eds. Maureen FitzGerald and Scott Rayter (Canadian Scholars Press/Women's Press, 2012), 366.

[110] Suzanne Lenon, "Monogamy, Marriage, and the Making of Nation," in *Disrupting Queer Inclusion: Canadian Homonationalisms and the Politics of Belonging*, eds. OmiSoore H. Dryden and Suzanne Lenon, Sexuality Studies Series (Toronto, UBC Press, 2015), 84-90.; *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, para. 884, 279 CCC (3d) 1 (CanLII).

> identity is assertable only as the amalgamation of the things that it is not), whites are left wanting for a positive identity of their own to assert… As a result, through the logic of reverse discrimination, the political right has provided a significant number of white Americans with a language by which they have turned the tide of discrimination in their favor. Victim status has become sacred turf in the battle for "special privileges" that, conservatives have argued, blacks and other people of color used for their own gain.[111]

Academic supporters of TWU cannot turn the sow's ear of discrimination into the silk purses of diversity, equity and justice. Nevertheless, it is helpful to analyse the CCA in greater detail; for this analysis will help us to appreciate better how a religious insider may perceive the covenant. By attempting this incomplete insider's perspective, we can comprehend the emotion in this dispute with greater clarity and empathy. Notwithstanding my wish to empathize with TWU, I adopt the following statement of McPherson J.A., writing for a unanimous Ontario Court of Appeal: "My conclusion is a simple one: the part of TWU's CCA in issue in this appeal is deeply discriminatory to the LGBTQ community, and it hurts."[112]

The CCA and Evangelical Identity

This thesis does not concern Evangelicals directly, nor am I an expert on Evangelicalism. Instead, this dissertation analyzes how legal actors imagine and contest definitions of religion and emotion as well as the assumptions they share, even as they also disagreed on other matters. To understand this dispute correctly, however, we must have some facts concerning TWU, in addition to its ongoing struggle to protect its religious identity.

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[111] Dwight A McBride, *Why I Hate Abercrombie and Fitch: Essays on Race and Sexuality,* Sexual Cultures: New Directions from the Center for Lesbian and Gay Studies (New York: New York University Press, 2005), 155-7.

[112] *Trinity Western University v. The Law Society of Upper Canada* 2016 ONCA 518, para. 119, 398 DLR (4th) 489 (CanLII).

TWU is an Evangelical private university, located in Langley, British Columbia (part of the Canadian "Bible Belt"). It was founded in 1962 under the name Trinity Junior College, and later as TW College. Eventually, it gained the right to award baccalaureate degrees and became a legislated university in 1985. It has a high academic ranking, and professional programs, including teaching, nursing, and accounting. TWU styles itself as an arm of the Evangelical Free Church.[113]

Despite its mission, and the fact that it requires faculty to hold beliefs consistent with this objective, it accepted students of every religion (or no religion), provided they adhered to a code of conduct consistent with, and intended to further, the University administration's perception of what is required behaviour for Evangelicals Thus, the factum TWU filed at the SCC states the following:

> Evangelical education involves much more than the impartation of facts and knowledge. It is a holistic means of forming students' character and spirituality in a manner consistent with evangelical Christian beliefs.…TWU's philosophy of providing Christian education is guided by its long-standing mission to "develop godly Christian leaders" with "thoroughly Christian minds." … While TWU is open to all academically qualified people wishing to live and learn in its religious community, most of its students are Christian. During its admissions process, TWU does not ask for or consider information regarding the sexual orientation of any of its student applicants… The belief that people reach their fullest potential by participating in a community committed to observing Biblical ethics and morality is foundational to TWU's approach to education. As a means of preserving, enhancing, and strengthening their distinct religious identity, Christian

[113] Trinity Western University, "The History of Trinity Western University," *twu.ca,* https://www.twu.ca/about/histons.

> communities commonly adopt codes of conduct that prescribe normative behavioural standards for community membership based on Biblical ethics and morality.[114]

Though this quotation is at pains not to focus on prescriptions regarding (homo)erotic activity, it manifests the following claim made by Amy DeRogatis:

> [I]n the [hegemonic] evangelical worldview sexual sins impact everyone. Evangelical[s]… claim that a person's sexual misdeed has individual, communal, and eternal consequences. Those who fall into sexual sin and impurity…jeopardize their own salvation, the salvation of their future children, and those souls waiting to be brought to Christ. Sexual sins— masturbation, premarital sex, adultery, and same-sex acts, — imperil the salvation of the individual, the building of the kingdom of Christ, and the salvation of the world.[115]

Or as Stanley J. Grenz reminds us, "both marriage and the informal friendship bond are theological metaphors picturing aspects of God and God's intended relationship to humans. Consequently, to transgress the biblical ethic of chastity is to efface what God has ordained to be a powerful theological symbol."[116] Eric Fuchs writes the following:

> [S]exual difference ... crowns the creative action of God: the creation of the world culminates in the creation of man as man-and-woman. The couple thus experiences in their flesh the order of differentiation which structures the world. . .. [Hence] sexuality should be lived out by the man and woman as the very meaning of all differentiation, that

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[114] *Law Society of British Columbia v. Trinity Western University,* 2018 SCC 32, [2018] 2 SCR. 293 (Factum the Respondent) (CanLII) authored by counsel for the Respondents Kevin L. Boonstra, Jonathan B. Maryniuk, Andrew D. Delmonico, Anne S. Cochrane, paras 8-11.

[115] Amy DeRogatis, *Saving Sex: Sexuality and Salvation in American Evangelicalism* (New York: Oxford University Press, 2014), 3.

[116] Stanley J. Grenz, *Welcoming but Not Affirming: An Evangelical Response to Homosexuality* (Westminster, KY: John Knox Press, 1998), 146.

> is, recognized as a call to a relationship that is organized and creative, like a call to arms against the constant threat of disorder and chaos, whose most insidious form is the confusion of the sexes.[117]

Consequently, many of the supporters of TWU perceive what they believe to be biblically mandated (hetero)sexism as integral to their identities. Disapproval of this communally institutionalized moral perspective takes a hammer to a keystone in the narrative arch of their normative universe. Its especially important if one has a communitarian conception of identity; for some TWU members may see institutional condonation of homosexuality as placing them in forced spiritual jeopardy. As Paul Tillich observes, "Man, like every living being, is concerned about many things, above all about those which condition his very existence ... If [a situation or concern] claims ultimacy it demands the total surrender of him who accepts this claim ... it demands that all other concerns ... be sacrificed."[118]

For many Evangelicals, the ideal is to create a unified body of Christ (Gal. 3:28), that is, consensus among the community of believers. This communitarian aspiration demonstrates a dialogical and narrative-virtue-based conception of character.[119] In this conception of personhood, the spiritual life, and striving to achieve greater degrees of moral excellence therein, is imagined as a kind of ultimate quest in communion with others.

"[W]e become individuals", Clifford Geertz says, "under the guidance of cultural patterns, historically created systems of meaning in terms of which we give form, order, point,

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[117] Eric Fuchs, *Sexual Desire and Love*, trans M, Daigle (1979, repr. Cambridge: Cambridge University Press, 1983), 214.

[118] Paul Tillich, *The Dynamics of Faith* (New York: Harper and Row, 1957), 1-2.

[119] My thanks go to Janet Buckingham for clarifying this point over coffee.

and direction to our lives."[120] To be an agent is by definition to take a normative stance on the world and, thereby, to have some higher order values against which other goals ought to be judged.[121] Thus cross-sex marriage, to use Charles Taylor's terms, becomes a constitutive and individual good related to the development of our identity. This identity-constituting good is related to the pre-eminent ('hyper,' in Taylor's terms) good of fulfilling God's commands.[122] Furthermore, religion and sexual orientation have much in common. Both involve (perceived) free choice, constraint, and agency.[123] The problem the CCA creates for many in Canadian constitutional culture, however, is easily stated but not so easily solved. Proponents of the CCA believe in a (collective) teleological ethical system that values the good (or following God) over the right (or Justice). For those like John Rawls, "each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override."[124]

From a sociological perspective, Samuel H. Reimer describes Evangelicals as an identifiable group. He writes, "[t]here exists a trans denominational transnational evangelical subculture in North America. This subculture is distinctive, and those active in it have a clear sense of identity, a clear understanding of subcultural boundaries, and knowledge of the norms

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[120] Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973), 52.

[121] Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, MA: Harvard University Press, 1989), 63-73; Ruth Abbey, *Charles Taylor* (Princeton: Princeton University Press, 2000), 37.

[122] C. S. Lewis, "The Moral Law is from God," in *Ethics: Contemporary Readings*, Routledge Readings in Contemporary Philosophy, eds. Harry J. Gensler, Earl W. Spurgin, and James C. Swindal (New York: Routledge, 2005), 70-78; Grenz, *Welcoming But Not Affirming: An Evangelical Response to Homosexuality* (Westminster, KY: John Knox Press, 1998), 63-100.

[123] Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014), 10-11, 41-54.

[124] John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA Harvard University Press 1999), 3.

and values associated with it."[125] Evangelicals as a group hold a common set of beliefs. David W. Bebbington describes what he calls the "evangelical quadrilateral" as follows:

> There are the four qualities that have been the special marks of Evangelical religion: conversionism, the belief that lives need to be changed; activism, the expression of the gospel in effort; biblicism, a particular regard for the Bible; and what may be called crucicentrism, a stress on the sacrifice of Christ on the cross [italics removed].[126]

Reimer also suggests that sexual orthodoxy has become a particular litmus test for the true believer in this transcontinental Evangelical subculture, defining who is a true believer against the heretic or apostate.

Other Christian groups started to liberalize their position on sexual matters, including problems of queer sexuality, in response to the rapid growth of gender egalitarian relationships and the related development of widespread contraception, but Evangelical and Catholic elites have been stalwart defenders of what they consider to be the traditional heterosexual family. Nevertheless, they too are not immune from this ongoing trend of the (partial) de-Christianisation of sexuality, gender, and the law in Canada. This "traditional heterosexual family" is, paradoxically, natural and hegemonic yet forever fragile and always vulnerable to outside social pressures. Linda Woodhead observes that, as many religious practitioners, especially those in positions of leadership, begin to perceive the weakening of their erstwhile public authority and influence, doctrinal orthodoxy and orthopraxy in sexual matters becomes

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[125] Samuel H. Reimer, *Evangelicals and the Continental Divide* (Montréal: McGill-Queens University Press, 2003), 21; see also, Samuel H. Reimer and Michael Wilkinson, *A Cultural Faith: Evangelical Congregations in Canada* (Montréal: McGill-Queens University Press, 2015); Christian Smith, *American Evangelicalism, Embattled and Thriving* (Chicago University of Chicago Press, 1998).

[126] David W. Bebbington, *Evangelicalism in Modern Britain: A History from the 1730s to the 1980s* (New York: Routledge, 1988), 2-3.

especially important. In this way, the believer demonstrates her faith and becomes an incarnated protest against religions' perceived waning influence.[127]

Sexual conformity has a strong association with identity and group cohesion among Evangelicals. Taking a stand against practices that threaten the traditional family is a definitively evangelical act.[128] As Constance R. Sullivan-Blum notes:

> [Hegemonic]… Evangelicals argue that sexual responsiveness and desire are structured through and determined by gender… they construct a… rigid gender dichotomy and employ it as the basis for a discourse which posits heterosexuality as the only natural and morally acceptable sexual expression. Male and female attributes are imagined by Evangelicals as natural, biological characteristics, constructed in complementary opposition to each other. This not only provides the underpinnings for obligatory heterosexuality; it also provides the logic for monogamous, heterosexual marriage … Men are understood to be sexually aggressive and naturally promiscuous. Women are, on the contrary, understood to be sexually passive and biologically programmed to be nurturing…. Sex in marriage, therefore, is imagined as the glue that keeps men and women together …[129]

Reimer argues for a spectrum of hegemonic views concerning queer persons within the Evangelical subculture. First, homosexuality is a choice and both indicative and a cause of moral

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[127] Linda Woodhead, "Sex and Secularization," in *Queer Theology: Rethinking the Western Body*, ed. Gerard Loughlin (London: Blackwell Publishing, 2007), 230-4.

[128] Samuel H. Reimer, ""Civility without Compromise: Evangelical Attitudes towards Same-Sex Issues in Comparative Context," in *Faith, Politics and Sexual Diversity in Canada and the United States,* eds. David Rayside and Clide Wilcox (Victoria: UBC Press, 2011), 76.

[129] Constance R. Sullivan-Blum, "'It's Adam and Eve, not Adam and Steve' What's at Stake in the Construction of Contemporary American Christian Homophobia," *Anthropology of Homophobias: Lust and Loathing Across Time and Space*, ed. David A.B. Murray (Durham, N.C.: Duke University Press, 2009), 55.

decay. Second, homosexuality is a choice but worthy of compassion and "therapeutic" treatment. Third, homosexuality is not a choice, but those unable to participate in heterosexual marriage ought to remain celibate.[130] Frequently, those opposed to homoerotic behaviour and gender diversity believe that early childhood trauma or maladaptive attachment mechanisms disrupt a person's innate drive toward opposite sex attraction and cisgender behaviour. The queer subject is, therefore, always already psychologically disabled, even though almost all mental health care professionals reject such therapeutic responses to queer identities and behaviours.[131] Robert J. Gagnon summarizes the dominant response within Evangelicalism when he states the following: "Love mandates that the church resist approval of homosexual behavior while reaching out in humility and gentleness to those afflicted by homoerotic desires."[132] Grenz advises that churches strive for the oxymoronic position of being "welcoming but not affirming." He describes this position as follows:

> [T]he church and its ministry are poorer if it ostracizes homosexual believers. The church, therefore, ought not only to minister to all but also to welcome all into membership on the same basis…. At the same time, participation in the faith community involves a give-and-take. Discipleship demands that each member understand that he or she is accountable to the community in all dimensions of life, including the sexual. As one homosexual believer wrote to Richard Hays, "Anyone who joins such a community should know that it is a place of transformation, of discipline, of learning, and not merely

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[130] Reimer, "Civility," 72.

[131] Fone, Byrne. *Homophobia: A History* (London: Macmillan, 2000), 144.

[132] Robert A. J. Gagnon, "The Bible and Homosexual Practices" in *Homosexuality and the Bible*: *Two Views*, eds. Dan O. Via and Robert A.J. Gagnon (Philadelphia: Fortress Press, 2003), 4.

> a place to be comforted or indulged." Because it is a community of discipleship, the church in turn has a responsibility both to nurture and to admonish and discipline the wayward in its midst, including those who are not living in sexual chastity, what-ever the exact nature of the unchaste behavior may be.[133]

The CCA reflects considered opinions regarding what it means to be a morally coherent and virtuous person and to embody God's call for justice and love in the world. This call includes strictures against gender diversity and homoerotic conduct. Offering a sociological explanation for requirements like these, Christian Smith argues that having a distinct subcultural identity (that is, an identity with not only different beliefs but, often stricter (divergent) ethical standards, practices, and bodily discipline, departing from mores of the public) helps to provide in-group members with a sense of meaning and purpose. Though a person sometimes must make sacrifices, she gains satisfaction from an identity which is at once apart from and engaged with the larger world.[134]

Notwithstanding the preceding, I do not wish to imply that Evangelical subcultures, or any culture, for that matter, is monolithic or somehow unilaterally determinative of behaviour and values. From as early as 1991, research has made it clear that one can be both Evangelical and queer/support queer rights.[135] It also defies logic, though this is a regrettable error made by defenders and detractors of TWU, that, just because one or several practices/beliefs are good or

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[133] Grenz, 133; Richard Hays, "Awaiting the Redemption, of Our Bodies: The Witness of Scripture Concerning Homosexuality," in *Homosexuality in the Church: Both Sides of the Debate*, ed. Jeffrey S. Silker (Kentucky: Westminster John Knox Press, 1994), 30.

[134] Smith, 116-19.

[135] Scott Thuma, "Negotiating a Religious Identity: The Case of The Gay Evangelical," *Sociological Analysis* 52, no. 4 (1991:333-47.

bad in a given set, the rest are good or bad by being grouped therein. The CCA has many praiseworthy principles; this does not shield it from scrutiny.

Hence, the dispute I have with Reimer's otherwise learned and nuanced research is its tendency to reify culture. The construction of an Evangelical subculture, though it may show contours in broad brush strokes, misses fine-grained distinctions. This oversight may be innocuous, yet, Reimer privileges a top-down approach to culture, often (un)consciously thinking persons like James Dobson, Ted Haggard, and Jerry Falwell represent Evangelicals (or what they should be) as a whole.[136] As Lori G. Beaman argues, the notion of culture, which is often juxtaposed with religion, tends to depoliticize the former category. This obfuscation makes culture more challenging to criticize by obscuring the historically contingent and often politically problematic power relationships that precipitated, and continue to perpetuate, its production perniciously. For Beaman, this way of perceiving how persons adapt to changing social trends is particularly apt for describing Christian groups. Claims for cultural preservation and the right to be culturally different may be a response to the perceived loss of majoritarian privilege.[137]

Consequently, while respecting the importance of subcultural identities, they alone cannot bestow moral worth on a position which may be morally dubious. What matters is the posture groups take towards other groups, and the deference a democratic society is willing to afford their collective way of life and (possibly illiberal) philosophical positions, not subcultural identity as such. I contest the all-too-frequent assumption that culture and religion are human goods *per se.* They are interconnected discourses of social control that we can use for vice or virtue. Human beings can derive much meaning from morally evil groups.

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[136] Reimer, "Civility," 72-4.

[137] Beaman, "Battle over Symbols," 78-99.

Mutual accountability enforced TWU's CCA (which supporters contend encouraged virtuous behaviour. Conversely, detractors argued it fostered authoritarian surveillance). The CCA had disciplinary measures up to and including expulsion or dismissal. Many of the principles of the CCA are praiseworthy. Nevertheless, prohibitions against same-sex erotic behaviour (whether matrimonial or not), non-matrimonial (sexual) unions, or sexual activity, whether same-sex or not, proscriptions against abortion, as well as difficulties accessing sexual assault support or treatment of sexually transmitted infections, were areas of concern. It is important to note that this code of conduct applied on and off campus. Moreover, there are extra restrictions placed upon faculty. They must sign a statement of faith as a condition of employment; or failing agreement with specified articles of faith, they must explain why they differ from the doctrine espoused by the institution in detail.[138]

Notwithstanding these reservations, there is no official record of any student being expelled solely for engaging in homoerotic behaviour, and the university professes to accept those with a nonnormative sexual orientation and gender identity/expression. We can see, however, that these strictures were intended to maintain sexual dimorphism; and that in addition to the disapproval of homoerotic sexual acts themselves, what troubles some Evangelicals regarding homoerotic conduct is its transgression of historically uneven gender roles.[139] By performing gender and erotic activity in the improper way, queers flout ideas concerning what many women (and especially transgender women) ought to do. We shall conclude this chapter

[138] For an overview of objections see Elaine Craig, "The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program," *Canadian Journal of Women and the Law* 25, no. 1 (2013): 158. Elaine Craig, "TWU Law: A Reply to Proponents of Approval." *Dalhousie Law Journal* 37, no. 2 (2014): 621-60.

[139] Christine E. Gudorf, "The Erosion of Sexual Dimorphism: Challenges to Religion and Religious Ethics" *Journal of the American Academy of Religion* 69, no. 4 (2001): 864-7.

with critiques of (hetero)sexism and transgender prejudice from a feminist and disability studies perspective to make this contention clearer.

Questioning the Status-Conduct Distinction

The status-conduct distinction is an important rhetorical tool used in defence of TWU and anti-queer bias generally, so it is crucial that we scrutinize it in some detail. TWU claimed it did not discriminate based on sexual orientation. Instead, it merely required all students, regardless of sexual orientation or gender identity, to refrain from sexual intimacy outside of heterosexual marriage. They claim that they can love queer persons, while simultaneously disapproving of homoerotic behaviour and showing compassion for persons who struggle with such feelings. As a response to this argument, Bruce McDougall states the following:

> The acceptance of a valid distinction between sexual orientation and sexual activity seems to be common, but there is rarely any analysis (especially logical analysis) of why this should be so. Is the person who lives solely with fantasy and dreams of persons of the same sex any less of a threat to society - that is, any less 'gay' - than someone who regularly engages in sexual activity with a person of the same sex? If what is required to be beyond the pale is actual physical sex with someone of the same sex, what constitutes sex? If Joseph kisses a man or hugs him a moment too long, is this sex?[140]

He also reminds us of the historical connection between homoerotic behaviour, censoriousness, and criminality when he states:

> It is unlikely that [Christians] would say that the law should respect [their] right to orient towards [Christianity] but not protect a manifestation of [their Christianity]. If there is

[140] Bruce Macdougall, *Queer Judgments: Homosexuality, Expression, and the Courts in Canada* (Toronto: University of Toronto Press, 2000), 26.

> legal respect for religious beliefs, then, except where it directly adversely affects an unwilling other, implementation, as well as inclination, must be respected. Sexual orientation, however, is thought to be less benign than religion and more than suitable for regulation similar to that provided to check the behaviour of criminals. We would probably attempt not to prevent or control a 'criminal mind' but only criminal acts. In such situations, the status is regarded with pity at best and identification of a person as having that status is somehow impolite or even offensive. The [criminal] act, however, must be controlled rigorously, even using publicity as discouragement.[141]

Allen W. Wood helpfully observes in the following quotation:

> [E]very person's humanity is deserving of equal respect. It is not inconsistent with [… Kantian ethics] (on the contrary, it is required by it) that we should honor the different ways of life people choose and the different ways they unfold the common capacities that make them human. Participating in a certain culture, for example, or cultivating a certain religious disposition, are certainly ways of developing our common humanity and exercising our rational nature. It is only to the extent that people value themselves for such things instead of for their humanity that [Kant] charges them with valuing themselves wrongly. Respect is not only a subjective feeling. It is also a relationship between people, which can exist only if the person respected as well as the person respecting fulfills certain requirements. It is not possible for you to respect me except for qualities for which I also respect myself. Thus, homophobic Christians cannot [from a Kantian perspective] genuinely respect gay people who affirm their identity as gay as

[141] Macdougall, 26.

> long as the Christians regard homosexual feelings and behavior as something unnatural, degrading, and hateful to God.[142]

We cannot respect persons while demanding that they change or suppress a fundamental part of their autobiography. Thus, it is not possible to love queer persons while reproving the alleged sin of queer sex, just as it is also not possible to claim we are anti-colonial while we chastised certain Indigenous groups for engaging in the potlatch ceremony. In both cases, restrictions against these practices come from a history of colonial violence. These restrictions were also designed to erase unique cultural identities, as well as maintain Christian norms of familial life and bodily discipline. In both cases, they were paternalistic. They did not consider the lived experience of those upon whom they sought to impose sanctions. They treated persons as objects and not autonomous human beings.

An Intersectional Critique of (Hetero)sexism

One may object to homoerotic behaviour based on theological voluntarism: that is, the position that ethics' ultimate source is clearly found in biblical writings.[143] Though many at TWU may disagree with these interpretations, it is worth noting the cliché that the Bible offers inconsistent views on some topics that are, for most of us, no longer matters of moral debate, such as slavery, the eating of shellfish, and the wearing of polyester.[144] But granting the consistency of Scripture

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[142] Allen W. Wood, *Kant's Ethical Thought*, Modern European Philosophy (New York: Cambridge University Press, 1999), 145.

[143] For a perspective consistent with the one espoused by the CCA and consistent with many Evangelical opponents of queer rights, consult Robert J. A. Gagnon, *The Bible and Homosexual Practice: Texts and Hermeneutics* (Nashville: Ashgate, 2001). Gagnon argues that the Hebrew Bible and the Greek writings that inform the New Testament are uniform in their condemnation of homosexual practice, "from Genesis to the revelation of John of Patmos." As an Evangelical Christian, Gagnon finds this sufficient for moral condemnation. Noteworthy is his oxymoronic statement that the inferential "data" concerning Jesus' condemnation of homoerotic practice is clear (181). Posterity, unfortunately, has no record of Jesus saying anything respecting homoerotic behaviour.

in condemning homoerotic behaviour — and, further, chastity's overriding importance for Christian identity, it is not clear that disciplinary measures, up to and including expulsion from a community, are the only mandated biblical response to the alleged sin of homoerotic conduct. Though the university has never taken this action, it insisted upon maintaining this threat of punishment. Consequently, this threat remains pertinent.

Persons opposed to homoerotic conduct or gender diversity often advance a claim concerning the naturalness of opposite sex attraction and heterosexuality as an institution. For example, Douglas Farrow argues that marriage, and, by extension, the most moral form of sexuality, is *by nature* cross-sex and open to procreation.[145] While accusing opponents of circular reasoning — because they presume that the cross-sex definition of marriage is discriminatory — his argument does just that. Marriage is opposite-sex; it is opposite-sex because it has always been so. In addition to being flawed on account of circularity, it is irrational to deny marriage to same-sex couples based on (perceived) character traits that could impact future children, while granting felons, the obese, or alcoholics the right to do so. The children of Mafiosi are not reared to be upstanding subjects, yet *The Godfather* famously opens with a wedding.[146]

Biological and teleological arguments, at least in their simplistic form, suffer from the appeal to nature fallacy. These arguments take the following syllogistic structure: natural things or actions are morally good; X is natural; X is, therefore, morally good. This can also be phrased

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[144] Jennifer Knust, *Unprotected Texts: The Bible's Surprising Contradictions about Sex and Desire* (New York: HarperOne, 2011), esp. 47-68.

[145] Douglas Farrow, "Facing Reality," in *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment,* eds. Daniel Cere and Douglas Farrow (Montréal: McGill-Queen's University Press, 2004), 155-6.

[146] Mario Puzo and Francis Ford Coppola, *The Godfather*, directed by Francis Ford Coppola, (1972, New York; Paramount Pictures; 2017), digital video disc.

negatively as follows: unnatural things are morally bad; Y is unnatural; Y is, therefore, morally bad. This reasoning is suspect because "nature," like the word "normal," is vague and overdetermined by ethical judgement. When we invoke the concept of nature, we commit the error of begging the question. The premises already contain the conclusion. Accepting, for the sake of argument, that these syllogisms are logical, Julian Baggini offers the following instructive observation: "Even if we can agree that some things are natural and some are not, what follows from this? The answer is: nothing. There is no factual reason to suppose that what is natural is good (or at least better) and what is unnatural is bad (or at least worse)."[147] Hemlock killed Socrates, despite being an entirely natural substance.

Though 35 years old, this declaration of Michael Levin, in a respectable Oxford Journal, demonstrates that my description of appeal to nature arguments is not an exaggeration:

> Clear empirical sense attaches to the idea of the use of such bodily parts as genitals, the idea that they are for something, and consequently to the idea of their misuse. I argue on grounds involving natural selection that misuse of bodily parts can with high probability be connected to unhappiness. I regard these matters as prolegomena to such policy issues as the rights of homosexuals, the rights of those desiring not to associate with homosexuals, and legislation concerning homosexuality… the intuition that there is something unnatural about homosexuality remains vital. The erect penis fits the vagina and fits it better than any other natural orifice; penis and vagina seem made for each other. This intuition ultimately derives from, or is another way of capturing, the idea that

[147] Julian Baggini, *Making Sense: Philosophy behind the Headlines* (Oxford: Oxford University Press, 2004), 181-2.

> the penis is not for inserting into the anus of another man—that so using the penis is not the way it is *supposed*, even *intended*, to be used [author's italics].[148]

Problems with simplistic naturalism become apparent when one considers that rape is likely the most natural form of mammalian cross-sex intercourse. No person of sound mind and good will would conclude that rape is, thereby, morally permissible. As Diane Williamson notes, "In no way does [biological] evolutionary theory about the origins of physiology yield moral dictates about the way we should behave."[149] This fallacy is related to, but conceptually distinct from, the naturalistic fallacy that G.E. Moore identified. He holds that it is erroneous to define the good by natural properties.[150] On a broader level, these arguments often provide unsatisfactory reasons for overriding the application of David Hume's guillotine, which holds that it is difficult to derive a prescriptive statement, "an ought," from a descriptive statement, that is, "an is."[151]

While some descriptive facts may provide presumptive reasons for action, we should be suspicious of persons who invoke social facts that perpetuate inequality. The inaccessibility of a large portion of public buildings is an unfortunate reality for persons with disabilities. This condition is not value-neutral, but it is, instead, a condition which we should correct for the sake of justice. Notwithstanding its many problems, the fundamental and compelling insight of modern liberal societies is that we should criticize those who perpetuate hierarchies grounded in characteristics over which individuals have little control, absent strong countervailing reasons.

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[148] Michael Levin, "Why Homosexuality is Abnormal," *The Monist* 67. no. 2 (1984): 251.
[149] Williamson, 61.

[150] See G.E. Moore, *Principia Ethica,* (1903; repr., Cambridge: Cambridge University Press, 1960). 15-16. Moore's fallacy is more a caution against simplistic forms of naturalism than a decisive argument against naturalism in ethics: see, on this point, David A.J. Richards, *A Theory of Reasons for Action* (Oxford: Clarendon Press, 1971), 9-10.

[151] David Hume, *A Treatise of Human Nature*, 10th ed., ed. L.A. Selby-Biggee (1739; repr. Oxford: Clarendon Press, 1960), 3.2, 469-70.

Though queer propensities may not be inherited from birth, persons have little control over whether they acquire them. Consequently, we would need pressing countervailing justifications to demean or criminalize those with queer propensities. Those opposed to these tendencies do not offer any. As Iris Marion Young observes, "Social justice means the elimination of institutionalized domination and oppression. Any aspect of social organization and practice relevant to domination and oppression is in principle subject to evaluation by ideals of justice".[152]

Granting the partial validity of the appeal to nature fallacy, John Finnis attempts to offer a non-reductionistic account of natural law rooted in the work of Catholic theologian Germain Griess, in addition to the tradition of natural law that preceded these *men*.[153] Finnis attempts to update natural law while giving it a more universal appeal, stating that there exists:

> (i) a set of basic practical principles which indicate the basic forms of human flourishing as goods to be pursued and realized, and which are in one way or another used by everyone who considers what to do, however unsound his conclusions; and (ii) a set of basic methodological requirements of practical reasonableness (itself one of the basic forms of human flourishing) which distinguish sound from unsound practical thinking and which, when all brought to bear, provide the criteria for distinguishing between acts that (always or in/particular circumstances) are reasonable-all-things-considered (and not merely

[152] Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990), 15.

[153] Nicholas Bamforth and David J. A. Richards, *Patriarchal Religion, Sexuality, and Gender: A Critique of the New Natural Law* (Cambridge: Cambridge University Press, 2007), 56. While I recognize that natural law reasoning is the traditional domain of the Catholic magisterium, Evangelicals, at least when seeking to make arguments with appeal to a broader range of audiences, make virtually identical arguments.

> relative-to a-particular-purpose) and acts that are unreasonable-all-things-considered, i.e., between ways of acting that are morally right or morally wrong - thus enabling one to formulate (iii) a set of general moral standards.[154]

The object of ethics and law should be to achieve an integrated moral life for each subject. This life strives to manifest seven purportedly universal human goods — life, knowledge, aesthetic fulfilment, meaningful work and play, friendship, and practical reasonableness. For Finnis, these goods are self-evident. The pursuit of them requires no further justification. Also, we must further these goods in society and ourselves and not act to prioritize one of these essential goods over another. Finnis believes that all are part of integrated moral human being-in-the-world.[155]

Cross-sex marriage is a transhistorical transcultural institution that positive law has no authority to alter in its essential heterosexual character. It is timeless and immutable because it alone is uniquely suited to realize our need for complementary sexual companionship and our need to maintain intergenerational stability. As Pope Leo XIII stated in 1880: "The civil law can deal with and decide those matters alone which in the civil order spring from marriage, and which cannot possibly exist, as is evident, unless there be a true and lawful cause of them, that is to say, the nuptial bond."[156] The problem with Douglas Farrow's analysis is that it fails to "face the reality" of parliamentary sovereignty. As M.H. Ogilvie reminds us, quoting the revered (or reviled) expositor of parliamentary sovereignty, A. V. Dicey:

> Parliamentary sovereignty means that in Canada, Parliament has supreme and sovereign authority over the affairs of all individuals and institutions within its geographical

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[154] John Finnis, *Natural Law and Natural Rights* (Oxford: Oxford University Press, 1980), 23.

[155] Finnis, *Natural Law,* 59, 61, 64-9, 85-97.

[156] Farrow, "Facing Reality," 159.

> jurisdiction, including all religious institutions and the religious practices of individual citizens, subject only to the generally applicable constitutional limitations on its sovereign legislative power. Parliamentary sovereignty means that Parliament has the power, as Dicey stated, "to make or unmake any law whatsoever."[157]

As Jean Jacques Rousseau famously quipped, "we do not know what our nature permits us to be".[158]

We may, as Farrow and John Milbank do, worry about an omnipotent state whose positivistic sovereignty has the power to create a totalitarian regime by trying to establish liberal heaven on Earth.[159] Farrow comes at the heart of this dispute, when, ignoring the hundreds of religious queers who wish to get married, says that same-sex marriage also marks the end of the supremacy of (a patriarchal) God.[160]

Assuming, for the moment, marriage's inherent relation to children, Alan Brudner persuasively argues that Hegel's reworking of Scholastic sexual ethics means that love, fidelity, and mutual recognition are the primary ethical goods of marriage and that the child, not biological offspring, is the fulfilment of this ethical bond. Even so, fertility has very rarely been a requirement for marriage at common law. Hence, future decisions overruled this specific

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[157] M.H. Ogilvie, *Religious Institutions and the Law in Canada* (Toronto: Irwin Law, 2010), 100; A. V. Dicey. *The Law the Constitution*, 10th ed. (London: Macmillan, 1959), 39.

[158] Jean-Jacques Rousseau, *Emile: or, On Education*, trans. Alan Bloom (New York: Basic Books, 1979), 62.

[159] Farrow, "Facing Reality," 170; John Milbank, "Paul Against Biopolitics" *Theory, Culture and Society* 25, no. 7-8 (2008): 160; Thomas Frederick Tierney, "Suicidal Thoughts: Hobbes, Foucault and the Right to Die" *Philosophy and Social Criticism* 32, no.5 (2006): 601-38; Giorgio Agamben, *Homo Sac we er: Sovereign Power and Bare Life,*" trans. Daniel Heller-Roazen (Stanford , CA: Stanford University Press, 1998), 1-12, 72; Thomas Hobbes, *Leviathan: Or the Matter, Formed And Power of a Commonwealth Ecclesiastical And Civil*, ed. Michael Oakeshott (1651, repr., Tondon: Colliers Macmillan Publishers, 1962) 99-110.

[160] Farrow, 170.

holding in *Egan*.[161] Nevertheless, the argument does have a certain appeal, by its elegance, simplicity, and absolutism. It becomes questionable after gleaning the sexist disgust that supports it.

Finnis expresses traditional (Christian) natural law's condemnation of homoerotic conduct when he states the following:

> Reality is known in judgment, not in emotion. In reality, whatever the generous hopes and dreams and thoughts of which some same-sex partners may surround their 'sexual' acts, those acts cannot express or do more than is expressed or done if two strangers engage in such activity to give each other pleasure, or a prostitute pleasures a client to give him pleasure in return for money, or, say, a man masturbates to give himself pleasure and a fantasy of more human relationships after a gruelling day on the assembly line. This is, I believe, the substance of Plato's judgment—at that moment in the Gorgias 494-5 which is also decisive for the moral and political philosophical critique of hedonism—that there is no important distinction in essential moral worthlessness between solitary masturbation, being sodomized as a prostitute, and being sodomized for the pleasure of it. Sexual acts cannot be self-giving unless they are acts by which a man and a woman actualize and experience sexually the real giving of themselves to each other—in biological, affective, and volitional union in mutual commitment, both open-ended and exclusive—which like Plato and Aristotle and most peoples we call marriage. In short, sexual acts are not unitive in their significance unless they are marital (actualizing the all-level unity of marriage) and (since the common good of marriage has two aspects) they are not marital unless they have not only the generosity of acts of friendship but also the procreative significance, not necessarily of being intended to

[161] Brudner, 343.

> generate or capable in the circumstances of generating but at least of being, as human conduct, acts of the reproductive kind—actualizations, so far as the spouses then and there can, of the reproductive function in which they are biologically and thus personally one.[162]

It is important to understand this quotation in full, despite its length. It ought to be in the back of readers' minds as we go forward. While Finnis does not support the criminal prohibition of homoerotic conduct, he believes the state should do everything possible to deter such conduct for the sake of the common good.[163] His student, Robert P. George, correctly following the implications of Finnis' logic, sees no reason that a society may not criminally proscribe homoerotic conduct. In so doing, it would be sacrificing the hedonistic liberties of the individual for its collective welfare. We should note that George's contention appears in the book entitled *Making Men* [not human beings] *Moral*.[164]

First, Finnis and George offer a very mechanistic conception of reproduction, arguably relying on the naturalism they disavow. Second, they maintain an understanding of sexual dimorphism and gender complementarity that subordinates women. Women represent the feminine, receptive principle, counterposed to the masculine, penetrative, one. Third, they offer questionable appeals to the alleged fathers of patriarchal occidental philosophy without acknowledging the misogyny and slavery that coloured their profoundly different cultural context. Fourth, they analogize homoerotic conduct to other forms of criminal behaviour thought to bring dishonour. Their distaste for sodomy leads them to suggest that queer persons are

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[162] Finnis. "Sexual Orientation," 341.

[163] Finnis. "Sexual Orientation," 341-5.

[164] Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Clarendon Press, 1993), 147.

profoundly misguided, mentally ill, or wilfully blind. Thus, they construct them as morally defective agents. Not content with this list of calumnies, Finnis goes on to compare having intercourse with a person of the same sex to intercourse with a goat. Both bestiality and homoerotic conduct are non-procreative. For Finnis, there is no substantive difference.[165]

As Pamela Dickey Young states:

> In response to the argument that procreation is what shows us the importance and naturalness of this bifurcation [human beings into male and female, we should ask the following]: how often do we really want to reproduce? In other words, for most of our lives, contemporary humans, at least in the West, are non-reproductive, so why does reproduction seen to be the key to understanding human categories? In terms of our current understanding of gender roles in the West, for virtually everything else besides human reproduction, sex is purportedly seen as relatively unimportant or irrelevant to education, employment or domestic duty. If we ask the question about who benefits most from the organization of society into males and females, the answer is males in heterosexual relationships, that is, those who have the unquestioned and assumed normative right to be at the top of the pyramid of power and authority in society.[166]

The opposite-sex definition of marriage is no more essential than the gendered power differentials that have existed within it. While not denying that what most societies thought of as proper sexuality occurred in marriage or marriage-like relationships between cross-sex partners, it has also changed dramatically in purpose and function.

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[165] Finnis, "Sexual Orientation," 320 (n. 14).

[166] Dickey Young, 14.

Particularly, it has changed in response to gender equality and the hegemony of the companionate relationship.[167] Whatever Finnis' other defects, he, and the Catholic *Magisterium* whom he supports, have the virtue of consistency. As we saw from the discussion of Aquinas above, any arguments about the supposed naturalness of cross-sex intercourse are most persuasive when they prohibit contraception and non-procreative sexual activity. Without this support, the discourse becomes even more patriarchal and confused. The CCA did not ban contraception.

In addition to disagreement with these authors concerning the definition of gender and marriage, we must discuss a separate, but related, objection. We should reject natural law arguments against same-sex marriage (and homoerotic behaviour more broadly) because they further ability-related discrimination. They make membership in a fundamental political, economic, and legal institution (that is, marriage) depend upon possessing (or willingness to perform) specific natural capacities and functions. Queerness is the disability or personal problem seeming to adhere in the individual, rather than an identity or behavioural propensity that may cause "access barriers."[168] Discourses against same-sex marriage sometimes are similar to how many think disabilities are "personal tragedies," rather than consequences of social oppression.

Likewise, South Asians are not discriminated against because they are "naturally brown," and some persons have a "natural aversion to brownness" (whatever that may mean). "Being brown" only becomes intelligible in a world whose structural features continue to

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[167] Stephanie Coontz, *Marriage, A History: How Love Conquered Marriage* (Toronto: Penguin books, 2006), 247-304.

[168] Michael Oliver and Colin Barnes, *The New Politics of Disablement* (Leeds: Palgrave Macmillan, 2012), 99-101.

advance white supremacy. Arguing queer persons should not have access to marriage because marriage is inherently heterosexual is analogous to claiming that buildings are inaccessible by nature. Persons who do not wish to see wheelchair users or the blind out in public frequently argue that buildings have always been inaccessible. Architectural change is not the responsibility of society. John Rawls offers this succinct challenge to the appeal to nature fallacy and reminds us to focus on the social nature of justice in the following quotation:

> A further essential distinction is between the unequal distribution of natural assets, which is simply a natural fact and neither just nor unjust, and the way the basic structure of society makes use of these natural differences and permits them to affect the social fortune of citizens, their opportunities in life, and the actual terms of cooperation between them. Plainly it is the way that social institutions use natural differences, and allow accident and chance to operate, which defines the problem of social justice.[169]

We should consider "traditional marriage," in addition to the heterosexual male privilege that attends this institution, as a regrettable part of the basic structure that shapes our (hetero)sexist society. We should change it owing to deeper commitments to justice and democracy. If arguments against queerness cannot withstand scrutiny, it is reasonable to suggest that something more insidious motivates them. The impetus behind many arguments against homoerotic behaviour is a belief in gender complementarity. Homoerotic activity is not an ideal choice. It is narcissistic at its core. It seeks the love of the same rather than the love of difference. These arguments also expose a discourse of disgust and subordination that is challenging to accommodate in a society that professes to value gender equality.

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[169] John Rawls, "Kantian Constructivism in Moral Theory," *Journal of Philosophy* 77, no. 9 (1980): 551.

As Leo Bursani notes, (hetero)sexism expresses a desire to maintain phallic potency, and concomitant fears over penetration. These arguments portray anyone who transgresses this phallocentric power arrangement as subhuman, or partially disabled.[170] They link queer sexuality and gender to animality, assume the naturalness of heterosexuality, believe that a single, as well as publicly enforced, sexual morality is necessary for social cohesion. Moreover, they assume that distaste of the average (assumed heterosexual and male) person for homoerotic conduct (especially male-male anal intercourse) is enough to justify criminal prescription or social disapprobation. Disgust is a normatively suspect emotion because of the human tendency to transform primary disgust into secondary disgust by transferring discomfort at our animality onto disliked minority groups.[171] Martha C. Nussbaum says the following:

> The idea of normalcy is like a surrogate womb, blotting out intrusive stimuli from the world of difference. But of course, this stratagem requires stigmatizing some other group of persons. Normals know that their bodies are frail and vulnerable, but when they can stigmatize the physically disabled, they feel a lot better about their human weaknesses. They feel really all right, almost immortal.[172]

Shame and disgust can be troubling moral emotions. They assume that a character trait defines a person. They, thereby, undermine her autonomy, by impairing her ability to make (correct) personal choices that reflect her status as a moral agent. Despite being childish, sexual shaming

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[170] Leo Bersani*, Is the Rectum a Grave? And Other Essays* (Chicago: Chicago University Press, 2010), 18.

[171] Paul Rozin, Brent Haddad, Carol Nemeroff, Paul Slovic, "Psychological Aspects of the Rejection of Recycled Water: Contamination, Purification and Disgust," *Judgment and Decision Making* 10, no. (2015): 51; Martha C. Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law* (Princeton, NJ: University Press, 2004), 107.

[172] Nussbaum, *Hiding.*, 219.

discourses are often ways to maintain gendered power hierarchies, which are effective on cognitive and emotional registers, despite, or, perhaps, because of, their inconsistency.

We should reject natural law arguments concerning this specific topic because they are impossible to falsify. As David Halperin observes, queers are in a double bind. On the one hand, if we argue that homoerotic behaviour and gender diversity are natural phenomena, for which there is some evidence, we meet the objection of the appeal-to-nature-fallacy and rightly so. On the other hand, if we argue that homoerotic behaviour and gender diversity are culturally contingent, we confront the transhistorical ground of biology or Natural Reason as an indicator demonstrating the unnaturalness of sexual and gender diversity. This is an ever-changing and an inescapable Gordian knot.[173]

Similarly, Margaret Somerville reinvigorates a familiar stereotype. She says that children have a right to receive primary care from their biological parents.[174] Because of this right, society is justified in promoting marriage as an inherently cross-sex legal and dynastic relationship, while extending civil union status to same-sex couples. This is her argument, even though Somerville's conception of civil union is marriage in all but name. Marriage is the best way of ensuring children's knowledge of their genetic parentage and their (proper) care by their biological parents.[175] Though a stable heterosexually oriented society can make a compassionate exception for same-sex couples, she explicitly claims that homoerotic desire and same-sex child rearing ought not to be (ultimately) normalized.[176] Though children are entitled to be reared in an

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[173] David M. Halperin, *St. Foucault: Towards a Gay Hagiography* (New York: Oxford University Press, 1997), 131.

[174] Margaret Somerville, "What about the Children?" in *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment,* eds, Daniel Cere and Douglas Farrow (Montréal: McGill-Queen's University Press, 2004), 66.

[175] Somerville, 67.

environment and by guardians best suited to their habituation and maturation, there is no such *a priori* "natural" legal entitlement or right that is protected by statute or moral law. Though attempting to provide a secular and (comparatively) civil critique, hers is more objectionable by its insidiousness. Somerville's reasoning exhibits classic tropes of what Lee Edelman has called "reproductive futurism." This term "describes the common tendency to defer justice and pleasure in the present for the continuance, or better realization of, an imagined, often more irenic, future. It also describes the tendency to figure queers and queer sexual practices as agents of death, sterility, and social decay.[177]

Our future hopes are incarnated in an imagined child. The prospect of harm to her is frequently used to justify hatred in the present. Edelman believes that such hopes explain the frequent moral panic over crimes involving children, in addition to how the safety of the family maintains the hegemony of the powerful. For example, the sexual abuse of children is an abhorrent social problem; yet, our culture is in a moral panic regarding stranger pedophilia, even though the alleged sanctity of the family blinds many persons to the overwhelming social science evidence that suggests most sexual abuse cases happen with family members, specifically heterosexual ones,[178] not the dangerous (historically constructed as queer) stranger within our midst.[179] Moreover, though the family is a source of emotional comfort to many, it is also the principal site of emotional and physical abuse. Albeit with slow changes, it is still the main site

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[176] Somerville, 70-8.

[177] Lee Edelman, *No Future: Queer Theory and the Death Drive*, 2nd ed. (Durham, NC: Duke University Press, 2004), 29.

[178] Elaine Craig, *Troubling Sex*, Law and Society Series, (Vancouver: UBC Press, 2012), 41.

[179] Elise Chenier, *Strangers in Our Midst: Sexual Deviancy in Postwar Ontario* (Toronto: University of Toronto Press, 2008), 17-42.

for the social subordination of women.[180] Age appropriate and consensual queer sexuality does not harm children, either through direct experience or indirect exposure. In the wise words of former Chief Justice MacLachlan, "tolerance is always age-appropriate."[181] I acknowledge, however, that many forms of queer social and sexual relations may change the so-called traditional family. This challenge is a praiseworthy endeavour.[182]

Anti--queer rhetoric has many contradictions at whatever level of feigned compassion or philosophy. Heterosexually oriented marriage is the most natural social institution, but it is the institution most under threat.[183] "Homosexuals" are a powerful group of social (minority) elites; yet, they use their (allegedly disingenuous) vulnerability to their advantage. They represent the height of urbanity and are a threat to civilization as we know it. As Mariana Valverde astutely observes, this rhetoric has a long pedigree and is like the disgust rhetoric levelled at women and other marginalized groups. [184] Many inconsistencies, both regarding reasoning and uneven

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[180] Statistics Canada, "Family Violence in Canada: A Statistical Profile 2014," Accessed February 26, 2018, http://www.statcan.gc.ca/daily-quotidien/160121/dq160121b-eng.htm. The report is misleading because, while the percentage of self-reported violence has achieved gender parity, women are twice as likely to experience life-threatening violence or sexual assault, moreover self reported data in this area is notoriously unreliable. See also Stephanie McMullen, Nancy Nason-Clark, and Barbara Fisher-Townsend, *Religion and Intimate Partner Violence: Understanding the Challenges and Proposing Solutions* (Oxford: Oxford University Press, 2017). This is not to deny the considerable agency women exercise within domestic spaces, but there is little denying that the domestic sphere has historically and contemptuously not been an entirely safe location for women.

[181] *Chamberlain v Surrey District Schoolboard No. 36,* 2002, para. 69, SCC 86, [2002] 4 SCR 710 (CanLII).

[182] Gayle S. Rubin. "Thinking Sex — Notes toward a Radical Theory of Sexuality," in eds. Henry Abelove, Michèle Aina Barale and David M. Halperin *The Lesbian and Gay Studies Reader* (New York: Routledge, 1993), 11.

[183] Katherine K. Young and Paul Nathanson, "The Future of an Experiment," in *Divorcing Marriage: Unveiling the Dangers in Canada's New Social Experiment,* eds. Daniel Cere and Douglas Farrow (Montréal: McGill-Queen's University Press, 2004), 45-48.

[184]Mariana Valverde, *Law's Dream of Common Knowledge* (Princeton: Princeton University Press, 2003), 126.

application, demonstrate that (hetero)sexism is a reasoned system of bias and not a very well-reasoned one.

These emotional contradictions make it difficult for Canadian constitutional culture to justify the perpetuation of (hetero)sexism. It is a historic, though presently largely unconscious, system of coercion. This system of coercion curtails actualization of human freedom, by unjustifiably deploying emotional discourses of negative normative assessment. Also, and perhaps more troubling from the perspective of liberal political discourse, is the primacy Christian, and by extension, modern natural law and sociological theories opposing homoerotic behaviour, give to the collective over the individual. They see interference with individual liberty and dignity, albeit to varying degrees, as essential for the health of many collectivities and society in general. Kantians find this disquieting; for in the words of H. L. A. Hart, a pioneer in his time concerning queer rights, though not a Kantian, "interference with individual liberty may be thought an evil requiring justification ... for it is itself the infliction of a special form of suffering." [185]

This chapter attempted to understand the CCA sociologically in a manner that respects an insider perspective. Taking this analytical posture reminds us that Evangelical (hetero)sexism is part of an integrated worldview and code of behaviour that possesses many praiseworthy qualities. Nonetheless, this chapter has situated the covenant within a troubling tradition of Christian sex negativity. This pervasive bundle of discourses and practices have ableist misogyny at their root. Queer sex is dishonourable because it violates the divinely ordained gender hierarchy. While there is far more to queer sexualities and lives than sodomy, understanding and critiquing the juridical fiction of the sodomite shows how Christian theology has structured the possibilities of legal erotic experience according to androcentric ideals of

[185] H.L.A. Hart, *Law, Liberty, and Morality* (Oxford: Oxford University Press, 1963), 22.

power. As well, Christian theology has used shame and silence to exclude queers from the circle of subjects deemed to be fully human.

Queer-equity-seekers and the possible bias of queers against Christian groups are understood better if we see then within this history of oppression. Such contextual analysis illuminates the tension between shame and pride endemic to contemporary queer lives and Canadian constitutional culture. The struggle to cast off the bonds of shame, owing to censorship, insufficient political clout, and increased criminalization, demonstrates that queers and Evangelicals are not two equally advantaged minority groups with equivalent social grievances. Finally, we should question the liberal distinction between the public and the private spheres. This division has subordinated women and maintained and indefensible Christian privilege within Canadian constittional culture.

Chapter 4:
From Sodomite to Citizen: An Analysis of Important Precedents

To speak of domination or symbolic violence is to say that, except in the case of a subversive revolt leading to inversion of the categories of perception and appreciation, the dominated tend to adopt the dominant point of view on themselves … The particularity of [heterosexual] symbolic… domination is that it is linked not to visible sexual signs but to sexual practice. The dominant definition of the legitimate form of this practice as the relation of dominance of the masculine principle (active, penetrating) over the female principle (passive, penetrated) [; this dichotomy] implies the taboo of the sacrilegious feminization of the masculine, i.e., of the dominant principle, which is inscribed in the homosexual relationship. Bearing witness to the universality of the recognition granted to the androcentric mythology, [queers]… very often apply the dominant principles to themselves, even though, together with women, they are the prime victims of those principles… — Pierre Bourdieu[1]

The typical sexual practices of homosexuals are a medical horror story—imagine exchanging saliva, feces, semen and/or blood with dozens of different men each year. Imagine drinking urine, ingesting feces and experiencing rectal trauma on a regular basis. Often these encounters occur while the participants are drunk, high, and/or in an orgy setting. Further, many of them occur in extremely unsanitary places (bathrooms, dirty peep shows) ….
—Paul Cameron[2]

Much has changed since Dr. Paul Cameron (widely denounced)[3], wrote his diatribe against homoerotic sex. Canadians approve of homoerotic sexual activity, formal legal equality afforded to most queers, and the institution of same-sex marriage by a two thirds-majority.[4] Nevertheless, it is essential to revisit Paul Cameron's politics of disgust. Only by appreciating this

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[1] Pierre Bourdieu, *Masculine Domination*, trans. Richard Nice (Cambridge: Polity Press, 2001), 119.

[2] Paul Cameron, "Medical Consequences of What Homosexuals Do," (Colorado Springs, CO: Family Research Institute), distributed as a pamphlet and online at http://www.biblebelievers.com/Cameron2.html. Accessed April 22, 2018.

[3] American Sociological Association, "Official Reports and Proceedings," *Footnotes*. 15, no. 2, (1987): 14; Canadian Psychological Association, "Public Statement by Paul Cameron on Homosexuality." Canadian Psychological Association, accessed on May 18, 2018 at https://www.cpa.ca/aboutcpa/policystatements; Michael Kranish, "Beliefs drive research agenda of new think tanks: Study on gay adoption disputed by specialists," *The Boston Globe*, 2015, accessed on May 18, 2018 at http://archive.boston.com/news/nation/articles/2005/07/31/beliefs_drive_research_agenda_of_new_think_tanks/?page=full.

longstanding bias against queer sex, mainly Christian strictures against male-male sodomy, may we comprehend the discursive force which has been, and continues to be, needed to reorient the imagined legal subject away from a politics of disgust toward an ethos of inclusion. Because conservative Christianity is often a particularly potent source of this disgust, the reorienting of constitutional culture entails the circumscription of religious freedom.

The preceding chapters have illuminated incompatibilities between Kantian ideals of dignity and freedom and the emotions that often underpin (hetero)sexism. (Hetero)sexism perpetuates hierarchies and shames persons based on their gender (identity/expression). In Chapter 1, I described tensions within Canadian constitutional culture between purportedly universal values and specific compromises. In this chapter, we shall see the Court grapple with a thorny situation: namely, that constitutional protection of sexual orientation entails a public repudiation and implicit shaming of persons who believe queerness to be a cause of sin.

I have chosen the 1998 case of *Vriend v. Alberta*, the 2001 case of *Trinity Western University v. British Columbia College of Teachers*, the 2004 *Reference: Re: Same-Sex Marriage*, and the 2013 case of *Saskatchewan (Human Rights Commission v. Whatcott*.) I have done so for seven reasons. First, all the cases suggest that religious freedom and sexual orientation protection are essential to Canadian constitutional culture, yet they are mutually circumscribed by the limits of each. Second, they struggle to contain religion and sex as troubling sources of emotion that the public official should dampen, if not bracket entirely. Specifically, they assume that law is a disinterested umpire in the alleged conflict between sex and religion, instead of a cultural phenomenon which interweaves with both. Third, they use

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[4] Lorne Bozinoff, "US court ruling boosts approval of same sex marriage in Canada," Forum Research, accessed on May 18, 2018 at http://poll.forumresearch.com/post/307/increase-in-approval-seen-among-oldest/.

shame to construct and redefine the boundaries of our imagined public and private selves. Fourth, they believe constitutional law is a powerful agent of historical change. Fifth, they deploy victimization to determine who is most worthy of protection and inclusion and under what circumstances. Sixth, they associate law with the progressive Kantian discourse of humankind's perfectibility through the free exercise of reason and attending gradual emergence from self incurred immaturity. Seventh, they all have human dignity and how to actualize this concept when there is a purported conflict between rights as a crucial preoccupation. These are recurring themes that will help us deconstruct the law school submissions and the attending Supreme Court decision. Even though the Supreme Court is frequently reluctant to criticize religious (hetero)sexism directly, it uses sexual orientation protection to curtail religious (hetero)sexism obliquely. In phenomenological terms, these judicial decisions regarding the interaction between religion and sexual orientation are (re)orientation devices. When we analyse these decisions, especially the dissenting voices created as a response, we should keep the following points of disagreement in mind. First, they divide on the public-private distinction's boundaries. Second, they argue over whether liberalism should be a *modus vivendi* or have more substantive values. Third, they argue about whether we should recognize the expressive harms of discrimination and to what extent we should do so. Fourth, they disagree about whether the law ought to redress historical inequalities and to what extent it should do so.

VRIEND (ABCA)

Delwin Vriend was a lab coordinator at Kings (Christian) College in Alberta who was fired in 1991 because he was gay. Having compassion for Vriend's plight allows us to appreciate the challenges queer Albertans confronted in the 90s, the toxic consequences of shame, and the moral errors the majority of the Alberta Court of Appeal committed in this case. Deploying our

method that uses ethical instincts as judgements requiring a compelling philosophical exposition,[5] this case is intuitively wrong because King's College, and then the Alberta provincial government, denied Vriend full humanity and unethically deployed shame.

Vriend was a model employee, who had some alleged behaviours contravening the organizational culture of the school that employed him and held him in high regard. This corporate culture did not concern Vriend. He was not a member of the institution's administration, nor was his work part of the school's core functions. Vriend's behaviours came from a personal trait which it is legal to express. As well, almost all ethicists consider it to be moral. Moreover, this trait is nearly impossible to change and not independently correlated to any maladaptive behaviour.

Even so, likely fewer acquaintances than he might have liked valued his characteristic. He might have learned to be scrupulously careful when choosing the confidants to whom he disclosed it. Separation from others owing to concealing his characteristic might have caused Vriend to be insecure since first becoming aware of the trait. His blemish may have sometimes cost him the esteem of loved ones. Persons might often have insulted him because of it.[6] One day, seemingly without reason, the president of Vriend's school asked if Vriend was gay. Vriend faced a harrowing dilemma. First, he could have been deceitful, aware that, because the president extemporaneously and impertinently solicited this information, the president likely had evidence to disprove Vriend's lie. Second, Vriend could have told the truth and anticipated reprisal. He opted for honesty. This encounter was likely mortifying, but sincerity was imperative.

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[5] Daniel McDermott, "Analytical Political Philosophy," in *Political Theory: Methods and Approaches*, eds. David Leopold and Marc Stears, (Oxford: Oxford University Press, 2008), 11.

[6] Steven Seidman, *Beyond the Closet: The Transformation of Gay and Lesbian Life*. (New York: Routledge, 2002), 22; Didier Eribon, *Insult and the Making of the Gay Self,* trans. Michael Lucey (Durham, NC: Duke University Press, 2004), 16.

For a time, everything was fine. A few months later, the school implemented a policy prohibiting homoerotic behaviour and quickly terminated him.[7] Likely feeling wounded and angry, Vriend applied to his province's Human Rights Tribunal for relief. He found only rejection. Such demeaning treatment worsened his embarrassment. He discovered that, though his jurisdiction had extensive human rights protection, it did not shield individuals with Vriend's trait from discrimination at that time.

Consequently, his complaint could not proceed. Adding insult to injury, Vriend learned that the legislature had actively refused to include his characteristic. They were obstinate, even though several other provinces, as well as his country's Supreme Court, recently recognized sexual orientation as a prohibited ground of discrimination after a long struggle.[8] Undaunted, Vriend applied for a review of the Tribunal's decision. He won.[9] Vriend's provincial government became aware of this victory and helped file an appeal. It did not want to protect persons like Vriend. Some of its constituents did not like "homosexuality" and the behaviours which they argued come from it.[10] He lost at the provincial Court of Appeal. Rubbing salt in his

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[7] *Vriend v. Alberta*, [1998] 1 SCR. 493, para. 7, 156 DLR (4th) 385 (CanLII).

[8] Lahey, Kathleen, *Are We 'Persons' Yet? Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999). The whole book is about this *but* especially pages 114-25; [8] *Canadian Charter of Rights and Freedoms,* Part I of *the Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11. sec. 15. Section 15 provides: (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; (2) 173; Barry L. Strayer, *Canada's Constitutional Revolution*. (Edmonton: University of Alberta Press, 2013). For discussion of analogous grounds and the problems I have with them, see material contained in (n. 80.) of this chapter; *Canada (Attorney General) v Mossop* [1993] 1 SCR 554, 580, 100 DLR (4th) 658 (CanLII).

[9] *Vriend* (SCC), para. 19.

[10] *Individual's Rights Protection Act*, R.S.A. 1980; *Vriend* (SCC), paras. 11-7. This Act is no longer in force and has been replaced by the Alberta Human Rights Act. *Alberta Human Rights Act*, RSA 2000, c A-25.5; Clark Banack, "Conservative Christianity, Anti-Statism, and Alberta's Public Sphere: A Curious Case of Bill 44," in *Religion in the Public Sphere: Canadian*

wound, the majority said he was akin to a sex offender.[11] He did not feel like a cherished and dignified member of society. These emotions likely changed when the Supreme Court affirmed the goodness of queerness. As well, it said that he was an integral part of the community.[12]

The judgement of McClung J.A., (a male Justice) recruits silence and the idea of parliamentary sovereignty to conceal thinly veiled disgust at queerness. It also uses silence to criticize Justice Russell's (female) judicial activism. He says the following:

. With respect, Russell J.'s conclusion sweeps within its condemnation anything falling short of federal initiatives declared under s. 15(1). Such a tenet, even in rights matters, would prove to be a debacle for the autonomy of provincial law-making.… Clearly, the content of the *IRPA*, as it presently reads, is neutral, non-aligned and inclines to neither the homosexual nor the heterosexual communities. "Sexual orientation" is not mentioned at all. … But the province, as it is allowed to do, has here positioned itself in a silent, disengaged and isolationist stance on the matter of the *IRPA* and "sexual orientation…. That is hardly to say that the governments of the day will not have to answer later to the voters for such a stance. That is as it should be.[13]

He has three central claims. First, Alberta's legislation does not discriminate. The law protects homosexuals on every other ground of discrimination. Second, underinclusive law is not state action that creates a formal distinction. He says the following: "Under the *IRPA*, as it stands, there is no burden imposed upon homosexuals or any other minority that is not mentioned in its

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Case Studies, ed. Lori G. Beaman and Solange Lefebvre (Toronto: Toronto University Press, 2014), 257.

[11] *Vriend v. Alberta*, 1996 ABCA 87, para. 36, 132 DLR (4th) 595 (CanLII).

[12] *Vriend* (SCC), para. 67.

[13] *Vriend* (SCC), para. 19.

declaration. The *IRPA* neither subjugates, nor promotes, the homosexual community." [14] Third, provincial legislatures are not required to follow the *Charter* in every respect and are entitled to deference and restraint from the Supreme Court when they make complex choices regarding issues of morality. He observes the following:

> While any legislative product touching governmental activity is, of course, now subject to *Charter* scrutiny under its ss. 32 and 52, the practice of judicially upgrading that product should be strictly disciplined. This is because of the spectre of constitutionally hyperactive judges in the future pronouncing all of our emerging rights laws according to their own values; judicial appetites, too, grow with the eating. Equally undesirable is the prospect of Canada's legislators, painfully aware of later electoral rejection for backing the wrong political horses, further acquiescing in the growing (and painless) expedient of shipping awkward political questions to the judiciary for decision, thus reserving to themselves the privilege of possible later disclaimer… That "sexual orientation" is so obviously a divisive issue, like right-to-life or euthanasia (issues which are also touched by the declarations of the Canadian *Charter* of Rights and Freedoms), does not, by its gravity alone, force the hand of the legislator. You cannot legislate morality or successfully order people to love each other.[15]

In this quotation. Justice McClung uncritically equates queer equality with abortion and medical assistance in dying. At that time, medical assistance in dying had not received constitutional protection. Moreover, abortion and medical assistance in dying are not essential to group identity and oppression in the same way that queer sex is intimately tied to queer group identity. He trivializes and feminizes human rights, by equating them with the impossible quest to love one

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[14] *Vriend v. Alberta*, 1996 ABCA 87, para. 25, 132 DLR (4th) 595.

[15] *Vriend* (ABCA), para. 25-6.

another. He also criticizes Justices with an overly empathetic temperament concerning queerness. Their bias causes them to exceed their proper role.

> He says the following concerning supposed controversial moral questions:
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> Legislatures, including the Parliament of Canada, need not, and do not enter every morally eruptive social controversy and attempt to resolve it by statutory remedy. The experience of government has shown that many of the day's major social conflicts may well find their own level of community resolution in time without legislative, let alone needless judicial, prod as the acceptance of wider social mores within Canadian society continues. Canadians of deeper memory will well recall W. L. Mackenzie King, who as Prime Minister, turned eschewment of insoluble political conflict into lasting political artistry. So did the astute Sir John A. Macdonald, who did not earn his sobriquet "Old Tomorrow" by any habit of impulsive legislation.

In this quotation, we should note Justice McClung's use of the phrase "morally eruptive." This phrase presupposes the intense moral controversy concerning queerness he is merely purporting to describe. As well, Justice McClung suggests his conceptions of parliamentary sovereignty and legislative deference are the correct ones by virtue of tradition. He invokes the illustrious names of John A. McDonald and W.L. Mackenzie King. These men exemplify the pragmatism that Justice McClung considers to be at the heart of Canadian history. This reference implies that Justice McClung is authentically Canadian and activist judges are not. He chooses a conservative and a liberal respectively. This pair implies that his is the moderate and reasonable position. This judicial posture is best in touch with the political pulse and history of the Province. The word "sober" also implies that he is rational and that others are perhaps drunk with power.

He evidently disapproves of homoerotic behaviour. He cites the infamous United States Supreme Court case of *Bowers v. Hardwick*, which upheld Georgia's sodomy law, based on a millennium of allegedly uniform Christian opprobrium against the practice. He says, "I am unable to conclude that it was a forbidden, let alone a reversible, legislative response for the province of Alberta to step back from the validation of homosexual relations, including sodomy, as a protected and fundamental right, thereby [as The United States Supreme Court said in *Bowers v. Hardwick*]' rebutting two millennia of moral teaching [concerning the wrongfulness of sodomy]"[16] This supposedly unanimous tradition of disapproval, at least for Justice McClung, means that the legislature is entitled to deference. He suggests that the good (assuming masculine) judge exercises restraint and defers to legislative silence. Legislatures need not "march to the *Charter* drum."[17] Hence, Justice McClung believes that homoerotic conduct is a private matter, undeserving of recognition by the state.

McClung J.A. does not let Vriend define his desires. Instead, he chooses to present the appellant according to an archaic juridical category (that is, sodomy). This unfortunate choice ignores how members of the appellant's group have come to define themselves. The reasons many queer individuals started to advocate using the term gay, as opposed to homosexual or sodomite, is because it has more positive connotations (that is, happy), was group chosen, not an identity an external authority imposed. Moreover, it denotes something encompassing, yet transcending, sexual acts. The term gay does not associate queer persons with the traditional disgust rhetoric levelled against them — hence, the political slogan, "gay is good". Conversely, homosexual or sodomite comes from a medical-legal discourse which denigrates queers by

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[16] *Vriend* (ABCA), para. 32; *Bowers v. Hardwick*, 1986 478 U.S. 186, 150.

[17] *Vriend* (ABCA), para. 21.

portraying them as pathologically passionate, weak, sick, and deviant. They have not been reclaimed in the same way that queer now has.

As gay American playwright, Tony Kushner, has one of his closeted characters put it in *Angels in America,* the term homosexual can be derogatory because*:*

> [A]ll labels [like homosexual] tell you one thing and one thing only: where does an individual so identified fit in the food chain, in the pecking order? … This is what a label refers to. Now to someone who does not understand this, homosexual is what I am because I have sex with men. But really this is wrong. Homosexuals are not men who sleep with other men. Homosexuals are men who know nobody and who nobody knows. Who have zero clout? Does that sound like me?[18]

In short, homosexuals or sodomites are not quite human. By contrast, to define oneself as gay, queer, lesbian, intersex, two-spirit, bi, or trans, for example, and to have that designation respected, is an act that asserts and maintains our humanity. An ongoing history of queer shame obscures this humanity. These circumstances explain why the politics of (self) designation is crucial for queer equality, as it is for other equity seeking groups' aspirations to substantively fair treatment.

Bowers v. Hardwick marked a significant blow to the American queer rights movement, and unjustly branded Michael Hardwick a criminal for having consensual male-male fellatio (which was punished under Georgia's sodomy statute) in his bedroom. Though this citation may appear incidental, in context, it is less so. Nothing required that Justice McClung use it. It is neither binding authority nor has it any bearing on *Canadian* constitutional analysis. It is,

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[18] Tony Kushner, *Angels in America: A Gay Fantasia on National Themes* (New York: Theatre Communications Group, 2003), 50.

however, often interpreted as a watershed case for the return to more conservative sexual values and the defence of Natural Law arguments in legal reasoning.

Justice McClung seems to associate all queer persons with sodomy. This preoccupation excludes queer women and the significant proportion of gay, bi, and questioning men who do not engage in anal sex. Justice McClung purports to know what Vriend is up to in his bedroom. Vriend is a quasi-criminal subject under McClung's forensic gaze, as opposed to a citizen meriting protection. Justice McClung constructs queers as sexual strangers, to use Shane Phelan's term. They are not enemies, though they are not full persons either. They are citizens entitled to the barest form of tolerance.[19] Sara Ahmed, in *Strange Encounters: Embodied Others in Post-Coloniality,* argues that the stranger is strange precisely because she is always already the subject of discursive production.[20] Justice McClung exemplifies the process of creating knowledge about strangers. He knows who Vriend is and what Vriend does. He draws upon a wealth of material that represents the sodomite as an archetypal stranger of Christendom.

Justice McClung compares queers to homicidal sex offenders. As an answer to the argument that sexual orientation rights protect the valuable activity of sex between consenting and mentally competent adults, he states the following, "It is pointless to deny that the [Jeffrey] Dahmer, [Paul] Bernardo, and Clifford Robert Olsen prosecutions have recently heightened public concern about violently aberrant sexual configurations and how they find expression against their victims."[21] Justice McClung distances himself and constitutional culture from the threatening sodomite. One of the reasons Justice McClung believes judicial circumspection is

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[19] *Vriend* (ABCA), para. 20, 24; Shane Phelan, *Sexual Strangers: Gays, Lesbians, and the Dilemmas of Citizenship* (Philadelphia: Temple University Press, 2001), 5, 29.

[20] Sara Ahmed, *Strange Encounters: Embodied Others in Post-Coloniality*, (London: Routledge, 2000), 22.

[21] *Vriend* (ABCA), para. 36.

necessary is the freedom of religious groups, many of whom, Justice McClung assumes, strongly disapprove of homoerotic conduct. He says the following:

> It is far from edifying but still conformable with fact, that, as homosexual-rights advocate Andrew Sullivan has conceded:
>
> "… For many people in Western societies, and most others, the sexual and emotional entanglement of two people of the same gender is a moral enormity. They find such behaviour abhorrent, even threatening; and while, in a liberal society, they may be content to leave such people alone, they draw the line at being told they cannot avoid their company in the workplace or in renting housing to them."[22]

Justice McClung appears to assume that Andrew Sullivan, a noted gay Republican and advocate of a conservative and integrationist sexual agenda, speaks for all queer persons; and that, because Sullivan concedes the fact of social prejudice against queers, this justifies judicial inertia with respect to their inclusion as full and equal members of society. For Justice McClung, questions of conscience are private matters of individual choice. They are not primarily attitudes stemming from social oppression. Neither Justice McClung or Andrew Sullivan tell us who these many persons are; nor do they indicate upon what evidence or rational argument such unnamed persons base their deductions concerning homoerotic behaviour. Justice McClung assumes that he is the purveyor of common-sense knowledge and the mouthpiece for the average "reasonable man".

Consequently, Justice McClung's decision implies that he does not consider protections for homoerotic expression something upon which reasonable persons would likely agree as

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[22] *Vriend* (ABCA), para. 32; Andrew Sullivan: *Virtually Normal: An Argument about Homosexuality* (New York: Vintage Books, 1995), 172.

parties to a situation analogous to Rawls' original position.[23] Resembling the line of discourse criticized by the United States Supreme Court in *Romer v Evans*, Justice McClung implies equality for sexual minorities is a "special right."[24] We should pay attention to the criticism of Justice McClung for later chapters. Owing to his rhetoric of privilege, the SCC constructs Justice McClung as an imperfect legal agent. He fails to understand and apply the correct forward movement of precedent.

VRIEND (SCC)

While Justice McClung is quick to cite a religious lineage for (hetero)sexism, this is absent in the discourse of the Supreme Court, which focuses on a mostly asexual narrative of pluralist inclusion. Though in the different context of the Australian Commonwealth's attempts at reconciliation with its Indigenous citizens, the work of Elizabeth A. Povinelli helps us analyse how judges often deploy shame and remorse in constitutional rhetoric to (re)construct and (re)present an imagined multicultural country. She observes the following:

> On the one hand, the court and state deploy an abstract language of law, citizenship, and rights—a principled, universalizing, pedantic language. On the other hand, they deploy a language of love and shame, of haunted dreams, of traumatic and reparative memory, of sensuality and desire. State functionaries engage dominant and subordinate social groups in an intimate drama …. As they do so, the court and state make shame and reconciliation—a public, collective purging of the past—an index and requirement of a new abstracted national membership.… state officials represent themselves and the nation

[23] John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA Harvard University Press 1999), 4.; John Rawls, *Political Liberalism,* Expanded Edition, Columbia Classics in Philosophy (New York: Columbia University Press, 2005), 50-4.

[24] *Romer v. Evans*, 1996. 517 U.S. 620.

> as subjects shamed by past imperial, colonial, and racist attitudes… Multiculturalism is represented as the externalized political testament both to the nation's aversion to its past misdeeds, and to its recovered good intentions.[25]

At the Supreme Court, Justice Cory (a male Justice) offers a different and more feminist conception of the public-private distinction. As well, he rebukes Justice McClung strongly, rejecting both his defence of legislative silence and parliamentary sovereignty.

First, he makes it clear that this case does not consider King's College per se as a private Christian institution or freedom of religion in general. The government cannot claim it merely does not want to interfere with "private activity," to which the *Charter* does not apply. Instead, courts must evaluate the public regulation of private conduct. This type of legislation is subject to judicial review. He says, "the respondents' submission has failed to distinguish between 'private activity' and 'laws that regulate private activity'. The former is not subject to the *Charter*, while the latter obviously is. It is the latter which is at issue in this appeal."[26] As well, Justice Cory avoids the problem of how to treat religious organizations who object to queerness by making the following distinction:

> This is not a case about employment discrimination as distinct from any other form of discrimination that occurs within the private sphere and is covered by provincial human rights legislation. Insofar as the particular situation and factual background of the appellant Vriend is relevant to establishing the issues on appeal, it is the denial of access to the complaint procedures of the Alberta Human Rights Commission that is the essential element of this case and not his dismissal from King's College. The particular

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[25] Elizabeth A. Povinelli, "The State of Shame: Australian Multiculturalism and the Crisis of Indigenous Citizenship," in *Critical Inquiry* 24, no. 2, 1998: 580-581.

[26] *Vriend* (SCC), para. 66.

> issues relating to his loss of employment would be for the Human Rights Commission to resolve and do not form part of this appeal. It must also be remembered that Vriend is only one of four appellants. The other three are organizations which are generally concerned with the rights of gays and lesbians and their protection from discrimination in all areas of their lives. There is nothing to restrict their involvement in this appeal to matters of employment.[27]

While we may appreciate the subtleties of Cory J.'s application of legal method, it is undeniable that reading sexual orientation into human rights legislation indirectly affects freedom of religion and reconfigures the public private distinction relating to sexuality. It curtails the contexts in, and extent to which, persons with religious convictions against queer behaviour and identity may discriminate. It also sends a clear message that sexual orientation discrimination is wrong, and that public morality has changed regarding homoerotic conduct. Even if human rights tribunals found in favour of religious objectors in every case (which they have not), the potential to become a defendant in a human rights complaint (as happened to Mr. Whatcott), incentivizes compliance with sexual orientation equality. The public recognition of sexual orientation equality, and especially how Justice Cory imposes this ideal upon the Alberta government, cannot be seen as anything other than a moral repudiation of the (primarily religious) conviction that homoerotic behaviour is sinful, an occasion for shame, and something that should be kept private.

We see this more clearly when Justice Cory criticizes Justice McClung for the latter's endorsement of legislative silence in the following way:

> McClung J.A.'s position that judicial interference is inappropriate in this case is based on the assumption that the legislature's "silence" in this case is "neutral". Yet, questions

[27] *Vriend* (SCC), para. 46.

> which raise the issue of neutrality can only be dealt with in the context of the s. 15 analysis itself. Unless that analysis is undertaken, it is impossible to say whether the omission is indeed neutral or not. Neutrality cannot be assumed. To do so would remove the omission from the scope of judicial scrutiny under the *Charter*. The appellants have challenged the law on the ground that it violates the Constitution of Canada, and the courts must hear and consider that challenge. If, as alleged, the *IRPA* excludes some people from receiving benefits and protection it confers on others in a way that contravenes the equality guarantees in the *Charter*, then the courts have no choice but to say so. To do less would be to undermine the Constitution and the rule of law.[28]

Justice Cory claims that the government of Alberta's inaction in this matter is, in fact, evidence of hostility. It is not something entitled to deference. He states the following:

> The fact that it is the under inclusiveness of the Act which is at issue does not alter the fact that it is the legislative act which is the subject of *Charter* scrutiny in this case. Furthermore, the language of s. 32 does not limit the application of the *Charter* merely to positive actions encroaching on rights or the excessive exercise of authority, as McClung J.A. seems to suggest.… at this point it must be observed that McClung J.A.'s reasons also imply a more fundamental challenge to the role of the courts under the *Charter*, which must also be answered.….. it may be useful to clarify the role of the judiciary in responding to a legislative omission which is challenged under the *Charter* … It is suggested that this appeal represents a contest between the power of the democratically elected legislatures to pass the laws they see fit, and the power of the courts to disallow those laws, or to dictate that certain matters be included in those laws. To put the issue in

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[28] *Vriend* (SCC), para. 56.

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> this way is misleading and erroneous. Quite simply, it is not the courts which limit the legislatures. Rather, it is the Constitution, which must be interpreted by the courts, that limits the legislatures. This is necessarily true of all constitutional democracies. Citizens must have the right to challenge laws which they consider to be beyond the powers of the legislatures. When such a challenge is properly made, the courts must, pursuant to their constitutional duty, rule on the challenge. It is said, however, that this case is different because the challenge centres on the legislature's failure to extend the protection of a law to a particular group of people. This position assumes that it is only a positive act rather than an omission which may be scrutinized under the *Charter*.… In this as in other cases, the courts have a duty to determine whether the challenge is justified. It is not a question, as McClung J.A. suggested, of the courts imposing their view of "ideal" legislation, but rather of determining whether the challenged legislative act or omission is constitutional or not.[29]

In this quotation, Justice Cory deflects charges of judicial activism by accusing Justice McClung of dereliction of duty. He also makes the Constitution appear as though it is a determinate document, whose plain meaning judges are bound to apply. Justice Cory, therefore, minimizes the subjectivity inherent in the judicial process, by claiming that an imagined external authority — that is, the Constitution, which often becomes conflated with the rule of law — compels his actions.

This tactic resembles how Justice McClung invokes legislative silence, and Andrew Sullivan's comments about what the average person believes regarding homoerotic, behaviour to avoid responsibility for his judgements concerning queer subjects. Justice McClung is not

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[29] *Vriend* (SCC), paras. 51-6.

making a judgement, the Alberta legislature is. In his learned view, it would be disgraceful for him not to obey this democratic choice. Justice Cory provides a different conception of democracy. For him, it is shameful when Justices accede to legislative supremacy despite the violation of vulnerable persons' rights. Both judges use shame, as well as implicit ideas concerning gender and moral obligation, to produce common-sense knowledge regarding human rights and the judicial enterprise generally.

Justice Cory discusses the broad range of grounds granted human rights protection in the *IRPA*. He argues the deliberate exclusion of sexual orientation is shaming. In contrast to Justice McClung's *Bowers v. Hardwick* citation, Justice Cory cites *Romer v. Evans*, which is a case that tried to bar queer persons from human rights protection based on a citizen motivated amendment to Colorado's state constitution. Justice Cory compares this case to his understanding of the province of Alberta in the 1990s. He says the following:

> It is clear that the *IRPA*, by reason of its under inclusiveness, does create a distinction. The distinction is simultaneously drawn along two different lines. The first is the distinction between homosexuals, on one hand, and other disadvantaged groups which are protected under the Act, on the other. Gays and lesbians do not even have formal equality with reference to other protected groups, since those other groups are explicitly included, and they are not. The second distinction, and, I think, the more fundamental one, is between homosexuals and heterosexuals. This distinction may be more difficult to see because there is, on the surface, a measure of formal equality: gay or lesbian individuals have the same access as heterosexual individuals to the protection of the *IRPA* in the sense that they could complain to the Commission about an incident of discrimination on the basis of any of the grounds currently included. However, the

> exclusion of the ground of sexual orientation, considered in the context of the social reality of discrimination against gays and lesbians, clearly has a disproportionate impact on them as opposed to heterosexuals. Therefore, the *IRPA* in its underinclusive state denies substantive equality to the former group.[30]

He also says the following:

> In *Romer v. Evans*, 116 S.Ct. 1620 (1996), the U.S. Supreme Court observed, at p. 1627: "the [exclusion] imposes a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint… These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society."
>
> While that case concerned an explicit exclusion and prohibition of protection from discrimination, the effect produced by the legislation in this case is similar. The denial by legislative omission of protection to individuals who may well be in need of it is just as serious and the consequences just as grave as that resulting from explicit exclusion.[31]

Moreover, Justice Cory tells us that sometimes the fear of discrimination is worse than discrimination itself. He makes the following conclusions: first, "law" ought to do everything in its power to avoid degrading and restricting the freedom of obedient subjects; second, subjects ought to be free to disclose their (assumed) authentic (queer) selves publicly without shame or fear of reprisal.[32] Specifically, he says the following:

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[30] *Vriend* (SCC), paras. 80-2.

[31] *Vriend* (SCC), para. 98.

[32] *Vriend* (SCC), para. 48, 99-104.

> Perhaps most important is the psychological harm which may ensue from this state of affairs. Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination… In excluding sexual orientation from the *IRPA*'s protection, the Government has, in effect, stated that "all persons are equal in dignity and rights", except gay men and lesbians. Such a message, even if it is only implicit, must offend s. 15(1), the "section of the *Charter*, more than any other, which … recognizes and cherishes the innate human dignity of every individual." This effect, together with the denial to individuals of any effective legal recourse in the event they are discriminated against on the ground of sexual orientation, amount to a sufficient basis on which to conclude that the distinction created by the exclusion from the *IRPA* constitutes discrimination [citations omitted].[33]

As we look forward to the dissent in *Trinity Western v. British Columbia College of Teachers* and the judgement in *Whatcott*, we should observe Justice Cory's assumption that emotions of negative normative assessment compromise human dignity. They undermine self-esteem and authenticity. He seems to believe that passions are evaluative judgements these passions may cause harm that hampers human flourishing owing to ingrained prejudices. Note that he repeats

[33] *Vriend* (SCC), paras. 102, 104.

the word fear and describes the government of Alberta as cruel. Justices must ensure that each subject has a basic sense of self-worth born of the conviction that he is equal to his fellows. The psychological harms unjust negative emotion create impedes this condition. Consequently, constitutional actors must curtail their negative emotions to achieve equality. Only then will it be possible to realize a peaceful and diverse society in which the law accords every subject equal concern and respect.

Rather than constructing queers as strangers within Canada, Justice Cory urges us to feel pride in sexual diversity, stating the following:

> The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society. When universal suffrage was granted it recognized to some extent the importance of the individual. Canada by the broad scope and fundamental fairness of the provisions of s. 15(1) has taken a further step in the recognition of the fundamental importance and the innate dignity of the individual. That it has done so is not only praiseworthy but essential to achieving the magnificent goal of equal dignity for all. It is the means of giving Canadians a sense of pride. In order to achieve equality the intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins, or other characteristics of the person. This in turn should lead to a sense of dignity and worthiness for every Canadian and the greatest possible pride and appreciation in being a part of a great nation.[34]

Justice Cory uses the discursively loaded word pride, which is both the direct antonym of shame and a word synonymous with the queer rights movement. He also repeats the words fundamental

[34] *Vriend* (SCC), para. 67.

as well as great and combines these words with fairness to underscore that equality is critical to the democratic project. This quotation contains a subtle rebuke of Justice McClung. Justice Cory connects queer equality to universal suffrage, thereby suggesting that queer equality is critical to the democratic project. It is not opposed to it, as Justice McClung implies. Also, he invites us to participate in his idealized conception of Canada's national community when he uses the phrase "highest hopes and fondest dreams". Additionally, Justice Cory makes the following comments intended to elicit empathy for queers in his readers:

> The concept and principle of equality is almost intuitively understood and cherished by all. It is easy to praise these concepts as providing the foundation for a just society which permits every individual to live in dignity and in harmony with all. The difficulty lies in giving real effect to equality. Difficult as the goal of equality maybe it is worth the arduous struggle to attain. It is only when equality is a reality that fraternity and harmony will be achieved. It is then that all individuals will truly live in dignity. It is easy to say that everyone who is just like "us" is entitled to equality. Everyone finds it more difficult to say that those who are "different" from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any enumerated or analogous group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of Canadian society are demeaned.[35]

Justice Cory tries to engender greater compassion for queers by discussing the shame that results from exclusion. Also, he attempts to sooth those who would attack queer rights by reassuring us that we are all members of one human family. Anti-queer discrimination is a blemish on society generally, in addition to being especially hurtful to a vulnerable group. Queers are incorporated

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[35] *Vriend* (SCC), para. 67-8.

into Canada's national community. Their public sexuality should make *all Canadians* proud. This sexuality embodies a progressive future. We should also note the motive of equal respect and concern throughout, specifically the pairing of dignity and harmony. This pair, joined with Justice Cory's idealistic vision of the Canadian national community, suggests a teleological view of history in which we gradually improve our capacity for ethical judgement. Justice Cory advances a conception of constitutionalism predicated on reflective equilibrium. For him, the equality of all persons is an intuitive idea. To incorporate queers as full and equal members of society we need only reflect upon and expand this intuitive judgement. He suggests that failure to do so is a moral flaw. This quotation offers another example of how producing legal common-sense knowledge frequently shames others. Advancing a position in this way requires that subjects label their adversaries irrational.

Whereas Justice McClung desires queers to remain outside the law, preventing conscientious objectors to queerness from becoming quasi-outlaws, Justice Cory makes it clear that queers are full and equal members of the legal community. They are not the social pariahs that Justice McClung assumes they are. Justice Cory's understanding of dignity recalls the Kantian idea of moral personality. It imagines a country in which citizens are free from shame, so long as they can govern themselves according to the fantasy of a tolerant Canadian mosaic. Both Justice Cory and Justice McClung deploy tradition to support their opposing positions. Justice McClung has a conservative conception of moral opprobrium directed at homoerotic conduct and the idea of parliamentary sovereignty. These convictions follow from his vision of the proper Canadian constitutional culture. Thus, Justice McClung appears to be closer to *modus vivendi* liberalism. By contrast, Justice Cory draws on a simple narrative concerning the

relationship between Parliaments and courts. Thus, Justice Cory appears to be closer to a more substantive and feminist conception of liberalism.

Justice McClung fears the loss of provincial autonomy under the *Charter*. A related concern is the specter of moral decay thought to be presaged by human rights protections afforded to sodomy. He is indignant that the *Charter,* as interpreted by modern courts, has placed him and fellow Albertans in this position. Conversely, Justice Cory fears possible harm queer Albertans suffer, as well as fear and anger on behalf of the integrity of the Canadian judicial system. It cannot have Justices who so wilfully ignore the rules of precedent.

Justice Cory uses his judgement to remind Justice McClung, and the Canadian public, of the proper role of the judiciary. He says that reading sexual orientation into human rights legislation does not break the principle of parliamentary sovereignty, though it may bend it. With the advent of the *Charter,* Canada transitioned from a primarily parliamentary state to a constitutional democracy. Lawyers and the judiciary ought to guard this Constitution and the emotional culture required to support it. To express this in terms reminiscent of Ronald Dworkin, Justice Cory shames Justice McClung, as Justice McClung did to Justice Russell, for failing to understand his proper duty to Canada's constitutional culture. This understanding should make him yield to principles that best uphold the integrity of the legal system. Justice Cory points out the following:

> In *Egan*, it was held, on the basis of "historical social, political and economic disadvantage suffered by homosexuals" and the emerging consensus among legislatures (at para. 176), as well as previous judicial decisions (at para. 177), that sexual orientation is a ground analogous to those listed in s. 15(1). Sexual orientation is "a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal

costs" (para. 5). It is analogous to the other personal characteristics enumerated in s. 15(1); and therefore, this step of the test is satisfied.[36]

Had Justice McClung followed the SCC, he would have executed his duty to protect vulnerable gays and lesbians from the harm and exclusion that an indifferent province visits upon them. Alberta deserves admonishment. It did not follow the progressive human rights discourse that the latter supports. Justice McClung constructs the queer as the sexual stranger who cannot be spoken of or recognized by law, using the idea of silence as a tool of oppression.[37] Inversely, Justice Cory enunciates and interpolates them as ideal creators and creations of Canadian, constitutional (emotional) culture, if they satisfy the transformed norms of privatized and responsible sexual citizenship.[38]

The SCC judgement sanitizes queerness. Particularly, the decision does not mention queer sex. As Mariana Valverde notes apropos of city mayors officiating at queer pride parades, the sex has disappeared from sexual orientation. Now, sexual orientation frequently denotes membership in a community requiring recognition.[39] This transformation is similar to how

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[36] V*riend* (SCC), para. 90

[37] Mariano Croce, "Quod Non Est in Actis Non Est in Mundo: Legal Words, Unspeakability and the Same-Sex Marriage Issue." *Law and Critique 26* (2015): 67-73.

[38] Jasbir K. Puar, *Terrorist Assemblages: Homonationalism in Queer Times*, New Wave: New Directions for Women's Studies (Durham, NC: Duke University Press, 2007), 39. Brenda Cossman, *Sexual Citizens: The Legal And Cultural Regulation of Sex and Belonging*, (Stanford, CA: Stanford University Press, 2007), 2; Lisa Duggan, "The New Homonormativity: The Sexual Politics of Neoliberalism," in *Materializing Democracy: Toward a Revitalized Cultural Politics*, eds. Russ Castronovo and Dana D Nelson, (Durham, Duke University Press, 2002) 175; Mariana Valverde, "A New Entity in the History of Sexuality: The Respectable Same-sex Couple," in *Queerly Canadian: An Introductory Reader in Sexuality Studies*, eds. Maureen FitzGerald and Scott Rayter (Canadian Scholars Press/Women's Press, 2012), 36; Carl Stychin, *Governing Sexuality: the Politics of Sexual Citizenship and Law Reform* (Oxford: Hart Publishing, 2003). 14.

[39] Mariana Valverde, *Law's Dream of Common Knowledge* (Princeton, NJ: Princeton University Press, 2003), 115-7.

religion has shifted from a social construction based on freedom to one based on identity in Canadian constitutional culture.[40]

We can see the importance of Cassirer‘s meditations upon space and time. Sexual and gender diversity— counter posed with implied religiosity — play an essential role in the construction of constitutional temporality and geography.[41] The suppression and redirection of emotion legitimates this project. The two Justices both use the sodomite as a figure to imagine the boundaries of Canada’s national community. Justice Cory positions those who disapprove of homoerotic conduct and orientation beyond the limits of Canada’s constitutional culture. They do not have the proper emotional response and rational understanding that would allow them to comprehend the full dignity of all moral persons. Justice Cory avoids a reasonable implication that Justice McClung likely foresaw; namely, sexual orientation protection inevitably curtails (some) religious freedom. Justice Cory states that this case only pertains to the inclusion of sexual orientation as a ground of discrimination under the Alberta human rights legislation. It does not concern freedom of religion or disapprobation of religious practices. Such things will be for future tribunals to resolve. This case specifically arose as a case of religiously motivated discrimination. Moreover, Justice Iacobucci, who wrote the analysis under section 1 of the *Charter* to determine whether this omission was demonstrably justified, has little patience for Justice McClung’s excuse of possible religious animus as a justification for legislative silence concerning sexual orientation protection.

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[40] Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014), 10-11, 41-54; see also, Bruce Ryder, “The Canadian Conception of Equal Religious Citizenship” in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver, UBC Press, 2008); Richard Moon, "Freedom of Religion under the Charter of Rights: the Limits of State Neutrality." *University of British Columbia Law Review* 45, no. 2 (2012): 495-521.

[41] Ernst Cassirer, *An Essay on Man: An Introduction to a Philosophy of Human Culture* (New Haven, CT: Yale University Press, 1944), 42.

Justice Iacobucci says the following:

> [T]he respondents suggest that the facts of this case are illustrative of a conflict between two grounds, namely, religion and sexual orientation. If sexual orientation were simply read into the *IRPA*, the respondents contend that this would undermine the ability of the *IRPA* to provide protection against discrimination based on religion, one of the fundamental goals of that legislation. This result is alleged to be "inconsistent with the deeper social purposes of the *Charter*." I concluded above that the internal balancing mechanisms of the *IRPA* were an adequate means of disposing of any conflict that might arise between religion and sexual orientation. Thus, I cannot accept the respondents' assertion that the reading in approach does not respect the purposes of the *Charter*. In fact, as I see the matter, reading sexual orientation into the *IRPA* as a further ground of prohibited discrimination can only enhance those purposes. The *Charter*, like the *IRPA*, is concerned with the promotion and protection of inherent dignity and inalienable rights. Thus, expanding the list of prohibited grounds of discrimination in the *IRPA* allows this Court to act in a manner which, consistent with the purposes of the *Charter*, would augment the scope of the *IRPA*'s protections.[42]

To rephrase this in Kantian terms, Justices Cory and Iacobucci find Justice McClung's decision wanting because he is acting with a heteronomous will. Likewise, his reasoning does not reach stage six of Kohlberg's teleological theory of moral development.[43] Surrendering to disgust and improper indignation at the supposed usurpation of parliamentary sovereignty, he does not correctly apply constitutional principles (that is, provide public reasons in Rawls' meaning). He

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[42] *Vriend* (SCC), para. 152-3.

[43] Lawrence Kohlberg, *The Philosophy of Moral Development: Moral Stages and the Idea of Justice,* Essays on Moral Development, vol. 1 (Toronto Harper and Row, 1981), 17-19.

fails as a Kantian agent. He has a perfect duty to uphold the rule of law. This obligation comes from his appointed office. At least in this instance, Justice McClung was no Judge Hercules. Consequently, Justices Cory and Iacobucci gave him an elegant "bench-slap" to maintain and develop Canada's constitutional culture.

The case connects queer equality with the discourse of constitutional supremacy. It links these two notions to the idea of a diverse and tolerant polity with human dignity as its binding force. It also places legal actors at the vanguard of this cultural sea change and requires an emotional response from them. The SCC judgement invokes a teleological conception of history to accomplish this aspiration. The culture of silence, shame, religiously motivated animus, and parliamentary deference becomes antiquated and regrettable. Queer equality becomes one of the vehicles through which the SCC attempts to create a constitutional culture devoid of shame. It implicitly holds that the culture of silence around sodomy is dehumanizing and undemocratic.

Justice Cory seems to have a substantive conception of democracy. We should compare his statement above to the Kantian conception of democracy that Ronald Dworkin proffers in the following passage:

> True democracy is not just statistical democracy, in which anything a majority or plurality wants is legitimate for that reason, but communal democracy, in which majority decision is legitimate only if it is a majority within a community of equals. That means not only that everyone must be allowed to participate in politics as an equal, through the vote and through freedom of speech and protest, but that political decisions must treat everyone with equal concern and respect, that each individual person must be guaranteed fundamental civil and political rights no combination of other citizens can take away, no

> matter how numerous they are or how much they despise his or her race or morals or way of life.[44]

Whereas Justice McClung enforces populism, provincial autonomy, and legislative supremacy, Justice Cory argues that the principles of the Constitution are sovereign. Justice Cory acts like a Kantian ought to act. He values preventing unjust shame more than unsubstantiated policy considerations. In short, he prioritizes the right over the good.

We can see that a justificatory mode of discourse predominates in their disagreement, through appeals to precedent, institutional practice, and legal principles, but that persuasion operates at a subterranean level. Specifically, they both use gendered metaphors to imagine the Canadian national community. These invite us to orient our emotional dispositions, such that we may reach their desired conclusion more easily. We shall see the implicit deployment of justificatory discourse combined with the unacknowledged use of persuasion in the rest of this chapter's decisions, the Law Society submissions, and the TWU law school judgement. We must first consider its precursor, however.

TWU v BCCT Majority

Three years later, the SCC confronted condoning religiously motivated discrimination directly, in the case of TWU's application for an education program. A majority of the SCC takes a more pragmatic approach. The key features of this approach are compromise, balance, and reconciliation. Nonetheless, it still relies on the Kantian emotional framework. TWU was successful at all levels of court, so it is possible to focus solely on the SCC judgements. Like Justice McClung, the majority opinion tries to reorient the British Columbia College of Teachers based on its specific spatial conception of a Kantian aesthetics of religious freedom. Particularly,

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[44] Ronald Dworkin, *A Bill of Rights for Britain* (London: Chatto & Windus, 1990), 35.

the majority judgement uses evangelical Christianity and (a lack of) homoerotic desire as discursive tools to shape the feeling-rules of Canadian constitutional culture.[45] As well, it relies on the (hetero)sexist public-private distinction.

The litigation regarding TWU's education program began in 1995, soon after the constitutional entrenchment of sexual orientation and in the middle of the *Vriend* case. It is easier to empathize with teachers who believed accrediting a university with a (hetero)sexist CCA was not in the public interest if we imagine what it might have been like for queer students in the 90s and early 2000s. I shall briefly describe my experience of Ontario's public schools around this time. Aspects of my story are sadly familiar. I was in primary and secondary school from 1995 to 2008. As an advocate for queer students during high school, it was nerve-wracking to raise homoerotic behaviour and gender diversity in classroom discussions, though I desperately wanted knowledge regarding these subjects. As well, I was closeted to my family until the end of grade 11 (2007), did not view many positive images of queer persons in the media, and received many stereotypes concerning my queerness from my (hetero)sexist relatives. When someone broached the topic of queerness at home, it was nearly always ridiculed. My adolescent self developed pervasive feelings of disgust, shame, fear, and guilt.

In grade nine (2004), I began to disclose and to embrace my sexuality. I attended school in a conservative small town. Thus, I suffered teachers, educational assistants, and classmates who thwarted my efforts to establish sexual orientation harassment protection, a gender and sexuality alliance (GSA), and safe classrooms for queer students. Because of these circumstances, I began speaking regarding my struggles to (queer) students and teachers across Ontario. Though never assaulted during school (as many queer children are) other forms of queer bullying were frequent. Staff who were aware that I was gay, and who affirmed it as a valuable

[45] Ahmed, *Phenomenology,* 69.

characteristic, were precious gifts. My mental health and academic achievement likely would have decreased considerably, were it not for the few staff members who gave me enrichment work related to queer studies as well as hours of psychological support. These rare pedagogical interventions did what public education should do. They allowed me to become a productive and well-adjusted citizen.

Referring to our protagonists in the introduction, we can also contemplate what school may have been like for Ms. Bishop, Mr. Caljoux, or Mr. Wudda. Whatever their religious beliefs, teachers must instruct students who have many backgrounds and specific needs. It is arguable that an education program with institutionalized discrimination does not prepare future teachers for this task. Before its request, TWU had been offering a joint education program with Simon Fraser University in which students would complete four years of their degree at Trinity and spend some of their fifth year at the other institution.[46] Some students from Simon Fraser would, in turn, matriculate at Trinity. Trinity wanted to have full control over the program to make it more consistent with its worldview and communal ethos. The school then prohibited homoerotic conduct both on and off campus, citing biblical passages for support, in addition to establishing a community enforced disciplinary regime.[47]

The British Columbia College of Teachers (BCCT) contended that such an environment was an inappropriate one for the education of teachers, mainly because teachers play a unique role in the protection of the vulnerable. Also, the BCCT argued that teachers frequently could be comforting mentors for queer students. Such mentorship is crucial because many queers do not receive positive cultural affirmation at home. Compounding these problems, queer students have

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[46] *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, para. 2, [2001] 1 SCR. 772 (CanLII).

[47] *TWU v. BCCT* para. 5.

an increased risk of violence and educational discrimination.[48] A discriminatory environment in an education program impedes the fulfilment of pressing objectives.

The lower courts and a majority of the SCC disagreed. The eight-judge majority makes the classic Kantian distinction between private emotions, virtues, as well as beliefs, and public duty. One sees the relevance of an aesthetic approach to the discursive construction of religious freedom. The spatial conception of the rule of law causes the tension in this decision. For example, the majority states that the freedom to hold beliefs is much broader than the freedom to act on those beliefs (publicly). That is, professional bodies cannot punish a teacher because she has illiberal beliefs. They can only punish her if she acts upon them when she is teaching.[49] Curiously, the majority's holding on this point is much like the one TWU took concerning homoerotic behaviour. That is, we may love the queer person — qua human being — while disapproving of homoerotic activity. By analogy, the majority is trying to love those who may hold discriminatory tendencies while disapproving of sinful discrimination.

Albeit tentative, the Court commented that there was no evidence before it of a Trinity graduate engaging in public acts of discrimination, so her private beliefs, if these are even discernible from agreeing to adhere to a certain code of conduct while at university, were irrelevant to the BCCT's decision-making.

The majority notes the following:

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[48] *TWU v. BCCT,* para. 6; Egale: Canada Human Right Trust, *In Every Class and Every School* (2011). Accessed on April 9, 2018. https://egale.ca/every-class/. C.J. Pascoe, *Dude You're a Fag: Masculinity and Sexuality in High School* (Berkeley: University of California Press, 2007), 52-81; Don Short, *Don't Be so Gay: Queers, Bullying and Making Schools Safe,* Law and Society Series, (Toronto: UBC Press, 2013), esp. 45-123; Shipley, Heather. "Queering Institutions?: Sexual Identity in Public Education in a Canadian Context." *Feminist Teacher* 23, no. 3 (2013): 196-210.; Shipley, Heather. "Religious and Sexual Orientation Intersections in Education and Media: A Canadian Perspective." *Sexualities* 17, no. 5-6 (2014): 512-28.

[49] *TWU v. BCCT* para. 36-7.

> The BCCT relied on the internal documents of TWU as evidence of discrimination against homosexuals. It concluded that the inclusion of homosexual behaviour in the list of biblically condemned practices demonstrates intolerance and that this cannot be overridden by the adoption of other values. Both the program and the practices of TWU, the declarations required of students and faculty in particular, were condemned because they reflected the beliefs of the signatories. According to the BCCT, discrimination against homosexuals had been institutionalized…The majority of the Court of Appeal was of the view that the BCCT misapprehended the evidence at the first stage by defining the world view of TWU too narrowly. It pointed out that the TWU documents make no reference to homosexuals or to sexual orientation, but only to practices that the particular student is asked to give up himself, or herself, while at TWU. These practices include drunkenness, profanity, harassment, dishonesty, abortion, the occult and sexual sins of a heterosexual and homosexual nature. There is no evidence before this Court that anyone has been denied admission because of refusal to sign the document or was expelled because of non-adherence to it. On the other hand, there is evidence that not all students admitted to TWU adhere to the Christian world view.[50]

Such reassurance is unsatisfactory for two reasons. First, the 2001 (as well as contemporary) CCA groups homoerotic conduct with criminal or immoral behaviour. Second, the BCCT was entitled, indeed, mandated, to consider possible discriminatory practices flowing from a teacher training program.[51]

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[50] *TWU v. BCCT* para. 23-4.

[51] *TWU v. BCCT* para. 13-4.

Nonetheless, the majority argues that were it to deny TWU accreditation of its proposed program, there is no principled ground upon which to grant teaching certificates to members of churches who hold similar beliefs. The majority notes the following:

> TWU's Community Standards, which are limited to prescribing conduct of members while at TWU, are not sufficient to support the 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.[52]

We should note how diversity, tolerance, and respect minimize conflict and (re)orient our attitude toward (hetero)sexist shame. The word "weigh" implies proportionality and reasonableness. These virtues are counterposed with the inconsiderate behaviour of the Teachers' College. The members of this institution did not exhibit the masculine fortitude required to tolerate difference in contemporary Canada. The majority states the following:

> [T]he proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs

[52] *TWU v. BCCT*, para. 33.

> while at TWU should be respected. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.… Acting on those beliefs, however, is a very different matter. If a teacher in the public-school system engages in discriminatory conduct, that teacher can be subject to disciplinary proceedings before the BCCT.[53]

First, as a preliminary matter, it is illuminating to appreciate the slightly negative connotation of the word "divergent". It seems the SCC struggles with the question of whether TWU is within or outside an imagined Canadian mainstream.

Second, this quotation is only plausible if we uncritically accept the liberal distinction between public and private. The Bachelor of Education links to public life. It attempts to train students to fulfil a public role. It is not obvious how the distinction between belief and conduct that the Court attempts to draw assists us with the complex and messy challenges of diversity. The Community Standards document was more than a statement of belief. It amounted to "conduct". The administration could enforce it through disciplinary measures.

It is also unclear why the BCCT was not entitled to take proactive steps to eliminate discrimination before it occurs and create a more positive environment for queer students in the process, rather than merely responding retrospectively to identified instances of discrimination. We should distinguish between having an objectionable belief, or being a member of a religious organization that has an objectionable belief, and being educated to perform a public function (that is, teaching) in an organization that institutionalizes these beliefs and supports them with possible sanctions, up to and including expulsion. As well, we should mind the word

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[53] *TWU v. BCCT*, paras. 36-7.

"landscape". This word suggests that difference is a "natural" fact instead of something that culture produces. Because we often think of relatively flat surfaces when we imagine landscapes, the majority implies that diverse groups are horizontally positioned and equally advantaged constituencies. The law must manage these equally advantaged groups impartially. They do not exist in complex vertical hierarchies of oppression and resistance.

To make (purportedly) wrong assumptions concerning how a teacher will behave in the classroom based on the institution from which she graduated demeans her affiliate group and restricts her freedom. It traps her in a stereotype, thereby not according her the respect that we owe her as a moral person. While the majority judgement acknowledges that "a homosexual student would not be tempted to apply to TWU and would do so at a great personal cost,"[54] it suggests that attitudes of disgust and moral stigma — as well as a culture of institutionalized shame resulting from this prohibition — do not affect behaviour.[55] It agrees with TWU's distinction between homoerotic orientation and homoerotic conduct. This endorsement again divides the self into public and private parts. It finds credible TWU's contention that it treats all human beings with equal respect, even though the University denies full liberty and equality to some of them.[56]

Emphasizing the liberal distinction between public and private, a major reason for the majority decision was that TWU is a private institution. It is exempted (in part) from the human rights code of British Columbia. Besides, the *Charter* does not apply to it. Because of these exemptions, the majority judgement reminds us that tolerance of divergent beliefs (that is, the

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[54] *TWU v. BCCT* para. 25.

[55] *TWU v. BCCT* para. 21.

[56] *TWU v. BCCT* para. 24

duty to restrain our emotions when confronted with attitudes that we find distasteful) is part of living in a diverse society. Though the majority judgement discusses tolerance, diversity, and balance frequently, it does not mention queers and Evangelicals in the same paragraph. Nor does the court comment upon the complicated relationship between conservative Protestant theology and (hetero)sexist oppression, especially when educating the young. Lori G. Beaman helpfully summarizes this case as a "preservation of heteronormativity."[57] It takes the erotic and political charge out of queerness, and it creates a dichotomy between the good (masculine) gay legal subject and the (feminine) queer one to police law's "unruly edges."[58]

It denies religious queers, on the one hand, and the equally important, though not simplistic and unilaterally determinative, relationship between evangelical sexual theology and (hetero)sexism in public discourse. The judgement positions the parties as two diverse groups whose (liable to be dangerous) emotions neutral law must manage. The court also relies on the distinction between religious beliefs and practices. Many religious and queer persons find that deceptive and not reflective of how they live out their religion(s).[59]

In this respect, the work of Heather Shipley is insightful. Shipley criticizes how the definition of the normatively religious and (hetero)normatively sexual body dictates who is properly "Canadian" and who deserves accommodation. For Shipley, this establishes a

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[57] Lori Beaman, "Preserving Heteronormativity: Trinity Western University v. British Columbia College of Teachers," in *Feminism, Law, Inclusion: Intersectionality in Action,* ed. Gayle MacDonald (Toronto: Sumach Pres

[58] Leo Bersani, *Homos* (Cambridge, MA: Harvard University Press, 1995), 1. 6; Carl F. Stychin, *A Nation by Rights National Cultures, Sexual Identity Politics, and the Discourse of Rights*, Queer Theories, Queer Politics (Philadelphia: Templeton University Press, 1998), 200. He acquires this terminology from: Ruthann. Robson, "Resisting the Family: Repositioning Lesbians in Legal Theory", *Signs: A Journal of Women in Culture and Society* 19, no. 4 (1994): 975; Carl Stychin, "Sexual Citizenship in the European Union," *Citizenship Studies* 5 (2001): 290.

[59] Richard Fenn, *Liturgies and Trials: The Secularization of Religious Language* (New York: Pilgrim Press, 1982), 187.

maladaptive clash of rights narrative. In this narrative, the queer is quintessentially secular, and the religious adherent is constructed as always already straight. The circumscription limits the freedom accorded to each, in addition to creating exclusion under the guise of expansive tolerance.[60] Indeed, concurring with Shipley and furthering the latter's general argument, Janet R. Jacobsen modifies Foucault's insight about sexuality being a prominent apparatus through which we determine the truth of the self, and she applies it to religion. She says the following: "Whether in its differentiating or uniting aspect, sexuality is presumed to have a special role in revealing "the truth" of religious difference, much as Foucault noted that sexuality provides the truth of the self in modernity."[61] What Jacobsen means to suggest by this brief, yet rich, observation is that proper sexuality demarcates an imagined sacred world from that of worldly life. In addition to boundary metaphors, as *Vriend* indicated, sexuality demarcates an imaginary religious and archaic or moral world, depending on our view, from an imagined secular progressive or retrograde present.

The majority judgement reminds us that no right is absolute.[62] The BCCT did not consider that moral persons hold rights in aggregate and are free to associate to put those aggregated rights into practice. [63] The majority judgement takes a Kantian line. We may only exercise autonomy consistent with the same independence of others. Because of this private autonomy, TWU can operate a teaching program, even though it is not for everyone. Four the

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[60] Heather Shipley, "One of These Things Is Not Like the Other: Sexual Diversity and Accommodation," in *Reasonable Accommodation: Managing Religious Diversity,* ed. Lori G. Beaman (Vancouver: UBC Press, 2012). 165.

[61] Janet R. Jacobsen, "Beyond Tolerance: Sexual Diversity and Economic Justice," in *Religion and Sexuality: Diversity and the Limits of Tolerance,* eds. Heather Shipley, Pamela Dickey Young and Tracy J. Throthen (Vancouver: UBC Press, 2015), 21-44.

[62] *TWU v. BCCT* para. 30-1.

[63] *TWU v. BCCT* para. 32.

preceding reasons, the BCCT acted unreasonably. The majority tries to be a pragmatic manager of cultural difference. The majority's judgement does not acknowledge that law as a cultural system.

Fear and disgust have a crucial, albeit subterranean, role. The majority judgement rests upon the assumptions that the CCA does not express pure fear or disgust towards queers. Even if it does, the hypothetical (hetero)sexist teacher will be able to keep her passions in check. The majority attempts to lessen the (possibly irrational) public's fears concerning TWU. At the same time, the majority assures subjects belonging to churches that oppose homoerotic behaviour (and in some cases identity) that their communities are safe from interference caused by state disapprobation.

TWU achieved a Pyrrhic victory. Constitutional actors (or those acting with authority) must withstand it as a quasi-deviant group entitled to tolerance. Nevertheless, its members, at least in their public roles, must keep their beliefs in an imagined private sphere and refrain from acting upon them, especially to the detriment of other equity-seeking groups. However we frame the liberal discourse of tolerance, it establishes (sometimes objectionable) hierarchies and maintains hegemony.[64] We should recall Steven Seidman's critique of the closet as an organizing structure within queer life. Mindful of the historical differences and the more oppressive closet for queers as it existed, and still exists, there is a whiff of closeting logic around the management of religious expression in public life.[65] Also, to use Ahmed's conceptual framework, both their practices and beliefs (because the Court erred in holding that we can

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[64] Ann Pellegrini and Janet Jakobsen, *Love the Sin: Sexual Regulation and the Limits of Religious Tolerance* (New York: Beacon Press, 2004),55–9.

[65] Steven Seidman, *Beyond the Closet: The Transformation of Gay and Lesbian Life*. (New York: Routledge, 2002), 22.

separate faith from activity) are being oriented to fit with the Court's Kantian liberal orthodoxy. This orthodoxy promotes a culture of duty, emotional regulation, and cognitive dissonance.

Queers must also subscribe to these emotional guidelines. The majority reassures us that there is no hierarchy of rights, that we are formally equal, and that we ought not to be wary of an institution that (professes to) strictly adhere to biblical principles having a Bachelor of Education program. The majority rules in favour of Trinity, even though much of the trauma queers have experienced in the past, and continue to suffer in the present, comes from the (hetero)sexism of Canadian education. As literature from the field of lived religion demonstrates, religion is not private. Nor is sexuality private. For example, though many think of prayer and sex as private, they always occur in connection with (imagined) others according to shared social norms. Consequently, even our most intimate moments reproduce public values. Even when we masturbate, we do so according to public sexual scripts. Further, we usually do so while fantasizing about others. As well, religion and sexuality also involve practices that are coterminous with group identity.[66]

While it is unfair to attribute prejudice towards a person of a specific background, prejudicial environments encourage (un)conscious unjust behaviour. Even though bias often denotes negative normative assessment of someone or a group, it need not.[67] Why have a shared community belief system with a strict code of behaviour, were it not to shape conduct and, in turn, influence others outside the community? We cannot claim that religion is significant, with

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[66] Meredith McGuire, *Lived Religion: Faith and Practice in Everyday Life* (Oxford: Oxford University Press, 2008); Dwight Newman, "On the Trinity Western University Controversy: An Argument for a Christian Law School in Canada," *Constitutional Forum* 22, no. 3 (2013): 2-3. Robert Orsi, *Between Heaven and Earth: The Religious Worlds People Make and the Scholars Who Study Them* (Princeton, NJ: Princeton University Press, 2005), 112.

[67] Gordon W. Allport, *The Nature of Prejudice* (New York: Addison-Wesley, 1954), esp. 55-81.

one breath, and insignificant, with the other. The decision, therefore, leaves readers with a sensation akin to that of *coitus interruptus*. We are dissatisfied, confused and inevitably wanting more, whether we are queer, Christian, both, or neither.

TWU v BCCT Dissent

The dissenting judgement of Justice L'Heureux-Dubé is even more confining when viewed from the perspective of persons who sincerely object to homoerotic behaviour and gender diversity for religious reasons. For her, we should not consider freedom of religion at the stage of an administrative decision.[68] She focuses on antidiscrimination as a policy integral to the education of teachers for today's diverse and complex classrooms. She says the starting point ought not to be on the religious beliefs of TWU. Indeed, the BCCT is not competent to consider or balance these against competing *Charter* rights. This task is the bailiwick of human rights tribunals. Instead, the BCCT has the right to inquire about the effect of individual policies. The College has the gate-keeping function for the profession of teaching and accompanying duty to protect the public interest.[69]

Unlike the majority, she does not think the right at issue is freedom of religion. Freedom of expression is the right we should consider, and we should take the covenant seriously as an expression of belief. She observes the following:

> Signing the contract makes the student or employee complicit in an overt, but not illegal, act of discrimination against homosexuals and bisexuals. It is not patently unreasonable

[68] *TWU v. BCCT* para. 64.

[69] *TWU v. BCCT* para. 52-6.

> for the BCCT to treat TWU students' *public expressions of discrimination* as potentially affecting the public school communities in which they wish to teach.[70]

She chastises her colleagues for having failed to apply what she considers universal principles. They did not recognize all equality grounds as equal. She rejects the status-conduct distinction. She says this condones the unacceptable "love the sinner but hate the sin" approach. She observes that we must expect more from the teachers of today than mere tolerance. Moreover, she argues that the requirement to hide our sexual orientation violates the dignity and moral personhood of queers.[71] She cites the US Supreme Court's condemnation of anti-miscegenation policies, even though such policies were born of "sincere" religious reasons, to support her position.

She states the following:

> [I] would emphasize the relevance of the United States Supreme Court's decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983). In that case, the court denied tax-exempt status to a religious institution that at the time prohibited interracial dating and marriage based on apparently sincerely held religious beliefs. Burger C.J. for the court wrote that "there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice" (p. 592). He added that "Bob Jones University . . . contends that it is not racially discriminatory. It emphasizes that it now allows all races to enroll, subject only to its restrictions on the conduct of all students, including its prohibitions of association between men and women of different races, and of interracial marriage" (p. 605). This American case provides an example, namely a ban on interracial dating and marriage, that is difficult to distinguish in a

[70] *TWU v. BCCT* para. , 72.
[71] *TWU v. BCCT* para. 69.

> principled way from the ban on homosexual behaviour at issue here. In my view, to paraphrase Burger C.J., there can no longer be any doubt that sexual orientation discrimination in education violates deeply and widely accepted views of elementary Justice… It was not Bob Jones University faculty or students' religious beliefs that led to the American Supreme Court decision, but rather a disciplinary rule of conduct prohibiting interracial dating and marriage. Similarly, in this case, where the salient difference is the ground of discrimination, namely sexual orientation, it is the Code of Community Standards that is at issue. [72]

Unfortunately, L'Heureux-Dubé J. did not provide a clear rationale for her analogy. As Mary Ann Waldron argues, from a historical and theological perspective, it is not entirely apt. Nonetheless, she likely did not mean to compare sexual orientation and race directly. Instead, she intended to imply that a restriction on sexual orientation is equally as offensive to dignity as prohibitions on miscegenation. Both are an insult to her idea of moral personality. The problem is this: for better or worse, religion is also an intrinsic part of the Kantian subject. When framed in this way, it makes balancing exercises highly emotionally charged and causes legal actors' tendency for disavowal to become more pronounced.

Perhaps the most revealing feature of L'Heureux-Dubé J.'s judgement for our purpose — that is, to trace changes within constitutional culture concerning shame and dignity — is her attention to feminist ethics of care. L'Heureux-Dubé J. is not only preoccupied with matters of principle, like Kohlberg's moral agent. She is also leery owing to the environment of TWU, the impact it has on students, the caring relationships they form with one another, as well as the effects of these relationships upon interactions between future teachers and their pupils. She

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[72] *TWU v. BCCT* para. 70-1.

recognizes that awareness of compassion, power, and vulnerability ought to be superordinate to, or at least operate in conjunction with, justice. She challenges the feeling-rules the majority judgement offers. She displays, and this is not meant to be pejorative, maternal compassion for children, specifically, concern for queers, who have an increased risk of harm in elementary and high school.[73] Particularly, she observes the following:

> As the intervener EGALE pointed out, it is vital to remember in the context of the case at bar that "[b]ecause lesbian, gay, and bisexual youth are almost always 'minorities' in their own families, they do not enter the school environment with the same level of family support and understanding that other members of minority groups do. Thus, schools are an important second line of support for students dealing with issues of sexuality and can counter the effect of a hostile family environment.[74]

Justice L'Heureux-Dubé echoes feminist philosopher Iris Marion Young. The two women agree that identity is a relational construct born of power. The former woman observes the following:

> In the fifth year, TWU students now spend seven weeks at TWU, six weeks at SFU, and 19 weeks practice teaching, all under the supervision of SFU personnel. The BCCT could rationally find that this promotes interaction between TWU students and the purportedly more diverse faculty, staff and student body of SFU. We should not question what appears to be the expert opinion of the BCCT: that this time is valuable for inculcating

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[73] *TWU v. BCCT*, para. 73-82; Carol Gilligan, "In a Different Voice: Women's Conception of Self and Moral Development," *Harvard Educational Review* 41, no. 4 (1977): 494-510. For elaborations of the feminist care ethics into coherent political and legal programs, see, Joan C. Tornto, *Moral Boundaries: A Political Argument for an Ethic of Care* (New York: Routledge, 1993); Jennifer, Nedelsky, *Law's Relations: A Relational View of Self, Autonomy, and the Law* (Oxford: Oxford University Press, 2011).

[74] *TWU v. BCCT,* para. 81.

> teachers with the skills needed to promote and enhance diverse classroom environments. Beliefs do not have to change, but it is not patently unreasonable to hope that awareness and attitudes will become broader… Instead of immersing themselves in the scholastic context, those who urge us to dismiss this appeal give short shrift to the pressing need for teachers in public schools to be sensitive to the concerns of homosexual and bisexual students. It is reasonable to insist that graduates of accredited teacher training programs be equipped to provide a welcoming classroom environment, one that is as sensitive as possible to the needs of a diverse student body. The modern role of the teacher has developed into a multi-faceted one, including counselling as well as educative functions.[75]

For her, to posit a substantial (in the Aristotelian sense) identity is dubious.[76] Fixed characters rely on a now debunked, (implicitly patriarchal) metaphysics and philosophical anthropology that misrecognizes and undervalues the interdependence and vulnerability characteristic of human-being-in-the-world.[77] Hence, she offers a feminist conception of identity that takes oppression as a starting point. As she clarifies, speaking extra-judicially:

> Domination always seems natural to those who benefit by it. Inequality permeates institutions that people have held near and dear over centuries, so a commitment to its

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[75] *TWU v. BCCT*, para. 79-80.

[76] Iris Marion Young, *Justice and the Politics of Difference* (Princeton, NJ: Princeton University Press, 1990), 44 (n. 46).

[77] Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2000), 87-9.

> eradication requires that we look deeply into ourselves and into the reality experienced by those that do not "by nature" dominate.[78]

Consequently, unlike the majority, she does not conceive of the contest between Christian and queers as a matter of horizontal cultural "diversity." Instead, she understands that difference occurs because of hierarchical relationships. She also offers a conception of identity more in keeping with the phenomenological one I have been advocating as the most accurate description of how we live our lives. Regrettably, the majority judgement continues to base a quasi-ontological notion of identity upon the concept of equality grounds.[79] Justice L'Heureux-Dubé's understanding exemplifies a feminist position that did not persuade her colleagues at the SCC. It will gain greater traction in future. We will see even more tension between (constructed as masculine) principle and (thought of as feminine) emotion in the law school submissions.

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[78] Hon. Claire L'Heureux-Dube, "New Challenges for the Legal System," *in Roads to Equality, supp to vol 1* (Ottawa: Canadian Bar Association, Continuing Legal Education Program, Annual General Meeting, 1994), 5-8.

[79] As stated previously, the *Charter* protects both explicitly listed grounds of discrimination and those which are said to be analogous to enumerated grounds of discrimination. In addition, since the earliest case on the subject, the Supreme Court has purportedly adopted a conception of substantive equality, as opposed to formal equality. This means that the judiciary ought to consider the adverse impact on a rights claimant of laws with seemingly neutral application. The at times overly zealous emphasis on a particular ground of discrimination means, at least to some extent, that an individual claimant shapes her identities to better reflect those required by legal categories. *Andrews v. Law Society of British Columbia* [1989) 1 SCR 143, 10 CHRR D/5719 [Andrews] (challenging the Law Society of British Columbia's requirement that lawyers be Canadian citizens). The literature concerning equality jurisprudence and the formation of identity is quite immense and will be dealt with in later chapters. The classic statement on how the concept of enumerated and analogous grounds shapes a claimant's identity is Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity," *Queen's Law Journal* 19, no. 1 (1993): 179-207. For a comparatively recent restatement, see Jonnette Watson Hamilton and Jennifer Koshan, "Adverse Impact: The Supreme Court's Approach to Adverse Effects Discrimination under Section 15 of the Charter." *Review of Constitutional Studies* 19, no. 2 (2014), 191-238.

TREE HUGGERS: THE SAME-SEX MARRIAGE REFERENCE

We can see such conflict between principle and pragmatism in the *Same-Sex Marriage Reference.*[80] On the one hand, it further protects queers with the *Charter* blanket. On the other, the SCC includes the opponents of same-sex marriage on the living tree. The legal recognition of same-sex relationships was a gradual process. Five years before the Same-Sex Marriage Reference, the Supreme Court held in *M. v. H.* (1999)[81] that the exclusion of same-sex common-law partners from benefits conferred under the *Ontario Family Law Act* violated section 15 of the *Charter*. Furthermore, section 1 did not save this violation. Though expressly holding that it was not pronouncing on the constitutionality of the opposite sex definition of marriage which then formed part of Canadian common-law, queer rights groups began to use the ruling in *M. v. H.* to challenge their exclusion from marriage. This initiative provoked concerted opposition from persons opposed to same-sex marriage, and the debate became particularly heated when queer rights activists won their challenges to the opposite sex definition of marriage in British Columbia, Ontario and Quebec. As a response to these appellate rulings, the then-Liberal government of Jean Chrétien (and later Paul Martin) proposed a draft civil marriage act and submitted it to the Supreme Court to determine whether this bill passed constitutional muster. It hoped that an endorsement from the Supreme Court would give its policy greater legitimacy and soften the voices of those opposed to this social innovation.[82]

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[80] *Reference re: Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR. 698, (CanLII).

[81] *M. v. H.*, [1999] 2 SCR 3, 1999 CanLII 686 (SCC).

[82] Sylvain Larocque, *Gay Marriage: A Story of a Canadian Social Revolution* (Toronto: J. Lorimer, 2006) 109-150, 183-194.

While we may acknowledge that it is the routine business of an apex Court to make controversial decisions, it is also helpful to empathize with the position of the SCC. The government of the day wanted to abdicate some of its own responsibility. It asked the SCC to rubberstamp what would be a very unpopular decision for a sizable minority of Canadians and, in so doing, presage the way for a considerable reconfiguration of family life. It is not often that judges are under such pressure to execute their work with skill and every sign of legitimacy. We can also imagine how are different protagonists might have eagerly anticipated or dreaded the outcome of this reference, as they debated it with friends and family, along with millions of other Canadians from all walks of life. It was an exciting time for Canadian constitutional culture.

The *Same-Sex Marriage Reference* is tellingly terse. Rationality and legal method legitimate the decision rather than direct emotional appeals. "The Court" signs the opinion. This action relieves any individual Justice of responsibility. As well, it indicates that the decision is especially authoritative. Moreover, there are no personal pronouns or declarations that would demonstrate a definite philosophical position. The decision's dispassion betrays unease with the burden placed upon the Court, explaining recourse to the alleged bread-and-butter of the legal profession. We can find further support for my position in the reasons upholding the sentence of the supposedly merciful child killer Robert Latimer and the "legal objectivity" and jurisprudential circumspection with which the Court has handled the abortion cases.[83] It has used

[83] R. *v*. Latimer, 2001 SCC 1, paras. 6, 30-40, 80-90, [2001] 1 SCR. 3. (CanLII). *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 SCR. 92, 152 DLR (4th) 193 (CanLII). (fetus not considered a person at common law for the purposes of placing mother under protective custody); *Tremblay v. Daigle* [1989] 2 SCR. 530, 62 DLR (4th) 634 (CanLII).; (foetus not a "human being" for purpose of right to life in Québec Charter of Rights and Freedoms or for purpose of civil rights under Québec Civil Code); *R. v. Sullivan* [1991] 1 SCR. 489, S.C. J. No. 20. (foetus not a "person" within Criminal Code offence of death by criminal negligence) (CanLII).; *Borowski v, Canada (Attorney General)*. (1987) 39 D.L.R. (4th) 731 (Sask. C.A.) (foetus not included in s. 7's "everyone" or s. 15's "individual"). The Borowski case went up to the Supreme Court of Canada, but in that Court these rulings were not addressed, because the issue, which was the validity of the abortion provisions of the Criminal Code, had

similar "dispassionate" legal methods when discussing other controversial topics related to sex, such as group intercourse,[84] the criminalization and regulation of procedures relating to assisted reproduction,[85] and the constitutionality of sex work curtailment.[86] Because it was deciding a contentious issue and legitimating a government in its pursuit of a controversial policy choice, the Court endeavours to perform what it believes to be its function to the letter.

The Court answered four of the five questions put to it. They were as follows. First, which level of government has jurisdiction over the capacity to marry (and by implication, is a federal civil union scheme for same-sex partners constitutional)? Second, did the meaning of marriage in 1867 constitutionally entrench a heterosexual definition of it? Third, was the proposed bill consistent with the *Charter* (because many interveners, both at lower courts and the Supreme Court, argued that changing the civil definition of marriage would have an identarian and practical impact on the dignity and religious freedom of those who subscribed to the traditional view?) Fourth, did section 2(a) protect religious officials who refuse to perform same-sex marriages owing to sincere beliefs? Fifth, does the Constitution mandate same-sex

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become moot: *Borowski v. Canada* [1989] 1 SCR. 342, 57 DLR (4th) 231 (CanLII). The abortion provisions of the Criminal Code were held to be unconstitutional in *R. v. Morgentaler (No*. 2*)* [1988] 1 SCR. 30, 44 DLR (4th) 385 (CanLII), on the ground that they infringed the mother's right under s. 7; there was no ruling on whether the foetus had any rights.

[84] *R. v. Labaye*, 2005 SCC 80, para. 71 [2005] 3 SCR 728 (CanLII). The decision focused on the liberal concepts of privacy and tolerance, making persons to engage in group sex strangers to be tolerated rather than full citizens. In this respect, is interesting to note that an allegedly sexually liberal Court refuses to acknowledge that something of social value might come from relationships that transgress traditional conceptions of intimacy and conjugality.

[85] In an excellent display of how legal method be sometimes be abstracted form genuine moral issues, the essence of this reference turned on whether certain regulations concerning reproduction were in the criminal law power of the federal government, instead of the health power of the provinces. *Reference Re: Assisted Human Reproduction Act*, 2010 SCC 61, paras 9, 28, 35, 90-100, 177, 179. [2010] 3 SCR. 457 (CanLII).

[86] Again, this reference turned on to what extent parliament could impede a clandestine but not illegal activity that, in a manner, endangered the lives of sex workers. *Canada (Attorney General) v Bedford*, 2013 SCC 72 para. 42, [2013] 3 SCR 1101 (CanLII).

marriage? I shall deal with the questions in reverse order. The Court declined the invitation to answer question five. This hesitation was likely because, as Peter W. Hogg speculates, it wanted to give Parliament some role in the process, thereby avoiding charges of judicial activism. Also, there had already been successful challenges in the lower courts. Same-sex marriages had been taking place for some time. The Court did not wish to declare these unions a legal nullity. A judgement against these marriages would create uncertainty. Reference questions are not technically legally binding.[87]

Turning to the trickier freedom of religion question, The Court says that freedom of religion would protect religious officials, and the *Civil Marriage Act* would later try to redress this concern. [88] The Court was regrettably, and perhaps deliberately, silent on the meaning of the phrase "religious officials." Much, at least in legal discourse, hinges on whether this ambiguous phrase means "public officials who happen to have religious beliefs," or persons who act as officials of religious organizations — that is, at least in this context, officiants at weddings. There are possible arguments for both interpretations, in both the English and French version of the *Civil Marriage Act*.[89]

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[87] Peter W. Hogg, "Canada: The Constitution and Same-Sex Marriage." *International Journal of Constitutional Law* 4, no. 3 (2006): 720-1; *Reference: Re Same-Sex Marriage,* 2004 S.C.C. 75*,* para. 60, [2004] 3 SCR. 698.

[88] *SSM Reference*, 46-48.

[89] Canadian statutory interpretation relies on the so-called "modern principle." The modern principle, among other things, prizes the "plain and ordinary" meaning of words, unless a technical one is specified, or an irreconcilable ambiguity arises, interprets every part of a statute in relation to the whole of the enactment, other enactments and common law principles, taking into account historical and cultural context, and endeavours with utmost diligence to discern and give effect to the will of Parliament within the bounds of the Constitution. There are several conditions subsequent to the modern principle. First, Parliament is presumed to act in accordance with the Constitution, unless an agent making this claim can demonstrably rebut this presumption. This presumption means that if there is a constitutional way of reading a statute, it must be taken over the unconstitutional mode of reading, thereby giving effect to Parliament's intention. Second, Parliament is presumed to be of one mind, have all the relevant facts, and not err. An interpretative presumption against tautology and circumlocution follows from the last

The SCC reiterates that there is no hierarchy of rights, and that barring exceptional circumstances that it cannot foresee, future judges must settle any conflict between the rights of same-sex couples to equal treatment and the religious freedom of objectors to homoerotic behaviour by "internal balancing."[90] The Crown's redefinition of marriage for civil purposes does not offend the religious rights of objectors. Her Majesty's recognition of the rights of one group cannot abrogate the rights of another. The proposed legislation cannot be inconsistent with the *Charter.* Same-sex marriage actualizes the ideal of equality that was constitutionally entrenched, precisely so that it could come to greater fruition in public life for the benefit of every subject, including a queer one. The Court states the following:

> The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster.[91]

The Court also argues the following:

> Some interveners submit that the mere legislative recognition of the right of same-sex couples to marry would have the effect of discriminating against (1) religious groups who do not recognize the right of same-sex couples to marry (religiously) and/or (2) opposite-sex married couples. No submissions have been made as to how the Proposed Act, in its

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two assertions. Because Parliament is assumed to be an intelligent and reasonable collective body, every word must be given effect, otherwise Parliament would have been more parsimonious. Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: ON: Lexis-Nexis, 2014), 3, 211, 248-74; Peter W. Hogg, *Constitutional Law vol. 1*, 5th ed. (Toronto: Carswell, 2007), 449.

[90] *SSM Reference,* paras. 50-6.

[91] *SSM Reference,* para. 46. Lori G. Beaman, 'It was all slightly unreal': What's Wrong with Tolerance and Accommodation in the Adjudication of Religious Freedom?" *Canadian Journal of Women and the Law* 23, no. 2 (2011): 450-62.

> effect, might be seen to draw a distinction for the purposes of s. 15, nor can the Court surmise how it might be seen to do so. It withholds no benefits, nor does it impose burdens on a differential basis.

It is important to notice here, because this will re-emerge in arguments over TWU's law school, that the proposition can cut both ways. The mere recognition of religious equality and freedom does not, at least by itself, abridge sexual orientation and gender equality. The SCC represents queers and religious persons as two distinct and homogenous groups. These groups are often opposed owing to implied excess passion. Because of such passion, they require management from the legal system. This legal system styles itself as a referee. Though state public policy can match a certain religious viewpoint, if such a viewpoint meets the implied constitutional standard of public reason, it is not mandated to do so. Everyone must play fair in this constitutional game of hockey, otherwise known as multicultural diversity.

Next, the Court holds that the power to determine legal capacity to wed rests with the federal Parliament. By contrast, provincial legislatures retain power over solemnization. Thus, a federal scheme of civil partnerships falling short of marriage is beyond the competence of Parliament. Briefly disposing of this question, the Court turns to the argument respecting the constitutional entrenchment of the opposite-sex requirement for marriage. The Court criticizes the "frozen concepts" reasoning of same-sex marriage opponents and the *amicus* (the advocate who represents a position as a party to adversarial litigation when no actual party exists). They argued that the definition of marriage in 1867 meant that it was constitutionally entrenched. The word frozen implies temporal stasis, as well as emotional coldness and rigidity. The Court considers neither of these appropriate postures in Canada's constitutional culture. The SCC invokes the common law, and especially Canadian, constitutional doctrine of the living tree.

Lord Sankey authoritatively enunciated this doctrine, when he spoke for the Privy Council in *Edwards v Attorney General* (1930), commonly called the "Persons" case. Lord Sankey, against the judgement of the then SCC judges, determined that the *BNA Act* was "capable of growth within natural limits." His decision allowed women to be appointed as Canadian senators, even though they would not have been considered "legal persons" at Confederation.[92]

The Court notes the following:

> 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. In the 1920s, for example, a controversy arose as to whether women as well as men were capable of being considered "qualified persons" eligible for appointment to the Senate of Canada. Legal precedent stretching back to Roman Law was cited for the proposition that women had always been considered "unqualified" for public office, and it was argued that this common understanding in 1867 was incorporated in s. 24 of the Constitution Act, 1867 and should continue to govern Canadians in succeeding ages. Speaking for the Privy Council in Edwards v. Attorney-General for Canada, 1929.) (the "Persons" case), Lord Sankey L.C. said at p. 136:

[92] *Edwards v. Canada (Attorney General)*, [1930] A.C. 124 (P.C.). Patrick Macklem, Ian Lee and Hamish Stuart provide helpful summary of this case as well as relevant passages from both levels of Court in their text *Canadian Constitutional Law* 5th ed. (Toronto: Edmund Montgomery, 2017), 35-41.

> "Their Lordships do not conceive it to be the duty of this Board — it is certainly not their desire — to cut down the provisions of the [B.N.A.] Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs." A large and liberal, or progressive, interpretation ensures the continued relevance and, indeed, legitimacy of Canada's constituting document. By way of progressive interpretation our Constitution succeeds in its ambitious enterprise, that of structuring the exercise of power by the organs of the state in times vastly different from those in which it was crafted. For instance, Parliament's legislative competence in respect of telephones was recognized on the basis of its authority over interprovincial "undertakings" in s. 92(10)(a) even though the telephone had yet to be invented in 1867…[93]

First, this quotation associates queers with an aspect of national pride, by incorporating them into our gender equality narrative. Second, it attempts to produce moral common sense by analogizing same-sex marriage, an emotionally charged and contested issue, to the equality of women. The SCC reasons that very few (implied reasonable) persons would disagree concerning this matter. Third, it enfolds queers within nature. This naturalization is significant given the historic trope that homoerotic behaviour and gender diversity are against nature and the interveners' arguments that the redefinition of marriage exceeds the natural limits of the Constitution. Fourth, and relatedly, it positions same-sex marriage within an organic teleology concerning the progressive development of history facilitated by the rule of law.[94] That is, the SCC describes constitutions as living trees.

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[93] *SSM Reference,* para. 22.

Fifth, it implicitly associates Christian sexual attitudes with the past and same-sex marriage and the *Charter* with the future, The decision notes that the common law definition of marriage from *Hyde v. Hyde* (upon which objectors to same-sex marriage often rely) refers to marriage in "Christendom." This idea cannot be a concept countenanced in the emotional culture of Canadian constitutionalism, at least not explicitly. The Court offers an implied progressive discourse in which same-sex marriage is new and "traditional" Christian sexual morality is old.

It is challenging for nonlawyers to appreciate the emotion behind this seemingly sedate passage. Nevertheless, this becomes more evident when we appreciate the centrality of the living tree doctrine to many within Canadian constitutional culture, in addition to its connection with the person's case. The latter is an important myth of the Canadian constitutional *Zeitgeist.* Indeed, for those espousing a progressive legal agenda, the living tree doctrine approaches an article of faith.[95] The Court uses words like "large, liberal and progressive." This language implies that the endorsement of same-sex marriage, as well as queer persons generally, is on the right side of enlightened history. By citing constitutional evolution in response to the telephone, it associates same-sex marriage with rationalization, technological developments, and the social benefits attending these things. It contrasts the outmoded concept of Christendom with the modern and progressive ideal of a just and multicultural polity. The Court also conflates technological innovation with social development.

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[94] *SSM Reference,* paras. 23-30.

[95] John von Heyking, "The Charter and Civil Religion," in John F. Young and Boris DeWiel, eds. *Faith in Democracy? Religion and Politics in Canada* (Newcastle: Cambridge Scholars Press, 2009), 36; Ronald Dworkin, *Law's Empire* (Cambridge, MA Harvard University Press, 1986), esp. 400-18; Hans-Georg Gadamer, *Truth and Method*, trans. Joel Weinsheimer and Donald G. Marshall (New York: Continuum Publishing Group, 2004), 150-160.; Hans-Georg Gadamer, *Philosophical Hermeneutics*, trans. and ed. David E. Linge (Berkeley: University of California Press, 1976), 80.

Adapting the Constitution to accommodate a value neutral object like the telephone is different from the moral change that condoning same-sex marriage involves, even though this development is just. We should also observe that The Court uses the phrase "vastly different time," and that it also connects the evolution of the Constitution to allow for same-sex marriage with the Constitution's very legitimacy. It suggests same-sex marriage should be an occasion for commemoration, just as we now celebrate the person's case as a further step to realizing a society in which all are treated with equal respect and concern. The Court implies that Christian beliefs impeded this ideal's realization.

In summary, paraphrasing Heidi Klum, host of *Project Runway*, "in the world of [legal] fashion, one day you're in, the next you're out." By differentiating marriage for civil purposes from marriage as a religious ceremony, the Court again divides the private religious sphere from the public legal one. Though the SCC acknowledges that marriage has a religious origin, it has little trouble concluding that marriage can shed its religious vestiges to reveal its true public and legal core. As a public and legal institution, it can accommodate same-sex couples easily. This holding is a dramatic change in perspective, considering that Justice La Forest said the following writing for the majority in *Egan* (1995, nine years before this reference):

> Suffice it to say that marriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate raison d'etre transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are

> generally cared for and nurtured by those who live in that relationship. In this sense marriage is by nature heterosexual.[96]

Based on this concise statement of heterosexual hegemony regarding relationship recognition, just shy of a decade before the same-sex reference, we can appreciate the alarm of many conservative groups at such a rapid shift in judicial opinion.

In the *Same-Sex Marriage Reference*, queer sexuality helps to constitute the boundaries of purportedly religious (private/feminine) and secular (public/masculine) spheres of life. Public actors are, in turn, encouraged to police these boundaries and obey the proper feeling-rules to maintain this emotional climate. Behind this injunction to public actors, there are, therefore, two discourses related to fear. First, there is apprehension that a covert return to Christendom threatens the integrity of the legal system. Second, there is the ever-present anxiety that sexuality, always already constructed as unruly, if not quarantined within the bounds of domesticity, has the potential to create disorder. Once more, the relevance of an aesthetic discursive approach is apparent. Religion and sex, especially when inflected with fears concerning emotionality, serve as powerful tools to construct temporal and spatial boundaries. In the next section we shall see how the SCC uses fear at the prospect of religious hatred and violence to circumscribe the boundaries of subjects' liberty.

THE WHATCOTT JUDGEMENT

Though sticks and stones break our bones, words also hurt. Hate speech excites our entrenched feelings of shame and recalls the violent histories required to maintain the supremacy of the powerful. It is useful to imagine what the experience of the complainants in the Whatcott judgment might have been like to provide the necessary emotional contexts for the decision. We

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[96] *Egan v Canada,* [1995] 2 SCR 513, 515 124 DLR (4th) 609 (CanLII), Lamer C.J Laforest; Lori G. Beaman, "Sexual Orientation and Legal Discourse: Legal Constructions of the "normal" Family, (Canada)." *Canadian Journal of Law and Society* 14, no. 2 (1999): 173-201.

need only picture what it would be like, after a long history of struggling with our sexuality and gender identity, to receive queer hate mail advising us that "sodomites" are infectious and dangerous criminals who threaten children and civilization as we know it. It forces us to recall the violence we have experienced at the hands of the heterosexual and cisgender majority. Receiving mail like this reminds queers that some persons do not consider us full human beings and actively campaign for our subordination. But hate mail is an extreme example on the long and complex continuum of queer oppression.

In 2013, an incident that happened in 2001-2 finally made its way to the SCC. William Whatcott is a long-time anti-choice and anti-queer equality activist. The Registered Practical Nurses Association of Saskatchewan previously attempted to discipline him for his anti-abortion activism off-duty.[97] The Saskatchewan Court of Appeal reversed this decision. The SCC later endorsed the conclusion of the Court of Appeal.

In a separate incident, he distributed antigay flyers in the mail. Four persons who received these documents filed a complaint with the Saskatchewan Human Rights Commission. At that time, the Saskatchewan Human Rights Code prohibited the public dissemination of material that exposes or tends to expose individuals to hatred, as well as ridicules, belittles or otherwise affronts the dignity of any person or class of persons based on a prohibited ground," of which sexual orientation is one.[98] There were three flyers and one duplicate. The first flyer was entitled "Keep Homosexuality Out of Saskatoon Public Schools;" the second one was entitled,

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[97] *Whatcott v. Saskatchewan Association of Licensed Practical Nurses*, 2008 SKCA 6 (CanLII), <http://canlii.ca/t/1vhtj>, retrieved on 2018-08-29; aff'd Saskatchewan Association of Licensed Practical Nurses v. William Whatcott, 2008 CanLII 33785 (SCC), <http://canlii.ca/t/1zdh6>, retrieved on 2018-08-29.

[98] *Saskatchewan (Human Rights Commission) v. Whatcott 2013 SCC 11*, [2013] 1 SCR 467 at para. 3.

"Sodomites in Public Schools;" and the other two were reprints of personal advertisements in Saskatchewan's largest gay men's periodical, posted by men seeking casual sex with other men. These classified ads had various annotations that Mr. Whatcott provided.

This dissertation is not the place to discuss the constitutionality of hate speech laws or their salutary effects on liberal democracy generally. What matters for our purposes is how the SCC tries to contain the perceived emotionality of religion and sex through the judicial method. The unanimous judgement, penned by Justice Rothstein, argues that the supposed harm of hate speech is its tendency to portray some as less human than others to the point of being animalistic, violent, and criminal. He says the following

> Hate speech often vilifies the targeted group by blaming its members for the current problems in society, alleging that they are a "powerful menace"… they are carrying out secret conspiracies to gain global control… or plotting to destroy western civilization … Hate speech also further delegitimizes the targeted group by suggesting its members are illegal or unlawful, such as by labelling them "liars, cheats, criminals and thugs" [citations omitted].[99]

The harm of hate speech is not the harm to individuals. The damage of hate speech is its tendency to perpetuate extreme forms of social subordination and physical violence.[100] The Court stresses that the test for hate speech is not one based on an individual's feelings concerning the message in question. Instead, it is an "objective test." That is, it is predicated upon what a reasonable person would understand as hateful in the given circumstances.

Consequently, the SCC emphasizes that the law may only proscribe the most extreme forms of speech – that is, speech that goes far beyond the ideal of reason and democratic

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[99] *Whatcott*, para. 45.

[100] *Whatcott*, para. 74.

dissension. This caution ensures that the law does not curtail our conduct unduly. To do otherwise would produce a chilling effect. Courts only seek to curtail speech that strays a considerable distance from the underlying purposes and values that inform the protected right of freedom of expression.[101] The Court acknowledges, along with American jurist Benjamin Cardozo, that subjectivity is part of the judicial process. Consistent with the persistent script of judicial dispassion, its insistence on an objective standard to maintain legal certainty is an important move. It allows the SCC to further the pleasing image of itself as a disinterested umpire of (the imagined) conflict between queerness and religion. It stands above them by rationality.[102] Justice Rothstein notes the following:

> Subjectivity is not unique to the application of standards within human rights legislation. If human beings act in the role of judge or arbitrator, there will be a subjective element in the application of any standard or test to a given fact situation. In the words of Cardozo J.: ". . . the traditions of our jurisprudence commit us to the objective standard. I do not mean, of course, that this ideal of objective vision is ever perfectly attained," but rather, inescapably, that "the perception of objective right takes the color of the subjective mind." …In response to this reality, courts develop legal principles for the purpose of providing a method of dealing with similar issues consistently. Where the applicable standard or test is an objective one, courts and tribunals apply it based on how a reasonable person in the same position or circumstances would act or think.[103]

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[101] *Whatcott*, para. 23.

[102] Shipley, Heather. "Religious Freedom and Sexual Orientation: Equality Jurisprudence and Intersecting Identities." *Canadian Journal of Women and the Law,* 27, no. 2 (2015), 248-83.

[103] *Whatcott*, para. 33-4; Benjamin Cardozo, *The Nature of the Judicial Process* (1921), at pp. 106 and 110.

Thus, Justice Rothstein, with due respect to his considerable skill and the substantive outcome of this judgement, uses judicial method in a manner analogous to pulling a rabbit out of a hat. He affirms subjectivity on the one hand, and objectivity on the other.

These contradictory impulses explain why the lack of rationality is what makes hate speech so odious for the SCC. Not only is he who uses it behaving barbarously, but he who uses it is morally flawed. He denies the dignity his opponents are owed, whatever their (perceived) faults in the hatemonger's view. Such tactics put the target(s) in the rhetorically disabled position of first having to defend their simple humanity and right to participate in public life and then having to respond to criticisms.[104] In the Court's view, which I have substantiated in the last two chapters, hate speech displaces our disgust anxieties onto other groups. This displacement transforms initial disgust reactions into higher order ethical condemnations of specified persons.

Justice Rothstein notes the following:

> The act of vilifying a person or group connotes accusing them of disgusting characteristics, inherent deficiencies or immoral propensities which are too vile in nature to be shared by the person who vilifies… delegitimizing a group as unworthy, useless or inferior can be a component of exposing them to hatred. Such delegitimization reduces the target group's credibility, social standing and acceptance within society and is a key aspect of the social harm caused by hate speech… Exposure to hatred can also result from expression that equates the targeted group with groups traditionally reviled in society, such as child abusers, pedophiles… or "deviant criminals who prey on children… one of the most extreme forms of vilification is to dehumanize a protected group by describing its members as animals or as subhuman. References to a group as

[104] *Whatcott*, para. 76.

> "horrible creatures who ought not to be allowed to live" "incognizant primates", "genetically inferior" and "lesser beasts"… or "sub-human filth"… are examples of dehumanizing expression that calls into question whether group members qualify as human beings [Citations omitted].[105]

Hence, the Court found that the flyers related to preventing homosexuals from teaching and the discussion of homosexality in public schools were hateful. Albeit in a more virulent form than Margaret Somerville's pseudo-social scientific (hetero)sexism discussed in the last chapter, they provide a typical dark fantasy of reproductive futurism. Mr. Whattcott represents sodomites as vectors of disease, animalistic passion, social decay, corruption, and death. Troubling for the Court is the depiction of sodomites as paradoxically effeminate and masculine criminals who molest children.[106] The violation of the child, which has become the divine image of our (hetero)sexist social order, brings Mr. Whatcott beyond the range of tolerable and constitutionally protected expression.[107] Perhaps no social designation is more reviled than pedophile.

Taking a traditional Evangelical position, Mr. Whatcott argued that his speech was not aimed at queers themselves. It was merely remonstrating a behaviour that he found morally objectionable. Adopting the argument Justice L'Heureux-Dubé advanced in *TWU v BCCT*, Justice Rothstein says the following:

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[105] *Whatcott*, para. 44-5.

[106] *Whatcott*, para. 187.

[107] Lee Edelman, *No Future: Queer Theory and the Death Drive*, 2nd ed. (Durham, NC: Duke University Press, 2004), 29; Elaine Craig, *Troubling Sex*, Law and Society Series, (Vancouver: UBC Press, 2012) 41.

> I agree that sexual orientation and sexual behaviour can be differentiated for certain purposes. However, in instances where hate speech is directed toward behaviour to mask the true target, the vulnerable group, this distinction should not serve to avoid s. 14(1)(b). One such instance is where the expression does not denigrate certain sexual conduct in and of itself, but only when it is carried out by same-sex partners. Another is when hate speech is directed at behaviour that is integral to and inseparable from the identity of the group.[108]

He thus recognizes that sexual orientation is part of human moral personality. One cannot easily distinguish status from conduct. Indeed, many Evangelicals claimed that the criticism leveled at the status-conduct distinction by queers apply to them regarding their disapproval of homoerotic behaviour. By punishing Mr. Whatcott's hate speech, they are demeaning an activity (that is evangelism), that he sees as vital to his self conception and personal narrative.

While Mr. Whatcott's situation may have some similarities to anti-queer discrimination, because the SCC coerces him to change how he expresses a crucial part of his identity, there are at least three notable differences between him and queers. First, Mr. Whatcott is not shamed for a broad range of practices connected to Evangelicalism. Instead, the Court criticizes the vitriolic way that he expresses his identity. Second, it is arguable that erotic activity is more central to queer identity than anti-queer protest is to an evangelical one. Third, Mr. Whatcott criticizes other groups from a position of relative power and privilege that a long history of oppression created. It would seem that we would require at least some perfunctory acknowledgement of queer oppression as well as a discussion of Christian theology's role in feeding and propagating (hetero)sexist hate speech to have a defensible judgement in this case.

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[108] *Whatcott*, para. 122.

Regrettably, there is no mention of the oppressive history of (Christian) persecution that has made sexual expression so central to queer identity. As well, the SCC does not explain why religious attacks upon sodomy are likely to cause social subordination. Understandably, the Court is reluctant to criticize religious doctrine directly. This hesitation is more apparent when the SCC attempts to protect the classified ads that Mr. Whatcott reproduces with notation.

Mr. Whatcott informs us that Saskatchewan's largest gay magazine allows ads for "men seeking boys." He then cites the purported words of Jesus who admonishes society for not protecting children, saying the following: "Occasions for stumbling are bound to come, but woe to anyone by whom they come! It would be better for you if a millstone were hung around your neck and you were thrown into the sea than for you to cause one of these little ones [children] to stumble." (Lk 1:1-30). The SCC is right to argue that adjudicators ought to be wary of interpreting hateful messages from scriptural citation. Given the context of this citation, as well as Mr. Whatcott's overwhelming belief that sodomites are dangerous criminals who prey upon children, it is reasonable to infer murderous animus from his use of this passage. Mr. Whatcott incorporated it into the text of his flyer. He did not merely cite it. He combined it with the statement that homosexuality ought to be made illegal.

The bottom line for the SCC is that society can tolerate religious opprobrium and denunciation, so long as it does not stray too far from the reasonable bounds of democratic discourse. Nonetheless, Judaism and Christianity have a long history of strong rhetoric to advance theological claims and to lobby for moral reform. We need only think of Elijah, Isaiah, Jesus, Augustine, Martin Luther, and John Calvin for salient examples.[109] Consequently, though human rights legislation is remedial and not punitive, the Court's finding that Mr. Whatcott's

[109] Leonard W. Levy, *Blasphemy* (University of North Carolina Press, 1995), 164.

freedom of religion and expression do not protect his documents cannot avoid the fact that its is a negative judgement concerning persons who believe that homosexuality is a moral evil to the degree that Mr. Whatcott does.

Justice Rothstein also invokes fears of genocide and almost compares Mr. Whatcott to a fascist.

> The majority in *Keegstra* and *Taylor* [the governing cases on hate speech] reviewed evidence detailing the potential risks of harm from the dissemination of messages of hate, including the 1966 *Report of the Special Committee on Hate Propaganda in Canada*, commonly known as the Cohen Committee. The Cohen Committee wrote at a time when the experiences of fascism in Italy and National Socialism in Germany were in recent memory. Almost 50 years later, I cannot say that those examples have proven to be isolated and unrepeated at our current point in history. One need only look to the former Yugoslavia, Cambodia, Rwanda, Darfur, or Uganda to see more recent examples of attempted cleansing or genocide on the basis of religion, ethnicity or sexual orientation[110]

Though I agree with Justice Rothstein that we should curtail hate speech to prevent incitements to violence, especially those that cause the genocides he discusses, I question whether Mr. Whatcott reaches this level, except, ironically, concerning the modified personal advertisements that Justice Rothstein chooses not to find hateful; for they incorporate biblical passages. While recognizing that Justice Rothstein is commenting upon the general purposes of hate speech regulation in this passage, implying that Mr. Whatcott comes close to a Nazi likely does little to lessen the fears and feelings of exclusion of those who oppose queerness for sincere religious reasons.

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[110] *Whatcott,* para. 75.

For Mr. Whatcott, salvation is at stake. His caustic rhetoric goes back to the origins of the protestant reformation.[111] Nothing but extreme forms of admonishment are warranted. A polite discourse concerning rights will not suffice. This case cannot be anything but an indirect judgement concerning the rationality and moral worth of Mr. Whatcott's ethical position. Along with William T. Cavanaugh, I disagree with the SCC's implicit finding that true religion and speech contribute to democratic consensus.[112] Mr. Whatcott is following his convictions. His convictions are also abhorrent. He may be acting hatefully in this context, yet this behaviour does not make him any less Christian. While Christian beliefs may influence ethical behaviour, they are neither a sufficient nor a necessary condition for it. Hatred or violence does not diminish the authenticity of religious beliefs, or at least the hatemonger's perception of the compulsions said to flow from them. There will be times that a state must limit religious hatred. We should, however, be under no illusion that state coercion less intrusive because the hateful conduct is not "really religious". The malicious experience the effects of coercion just as much as a the benevolent. Most important, the vicious retain their status as an equal person. We risk failing at our aspiration to provide a coherent justification, if we exclude religious hatred from legal protection *a priori*.

The 1998 case of *Vriend v. Alberta* discusses *Charter* interpretation, the role of the courts in a constitutional democracy, and the pride and shame we ought to take in the past and future. Diversity eclipses freedom of religion, even though the college fired him owing to his sexual orientation. The judgement of *Trinity Western University v. British Columbia College of Teachers* (2001), also clumsily manages religion and sex. The majority judgement relies upon

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[111] Gregory, Brad. *Salvation at Stake: Christian Martyrdom in Early Modern Europe*. Cambridge, Harvard University Press, 1999, Chapter One: A Complex of Martyrs, p. 6-15.

[112] William T. Cavanaugh, *The Myth of Religious Violence: Secular Ideology and the Roots of Modern Conflict* (Toronto: Oxford University Press 10-25, 230-30.

beliefs concerning proper emotional regulation (both by teachers and students). The majority decision assuages anxiety concerning possible occurrences of institutional humiliation that the dissenting reasons express. Conversely, Justice L'Heureux-Dubé betrays a hint of anger at the (perceived) insensitivity of her colleagues regarding dignitary harm and pervasive (hetero)sexism in schools.

Reference Re: Same-Sex Marriage (2004) treats religious freedom even more perfunctorily. The Court accommodates religious objections to same-sex marriage within a progressive and organic liberal teleology of enlightenment reason. This decision, while explicitly not mandating same-sex marriage, weaves it into the illustrious fabric of Canadian constitutional culture. By contrast, it envelops subjects who object to same-sex marriage within the shade of Canada's living tree, so long as they display the proper emotional and cognitive dissonance that the court requires of its imagined constitutional agents. The Court tries to strike a delicate balance between Kantian principle and proportionate compromise. *Saskatchewan Human Rights Commission v. Whatcott* (2013) evicts religious (and specifically evangelically Protestant) objectors to same-sex marriage considerably further east of Canada's constitutional Garden of Eden. Once again, as we explore these cases, readers should meditate upon how each of our four protagonists may respond to the judgements. Keeping their responses in mind will prepare us for a nuanced engagement with the submissions, which I shall provide in the following chapter.

Chapter 5:
The Law Society Emails and Justice

[C]anada is a country which prides itself on adherence to the ideal of equality of opportunity. If that ideal is to be realized in our profession then law schools, and ultimately the legal profession, must be alert to the need to encourage people from minority groups and people from difficult economic circumstances to join our profession. — The Right Honourable Brian Dickson[1]

On our very first day at Harvard, a very wise professor quoted Aristotle — "the law is reason free from passion". Well, no offence to Aristotle, but in my three years at Harvard, I have come to find that passion is a key ingredient to the study and practice of law and of life… First impressions are not always correct… You must always have faith in people; you must always have faith in yourself — Elle Woods (played by Reese Witherspoon)[2]

In the last chapter, I argued that the SCC had trouble mediating between the rights claims of persons who oppose queerness for sincere religious reasons and gender and sexual minorities. The Court did not recognize that the constitutional entrenchment of sexual orientation and gender equality as prohibited grounds of unequal treatment repudiates (hetero)sexism. The entrenchment of sexual orientation created a notable, though still incomplete, orientation-shift in

[1] Rt. Hon. Brian Dickson, "Legal Education," *Canadian Bar Review* 64, no. 2 (1986): 377.

[2] Amanda Brown and Karen McCullah, *Legally Blonde*, dir. Robert Luketic (2001, Metro-Goldwyn-Mayer and Marc Platt Productions); DVD. The movie *Legally Blonde* is based on the novel by Amanda Brown. In the movie, a privileged white and blonde sorority queen from California attends Harvard Law School to win back her boyfriend. He underestimates her intelligence because of her stereotypically feminine characteristics and sees them as conflicting with his career aspirations. Initially, the protagonist has a difficult time adjusting to law school. She eventually rises to the top of her class, while she also learns to maintain her individuality, especially regarding how she expresses her gender. She has a crisis of self-doubt when one of her male professors sexually harasses her. After rejecting his advances, she also learns to esteem herself as a moral and intellectually capable legal actor and finds a new male partner who respects her as an equal. The above quotation is from the final scene in which she gives the class graduation speech. Though the movie perpetuates cisgender, heterosexual, and able-bodied whiteness, I have always found its tagline of "don't judge a book by its hair colour" inspiring. Truth be told, it is a major reason why I have become preoccupied with the intersection between law, discrimination, (specifically, sexual harassment) emotion, and gender. There is also a Broadway musical version of the film.

the feeling rules of Canadian constitutional culture. This shift to a more feminist substantive equality ethic is more apparent in the Law Societies' submissions. Nevertheless, patriarchal attitudes persist.

It is worthwhile to review the submissions and their context. The Federation of Law Societies (FLS) is the national coordinating body of law societies. One of the goals of the FLS is the harmonization of legal education across Canada. The FLS gave preliminary approval to TWU's proposed Juris Doctor (JD) program after the FLS appointed a special advisory committee to assess equity and pedagogical concerns relating to the CCA. The FLS sought the opinion of noted constitutional lawyer John B. Laskin, who produced a memorandum in favour of accreditation. He said there were no equity concerns. The FLS also received submissions from members of the public. These date from 2012-13, but they were not available at the time of writing. Despite the Federation's approval, provincial law societies retain the final authority over which programs they will accredit. A JD from an accredited school is the quickest and easiest way to begin the licensing process through which the bar of a specific province may "call" (that is, accept) a candidate.

Law is a self-regulating profession. It accomplishes this self-regulation through benchers. Their fellow lawyers elect these benchers. Their task is to design policy, draft professional rules, and make administrative decisions about the practice of law within their province. Initially, all law societies acquiesced to the decision of the FLS, yet there was considerable opposition in the provinces of British Columbia, Nova Scotia, and Ontario. Because of this opposition, the benchers solicited feedback from their members and the public concerning TWU's proposal, specifically the effect of the CCA, and whether it should influence their accreditation determinations. The windows to submit feedback were slightly different for each province. They

were approximately three months from the end of 2013 to the beginning of 2014. A majority of members provided their feedback electronically, either as a direct email or as an email with an attached print document facsimile (PDF).[3]

The purpose of this chapter is to demonstrate that lawyers are anything but stoic regarding the rule of law. They become very passionate concerning the idea of reason.[4] Specifically, I will attempt to demonstrate that they use shame to enforce their specific conception of human rights. I suggested in the introduction that Kant's philosophy is especially suitable for our purposes, owing to the strong links he makes between rationality, shame, respect, and the supremacy of justice. The problem with any human rights approach using shame is simple yet nearly impossible to rectify. Shame is, at least in part, necessary for the enforcement of human rights. Nonetheless, one of the goals of human rights is to protect persons from shame.

This chapter examines a more vulgar form of emotional excitement than is expressed in the *Same-Sex Marriage Reference*. The chapter connects a teleological view of history back to Dworkin's notion of legal integrity, hermeneutic development and the progressive purgation of parasitic passion.[5] Such a story of triumph and regression is inextricable from the idea that reason is the engine of historical progress. Its teleological fulfillment is the assumed (masculine)

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[3] The above summary is adapted from: Muniz-Fraticelli, "The (Im)possibility of Christian Education," in *Religious Freedom and Communities*, ed. Dwight Newman (Markham, ON: LEXIS-NEXIS, 2016), 209-10.

[4] Theodor Adorno and Max Horkheimer, *The Dialectic of Enlightenment: Philosophical Fragments,* trans. Edmund Jephcott, ed. Gunzelin Schmid Noerr, Cultural Memory in the Present (1987, repr. Stanford, CA: Stanford University Press, 2002), esp. 215-240.

[5] John von Heyking, "The Charter and Civil Religion," in John F. Young and Boris DeWiel, eds. *Faith in Democracy? Religion and Politics in Canada* (Newcastle: Cambridge Scholars Press, 2009), 36; Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), esp. 400-18; Hans-Georg Gadamer, *Truth and Method*, trans. Joel Weinsheimer and Donald G. Marshall (New York: Continuum Publishing Group, 2004), 150-160.; Hans-Georg Gadamer, *Philosophical Hermeneutics*, trans. and ed. David E. Linge (Berkeley: University of California Press, 1976), 80.

public legal actor who can supress emotion when performing his duty. The first duty of this legal actor, though this concept means vastly different things to different persons, is to be the ward of the public interest. To protect the public interest, this actor must separate his personal beliefs from his public role. This dichotomous self finds sustenance in the unfortunate vitality of the Kantian division between the public and private. Most of the submissions still rely on the public-private distinction, and their position on the accreditation of TWU's law school often depends upon whether they believe religion or sex is more shameful or likely to cause shame than the other.

While supporters of TWU attempt to recruit some of the cachet of substantive equality by claiming victim status, most operate within the traditional outlook of *modus vivendi* liberalism, As well, they adopt the androcentric way it has constructed public and private space. Generally, they are more individualistic and sceptical of the idea that laws can convey discriminatory messages that must be appraised contextually. Conversely, persons opposing accreditation are more sensitive to expressive harms. Persons endorsing accreditation frequently understand social differences as given facts. Detractors, though they also often engage in essentialism, are more likely to consider identities as consequences of unjust circumstances. On average, proponents understand law's role in this dispute as that of an umpire between two equally empowered groups. They usually do not recognize that the law has been a historic and ongoing tool of (hetero)sexist oppression, which has also helped to maintain Christian privilege in Canada. Consequently, proponents of the law school frequently imagine the self as free, complete, rational and less flexible. In short, it appears that certain feminist principles are becoming more frequent in legal discourse and are beginning to affect a dramatic change in the feeling rules within Canadian constitutional culture. Despite such positive developments, the public/private

distinction remains a powerful operating metaphor. Though many persons against TWU's proposal are willing to move the boundaries of the public/private distinction, few question its general utility and intelligibility. Most important for the purposes of this dissertation, however, is that there is still a strong predilection from both sides of this dispute to rely on justificatory language. Such dependence on masculinity and humiliation causes otherwise pertinent arguments from both sides to become a shame and blame game. This unfortunate tendency prevents us from cultivating a more persuasive and historically situated method for conducting legal disagreements with greater compassion and mutual respect. Naturally, therefore, the positions lawyers take concerning TWU's proposal are born of the implicit stance the authors adopt regarding the main tenant of the Enlightenment: that humankind can emerge from its (implied religious) self incurred immaturity through the free exercise of reason.

All these ideas relate to the elemental question of whether TWU, both as a (hetero)sexist and religious institution, is an appropriate venue for instructing future students in allegedly secular Canadian law. This demonstrates larger (hetero)sexist ambivalence within Canadian constitutional culture regarding religious, gender, and sexual diversity. We should understand the submissions considering the four basic points of disagreement outlined in the last chapter. First, they divide on the public-private distinction's boundaries. Second, they argue over whether liberalism should be a *modus vivendi* or have more substantive values. Third, they argue about whether we should recognize the expressive harms of discrimination and to what extent we should do so. Fourth, they disagree about whether the law ought to redress historical inequalities and to what extent it should do so.

Perspective Temporality and Enlightenment Discourse

There are few submissions from supporters of TWU on the progress of time and the need for change. They argue for the value of maintaining the *status quo* and tradition. Miriam Smith explains that, unlike in the United States, in which judicial decisions concerning race and religion have a much longer pedigree, the rough historical coincidence between the enactment and development of the *Charter* and the most successful period of the queer rights movement has created a strong association between the *Charter* and queer rights. The *Charter* is popular with Canadians and is also an identity marker.[6] Many submissions juxtapose queer rights with (implied premodern) religion. They implicitly associate the former with lawfulness and the latter with disorder.

For example, Gary L. Nelson of Nova Scotia (February 3, 2014) wonders, "How could a country, such as Canada, have made such great strides in the realm of human rights only to have establishments like [TWU] come along and throw us back by several hundred years, all in the name of religion? Religion should never be a deciding factor in law." Mitchell Eliasson of Nova Scotia (January 30, 2014), echoes his sentiments: "TWU's mandate to essentially exclude the LGBTQ community is morally repugnant and legally discriminatory. It's 2014; let's not start moving backwards." With considerably more colour, R. Glenn Nicholson of British Columbia (February 22, 2013), states, "Laws typically lag behind social norms. However, human rights laws should lead by preventing majorities from tyrannizing oppressed minorities. The Law Society should help lead society out of the dark ages."

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[6] Smith, Miriam. "Framing Same-Sex Marriage in Canada and the United States: Goodridge, Halpern and the National Boundaries of Political Discourse." *Social and Legal Studies* 16, no. 1 (2007): 5-8.

Amanda Dillman of Nova Scotia (January 9, 2014), "can't even believe we members of the law society are having this conversation in Canada in 2014." More bluntly, Jim Braunagel from British Columbia (March 2, 2014), opines, "I am not sure which is more disappointing, the discrimination of the covenant or the fact that students sign on to a covenant the language of which sounds oddly ancient and crazy. This institution can be faulted for delusional thinking as well as for discriminatory practices." Reflecting similar sentiments, Tony Pargeter from British Columbia (March 1, 2014), writes the following:

> I strongly believe that the practice of law and the justice system in Canada and British Columbia must be based on our laws, Constitution and *Charter* of Rights and Freedoms. The philosophy of TWU is clearly based on a different set of priorities - those set out in the scriptural doctrines of one particular religion, founded in the mores and limited knowledge of a desert society many centuries ago. TWU requires students and faculty to declare adherence to significant elements of that belief system which are in blatant opposition to human rights as our modern Canadian society has defined them.

Likewise, Jeffrey Yuen (March 2, 2014), a self-disclosed gay law student from British Columbia, is concerned that the Law Society of Upper Canada "will be on the wrong side of history," should they accredit TWU. The Rev. Dr. Linda Yates (February 9, 2014) expresses analogous worries. She expends much text painting opposition to same-sex marriage as an unfortunate patriarchal anachronism. In particular, she states, "Further, the writers of the Bible wrote with a limited understanding of science. For example, the world is considered flat and the Copernican understanding of the universe is unknown. Likewise, understanding of human sexuality was limited. It was assumed that all people were born heterosexual and chose to be homosexual."

Shame fuels this Enlightenment conception of temporality. Preoccupation with shame causes some to paint TWU as an eccentric institution that is determined to retard justice's advancement. For example, member of the public Eric Kristensen (March 1, 2014) says the following:

> I am writing to express my profound opposition to TWU's proposal to create a faith-based law school in British Columbia. My same-sex spouse and I were legally married by MY [author's capitals] faith community in the Commonwealth of Massachusetts in 2005. We would expect that any lawyer admitted to the bar in British Columbia would be able to represent our interests fairly and honestly. If the Law Society of BC agrees to admit lawyers professionally trained at TWU, under its CCA, we would be hesitant, if not opposed, to hire anyone trained at TWU. Your admission of lawyers trained in this program would substantially alter our trust in the legal profession in BC. Is it really worth supporting TWU in its obstinate refusal to grapple with the real world and its social diversity, simply in order that it might create a "Christian Disneyland" for its students? As a Christian myself, I feel ashamed that TWU brandishes its narrow-minded version of our faith as a defence against social progress and the development of a more open and caring society.

This quotation offers a useful counterexample to the assumption of many TWU supporters that queer equality is a secular phenomenon, and, thus, those who support it cannot truly be acting as Christians.

Unfortunately, however, it uses the same logic in reverse. Calling TWU a Christian Disneyland positions TWU outside normal adult reality, thereby implying that it is morally immature and socially disengaged. When Disneyland is joined with the phrase narrowminded, it is challenging to escape the deduction that Mr. Kristensen believes TWU is enacting a fairy-tale.

Similarly, because Disneyland is nearly synonymous with consumer culture, the author suggests that TWU is profaning the sacred or being insincere. This characterization fails to appreciate that TWU's administration does not see itself as creating an environment in which students and faculty may disengage from the profane world to enter an alternate evangelical universe. Instead, their intention is to offer students an Evangelical education. Such education is meant to enable students and faculty to keep their evangelical identity as they engage with the broader culture. Mr. Kristensen implies that he has the more correct understanding of Christianity. His faith is flexible and more in step with the times. Specifically, using the words "obstinate" and "brandish" constructs TWU as intransigent. TWU is against his vision of a diverse society. In his view, the University presents a distorted understanding of Christianity to the public. As well, he includes diversity in a list with progress and social development. This choice may indicate that he connects these concepts. Consistent with the feminist motifs we have gleaned from previous chapters, he links diversity and social justice with a more caring and open society. This connection implies that the value of care should prevail. It is reasonable to surmise from this conviction that he believes TWU to be uncaring. This callousness, in addition to the institution's supposed desire to live in the past, renders TWU unworthy of the public's trust.

Disapproval of TWU and the supposed threats that come from potential law graduates are often conflated with displeasure at moral puritanism. For example, Barbara Legate (n.d.), from Ontario writes the following:

> Acceptance of this "policy" means acceptance that being LGBT is bad, or evil. A quick review of the Ten Commandments shows that adultery, lying and many other "sins" that ordinary people engage in are apparently "worse" than being LGBT. Perhaps, as a first

step, Trinity should bring back the scarlet letter to demonstrate that it is serious about its behavioural code.

The scarlet letter is a reference to the famous eponymous 19th century American novel by Nathaniel Hawthorne. Hawthorne tells the unfortunate fate of an 18th century New England woman and her paramour after others discover their affair. The town forces the woman to wear clothing with a scarlet letter "A" to represent the crime of adultery. Her community ostracizes her as punishment. The scarlet letter has become a convenient symbol for the alleged threat of sexual puritanism, as well as the application of unjustified legal shame. Shame frequently involves determining who can remain unmarked, in addition to retaining (in)visible signs of moral laxity or rectitude. Though the status-conduct distinction is fallacious, the CCA does not proclaim queer persons to be evil. Instead, it prohibits acts central to many forms of queer identity. Nevertheless, the submission is very effective at portraying TWU as anachronistic. By consequence of this antiquarianism, (hetero)sexism becomes an unfortunate relic, consigned to past days of intolerance.

Treating anti-queer bias as abnormal and not part of our authentic culture or values obscures the fact that (hetero)sexist oppression is far more insidious and nuanced. This is the problem with the discourse of homophobia as opposed to (hetero)sexism. Rather than a term stemming from social justice research, homophobia comes from psychopathology. Persons tend to attribute homophobia to isolated (socially maladjusted) groups or individual persons. By contrast, (hetero)sexism and (cis)sexism are more accurate terms. They describe pervasive social ills that a legal system, with an official commitment to substantive equality, should eradicate

Running through the submissions are images of clocks and metaphors of going backward and forward. There is a very clear prospectively oriented temporality. Queer rights are the

movement of the future and the children of the secular enlightenment. Conversely, "religion," and particularly Evangelical Christians, are on the wrong side of history. By invoking a historical trope like the dark ages, the submissions placed the law societies within an enlightenment teleology of progress. They also conjure a simplistic view of the past that is intended to elicit, conscious to the authors or not, fears of religious persecution and violence.

By comparing the discovery of sexual orientation, and the subsequent legal protection afforded to it, to the Copernican revolution and other scientific discoveries, Dr. Yates bolsters the link between queer rights, the rule of law, science, reason, and modernity, on the one hand, and the connection between religion, the dark ages, mythology, retrogression, and lawlessness, on the other. While Christian beliefs originated in a "desert society" two millennia ago, they have had a long and distinguished intellectual history. Most of these quotations confine Christianity to the past.[7] As well, there is a metonymy in which Christianity — and, indeed, sometimes religion as an idea — is represented by TWU. This burden, however we may estimate TWU, is a heavy cross for any institution to carry. Readers will recall that the SCC used a similar strategy when discussing the teacher training program, though in that instance, and in many examples to come, it was to TWU's advantage.

Behind such concerns regarding our Christian past, there often lurks the fear of violence and animosity. For example, Dana Mackenzie (December 23, 2013), says, "The covenant at TWU is hate masquerading as religion, oppression masquerading as chastity." Heather Burchill from Nova Scotia (January 21, 2014) describes the CCA as "a perfect storm of condemnation," going on to associate saying no to the law school with preventing instances of hate motivated

[7] Lori G. Beaman, "The Myth of Religious Pluralism, Diversity and Vigour: The Constitutional Privileging of Protestantism in the United States and Canada," *Journal for the Scientific Study of Religion* 43, no. 3 (2003): 312-17.

homicide, observing, “Homophobia remains alive and well. In Nova Scotia, our recent history includes a hate-based murder and a hate-based attempted murder; both ignited by homophobia. These violent expressions of hatred are all to often premised on religious grounds.”

Dennis McCrea from Nova Scotia (January 20, 2013), declares, “cults that promote hatred would find it difficult to teach the inclusive values that are becoming the hallmark of Canada today.” Invoking similar fears of violence, Leslie Peter from Nova Scotia (February 4, 2014) says, “[Freedom of religion] does not mean… that in the name of religion one may have full rein to bully, abuse or condemn other groups.” Though this dissertation has criticized (Christian) (hetero)sexism unrelentingly and unflinchingly, this should not be taken as indicting the students and faculty at the university or Evangelicals. It is an unhelpful and insulting stretch to associate TWU’s students and faculty with hate-based homicide. It exploits indignation, shame, and fear. Though any sensible understanding of history demonstrates that some Evangelicals have victimized queers and those who support them, and some Evangelicals continue to do so, queers and their allies do not have the right to bully Evangelicals in return. It is both unwise and unethical from a Kantian perspective.

Understandably, Theodore C. Dueck**,** a professing Evangelical Christian and lawyer from Ontario (March 12, 2014) expresses concern in the following way:

> It is alleged that students who choose to attend a law faculty operated by TWU will, simply by virtue of its covenant and the belief system it purportedly stands for, be incapable of properly representing certain clients or arguing certain types of cases — particularly those involving gender equality. Evangelicals are thought to be bent upon undoing years of social progress and must be thwarted in their supposed efforts to turn back the clock. Being pigeon-holed and demonized in that

> fashion is the sole reason I have become sufficiently motivated to write this letter. Not only have I ably represented several gay clients over my 35 years in practice, I also have an "out-of the-closet" gay nephew who is loved and appreciated no less and no differently on that account by his evangelical, church-attending, extended family. Perhaps more importantly for this discussion, my partners and I recently hired an openly gay associate lawyer for our firm, simply because she was the best candidate for the position. Her sexual orientation was irrelevant to our hiring decision.

Mr. Dueck's submission is illuminating. First, before this excerpt, he denies any affiliation with TWU. This disavowal bolsters his objectivity. Nevertheless, he indicates that his only reason for writing is that he feels pigeonholed. This phrase is a metaphor which denotes stereotyping and spatial confinement. He also feels demonized. Demonized is a particularly loaded expression, and it is especially so for Evangelicals.

He denies charges of potential retrogression. He is not bent on turning back the clock. He is with the times because he has represented several gay clients and has an "'out of the closet' gay nephew" whom he loves and appreciates. His firm hired a lesbian woman owing to her abilities. This last comment is effective because it is imprecise. He does not provide the reader with the level of influence he had in the hiring decision, whether his fellow partners are also Evangelical, what steps (if any) they took to update the organizational culture of their firm in response to having a lawyer who identifies as lesbian, and so forth. Because he knows these individual queer persons and appreciates them, Evangelicals, and particularly the culture at TWU, are with the times.

More important, Dueck's submission encapsulates the traditional distinction between the public and the private that we saw in the 2001 decision of *Trinity Western University v. British Columbia College of Teachers*. In contrast to the opponents of the law school who often implicitly disagree with the majority of the supreme court in 2001, Mr. Dueck holds that it is possible to separate private socialization from the execution and performance of public duties. Yet there are vast differences between loving a relative or hiring a subordinate and acting in accordance with what other members of the legal profession deem to be "legal principles."

Likewise, Sandra G. Pallin from Ontario (n.d.) is eager to refute the stereotype that TWU, and Christians generally, harbour intolerance and are out of step with the realities of contemporary Canada. She describes her career as an immigration lawyer as follows:

> Although I obtained my law degree from Osgoode Hall Law School (1992), I am also a graduate of Brigham Young University-Idaho, a Christian school owned by The Church of Jesus Christ of Latter-day Saints. It is not in spite of my religious values but largely due to them that I have been able to represent clients from diverse beliefs and nationalities without judgment or bias. Long before I learned of constitutions, *Charter*s and human rights legislation, I was taught to love others, to reserve judgment, to be honest and to approach difficult issues with civility (a.k.a. peacemaking). My personal experience therefore leads me to support the TWU School of Law proposal. I wish to comment on a few issues. With concern I have read allegations that TWU graduates' religious beliefs would make them unfit for the bench or to represent gay clients. To suppose that lawyers who believe in traditional marriage between a man and woman could not represent gay clients without bias is to also suppose that gay lawyers would be similarly unfit to represent non-gay clients. I

> fear that precedent. Would it not then follow that Hindu lawyers couldn't represent Christians, that black lawyers couldn't represent whites and/or that Chinese Canadian lawyers couldn't represent Mexicans without bias? I do not accept that premise. My focus of law is immigration; therefore, I work with diversity on a daily basis. I proudly welcome new immigrants to Canada knowing that many have left countries of oppression, depravity, hostility and/or religious intolerance. I encourage their integration by advising them to make friends with neighbours of different cultures, faiths and perspectives. Canada has long been an international example of acceptance and accommodation. A refusal to license a law graduate because of his or her religious commitment to heterosexual marriage would be to restrict or deny the very accommodation and tolerance that our gay community and its supporters espouse to value… I made a similar religious commitment [to sexual abstinence before cross-sex marriage] many years ago. I can't think of even one instance where it has interfered with my ability to give professional advice to my clients.… I would welcome professional advice from a TWU law graduate in the same way I welcome advice from my gay financial advisor.

Ms. Pallin offers a helpful reminder that laws did not create the ideal of equality, and that we may support it for many reasons. Her submission is also commendable for how it combines persuasion and a feminist ethic of care. Instead of bombarding readers with precedent, anger, and a feeling of victimization, she offers them a specific instance of how loving Christian discipleship manifests in her legal practice with aspiring Canadians.

Nevertheless, some proponents and detractors of the law school, as this quotation illustrates, seem to view prejudice, judgement, and bias as both confined to and precipitated

by specific situations or individuals. The goal of using a conflict-theory-based sociological approach combined with queer phenomenology has been to demonstrate that prejudice, judgement, and bias are in themselves value neutral. They are also universal human characteristics. Her discussion of how the Christian ideals of charity and service influence her practice shows that she or anyone cannot represent clients without judgement or bias. Our society esteems the biases she mentions. Would that the legal profession cherished them even more so.

They are, however, still biases. She, nor anyone, therefore, can know with certainty if her signing a communal sexual morality code during her undergraduate education has affected her delivery of legal services to queer clients. To reiterate, we cannot separate emotions from reason. Feelings and judgements are coextensive. If persons who interpret Kant as holding that feelings and judgement oppose one another are correct, Kant erred.

This very quotation demonstrates that some negative bias, as Ms. Pallin appears to conceive it, is inevitable. While she adds to the conventional understanding of Canada as a tolerant and accepting country, she juxtaposes this tolerance with the alleged depravity of other countries. Though subtle, we can discern, particularly because she includes religious intolerance in her list of what makes other countries depraved, that Canada takes its first step to becoming like those depraved countries, should the Law Societies refuse TWU's request for accreditation. Additionally, Ms. Pallin tells readers how she encourages newcomers to Canada to be friendly with a variety of persons, as though this were not a near human universal when we are immigrants to a new place. Moreover, she seems to imagine that there is one gay community, not several queer communities. She also appears to suggest that social differences are interchangeable when considering prejudicial attitudes. That is, she implies

that because she works with aspiring Canadians with different racialized backgrounds and religions, it is unlikely she is prejudiced against queer persons. She claims that the entire gay community endorses same-sex marriage and seeks rights-based accommodation and tolerance, effectively erasing those who offer a more systemic critique of heterosexuality as a social institution. Finally, she makes a curious slip when she says that to suppose individuals espousing the traditional definition of marriage cannot represent gay clients is analogous to the claim that gay lawyers cannot represent straight clients. Persons opposed to same-sex marriage would have to become synonymous with the category straight for this analogy to be apt.

Many persons who are not allied with the queer community or interested in and affected by queer issues still support same-sex marriage. Socialization, and the orientations to the world we adopt because of it, are too complex to predict with absolute precision. Notwithstanding these caveats, the CCA did not convey mere "beliefs" concerning erotic activity. It attempted to coercively regulate erotic activity. Rights are far from perfect, but they can provide a shield against situations or practices we have come to see as harmful through experience, mindful that we should be circumspect when arguing from experience and harm.

The best we can hope for is to learn from our experience and create environments that endeavour to redress, not exacerbate, historical errors in judgement or circumstances likely to increase the chances of discrimination. The covenant was more than a simple expression of belief or a neutral identity marker, like skin pigmentation would be, were it not that white supremacy determines what skin pigmentation signifies. With context, it becomes easier to suggest that an institutionalized evangelical sexual morality code disadvantages students and

staff based on sexual orientation and gender and tends to foster a patriarchal homosocial environment, at least partially animated by feelings of shame and disgust. These feelings are bad in themselves, harmful to perpetrator(s) and victim(s) and have a greater chance of adversely affecting judgement when considering fundamental constitutional questions. Persons with different racialized statuses can represent one another ably, even though our society is systemically racist.

This contention is different than the holding that a law school which has institutionalized white supremacy with punishable enforcement mechanisms will produce law students with the cultural competence necessary to understand, empathize with, and adapt to the specific challenges persons of colour face. Having compassion such hardship, which (one assumes) we gain from actual interactions with persons of colour under conditions of relative equality, especially when we pursue a common interest, would help future lawyers represent their racialized clients more effectively.

Lawyers doubtless have represented many persons whom they regard as contemptible. The essential difference is this, however. Law classrooms after 1989, the year of the decision that officially enshrined substantive equality in the *Charter*, should have substantive equality as an animating principle. Those classrooms are charged with upholding and interpreting both positive law and the underlying values that maintain a functioning and just legal system. This moral duty is what distinguishes lawyers and law school from financial advisors and finance school. It does not follow from my argument that law schools must become the agents of the thought police. It does mean they have an obligation to ensure that characteristics irrelevant for assessing our intellectual and moral merit — especially

constitutionally protected ones — do not impede equal participation and access to law school for all applicants.

This position will cause some expressive harm to Evangelicals and those who oppose homoerotic behaviour and gender diversity. Given Canada's history and present reality of discrimination against queers and other marginalized groups, the expressive harm (that is, the shame) cause by the opposite result would be worse. Denigrating TWU, Christianity, or religion generally, however, as Mr. Dueck and Ms. Pallin suggest, perpetuates undesirable shame within Canadian constitutional culture. Toxic levels of shame in the submissions appears to be because, at least in part, they rely too much upon justificatory argumentative techniques. Such techniques depend a decontextualized ideal of reason. By contrast, persuasive strategies are contextual. They consider the emotions and judgements of our conversation partners. It is critical that we understand this because it relates distinction we have been attempting to see between dignity, as a noumenal property, and shame. as an embodied manifestation of that property's absence. Using dignity often invites abstraction, which connects to the justificatory mode, whereas discussing shame readily calls for a more ethically textured view of the defined circumstances in which we apply it. Such texture and humility make our judgements more persuasive.

THE WILL TO SECULARISM

Many emails associate secularism with the progressive conception of time (read Enlightenment), professional responsibility, and the liberal distinction between the public and private characteristics of the Kantian subject. Opponents of the law school express concern that Christian education, which they often implicitly equate with irrationality and indoctrination, will

somehow contaminate the (imagined as pure) legal system. For example, James Carpick (February 17, 2014), asserts the following gloss on the website of TWU:

> With respect, there can be no valid "Christ-centred approach" to legal education. Lawyers must be independent, competent, and act with honour and integrity. These values are undermined by an education that is biased to one perspective. (What legal analysis can be expected from a lawyer with a "thoroughly Christian mind?") The "Great Commission" refers among others to the Bible passage in Matthew 28:18-20; basically, admonishing all Christians to proselytize and convert all non-Christians to the faith. Given that British Columbia is increasingly secular and non-Christian, it would be surprising and offensive to many people if the Law Society endorsed such a commission. [He goes on to quote the website] "We live in a world that increasingly asserts and promotes pluralism not plurality in the sense of an increased demographic and cultural diversity in the nation which we embrace and welcome because all people are created in God's image, but a philosophical pluralism that denies ultimate truth." It's a little hard to understand what is meant here because it's a run-on sentence, but from the context what is meant is that multiculturalism (plurality) is OK as long as Christian principles (i.e., the infallible word of the Bible) govern - a big no to pluralism (which is recognition of more than one ultimate principle).

The author has an uncharitable view of what a "Christ-centred" worldview entails, with a simplistic reading of how to interpret the Great Commission, and evangelism more broadly. He uses the implicitly masculine concepts of honour and integrity that he associates with the ability to accept pluralism and multiculturalism. It is not clear how this association, incomplete though it may be, would hold, were it expounded in greater detail.

At the level of semantics alone, integrity suggests living with a coherent set of principles. Integrity requires at least some rejection of values inconsistent with those principles. There is no reason why having a definitive perspective on the world precludes an agent from acting with integrity. Moreover, Mr. Carpick unhelpfully conflates moral relativism and the recognition of cultural diversity. It is defensible to hold a definitive perspective on the world, while simultaneously maintaining that those who have a different view than ours are entitled to equal respect and understanding, even though we may think those who differ from us act and believe in error. Mr. Carpick supposes that British Columbia and Canada in general are becoming increasingly secular. He does not explore the nuanced ways in which Canadian courts accommodate various religious perspectives under the ill-defined concept of secularism.

Mr. Carpick thinks Evangelicalism, and the passions this phenomenon is said to engender, impair reasoning and provides us with a rhetorical question in parentheses. This query may be plausible to some, but it is worth noting three things. First, former Chief Justice Brian Dixon, architect of much cherished *Charter* jurisprudence, was a committed Anglican. Second, former Justice Bertha Wilson, the first woman appointed to the SCC and the only Justice to strike down abortion laws on the ground that they violated freedom of conscience, was a Presbyterian and the wife of a minister. Third, Justice Russell Brown, likely one of the most academically accomplished members of the current SCC, who is also the most committed to the "purity of legal method," is an Evangelical Christian. These Justices, and many others besides, have executed, and continue to execute, their duties with consummate professionalism, despite having a "thoroughly Christian mind." It is, therefore, unclear why an Evangelical worldview and a belief in the divine inspiration of the Bible, precludes an acceptance of, and ability to function within, current Canadian social conditions as a lawyer or jurist. It is not Evangelicalism

that possibly impairs our ability to act as a lawyer. Instead, it is receiving legal education from a university that institutionalizes shame and treats protected groups unequally that possibly impairs our ability to act as lawyers, Evangelicalism, like any other worldview, influences our perspectives. Even so, there are many Evangelical responses to homoerotic behaviour, most of which do not include disciplinary measures.

Professional Responsibilities and Masculinity

The conception of duty offered by many opponents of accreditation requires an arid understanding of reason, such as the one John Emmerton (February 5, 2014) espouses, "The role of lawyers and judges in our society is to dispassionately and without personal bias interpret the law equally for all citizens." This quotation endorses the persistent cultural script of judicial dispassion. Even some non-Christian supporters of TWU offer an endorsement which is, at best, ambivalent and, at worst, objectionable, because it trivializes religious commitment. For example, Rob Sider from British Columbia (February 24, 2014), states, "In my view, TWU's covenant is foolish, but, as lawyers, we should defend the right of an institution to be foolish, if it so wishes." By portraying lawyers as the guardians of the foolish, Mr. Sider wants us to believe that the legal actor is benevolent. Additionally, Mr. Sider gives the impression that TWU is stupid yet innocuous. These claims give him the benefit of "moderation," and they also allow him to lessen the seriousness of the constitutional questions at stake.

While he comes to a different conclusion, Thomas G. Conway from Ontario (March 17, 2014) rebukes his benchers (the governing members of the Law Society) in the following terms:

> [I] should say that I am appalled that some members of Convocation have chosen to militate publicly for or against the TWU's application. Those members knew that they would be called upon to decide on this application when it went forward from the

> Federation of Law Societies to the provincial law societies. One would not accept that a judge intervenes to advocate for or against an issue that may ultimately come before him or her for decision. Similarly, an ultimate judge in this case should not have intervened. I submit that is a very basic principle of the rule of law. At this time, it may well raise a question as to whether Convocation can decide "free of any apprehension of bias or predetermination" as outlined by the Treasurer. At a minimum, those members who have intervened to date must declare their involvement and not participate in the discussions and the decision making of Convocation on this application. Similarly, any member of Convocation who has been "lobbied" either for or against the recognition of the TWU proposed program in law should also disclose the details of this lobbying and decide whether he or she can be seen to decide free of bias or predetermination… A pluralistic society implies that we do not all share the same beliefs and values. That almost sounds like an argument that because they discriminate based on sexual orientation, we should discriminate against them on religious grounds. Somewhat like saying that because they will not let us chew on their bubble-gum, they cannot play in our sandbox… One must ask why a debate on the quality of education has been highjacked by a group seeking to gain exclusivity of recognition and credibility based on sophistic arguments. The orchestrated opposition to the TWU recognition is evident by observing the number of identical or similar letters and arguments that parrot the others even when the language is different. It clearly is an organized opposition by a few.

Mr. Conway is outraged because lobbyists improperly swayed the benchers. The benchers have let their (implicitly disapproved of) feelings cloud their duty of impartial judgement. These feelings are objectionable. A lawyer's first duty is to submit himself to the rule of law, an

implied criterion of which is the right to be tried before an impartial (frequently equated with dispassionate) tribunal. Hence, he compares his colleagues to toddlers with the sandbox analogy. Emotions are parasitic upon this enterprise. They cause prejudice (that is, "pre-judgement"). They also detract from the application of principles. From Mr. Conway's erudite, if somewhat brief, discussion of religious freedom immediately before his objections, he believes the benchers must adhere to the discourse of compromise delineated by the majority in *TWU v. BCCT*. He also places much weight on the fact that they have additional public obligations compared to average lawyers. The discursive construction of civic identity often relegates religious and sexual matters to the closet.

Kyle Hyndman from Ontario (n. d.) comments:

> Canada has a strong tradition of protection, and even promotion, of religious rights. However, it has an equally strong tradition of separating religion from public decision-making. As guardians of the legal system, lawyers must be taught to uphold this separation, regardless of their personal convictions. A legal education grounded firmly in any one religious tradition will likely be in a conflict of interest trying to teach a secular approach to the law. Religious schools should teach religion; public law schools should teach public law… Let them teach hate in private if they wish, but no public body should afford them any credibility or approval, least of all one so central to the administration of justice as the Law Society.

Mr. Hyndman acknowledges Canada's history of (relative) religious diversity and tolerance and then discounts it in the next sentence. He emphasizes the public nature of legal education. He distinguishes this from an imagined private sphere. He associates the private sphere with religion and passion. His concept of hate constructs TWU as both (excessively) emotional and diminishes

the significance of its covenant agreement. Hateful religion deserves the barest form of tolerance. He, in turn, represents secular education as the proper environment for the habituation of the public actor because it is benevolent. Mr. Hyndman represents the queer subject as secular in contradistinction to the Evangelical one. He imagines that the lawyer is masculine, so long as he acts dispassionately within the public sphere, whereas Evangelicals are hate-filled.

Similarly**,** George K. Bryce (February 11, 2014) expresses a rather direct form of Kantian indignation on behalf of the rights of queers and offers a rigorous conception of secularism, when he writes the following:

> I find it stunningly insensitive and blatantly discriminatory that any Canadian law school might make it a precondition for admission or employment that its students or faculty must agree in writing to adhere to an outdated religious dogma, be it a conservative Christian commitment to refrain from so-called non-traditional sexual relationships or a Muslim dictate that women must wear prescribed headgear. There is absolutely NO ROOM [author's capitals] for any religious teaching or influence in the study of law, be it Christian or otherwise.

The metaphor of space or room, as an extension of the Kantian discourse of public and private, is a recurring motif in the relationship between Evangelical Christians and queers in Canadian constitutional culture.[8] It suggests ideas of quarantine and containment. It indicates anxiety about the ability of law to define, control, and redirect phenomena that are thought to exceed its jurisdiction dangerously. The adverb "absolutely" and the short length of his sentences make this anxiety about circumscription more apparent. Curiously, but unfortunately, not that uncommonly, Mr. Bryce associates TWU with Islam, and particularly the quintessential sign of the non-secular other, the religiously mandated head covering, to indicate the hard-line stance he

believes that the law society ought to take against oppression. He positions TWU as a feminized institution that cannot produce graduates with the appropriate masculinity.

In opposition to this portrayal of religious experience as monolithic and unilaterally determinative, Brian Casey of Nova Scotia (January 2, 2014) recounts his professional practice in the following way:

> As a practising Catholic, I am pleased to have represented Dr. Morgentaler in obtaining funding and legal recognition for his abortion clinic in Newfoundland and pleased to have been responsible for having sexual orientation read into the protections offered by the *Human Rights Code* there. My religious beliefs do not prevent me from practising in a way which promotes important social values, and we should not presume others' religious beliefs will have that effect.

This quotation illuminates that religion is a complex phenomenon. This phenomenon is no less valuable because persons must make compromises when it conflicts with their personal life as well as many other identities and social roles.

Nevertheless, the quotation is partially confused. Despite its official condemnation of "unjust discrimination against homosexuals," the Catholic church has systematically campaigned against every queer rights advancement in Canada, apart from the 1969 criminal code amendment. It even went so far as to require a student in one of its publicly funded school boards to obtain an injunction to take his boyfriend to his prom.[9] It is still a matter of doctrine that Catholics must not condone, be a party to, or otherwise facilitate, immoral behaviour, especially

[9] *Hall (Litigation guardian of) v. Powers*, 2002 49475 (ON SC), 59 OR (3d) 423 (CanLII).

same-sex marriage and abortion.[10] Particularly concerning abortion, it is arguable that Mr. Casey committed a mortal sin, when he helped Dr. Morgentaler establish a clinic. The possible meaning of this quotation raises one of the central problems for those opposed to the law school. If TWU is serious concerning its Evangelical commitments, and requiring students to conform to those, so that they will live by them when they are lawyers, precisely what Evangelical values are they committed to implementing, and to what extent will these values shape students' practice of law? These questions are not concerning for Kevin Kindred, who offers some insights from his experience as a gay man and a legal advocate when he observes the following:

> I have… encountered members of the bar who, whatever their religious beliefs, have forcefully raised legal arguments in opposition to queer rights issues such as same-sex marriage and Human Rights Act amendments. While their arguments have not persuaded me (or ultimately, judges and legislators,) I have never questioned the right of such lawyers to be considered members of the bar in good standing. A moral or religious opposition to homosexuality does not, in my opinion or experience, disqualify a person from the practice of law; nor does a commitment to advocating that the law should reflect that moral stance. I would be frightened for the state of the law and of the profession if that were not the case. As it is evident to me that a Conservative Christian who advocates against queer rights has the right to join, and continue in, the practice of law, I must then question whether there are unique problems presented where a school catering to such Conservative Christians wishes to offer a law degree. [I endorse] the balance expressed in the conflict between the rights of gays & lesbians and the religious beliefs of those who

[10] Congregation for the Doctrine of the Faith, "Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons" The Holy See, June 3, 2003, accessed on November 14, 2018. http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html.

> oppose homosexuality. On occasion, that balance is struck by permitting religious organizations to have policies that otherwise would be struck down as discriminatory. This is not an accidental outcome of our human rights system, nor is it a flaw or something to apologize for. It is the product of the compromises and balancing which are at the core of the Canadian approach to human rights, and which to my mind, are the jewel of the Canadian legal system.

Mr. Kindred values compromise and social harmony as good in themselves, and because they foster free thought. He says the ability to compromise is the jewel, that is, the thing of incomparable worth, produced by the Canadian legal system. He positions himself as a masculine actor who has demonstrated the necessary forbearance, logic and argumentative techniques to help persuade judges and legislators. But this quotation makes it appear as though arguments against queerness occurred in a historical vacuum. It was simple progress of compromise and debate that led to the current settlement regarding this will queer equality and its intersection with religious freedom.

In short, this quotation makes the *status quo* appear neutral. It is not. As well, the quotation implies that legal and political actors have an equal chance of persuading others and instituting social reform, if they merely advance persuasive and logical arguments. Would that this were the case. Logic and persuasion are indispensable. Notwithstanding the value of logic and persuasion, the liberal marketplace of ideas that Mr. Kindred imagines in this quotation is more predetermined than he supposes. While we may applaud his human rights advocacy and the collegiality he shows to persons with whom he disagrees, not everyone is as able to refute arguments against queer equality as Mr. Kindred. Mr. Kindred also fails to appreciate the difference between representing a legal position in which we may, at least theoretically, have no

emotional investment, and signing the CCA. This document is presented as a solemn statement of collective beliefs that institutionalizes disciplinary measures in furtherance of those beliefs.

Doubtless many lawyers with (hetero)sexist views have represented (hetero)sexist clients. They should be free to do so. All lawyers trained in Canada, however, have also been trained in institutions free of explicitly discriminatory disciplinary measures. Like many other supporters of TWU, Mr. Kindred confuses opposing homoerotic conduct, and this opposition's relationship to professional competence, with the two separate yet interrelated questions of whether legal education in an institutionally (hetero)sexist environment impairs professional competence and what expressive harm accrediting this institution may cause queers. While recognizing the possible hardship he has experienced as a gay man, this quotation demonstrates the traditional masculinist rhetoric and tolerance discourse that acts as a deeper structural barrier to the queer equality for which Mr. Kindred has commendably fought.

Some other queers who wrote to the law societies had different experiences and perspectives. For example, Katelyn Scorer, past JD candidate from the University of Windsor (March 1, 2014), tells her story in this way:

> As a gay woman with a non-conforming gender expression, I have witnessed and experienced a large share of homophobia and (hetero)sexism throughout my life. It is a reality that I have come to live with, and I have learned to use these experiences to fuel my passions. However, the ability to take such negative experiences and translate them into positive outcomes is not a skill I immediately inherited upon accepting and embracing my sexuality. For years I was emotionally destroyed by homophobia and (hetero)sexism - sparking bouts of depression and welcoming darkness in my life. I found my way through it all by placing trust in the systems I was involved in to protect and

> support me. It was within these systems, including my experience in both college and university, where I learned to thrive amidst animosity. The support I have received is the reason I plan to return to the academic world as a professor - because I truly believe in the system.

By sharing her struggles with mental wellness, Ms. Scorer demonstrates that gender and, particularly, a nonconforming embodiment of it, may influence how we experience (hetero)sexism. While in no way diminishing her experiences or questioning their truth, they also ignite indignation and sympathy in her readers and shame those who exercise a politics of disgust that cause(d) her unfortunate experiences. Conversely, she describes a nonreligious and less (hetero)sexist law school as a haven in which she was able to flourish and realize her authentic self. This acceptance encourages the proper emotional response, just as it caused her to believe in the system. Ms. Scorer offers us a feminist care ethic, as opposed to a discussion of principle and duty. Fortunately, one (and sadly only one) transgender person (Cole Caljoux from British Columbia, February 27, 2014) provides the following perspective to the Law Society:

> No law faculty will ever be perfect for all students. There will always be challenges and changes necessary for advancements and progress in law. However, I urge the Law Society to take a rigorously contextual approach to the analysis of the accreditation of TWU law graduates…. If a law school can openly discriminate against LGBTQ students, the profession runs the risk of perpetuating systemic marginalization and discursive violence [against] LGBTQ individuals under the guise of religious accommodation…. I can tell you that my experience as a transgender man and mother of two has been that the pillars of justice, access, and equality suffer when discrimination against LGBTQ people goes unrecognized and unchallenged in the

> legal system. Two years ago, when my children were taken from me based on my transgender status, I struggled to find counsel that understood my situation. Moreover, the rampant assumptions and stereotypes about transgender and transsexual individuals were hurdles that I needed to overcome even when I was most vulnerable before a judge. Transphobia and homophobia within the current legal regime require, more than ever, a paradigmatic shift. Such a shift will be slow, if not impossible, when legal training includes homophobic and transphobic vows and community policing.

The author takes an implicitly constructivist approach to sex and gender. He refers to himself as a transgender man and mother of two. His statement illustrates the instability and contradiction within these categories. He frames anti-queer bias as both an individual and systemic problem. He feels victimized owing to his identity. Words like struggle and hurdle are meant to cause sympathy in his readers, while they simultaneously construct him as a resilient agent. He also suggests TWU is authoritarian when he uses the phrase community policing.

His submission reminds us that cultural competence, including some awareness of the obstacles transgender clients face, ought to be a part of legal education. As well, he reminds us that (cis)sexism is pervasive, harmful, and dependent on the liberal metaphor of the public-private distinction. For example, if one is transgender, intersex, or two-spirit, particularly if one does not have access to private healthcare, one's most "private parts" become great sites of public regulation and discourse.[11]

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[11] Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, and The Limits of Law*, (Durham, NC: Duke University Press, 2015), 38-49; Lane R. Mandlis, "Human Rights, Transsexed Bodies, and Health Care in Canada: What Counts as Legal Protection?" *Canadian Journal of Law and Society* 26, no. 3 (2011): 509-29.

The first step of legal education that considers cultural competence when dealing with transgender clients should be allowing transgender persons to participate in community life equally without fear of expulsion. For example, depending on the extent to which a transgender man fails to present as cisgender (according to cissexist standards), he could be described as in a lesbian relationship when he chooses a female partner. Alternatively, if he chose a male partner, and were able to present as cisgender, he would rightly be described as being in a "gay relationship," even though, if one were to disregard his transgender identity, saying that he is a woman, he would be in the (theologically correct) cross-sex relationship desired by the administration of the University. This is objectionable because it perpetuates some of the main insidious stereotypes that transgender persons confront: namely, that they are not really that are the gender which they come out as later in life; that they are delusional; that they are otherwise mentally defective or in need of special pastoral care; and that they are intentionally the others.

In short, albeit indirectly, a (hetero)sexist environment discriminates against everyone, particularly, transgender, intersex, and two-spirit persons. These submissions have thus far substantiated my position that the TWU law school dispute is highly gendered. Specifically, professional responsibility and social progress are often gendered as masculine. Even opponents of the law school engage in this engendering process, despite often providing something that resembles a feminist care ethic. Victim identities are often gendered feminine. In addition to these observations, we have seen how the discourse of tolerance, which many opponents and proponents also proffer, imagines a masculine subject who is able to bracket his emotions to withstand those he does not like. The discourse of

tolerance often maintains patriarchy. It supports the distinction between the public and the private spheres.

Claims of Equality and Diversity

I have been at pains to stress that we must approach equality claims contextually. Those in favour of TWU often downplay the history of (hetero)sexism in Canada and how that history means that the consequences of sexual orientation expression restrictions are different for queers than those who have cross gender desire and normative sexual practices. Moreover, they tend to adopt an idealistic view of North America's supposed Christian heritage. It is unsurprising that many supporters of TWU feel threatened, perhaps owing to a loss of privilege, and would attempt to advance claims based on diversity and equality. Juxtaposed with the theme of progress, though far less frequent, is the use of tradition to support the inclusion of TWU into the legal community. For example, Dan Miller (n.d.) from Ontario offers the following:

> [M]any of the great universities in the West were initially established by "Christian" believers. And for those who fear that such a University would be intolerant, I would look to the example set by Rev. John Witherspoon, a Scot who established "Princeton" University. Despite his strong opinions, he showed no desire to protect his students from ideas that he disagreed with. His tolerant approach was consistent with all that we expect a first-class university to be and became a model for others. He understood and helped establish the concept of separation of church and state, despite his own strong views. I would fully expect TWU to honour this tradition. In addition, it is worth remembering that the basis and foundation for our law remains the Judaeo-Christian tradition and the Mosaic Code is the root of our legal tree.

It is worth noting Princeton's cachet in this quotation. Mr. Miller anoints TWU with the cultural capital that Ivy League schools have accrued in educational discourse. Although colonists founded Princeton University in 1746, it did not admit an African American student until 1935. Furthermore, many of its early presidents owned slaves.[12] He associates TWU with the (settler colonial) founding of North America, and the idea of Protestant dissent, thereby bolstering the case of TWU. He frames the current dispute in the paradigmatic legal narrative of religious freedom. He compares the tolerance of religious dissent, in the 18th century, to tolerance of contemporary forms of sexual, gender, cultural, and conjugal diversity in 21st century Canada. This quotation demonstrates how supporters of TWU attempt to gain rhetorical advantage by decontextualizing this dispute. When these analogies are probed further, they often fall apart.

John Witherspoon would have condemned homoerotic behaviour, transgender expression and identity, atheism, and common-law-unions, and would not have allowed them at Princeton. Mr. Miller deploys the tactic of using the phrase "Judaeo-Christian" to make the Christian "civilizational ethos" seem at once historically rooted and value neutral. While this does not, strictly speaking, erase the Judeo elements in Judeo-Christian, it does not give them independence from the Christian appropriation of them.[13]

Christians, as Daniel and David Boyarin explain, often seek to gain power by laying claim to the universal.[14] It appears Mr. Miller means the Decalogue by the phrase "Mosaic

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[12] Martha A. Sandweiss, Joseph Yannielli, Craig Hollander, et al. "About Princeton and Slavery," Princeton and Slavery, accessed October 25, 2018, https://slavery.princeton.edu/about/overview.

[13] Jean-François Lyotard and Eberhard Gruber. *The Hyphen: Between Judaism and Christianity*, trans. Pascale-Anne Brault and Michael Naas, Philosophy and Literary Theory. (Amherst, N.Y: Humanity Books) 13.

[14] Daniel Boyarin and Jonathan Boyarin, 'Diaspora: Generation and the Ground of Jewish Identity'. Critical Inquiry 19, 4, 1993:693–725.

code"; for English statute or common law have never held Levitical dietary, dress, or ritual purity regulations (Lev.11:12) to be binding. English law also outlawed slavery (in most jurisdictions) since before Canada's confederation, and has overall exacted lesser punishments for the crimes of blasphemy, adultery, and rape (Lev. 20:10).

Even when discussing the Decalogue, however, most of the prohibitions from the Ten Commandments with contemporary relevance — it has never been an offense at common law to covet something in our minds (Ex. 20:17) or to make a graven image (Ex. 20:4-6)— can easily be justified from any number of normative perspectives. It is erroneous, not to mention offensive to those who are not Christian or Jewish, to claim that "Judeo-Christianity" discovered the fact that lying (Ex. 23:1-3), stealing (Ex. 20:14), and murder (Ex. 20:13) are repugnant things to do, while respecting and caring for one's parents (Exodus 20:12) is generally a praiseworthy activity. Lastly, the Canadian system is still one of (partial) parliamentary sovereignty. Within the bounds of the constitution, parliament can regulate religion. Indeed, positive law has maintained jurisdiction over it since the Reformation.[15] From the *Acts of Supremacy* (1534 and 1559) onward, the laws of England, which Canada inherited, were separate from and superordinate to ecclesiastical authority, whatever the latter's influence upon the former.[16]

My readers could argue that I have missed the point and that law and Christianity have created an indivisible moral framework. The problem with this approach, however, is that Christianity ceases to be a useful analytical concept. Instead, it becomes synonymous with everything the author prefers. If Christians claim the discursive territory of love and justice, it is

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[15] M.H. Ogilvie, *Religious Institutions and the Law in Canada* (Toronto: Irwin Law, 2010), 100; A. V Dicey. *The Law the Constitution*, 10th ed. (London: Macmillan, 1959), 39.

[16] J.E. Neale. "The Elizabethan Acts of Supremacy and Uniformity." *The English Historical Review* 65, no. 256 (1950): 304-311.

virtually impossible to dissent from Christian values. In this reading, Christianity offers goods any sane person would want and an ethical position that most virtuous agents would strive to achieve.

Furthermore, his metaphor of the living tree is troubling. It suggests there is one root of law. This single root has developed organically while being nourished by the Ur-Text of the Bible. Upon what do we draw exactly? Which of the many conflicting values contained in the Bible defined the proper boundaries of (post)secular Christian heritage in Mr. Miller's worldview? His submission exhibits what Lori G. Beaman has called "a will to religion."[17] For Beaman, persons exhibit a will to religion when they naturalize it, think it is a universal part of the human condition, or believe that a person's life is deficient without it. Whatever Christianity's historical and contemporary influence, neither it nor religion in general is or was necessary or sufficient in Canadian law's development. Nevertheless, neither are many of the phenomena grouped under the amorphous term secular

Christopher L. Moon from Ontario (February 28, 2014), argues, "Our diverse society must recognize that individual moral and religious choice must be respected so long as it does not impact adversely on others, promote illegal activities, or result in illegal discrimination." In this quotation, he imagines Canadian society as a hardy organism that can subsume difference within itself through compromise and tolerance.[18] Readers should remember that this fits well with Benjamin Berger's description of the tension between universal and particular values at the

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[17] Lori G. Beaman, "The Will to Religion: Obligatory Religious Citizenship." *Critical Research on Religion* 1, no. 2 (2013): 141-57.

[18] Suzanna Danuta Walters, *The Tolerance Trap* (New York: New York University Press, 2014). Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton, NJ: Princeton University Press, 2006).

heart of Canadian constitutional culture.[19] This quotation also matches Kevin Christiano's description of the Canadian diversity management strategy as one of subsumption within a broader social totality, rather than confrontation, often contemplated by citizens of the United States.[20] Adding an equality dimension, Kenneth Vollenant from British Columbia (February 28, 2014) argues the following:

> Having a law school at a faith-based university will open rather than close opportunities for individuals to join our profession. For a student who considers his or her faith to be inseparable from his or her identity, non-faith-based universities and law schools can be places of extreme intolerance, institutions where religious beliefs are ridiculed and where religious views and perspectives are completely excluded from discussion.

Along similar lines, J. Andrew Bird from British Columbia (March 3, 2014) writes the following:

> I was a nascent Christian when I attended University of Toronto Law School from 2003-2006. Law school is one of the hardest places to learn how to follow Christ. Christians are underrepresented in law school and I was one of only a handful in my class of nearly a hundred. In discussions about gay marriage, freedom of religion and minority rights, which occupy a good deal of law school, the general culture framed Christianity as a threat to the public good. TWU's covenant is all about fellowship. For Christians, living in community with one another is a directive given by Jesus and is essential to spiritual development. To borrow a proverb, Christians sharpen one another as iron sharpens iron.

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[19] Benjamin L. Berger, "Children of Two Logics: A Way into Canadian Constitutional Culture." *Oxford Journal of International Constitutional Law* 11 (2013): 320-5.

[20] Kevin Christiano, "Church and State in Institutional Flux: Canada and the United States," in *Rethinking Church, State and Modernity: Canada between Europe and America,* edited by David Lyon and Marguerite Van Die. (Toronto: University of Toronto Press, 2000), 74.

> We lift one another up when we fall in sin, and we inspire one another to strive to live out Christ's ideals…. Sexuality is not the essence of Christianity, but it does matter. Maintaining sexual purity in our era is countercultural and radical, and abstinence is just as difficult for heterosexuals as it is for homosexuals. I can tell you firsthand, as an unmarried man of 35 years, that abstinence in a dating relationship is a mighty challenge, even when the girl isn't equally as committed to it, and that I do not have a perfect record. But though I may have failed it, I would have agreed with TWU's covenant, and welcomed the support that would have been offered me.

Mr. Bird takes his experience of law school to be indicative of law school in general and then assumes that critiques of some Christian perspectives on homoerotic conduct and gender diversity are indicative of discomfort with Christianity in general. For him, it is not queer sexuality but celibacy that is radical and countercultural. He endeavours to be celibate, and this effort goes against our (implicitly licentious) contemporary sexual mores. He would have appreciated the support on this Herculean struggle (note the "iron sharpens iron" metaphor) to purge himself of passion and channel it into the confines of conjugality.

He endeavours to give himself a sexual minority status while remaining within a (hetero)sexist paradigm. He refers to his female sexual partners as girls rather than women or persons. He does not tell how or why (conservative) Christian views on marriage, sexuality, and gender diversity are framed as against the public good. It is understandable, given the Kantian underpinnings of Canadian constitutional culture, why some may view certain Evangelical beliefs as a threat to the public good. This apprehension does not necessarily entail (conscious) ridicule of Evangelicals as persons.

Mr. Bird confesses his sinful nature. This admission decreases the likelihood that we will perceive him as judgemental and particularly so concerning questions of sexual abstinence. He assumes that the condition of celibacy has a single meaning. Furthermore, he seems to believe that all persons interpret and experience celibacy in the same way. He does not distinguish between conditions ideally suitable to the maintenance of self-imposed rules of conduct and those which others experience as an unjust imposition. Celibacy may mean something different for a disabled Somali lesbian transgender or intersex woman than it does to Mr. Bird. Her likely experience would be part of a history of oppression in which she has been made to deny her sexuality, intersecting cultural identities, and womanhood. Using the framework of Sara Ahmed and Allen G. Johnson, heterosexual Christian celibacy is a hard, *but chosen*, path for Mr. Bird. By contrast, the forced closeting of a person's identity is an *unchosen path* of least resistance to maintain social standing.[21] Mr. Bird is still following the dominant orientation for his desire. By contrast, our disabled Somali lesbian transgender or intersex woman would be forced to orient her desire and gender expression in a manner that contradicts her will.

Shame and criticisms of improper sensitivity also delineate who precisely is an authentic or deserving minority group. Paul D. Mack from Ontario observes the following:

> [While criticizing TWU,] opponents of TWU appear to be unfazed by the fact that the Triangle Program (for gay and LGBT students) receives financial support from the state, through the Toronto District School Board. In other words, separation of church and state is considered by such opponents to be essential, but state support for other minority groups (particularly those critical of TWU) is taken for granted. It is acknowledged that blacks and Jews were persecuted minorities in various places and times; however, simply

[21] Sara Ahmed*, Queer Phenomenology: Orientations, Objects, Others* (Durham, NC: Duke University Press, 2006), 69; Allan G. Johnson. *Forest and the Trees: Sociology as Life, Practice, and Promise*, Philadelphia: Temple University Press 1997) 27-54.

> because a group is a minority and might not feel accepted is insufficient to compare it to those minority groups (including Jews or blacks) who endured severe persecution - indeed, such comparison coldly trivialises, for the purpose of promoting one's own argument, the persecution that was experienced by others.

In this quotation, suffering is the defining feature of a minority group and queers are supposedly less worthy of constitutional protection. We are not like "Jews or blacks." Mr. Mack accuses other persons of cold and trivializing assumptions when he does just that. Many queers died in the Holocaust; they were some of the least likely to survive, and they were imprisoned after being liberated. The Triangle program, in fact, references the pink triangle queers had to wear in the concentration camps.[22]

The Triangle program is not the same as state support for religion. Though sexual orientation can have ideological dimensions that amount to a political position, they are not equivalent. The reason many persons believe that state support for religion is morally wrong is that it imposes coercion from the state. This coercion violates liberal ideas concerning autonomy and dignity. The Triangle program is quite different from state support for (what was once) a majoritarian religion. It is intended to improve the educational outcomes of children and adolescents who were severely psychologically or physically abused in a regular school Environment. Its primary aim is not the promotion of queer rights. Instead, its goal is to provide a safe environment for a specific at risk set of pupils to improve pedagogical outcomes and build self-esteem. As Anthony Moustakas from Ontario (March 27, 2014) says, "Polite discourse about "equity-seeking groups" and "historically disadvantaged minorities" glosses over historical realities. LGBT people are an equity-seeking group because they have historically faced

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[22] Ricard Plant, *The Pink Triangle* (New York: Henry Holt and Company, 1986), esp. 105-51.

stereotyping, ridicule, assault, chemical castration, imprisonment, and execution because of their identity."

Choice and the Civil Rights Movement

Nonetheless, it is difficult to endorse casual comparisons to the black Civil Rights Movement, such as the one made by Patricia Smith from Nova Scotia (February 5, 2014). She opines, "It was no answer to Rosa Parks that there were plenty of seats at the back of the bus, and it should be no answer to LGBT persons that there are plenty of seats in non-discriminatory law schools. The Nova Scotia Barristers' Society must act to oppose all forms of institutionalized humiliation and to ensure that all persons are truly equal before the law." Her use of this iconic incident is evocative and meant to move homoerotic desire and gender diversity from a topic of contestation to one that is beyond debate. She uses a situation and narrative that those in a position of power generally consider as an occasion for remorse and indignation.

While Jim Crow laws and (hetero)sexist community standards may use similar discourses of patriarchal disgust and shame, they are different in kind and degree. What we require to make this association cogent is the discourse of Kantian moral personality. This discourse may be implicit in her reasoning. She does use the phrase "institutionalized humiliation." Once again, this suggests the shame that purportedly arises from compromising our rational natures, in addition to other persons failing to recognize and respect the boundaries of the same. This observation is likely intended to make a more direct analogy between race and sexual orientation as innate, possibly biological, phenomena.

This tactic makes it easier to portray religion as a mere choice. For example, Susan Ursel from Ontario (March 28, 2014) notes the following:

> The evidence [concerning the etiology of sexual orientation] tends to point to it being a complex creation rooted in genetics, biology, physical components of the brain and, at the far end of all of this, social context or opportunity for expression. But same sex attraction is not the same kind of choice as choosing to believe in transubstantiation as truth rather than metaphor. Nor is it the same kind of choice as belief in Mohammed rather than Jesus. One may feel these religious choices deeply and they may resonate throughout one's life, but they are nevertheless deliberate acts of human conscience.

More bluntly, Gary L. Nielsen from Nova Scotia (n.d.) declares the following:

> Religion is a choice. No one is born a Catholic, a Jew, a Muslim et cetera. Homosexuals, on the other hand, are not homosexuals by choice. It is simply their natural orientation and has no bearing on how they would perform in any vocation, including law. For an institution to turn away potentially great lawyers for something as mundane as their sexual orientation, or to make them sign a waiver, is ludicrous.

These quotations use ideas of nature and naturalness to neutralize what would otherwise be contentious areas of disagreement. He likely assumes that if one is born possessing a particular characteristic, one does not have a choice concerning it. The appeal to nature fallacy precludes an ethical argument concerning homoerotic behaviour based on this assertion alone. Furthermore, there is a profound difference between saying something is morally irrelevant and saying that it is mundane. As Chapter 3 was intended to show, and especially regarding the historical suppression and punishment of queer sexuality and gender expression, queer sexualities and genders are still not pedestrian characteristics. Assuming, for the sake of argument, that Mr. Nielsen would have said something such as "morally irrelevant for the purposes of legal education" with the benefit of hindsight, this is precisely the problem that

ought to be recognized and addressed directly. For Evangelicals committed to (hetero)sexism, queer sexualities and gender expressions are *anything but* morally benign characteristics. If the state must act in a way that is perceived as disrespectful by some, an argument stronger than the simple invocation of diversity and race is morally required.

Personal Experiences at TWU

Rather than questioning the desirability of creating a bifurcated legal subject, some proponents of the law school generally argue that they too are capable of separating religion from public functions. For instance, Lauren Witten (March 28, 2014), a TWU alumna from British Columbia, notes the following:

> At TWU, I learned invaluable critical thinking skills and the ability to scrutinize problems from myriad angles. At UVIC, I learned law, advocacy and principles of legal analysis. I am blessed to have had some success in the legal realm. I graduated valedictorian from TWU and was the gold medalist at the University of Victoria. I clerked at the British Columbia Court of Appeal, articled with the Ministry of Justice (Criminal Justice Branch) for Criminal Appeals and Special Prosecutions, and am currently a Crown prosecutor with the British Columbia Attorney General. Those in the legal profession are not immune, nor does public secular education insulate students from the inevitability of perspective. All of us come to the study and practice of law indelibly laden with perspective, be it from a theistic worldview, life experience or a political orientation. Lawyers are adept at seeing multiple sides to problems and arguments. By trade, they can set aside personal feelings or preferences for the sake of effective advocacy. Lawyers routinely advance positions they may not personally embrace or condone…Respectfully, attempts to distinguish the legal profession from the realm of

> public education—the context of the 2001 TWU decision—are ill conceived. Public education plays an integral role in the moral formation of children and helps prepare them for civic and social participation. Surely the teacher's ability and responsibility to propagate these values at least approximates that of the lawyers.

Ms. Witten successfully rebuts stereotypical portrayals of Evangelical Christians as being irrational and anti-intellectual, by recounting her academic achievement. She also makes sure readers know she has proved her mettle, by telling us that she had the honour of serving under appellate Justices. Justifiably, Ms. Witten takes pride in her work and associates this pride with her distinguished time at TWU.

Also, she assuages fears over evangelical emotionality by indicating that she has worked in criminal law. Criminal law is the area of law traditionally thought to require the most dispassion and personal detachment. She portrays herself as a masculine actor. Public officials have entrusted her with the male power of the Crown. She indicates that the ability to separate personal (private) convictions from professional (public) actions is part of the vocation of law. She further challenges the implicit pretense of universality characteristic of actors she identifies as secular. While I partially agree with Ms. Witten, I have the same criticisms of her conception of law and prejudice that I outlined with Ms. Palin above.

In a curious move, given the extent to which she lists her various legal accomplishments, she contends that there is little distinction between the role played by the teaching profession and that of the legal profession, at least for a constitutional analysis related to the balancing of human rights. The previous chapters have discussed why we should reject this argument. I shall provide more reasons to do so below. Notwithstanding her achievements, her professional integrity

cannot represent all TWU graduates. Nor is her experience of TWU's CCA culture true of the entire student body. Jill Bishop from British Columbia (February 11, 2014) says the following:

> I was in a same-sex relationship when I attended TWU. I had to sign the CCA on my first day of school. Some would argue that I should have attended at a different university - one where my sexual orientation would be accepted. However, I found myself at TWU for the same reason many law students will (if the proposal is approved). It was where I was admitted. You see, I was raised in a religious home and I was homeschooled…. TWU accepted homeschooled students without requiring the entrance exam. My observations at TWU suggested to me that the CCA was doing more harm than good. It was apparent that other students were very guarded - not just with me, but with everyone. I found that very few (if any) students were willing to engage difficult issues or share opinions that might deviate from what was expected of a Christian. I also observed professors to tread lightly and avoid voicing opinions that contradicted the covenant. I recall being taught condemnation of homosexuality and although some professors did not condemn it - none condoned homosexual "practice." I suspect that other students shared my fear of expulsion and were careful to conform. We all signed an agreement that we would conform, so the conformity was unsurprising.

Ms. Bishop further comments in response to former TWU President Bob Kuhn's exhortation to alumni inviting them to defend TWU's right to religious freedom with the following hortatory exegesis:

> You [President Bob Kuhn] cite I Corinthians 16:13-14 in your email to alumni. Verse fourteen instructs to "do everything in love." The loving thing for TWU to do in these circumstances is to delete the harmful heterosexual marriage clause of the covenant and

> follow Jesus' example to embrace the outcast. I encourage you to heed his teaching and avoid his description of the Pharisees in Matthew 23:2. Let your actions comply with your claim to be a welcoming school to all.

Much like Ms. Witten proved her abilities as a lawyer and right to exist in the legal community, by recounting her intellectual and professional achievements, Ms. Bishop cites the Bible to show her exegetical talent as a (former) Evangelical Christian.

TWU alumnus Philip Wudda from Ontario (n. d.) offers us a different perspective when he recounts his spiritual and psychosexual journey as follows:

> I am a TWU alumnus; I identify with Christianity; I'm gay; and I will apply for TWU's law school program. I am a proud TWU alum from the class of 2006 with a Bachelor of Arts. I was privileged to serve the university community for three years as an employed student leader, and will toot my own horn claiming creative license behind the tradition now titled, "Fort Week" [that is a student event]- probably the most, highly anticipated and fun week of TWU campus life. I am a gay man, and this may be qualified if you ask Paul, Guillaume, Etienne, Mike, or Marvin and all our witnesses. I identify with Christianity, and with Christians. I was raised in a Christian community in my hometown of Agassiz, BC near Vancouver. I was employed as an evangelical missionary for two years throughout Canada and started a "house church" at SFU, as well as incorporating a church here in Ottawa. I am not a fan of the CCA's interpretation of biblical scriptures regarding "healthy sexuality," however, I adhered to it once and I can do it again.

His quotation is refreshing. It reminds us that one can have a sexual identity without (always) expressing it in sexual acts. It is heartwarming that he has played such an active role in the TWU

community and felt accepted therein. He reminds us that we live out sexuality and religion in complex and contradictory ways.

Perhaps deliberately, he does not describe the nature of the persons who qualify his sexuality in any detail. We have no information concerning how he describes himself around those persons. In other words, we do not know whether he qualifies his sexuality himself or whether this qualification is a label imposed upon him. If the latter scenario is the case, however well-intentioned these qualifications may be, and however benignly Mr. Wudda may experience them, from a Kantian perspective, they constitute a moral wrong. These persons are not affirming Mr. Wudda ‘s self-designation. This designation is an offspring of his (moral) autonomy. Absent overwhelming countervailing evidence, we should presume that persons have the right to define themselves through conscientious activity. Sex and religious observance can be equally valuable forms of moral activity. More to the point —self-imposed ascetic restrictions are morally permissible because they come from one’s own will. Mr. Wudda is willing to comply with them. He does not experience them as especially difficult, likely because, in specific contexts, he prioritizes his religious affiliation and expression over his sexual affiliation and expression. He is, of course, entirely free to do this and no “less gay” because he does so. The point of detractors is that there may be Christians, like Jill Bishop, who see these facets of moral personality as equivalent and or interconnected, in addition to being expressed through one another.

Ms. Bishop’s observations are not truer because of her subject position as lesbian or the fact that they are negative. To the contrary, Ms. Bishop and Ms. Witten are guilty of the same defect. They take their experiences of TWU to be representative of the entire institutional culture. The representations they make, in turn, dictate the posture they believe the law society

ought to assume when deciding whether to intervene in the TWU matter. They both think that the legal profession. and the environment that teaches the skills necessary for that vocation, ought to regulate emotions and increase free thought. Ms. Witten seems to rely more heavily on the Kantian idea that it is possible to separate institutional environments from the beliefs governing our future conduct. The divide between the women, as well as the emotional tactics they employ, is very similar to the split between the minority and majority judgements in *TWU v. BCCT.* Ms. Witten is concerned with the ability of future lawyers to execute their duty. Conversely, Ms. Bishop worries about the relationships between students at TWU and the harm these are likely to cause.

Public Interest Groups

Public interest groups also basically divide on the same four issues. First, they divide on the public-private distinction's boundaries. Second, they argue over whether liberalism should be a *modus vivendi* or have more substantive values. Third, they argue about whether we should recognize the expressive harms of discrimination and to what extent we should do so. Fourth, they disagree about whether the law ought to redress historical inequalities and to what extent it should do so. The Right Reverend J. Michael Miller, Archbishop of the Vancouver Catholic diocese notes that:

> True pluralism in Canada, as the courts have recognized, must allow religion to operate freely in our democratic society, rather than giving a preferred place to the convictions of non-religious believers and driving religious believers into the private sphere. With the Supreme Court of Canada, I believe that Canada should have a "religiously inclusive" public sphere. While a religiously informed conscience should not be accorded any

> privilege, neither should it be placed under a disability. Canada is a diverse society, and this means the co-existence of different spheres of belief in the public sphere as well.

I applaud His Grace's commitment to liberal values. As well, I acknowledge the tremendous growth within the Catholic Church, particularly post-Vatican II. Nonetheless, it seems rather strange, except when it is understood as an (un)conscious tactic to gain a rhetorical advantage, that a patriarch of an explicitly (hetero)sexist institution — with a long and unfortunate record of discrimination against several groups — would define what true pluralism or religious inclusion entails. Catholic means one or whole, as in, the Catholic Church offers one indivisible, absolute, and final truth. His Grace recruits disability. This choice positions his religion as feminine and vulnerable. His Grace assumes that persons who endorse queer equality or oppose TWU are secular and those who oppose queer equality are religious. His Grace offers a modified version of the public-private distinction. He believes religious groups or individuals should bring their identity into the public domain, like how many persons in support of refusing TWU's proposal believe that queer persons should participate as queer persons in public life. In other words, at least with respect to religion, His Grace does not accept a division between status and conduct. He recognizes that religion is a lived phenomenon that goes beyond matters of doctrine.

Amplifying these strategies, Rev. Jeremy Bell (March 3, 2014), the executive minister of the Canadian Western Baptists, attempts to get readers to consider his Church's institutionalized (hetero)sexism against an otherwise undeniably meritorious human rights record. He recounts the following.

> The Canadian Baptists of Western Canada, which began its work in the West in the 1870s, has long been known for its celebration of the diversity inherent in Canadian life. Tommy Douglas and John Diefenbaker, two members of our family of churches,

> promulgated the following Canadian traditions of social justice with great effectiveness: the enfranchisement of First Nations, the opposition to apartheid by a Commonwealth head of state, the Canadian Bill of Rights, and Medicare. The wider North American Baptist family includes three Nobel Laureates in the areas of civil rights, peacemaking, and the environment, in the persons of Martin Luther King Jr., President Jimmy Carter, and Vice-President Al Gore.

The last two quotations attempt to elicit sympathy and alleviate indignation by placing their respective institutions within the emotionally charged narrative of human rights. Specifically, because Diefenbaker's *Bill of Rights* was a crucial precursor to the *Charter*, the Canadian Western Baptists are placing themselves at this culture's epicentre. Because they have participated in most other "legitimate minority causes," they imply queer equality is less worthy. It is not part of this illustrious tradition. The Rev. Jeremy Bell also appears to assume that social justice initiatives are equatable. None of the notable Baptists he lists, though undoubtedly meritorious in other respects, have distinguished records concerning the promotion of queer and gender equality. This equation tends to decontextualize the problem.

The Association for Reformed Political Action (n.d.) does this to an even greater degree, when it states the following:

> In fact, to ask the question [of whether TWU should be accredited by the law societies] despite the conclusions of two professional legal opinions, the findings (after extensive investigation) of two government decision-making bodies, and the ruling of an 8-1 majority of the Supreme Court of Canada in a case barely a decade old with virtually the exact same fact scenario, demonstrates a bias amounting to a religious inquisition on the part of those asking the question… There is no doubt in my mind that if this were about

an orthodox Jewish, Muslim, atheist, Black, feminist, LGBTQ or any other private law school formed along associational lines, there would be no such "due diligence" practiced. This double standard is evidence for not only why we should accredit TWU, but also why we need to accredit TWU… There are a number of homosexual men and women who attend TWU. Again, the irony is rather thick: These objectors totally ignore or refuse to acknowledge the existence of self-identifying homosexual men and women who willingly adhere to TWU's CCA. These students' existence is ignored because of... their behaviour! "Such individuals can't really be gay because, judging by their (lack of certain) behaviour, they aren't gay." Such hypocrisy is disappointing to say the least… [Opponents of the law school] assume it is a large, powerful, mean institution discriminating against small, powerless, weak individuals. But that's not the way a covenant works. A lifestyle covenant is something that an individual willingly chooses to adopt in order to guide his or her own path. Canadians who share a moral code and wish to embark on a corporate enterprise together, guided by that particular religious code, are protected by the *Charter*'s guarantee of freedom of association. That freedom, to be clear, includes an absolute protection of the constitutional rights of individuals when those rights are exercised in common with others. That's what TWU is: more than 4,000 individuals who see value in governing themselves according to a certain code that happens to be religiously informed. There is no harm in that…Associational rights may act in such instances as a prophylactic between the state and the pursuit of group purposes. To the extent, then, that a pluralist theory of the constitution accommodates vulnerable communities and subcultures, the world will be made a safer place… For

> example, a gay men's baseball team in the United States was under fire for removing a team because three of the teammates were bi-sexual [but it was successful in its claim].

This quotation offers an insightful description of *modus vivendi* liberalism, in addition to the type of pluralistic society that is often thought to attend it. It acknowledges the profound change that has occurred in Canadian constitutional culture in just over a decade. Nevertheless, it does not consider context, power or vulnerability. Though we should oppose a law school predicated on identity-based characteristics to the exclusion of others on moral grounds, were we to accept the rightness of permitting a law school founded by and for African-Caribbean-Black Canadians, queers, or women, such schools would express a different meaning than a school that seeks to prohibit queer sexual and gender behaviour both on and off campus. Judgements regarding equality are always contextual. They are unconvincing when they are abstracted from the specific context in which they arise. His criticism of the Benchers' excessive diligence is misplaced. Given the history that animates this dispute, such diligence was required. I have no doubt that the quotation is sincere when it states that the dispute concerning TWU's proposed law school amounts to a religious inquisition. Nevertheless, it is not a tenable interpretation of the situation considered contextually.

On paper, it may look like the CCA is voluntary. If, however, we examine the many ways that sexual orientation and gender have come to manifest in our specified time and place, this is not so. It is not always the case that individuals can make clear and informed choices regarding the future development of their sexual and gender identities. Supposing that they were able to accomplish this task, the point of affording such grounds extensive human rights protection is that our society has determined that they should not have to, especially when interacting with all aspects of the legal system.

Though this quotation rightfully reminds us to be cognizant of the expressive harms Canadian constitutional culture can sometimes commit against Christians, it does not consider the expressive harms that complicity in acts of discrimination within the context of legal education commit against queers as a group. Furthermore, it reminds us that we should be scrupulous about this type of discrimination, considering the historical and ongoing role the law has played in the marginalization of queers. The quotation uses long lists and acerbic asides to combine a persuasive with a justificatory argument. This rhetorical tactic is meant to imply that those who oppose TWU are irrational and unenlightened. This motif of irrationality becomes clearer when we consider how loaded the phrase religious persecution is in this context. At the time of writing, Canada has not imposed laws criminally punishing Christian religious expression.

We are, however, unfortunately, still recovering from institutionalized patriarchy and, especially, the dehumanizing effects of sodomy laws. Nor has the law systematically privileged queer structures of kinship to the detriment of Christian definitions of appropriate erotic and romantic pairing for two millennia. This quotation deploys diversity and pluralism as an emotional regulation strategy that minimizes conflict and maintains a more traditional patriarchal division between the public and private spheres. We can appreciate that pluralism may act as a prophylactic against certain forms of intrusive state conduct, but the author fails to acknowledge that this prophylactic comes with considerable costs for women and other minorities.

Last, comparing the accreditation of TWU's law school to the endorsement of a gay men's baseball team is inapt. First, membership in a gay baseball league does not carry the same cultural prestige, and resulting opportunities for social advancement, as does a spot at law school. Second, even the most devoted amateur baseball player is unlikely to invest as much

time, money, and personal esteem as a law student does in his JD. We can change baseball teams at far less risk of shame and other forms of trauma. We cannot, however, play for another sexual team at such low risk. As argued above, for gay men, who is pitching and who is catching has much more symbolic weight. Third, despite many lawyer jokes, our culture places more expressive meaning in law and legal education than it does baseball. Exclusion from baseball because of sexual orientation or gender identity has a far less discriminatory meaning than does exclusion from legal education. Fourth, presumably such gay men's sports leagues emerged owing to the historic discrimination and anxiety many gay men have experienced in the context of sport.

We need only imagine the shame and power imbalances some queer persons may feel showering and being naked in front of their likely heterosexual teammates to understand a possible reason for implementing this admittedly bi, intersex, Two-Spirit, and trans exclusionary rule. Some form of athletic shower humiliation is an especially common psychic scar among gay men, owing to how (hetero)sexism emasculates us.[23] Creating an environment in which gay men can explore male bonding and rebuild a positive body image and conception of masculinity is crucial.[24] The pivotal difference between these two cases is that when we properly consider context, a gay men's baseball team is a measure that compensates for historical injustice. TWU's erstwhile mandatory covenant explicitly sought to further this injustice.

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[23] Roberto Baiocco, Jessica Pistella, Marco Salvati, Salvatore Ioverno, and Fabio Lucidi, "Sports as a risk environment: Homophobia and bullying in a sample of gay and heterosexual men," *Journal of Gay and Lesbian Mental Health*, 22 no 4 (2018): 385-411.

[24] For somewhat contrasting views on the topic of gay men's sports and their value, see: Gordon Watt, "Gay Games: From out of the Closet of the Locker Room," *Social and Cultural Geography* 42, no. (2003): 167-83; Vikki Krane, Heather Barber, and Lisa R. McClung, " Social Psychological Benefits of Gay Games Participation: A Social Identity Theory Explanation," *Journal of Applied Sport Psychology* 14, no. 2 (2002): 27-42. Though I understand that sports can replicate (hetero)sexism, I favour the position of the second article that communal and safe physical activity can be an essential component of self-esteem and group identity.

We must have a perspective that links anti-queer bias with the desire to exercise patriarchal control over women's bodies to appreciate this difference. The Women's Legal Education and Action Fund (LEAF) (February 5, 2013) provides such insight in the following quotation:

> As you know, TWU seeks to establish a law school that is closed to individuals whose sexuality has expression outside of marriage between a man and a woman. TWU also restricts the reproductive freedom of its community members. Students, staff, and faculty must sign an agreement with the University to this effect, and anyone who does not comply with these requirements may be expelled from the University or otherwise sanctioned. The school's CCA specifically contemplates that LGTBQ students may be subject to disciplinary measures, including expulsion, on the basis of their sexuality. Similarly, women may face sanction and/or expulsion for exercising their constitutionally protected right to access abortion care. The requirement that prospective students and staff must agree to abstain from same-sex sexual activity discriminates against gays and lesbians, including those who are legally married. Moreover, the policy effectively excludes LGBTQ students from access to the benefits of a legal education at the University, at least not without sacrificing their sexual identity and expression.
> It also requires women to cede their constitutionally protected reproductive rights, regardless of their own personal aspirations, dignity, and autonomy. These policies are contrary to the laws of Canada and have no place regulating a law school in British Columbia. In West Coast LEAF's submission, prospective lawyers cannot receive effective and adequate instruction in human rights and legal ethics in an environment that practices discrimination against gays and lesbians. Moreover, it is not in the public

> interest for lawyers to be trained in an environment that does not reflect Canada's diversity. Learning to practice law effectively means learning to work with colleagues and clients whose backgrounds, beliefs, and identities differ from one's own. In our submission, a law school cannot possibly prepare its students to be lawyers without the benefits of a diverse student body. While Canada's law schools have a long way to go towards meeting the goal of diversity, particularly with respect to socio-economic status, we should not be moving in the opposite direction with the creation of a law school that actively excludes particular communities. A law degree confers considerable power and public status in Canada, and TWU's admissions policies exclude a vulnerable and historically marginalized segment of Canada's population from accessing this benefit. The additional 60 seats the proposed law school would add in British Columbia would not be open to LGBTQ students, disadvantaging this community and creating a situation in which Christian law students have greater access to the social and economic advantages that a law degree confers.

In addition to its refreshing concern with reproductive rights and the protection of common-law relationships, LEAF takes a contextual perspective. It is particularly concerned because of the historical disadvantage and stereotyping of queers. It does not want the legal profession to impose what it sees as an unjustified quota system.

The quotation does not accept a stark definition between private emotion and public duty, in keeping with the organization's feminist principles. It holds that the emotional culture in which a student is educated will inevitably affect her internalization of the law. LEAF adopts substantive equality as a normative principle. It believes that students' comprehension of equality should exceed *pro forma* memorization of precedent. Instead, it ought to suffuse legal

education. Refreshingly, LEAF also worries that the proposed law school may maintain Christian privilege within Canada. The submission points out that it would be easier for Christians to comply with TWU's CCA. This statement implies that non-Christians would be less likely to attend the proposed law school. This pedagogical environment gives some Christians an advantage when they try to access the considerable power and cultural prestige that a law degree frequently confers on persons fortunate enough to obtain one. Unlike the traditional negative-liberty-based understanding of justice, which the quotation also uses, LEAF's submission highlights the importance of distributive questions to justice.

Unfortunately, this quotation confuses diversity as a descriptive fact and a normative value. Also, it provides no definition of diversity. Moreover, it seems to equate TWU, an institution that purports to espouse a unique strain of evangelical Christianity, with Christianity as a whole. By stating that TWU's policies are contrary to law and have no place in British Columbia, the submission does not distinguish between what may be contrary to the values that LEAF thinks should inform the law and the positive rights and prohibitions stemming from statutes and precedents. Its analysis, therefore, would have been more compelling, and arguably more in keeping with feminist principles, had it surpassed the justificatory mode of discourse and attempted to persuade readers with a more contextual analysis.

For example, though I unequivocally support a woman's right to terminate a pregnancy at any time for any reason whatsoever, merely mentioning access to "abortion care" does not explain why this is such a pivotal and divisive problem for both the women's movement and evangelicals. Further, it does not explain how access to abortion connects to queer equality and the erosion of Christian male privilege. LEAF also failed to criticize the public-private distinction directly, upon which so many supporters and detractors of TWU rely. Opting for a

different tactic, LEAF decides to use the rhetorical power of this erroneous distinction to banish TWU to the private domain. Finally, though dwelling upon victimizing behaviours and institutions is edifying, and to some extent required by the current state of equality jurisprudence, feminism also has a positive political vision of interdependent liberty, and self-actualization. Though this vision may be inchoate in LEAF's submission, it remains unarticulated. Failing to articulate this vision means that its submission comes close to perpetrating the harm it seeks to alleviate. The submission represents those living under patriarchy as passive victims, as opposed to agents engaging in complex strategies of compliance and resistance.

Recognizing victimization and trauma is vital to any social justice project. Nonetheless, if respect and caring do not check our desire that others atone for past wrongs, we create a rhetorically intransigent debate with a Manichaean emotional hue. In so doing, we miss a vital opportunity to ask not only how we have been hurt, but what we want going forward. The only way we can truly redress the harm of the past is by articulating and implementing a positive conception of the future. Sadly, not enough of the submissions undertake such an articulation, least of all those whose primary focus is victimization and violence.

In these submissions, there is very little room for disagreement, legal pluralism or discussion of the possible persuasive power of different normative systems. Howard Kislowicz finds such a hubristic posture problematic because it does:

> [V]iolence to the common understanding that there is something called religious law embodied in written and oral traditions that is subject to multiple interpretations. Moreover, insisting that religious norms are not legal, discursively diminishes the significance of the religious practices. The particular obligations at issue in [a given case]

> thus challenge state-centred and functional definitions of law, prompting a re-examination of the term "law".[25]

This discursive violence is understandable, though not entirely excusable, given Benjamin L. Berger's observations. First, education and law are primary sites for the transmission of meaning and social mores in contemporary Canada. They, to some extent, are replacing religion as the primary marker of group belonging.[26] Second, and related to the first point, religion, law, and education have had a particularly significant relationship in the context of Canadian constitutional history.[27] Third, this situation can create what Berger calls an inducement to fundamentalism.[28]

These reflections concerning manufactured fundamentalism can apply to queer and legal identity as well. It is no accident that perhaps the most well-known Kantian moral psychologist, Lawrence Kohlberg— along with his most notable feminist opponent, Carol Gilligan— are both concerned with education. They understand that training, from cradle-to-grave, is necessary for the implementation of their respective positions concerning the good life. Although feminist care ethics is a secondary theme, a Kantian ethos is dominant. This ethos often pictures Evangelicals (and perhaps even religion in general) as inimical to social progress. Most of the submissions do

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[25] Howard Kislowicz, "Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation," *Queen's Law Journal* 39, no. 1 (2013): 194.

[26] Benjamin L. Berger, "Belonging to Law: Religious Difference, Secularism, and the Conditions of Civic Inclusion." *Social and Legal Studies* 24, no. 1 (2015): 47-64.

[27] Benjamin L. Berger, "Religious Diversity, Education, and the' Crisis' in State Neutrality," *Canadian Journal of Law and Society* 26, no. 1 (2013): 104-6.

[28] Benjamin L. Berger, "Inducing Fundamentalisms: Law as a Cultural Force in the Domain of Religion." *Canadian Diversity* 9, no. 3 (2012): 25-28.

not recognize that a religious orientation to the world, though it may be contestable and mutable — as with many instances of sexual orientation or gender identity — is not entirely so.[29]

As Heather Shipley says, overemphasizing supposedly religiously motivated prejudice is a discursive tactic which makes critiques that explain bias against queers as not a by-product of abhorrent individuals, but a consequence of systemic socio-structural causes, harder. This failure = plays out in the differences among the judges in the next chapter. It leads to confusion concerning upon what specific ground(s) the law society should (not) prohibit TWU.[30]

Though many submissions attempt to persuade their interlocutors, the predominant mode of discourse is justification. The justificatory language correlates to the gendered nature of constitutional culture and the (hetero)sexism that still fuels its feeling rules as well as (un)conscious *habitus.* This *habitus* connects to the prevalence of Kantian theory and discourse as a crucial and long-standing assemblage of legitimation. This assemblage maintains (heterosexual) hegemony by (re)orienting (legal) subjects' phenomenological and moral perceptions. This reorientation process better manages diversity. Such diversity management requires the reconfiguration of both the trope of the sodomite and the closet. These transformations require a deeper reappraisal of the feminine as the embodiment of disability, negativity, and abjection within legal theory, even though juristic misogyny is an enduring shadow.

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[29] Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014), 10-11, 41-54; see also Bruce Ryder, "The Canadian Conception of Equal Religious Citizenship" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver, UBC Press, 2008); Richard Moon, "Freedom of Religion under the Charter of Rights: the Limits of State Neutrality." *University of British Columbia Law Review* 45, no. 2 (2012): 495-521.

[30] Heather Shipley, "Queering Institutions?: Sexual Identity in Public Education in a Canadian Context." *Feminist Teacher* 23, no. 3 (2013): 196-210.; Heather Shipley, "Religious and Sexual Orientation Intersections in Education and Media: A Canadian Perspective." *Sexualities* 17, no. 5-6 (2014): 512-28.

Chapter 6
LSBC V. TWU

People we used to call "biased" now felt free to raise insensitivity and intolerance to the level of a constitutionally protected right on the same plateau with the rights of minorities, or women or aboriginal people. We started to think that all rights were created equal, even the right to discriminate. We forgot that… there is a difference between disadvantage and inconvenience…that promoting racist or sexist or homophobic ideas is different from promoting diversity. In other words, we forgot that intellectual pluralism does not mean the right to expect that racism is entitled to the same deference as tolerance. — Hon. Rosalie Silberman Abella[1]

Before there is morality there must be the person. We must attain and maintain in our morality a concept of personality such that it makes sense to posit choosing, valuing entities—free, moral beings. But the picture of the moral universe in which my own interests disappear and are merged into the interests of the totality of humanity is incompatible with that, because one wishes to develop a conception of a responsible, valuable, and valuing agent, and such an agent must first of all be dear to himself. It is from the kernel of individuality that the other things we value radiate. The Gospel says we must love our neighbor as ourselves, and this implies that any concern for others which is a human concern must presuppose a concern for ourselves. The human concern which we then show others is a concern which first of all recognizes the concrete individuality of that other person just as we recognize our own — Charles Fried[2]

The proceeding arguments can be summarized like this: diversity in the dispute concerning TWU's proposed law school is best understood considering the relationship between pride, shame, guilt, and anger, within legal education, argumentation, analysis, practice, and advocacy. Such emotional tactics, in turn, reflect a sexist ambivalence in the sentiments of Canadian constitutional culture concerning the place of the nonrational. Sexuality, religion, and femininity have traditionally been subsumed under this category. This amalgamation has influenced the construction of laws (as well as their interpretation and execution).

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[1] Hon. Rosalie Silberman Abella, "Judging in the 21st Century." *Advocates' Quarterly* 25, no. 2 (2002): 131-40.

[2] Charles Fried, "The Lawyer as Friend: The Moral Foundations of The Lawyer-Client Relation." *The Yale Law Journal* 85, no. 8 (1976): 1068-9.

Additionally, diversity discourse requires contradictory values of compromise and justice. It has also raised questions regarding the extent to which legal institutions, discourses, and practices can ameliorate and prevent (perceived) emotional injury. This emotional rhetoric happens at the three following intertwined registers: first, the (perceived) effects of guilt, shame, pride, and indignation at TWU itself, second, the (imagined) consequences of the same emotions and sentiments in the legal profession more broadly, and, third, the latter two's queer co-penetration with our moral commitments.

Dissenting on the issue of whether denying pension benefits to same-sex partners was justified under section 1 of the *Charter* in *Egan* (1995), Justice L'Heureux-Dubé provides the following evocative image to describe the effects of discrimination on marginalized groups (and, in this context, queers):

> For a court to determine … whether the impugned distinction will leave a non-trivial discriminatory "scar" on the group affected, it is instructive to consider…: (1) the nature of the group adversely affected by the distinction and (2) the nature of the interest adversely affected by the distinction. No one would dispute that two identical projectiles, thrown at the same speed, may nonetheless leave a different scar on two different types of surfaces. Similarly, groups that are more socially vulnerable will experience the adverse effects of a legislative distinction more vividly than if the same distinction were directed at a group which is not similarly socially vulnerable. As such, a distinction may be discriminatory in its impact upon one group yet not discriminatory in its impact upon another group. While it may be discriminatory against women to prohibit female guards from searching male prisoners, it may not be discriminatory against men to prohibit male guards from searching female prisoners…

When discussing her dissent in *TWU v BCCT*, I noted how this concern for injury and vulnerability evinced a feminist care ethic that also supported an expressive and contextual view of discrimination. I wrote about how her conception of harm challenges the traditional Kantian aesthetics of space and time —that is, the liberal divide between public and private. This division defines a proper legal subject.[3]

We have seen that the difference between her assessment of TWU's CCA and that of the majority is a disagreement over the proper feeling-rules within constitutional culture: to what degree may one separate private feelings and public conduct? In other words, we can break it down into the following four related subsidiary questions. First, how much must those in a position of authority exhibit empathy to those whom they do not fully comprehend? Second, to what degree are sexual feelings separate from our true selves? Third , what kind of emotional harms by the state are legally relevant? Fourth, to what degree ought we to feel shame over our (hetero)sexist past and present? These are the same questions that the SCC tackles in this case.

The SCC decided two cases related to the accreditation of TWU's proposed law school. The Nova Scotia Barristers Society chose not to contest its case against TWU, which it lost at the Nova Scotia Court of Appeal. The Law Society of Upper Canada (Ontario) and the Law Society of British Columbia won at the Supreme Court. The Ontario Court of Appeal ruled in favour of the Law Society of Upper Canada. By contrast, the British Columbia Court of Appeal ruled against the Law Society of British Columbia. I have decided to analyse the Law Society of British Columbia case. It is the first decision, much longer, and, at least for our purposes, the judgements are the same as the LSUC decision.

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[3] Lori Beaman, "Preserving Heteronormativity: Trinity Western University v. British Columbia College of Teachers," in *Feminism, Law, Inclusion: Intersectionality in Action,* ed. Gayle MacDonald (Toronto: Sumach Press, 2005) 81.

Though we may characterize the accreditation of TWU's proposed law school as a freedom of religion case, we can also think of it as an administrative law matter. Administrative law concerns the exercise of the power vested in government bodies. There are two standards of review for administrative decisions — correctness and reasonableness. On a correctness standard, there is only one proper outcome. Issues of fundamental importance to the legal system, imperatively, when they surpassed the competence of the tribunal in question, are appraised according to a correctness standard. We should always assess an allegation that a government body operated beyond its statutory authority according to correctness. Acting outside our authority is unlawful, and the courts' vocation is to maintain the balance of power between the different branches and subsidiaries of government.

Conversely, reasonableness is a more flexible standard. It asks if an administrative decision falls within an acceptable range of results, assessing such outcomes against all the relevant facts and law. Courts give considerable deference to quasi-legal bodies, such as law societies, when they interpret their enabling statute, or when they have expertise in a specific area of law, such as human rights norms or educational standards.[4]

The SCC had to decide two questions. First, with what standard should it evaluate the decision of the law societies? Second, considering the chosen measure, should it overturn or affirm the judgment of the law societies? The plurality determines that it should review these decisions on a reasonableness standard, and, considering this reasonableness standard, it should affirm the judgments of the Law Societies not to accredit the program. Their choices were reasonable. They resulted from the broad interpretation they gave to their enabling statutes. Additionally, they were an equitable balance between the rights of queer persons and

[4] *Dunsmuir v. New Brunswick*, 2008 SCC 9, paras. 43-64, [2008] 1 SCR 190 (CanLII).

Evangelicals. The competence of the law societies extends to diversity, within and equal access to, the legal profession.

The dissent argues that the SCC should review the decision on a correctness standard. The law societies exceeded their statutory authority when they purported to regulate legal education, which the dissent sees as distinct from professional discipline. Professional discipline, not legal education, is the bailiwick of the law societies. Such distinctions honour the just balance between the private sphere of personal ethics and the public sphere of professional ethics. Furthermore, were the SCC to review these decisions on a reasonableness standard, it should still overturn them. They are not a proportionate balance between freedom of religion and queer equality rights. Indeed, the law societies' accreditation decisions do not even implicate queer equality rights. No balancing of these two rights, therefore, must occur.

Judicial review always involves emotion and value judgements. Nevertheless, decisions at the intersection of constitutional and administrative law provide a unique opportunity to examine how passions influence the judicial process. Their determinations, by necessity, are always fact specific. Also, it is tricky to develop stringent legal tests for impressionistic judgements like what constitutes a proportionate balance between two competing values. Thus, analysing judicial review of administrative decisions gives us sharper insight into the metaethical values that feed constitutional litigation. Because administrative law is preoccupied with the proper exercise of public power, it provides an excellent window into how shame genders legal practice and colours our judgements concerning rights.

While not saying so explicitly, the majority judgement and, to some extent, the concurring opinion of former Chief Justice Mclachlin, is an unexpected mutation of some of the traditional arrangements of Kantian constitutional culture; yet it retains the dignity of the human

person and rationality as central preoccupations. Though the outcome of the majority's reasons and some of their language is correct, it also has weaknesses. Namely, it produces legal subjects who have the potential to be injured. Nor does the majority define LGBTQ. Curiously, it rarely mentions the legal categories of sexual orientation and gender expression/identity. It cites few queer rights cases, as though this is a long-decided issue. A central contention of my dissertation is that queers and Christians have been jockeying in the judicial mind for the position of the ideal (rational), and constitutionally protected legal subject. It appears, for the majority of the SCC, that queers have won this contest. This (un)holy victory requires that we excise sex (and thereby emotion) from sexual identity.[5] For the majority opinion and the concurrence of former Chief Justice Mclachlin, queers in the legal profession represent a more authentic incarnation of diversity. A legal community that accepts queers offers a more pleasing ideological image around which to govern the subject's allegiance.[6]

Queers are incorporated into the cultural regime of equality law. (Hetero)sexist persons wishing to gain a legal education in an environment reflective of those (now antiquated) values are (implicitly) constructed as (partial) outlaws. To use a phrase of Benjamin Berger, this makes a particular type of homonormative responsible privatized sexual citizen "belong to law." By contrast, it makes "ultra-straight" (hetero)sexist Evangelicals a new kind of queer legal subject.[7]

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[5] Mariana Valverde, *Law's Dream of Common Knowledge* (Princeton, NJ: Princeton University Press, 2003), 114-115.

[6] Slavoj Žižek*, The Sublime Object of Ideology* (London: Verso, 1989), 105.

[7] Benjamin L. Berger, "Belonging to Law: Religious Difference, Secularism, and the Conditions of Civic Inclusion." *Social and Legal Studies* 24, no. 1 (2015): 47-64.] [7] Brenda Cossman, *Sexual Citizens: The Legal And Cultural Regulation of Sex and Belonging* (Stanford, CA: Stanford University Press, 2007), 2; Lisa Duggan, "The New Homonormativity: The Sexual Politics of Neoliberalism," in *Materializing Democracy: Toward a Revitalized Cultural Politics*, eds. Russ Castronovo and Dana D Nelson, (Durham, Duke University Press, 2002) 175; Mariana Valverde, "A New Entity in the History of Sexuality: The Respectable Same-Sex Couple," in

This is on the condition that queers exhibit the right sort of (feminine and passive) emotional disposition.

Much like *Vriend* at the Court of Appeal for Alberta, the dissenting judgement uses legal method and judicial dispassion to implicitly shame the other members of the bench and express indignation that they are not faithful to the law. It, thereby, castigates them for compromising the integrity of constitutional culture. The dissent too expresses indignation at a lack of empathy. Yet, in its view, the party deserving empathy is TWU and maintaining the (hetero)sexist *status quo* best serves the public interest. It uses legal method to present equality in a formalistic fashion, as opposed to the expansive view of it the majority proffers.

This set of reasons also demonstrates the continuing relevance of Kohlberg's Kantian theory of moral development. All decisions implicitly hold that parties have not reached the emotional maturity required to set aside (improper) bias and act from principle.[8] It is also instructive to remember that this linear narrative of moral development accomplishes an educastration,[9] or what Leo Bersani criticizes as desexualisation of queerness, accomplishing the cultural and legal process of (self) erasure.[10] This erasure, in turn, creates a dichotomy between the good (implied masculine) gay and the bad (implied feminine) queer subject.[11] Regrettably,

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Queerly Canadian: An Introductory Reader in Sexuality Studies, eds. Maureen FitzGerald and Scott Rayter (Canadian Scholars Press/Women's Press, 2012), 366.

[8] Lawrence Kohlberg: *The Philosophy of Moral Development: Moral Stages and the Idea of Justice,* Essays on Moral Development, vol. 1 (Toronto Harper and Row, 1981), 17-23.

[9] Mario Mieli, *Homosexuality and Liberation: Elements of a Gay Critique*, trans. David Fernbach (London: Gay Men's Press, 1980), 24.

[10] Leo Bersani, *Homos* (Cambridge, MA: Harvard University Press, 1995), 1, 6.

[11] Carl F. Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights*, Queer Theories, Queer Politics (Philadelphia: Templeton University Press, 1998), 200. He acquires this terminology from Ruthann Robson, "Resisting the Family:

such a dichotomy is perhaps a necessary criterion for sexual and gender minorities to acquire legal intelligibility.[12] This process of making queers intelligible relates to the tension between particularist and universalist values within Canadian constitutional culture. This conflict creates inevitable metaethical instability.[13] On the one hand, these judgements show a desire to enfold difference into the Canadian imaginary by compromises and balancing. On the other, they confront diversity directly by the discourse of rights. The first approach is traditionally Canadian, the second traditionally American.[14]

THE MAJORITY JUDGEMENT

The emphasis Kantian philosopher Ernst Cassirer places on space and time for understanding culture is a vital resource for comprehending the world view of liberal legalism, which, at least based on this judgement, is weakening.[15] The persistent script of judicial dispassion, though demonstrably false,[16] is a contested keystone of Canadian constitutional culture's *habitus*, which operates at pre-discursive, micro-discursive, meso-discursive and macro-discursive levels, to

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Repositioning Lesbians in Legal Theory." *Signs: A Journal of Women in Culture and Society* 19, no. 4 (1994): 975.

[12] Mariano Croce, "Quod Non Est in Actis Non Est in Mundo: Legal Words, Unspeakability and the Same-Sex Marriage Issue*." Law and Critique 26* (2015): 67-73.

[13] Benjamin L. Berger, "Children of Two Logics: A Way into Canadian Constitutional Culture." *Oxford Journal of International Constitutional Law* 11 (2013): 320-5.

[14] Kevin Christiano, "Church and State in Institutional Flux: Canada and the United States," in *Rethinking Church, State and Modernity: Canada between Europe and America,* edited by D. Lyon and M. van Die. (Toronto: University of Toronto Press, 2000), 74.

[15] Ernst Cassirer, *An Essay on Man: An Introduction to a Philosophy of Human Culture* (New Haven: Yale University Press, 1944), 42.

[16] Terry A. Maroney, "The Persistent Cultural Script of Judicial Dispassion," *California Law Review* 99 (2011): 634-46; Terry A. Maroney, "Emotional Regulation and Judicial Behavior." *California Law Review* 99, no. 6 (2011),1 501; Kathryn Abrams and Hila Kerentf, "Who's Afraid of Law and the Emotions?" *Minnesota Law Review* 94 (1997): 2001-8; Kathryn Abrams, *Hearing the Call of Stories*, (California Law Review 79, 1991), 971; Kathryn Abrams, The Progress of Passion, *Michigan Law Review 100*, (2002), 1602; *The Passions of Law*. ed. Susan A. Bandes. (New York: New York University Press. 1999), 367.

"straighten" legal theory and practice. Whatever else judicial opinions may (purport to) affect in the world, they also function as emotional (re)orientation devices to maintain and contest existing unequal social relations.[17] Legal method has the power to define and delimit the scope of legal issues. This power of definition has often marginalized women and other minorities.[18]

The legal issues in this appeal were as follows: first, do the law societies have jurisdiction as a (discursively constructed) public body to consider the admissions criteria of a (discursively constructed) private university? The law societies are the gatekeepers to a public profession, though not in themselves human rights tribunals. Second, did the law societies strike a proportionate balance when they denied TWU's application and (claimed) rights? In other words, did the law societies perform their duty and act as lawyers ought to act? Consequently, attempting to narrow the scope of the case, its ramifications for Canadians, and significance for (hetero)sexist community members at TWU, the majority clarifies: "At the outset, it is important to identify what the LSBC decided when denying approval to TWU's proposed law school. The LSBC did not deny graduates from TWU's proposed law school admission to the LSBC; rather, the LSBC denied TWU's proposed law school with a mandatory covenant."[19] The court delineates the issues rather narrowly. The designers of the proposed JD program considered the

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[17] Sara Ahmed*, Queer Phenomenology: Orientations, Objects, Others* (Durham, NC: Duke University Press, 2006), 69; Antonio Gramsci, "The Modern Prince," in *Selections from the Prison Notebook*s, trans. and ed. Quintin Hoare and Geoffrey Nowell Smith (New York, 1971), esp. 132-3; Pierre Bourdieu, *In Other Words: Essays Towards a Reflexive Sociology* (Stanford, CA: Stanford University Press, 1990), 13.

[18] Mary Jane Mossman, "Feminism and Legal Method: The Difference It Makes." *Wisconsin Women's Law Journal* 3 (1987): 147-68.; Carol Smart, *Feminism and the Power of Law*, Sociology of Law and Crime (London; New York: Routledge, 1989), 10–20.; Rebecca Johnson, *Taxing Choices: The Intersection of Class, Gender, Parenthood and the Law*, (Vancouver: UBC Press, 2002).

[19] *Law Society of British Columbia v. Trinity Western University,* 2018 SCC 32, para. 27, [2018] 2 SCR. 293 (CanLII).

covenantal lifestyle outlined in the agreement under dispute as part of the University's *raison d'être*. The BC Minister of Education made approval of the law school program contingent upon approval of the law faculty.

None of the justices raised the issue of TWU's possibly tainted pedagogical environment flowing from its mandatory CCA. The SCC felt its decision in *TWU v BCCT* was determinative. As well, it could not decide this question at that point, were it able. Parties had made few submissions on it.[20] Nevertheless, a law school is different from a Teachers' College. Moreover, we need not show direct evidence of discrimination by graduates to suggest that graduates forced to reside in or condone an environment, such as the one the CCA formerly facilitated, has had an unsuitable culture for constitutional education. The SCC's concession on this point in favour of TWU was erroneous.

The majority sidesteps this cultural competence issue by focusing on the Law Society's public interest mandate. The majority finds that the LSBC did have it. The open language of the statute supports this.[21] It notes, offering a questionable interpretation of history, that the legal profession has had an established pattern of trying to eliminate barriers and promoting the cause of justice and the rule of law.[22] This history and mandate entitle the Law Society to examine and remove discriminatory barriers. It states the following:

> Limiting access to membership in the legal profession by personal characteristics, unrelated to merit, is inherently inimical to the integrity of the legal profession. This is especially so considering the societal trust placed in the legal profession and the explicit

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[20] *LSBC v. TWU*, para. 29.

[21] *LSBC v. TWU*, para. 32-25.

[22] *LSBC v. TWU*, para. 46.

> statutory direction that the LSBC should be concerned with "preserving and protecting the rights and freedoms of all persons" to upholding the public interest in the administration of justice (LPA, s. 3 (a)). Indeed, the LSBC, as a public actor, has an overarching interest in protecting the values of equality and human rights in carrying out its functions.[23]

Here one sees a very Kantian conception of the constitutional actor and the legal profession. Lawyers must protect the dignity of every person. Recalling Ronald Dworkin and Lawrence Kohlberg, this rationalism protects the integrity of the legal system and those who apply it. It also ensures that lawyers are in a proper state of emotional maturity so that they can maintain public trust.[24] Even though these moral considerations are implied, more explicit articulation of them would have been useful. It would have also prevented the unfair comments of the dissenting judgement that equality (if undefined) is compatible with simple uniformity and totalitarianism.[25] However imprecise the majority's articulation of equality may be, a fair appraisal of the reasons suggests that Kantian principle and feminist care ethics inform its idea of equality. It is compatible with neither uniformity nor totalitarianism. Though there is ambiguity in the reasons, to claim otherwise is to deploy a red herring *reductio ad hitlerum* argument like the ones we saw in the last chapter.

The public's trust in the LSBC is necessary because the law is a self-regulating profession. This privilege comes with increased moral responsibility, on the one hand, and

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[23] *LSBC v. TWU*, para. 41.

[24] Ronald Dworkin, *Taking Right Seriously* (Cambridge, MA: Harvard University Press, 1978), 80-92; Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), esp. 400-18; Lawrence Kohlberg: *The Philosophy of Moral Development: Moral Stages and the Idea of Justice,* Essays on Moral Development, vol. 1 (Toronto: Harper and Row, 1981), 17-23.

[25] *LSBC v. TWU*, para. 310.

deference from courts, owing to their maturity, on the other. This public trust helps them defend the rights of implicitly sensitive and more emotional private subjects. Also, they can manage diversity with empathetic dexterity. This skill increases esteem for the legal profession.[26] Variety is a fact of life. The mature lawyer deals with this as part of her professionalism. Ensuring diversity is also important because the bar must reflect the public that it serves.[27] The majority's reasons illustrate a process of emotional reorientation in which (hetero)sexist Evangelicals become partial constitutional strangers. In Ahmed's terms, they are subjects at once unknown to the law and about which the law already has plenty of common-sense stereotypes.[28] This type of Christianity is no longer friendly to the law, hence the majority's use of the word "inimical."[29]

> When discussing open access to legal education, the majority states the following: Eliminating inequitable barriers to legal education, and thereby, to membership in the legal profession, also promotes the competence of the bar and improves the quality of legal services available to the public. The LSBC is statutorily mandated to ensure the competence of lawyers as a means of upholding and protecting the public interest in the administration of justice (LPA, s. 3(b)). The LSBC is not limited to enforcing minimum standards of competence for the individual lawyers it licenses; it is also entitled to consider how to promote the competence of the bar as a whole.[30]

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[26] *LSBC v. TWU*, para. 36-38.

[27] *LSBC v. TWU*, para. 43; Robert McRuer, *Crip Theory: Cultural Signs of Queerness and Disability* (New York: New York University Press, 2006), 12.

[28] Sara Ahmed, *Strange Encounters: Embodied Others in Post-Coloniality* (London: Routledge, 2000), 22.

[29] *LSBC v. TWU*, para. 41.

[30] *LSBC v. TWU*, para. 42.

For the majority, it is as simple as this: a diverse bar is a more competent bar: the CCA impedes such diversity; ergo, it should not exist within the legal profession.[31] The law society was entitled, indeed, perhaps even obliged, to consider the public's perception of it when making its decision.[32]

The majority reasons that respect for diversity and having the proper emotional disposition toward its Kantian conception of pluralism, is synonymous with fidelity to the (increasingly emotional and egalitarian but still masculine) rule of law itself. For legal ethicist Wendell W. Bradley, who writes from an explicitly Kantian perspective, fidelity to law ought to be the lawyer's primary concern.[33] We should remember Dworkin's image of Judge Hercules, who is always able to set his interests aside in defence of the public good.[34] The notion of lawyers as heroes of justice and champions of diversity receives support from references to the independence of the bar.[35]

Elegies to diversity as such confuse diversity as a fact of contemporary life and a normative value. Without explicit clarification, this is troubling. We can use it to commit a

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[31] *LSBC v. TWU*, para. 43.

[32] *LSBC v. TWU*, para. 40.

[33] Wendell W. Bradley, *Lawyers and the Fidelity to Law* (Princeton, NJ: Princeton University Press, 2010), 8-12.

[34] Brenda Cossman, *Sexual Citizens: The Legal And Cultural Regulation of Sex and Belonging* (Stanford, CA: Stanford University Press, 2007), 2; Lisa Duggan, "The New Homonormativity: The Sexual Politics of Neoliberalism," in *Materializing Democracy: Toward a Revitalized Cultural Politics*, eds. Russ Castronovo and Dana D. Nelson, (Durham, Duke University Press, 2002) 175; Mariana Valverde, "A New Entity in the History of Sexuality: The Respectable Same-Sex Couple," in *Queerly Canadian: An Introductory Reader in Sexuality Studies*, eds. Maureen FitzGerald and Scott Rayter (Canadian Scholars Press/Women's Press, 2012), 366.

[35] *LSBC v. TWU*, paras. 37-8.

version of the is-ought-gap-fallacy.[36] As I have suggested, however, discourses of diversity do have emotional utility. They facilitate individual and collective purgation of shame and remorse experienced owing to past and present injustices. This governs legal subjects through the ideologically pleasing image of a balanced mosaic.[37] Such (dis)affiliation processes maintain the hegemony of Canadian constitutional culture. They change some of its deep cleavages and contradictions into manageable (often ahistoricized) "problems of difference," as opposed to conflicts born of socio-structural inequality. In short, diversity and its associated emotions help, in the words of C. Wright Mills, (dis)figure (hetero)sexism from a social issue to a personal trouble. To its credit, the majority does suggest that (hetero)sexist attitudes may be ingrained in the social system, by discussing barriers and systemic discrimination.

Nevertheless, the proposed law school is represented as an outlier on a far from perfect (but quickly improving) record of legal inclusion. The burden of discrimination rests with TWU. Mainstream and secular society has transcended the socio-historical, religious, and legal conditions that first gave rise to this institution and the beliefs of its administration. For the majority, things like the CCA are anachronistic. There are two additional consequences of diversity discourse and the circumscription of sexual politics in this judgement. First, the reasons focus almost solely on sexual orientation equality. The decision does not conceptualize the CCA as an interconnected series of beliefs, practices, and norms that has a disparate impact upon women, and transgender and intersex women especially. The majority missed an opportunity to

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[36] David Hume, *A Treatise of Human Nature*, 10th ed., ed. L.A. Selby-Biggee (1739 repr. Oxford: Clarendon Press, 1960), 3.2, 469-70.

[37] Elizabeth A. Povinelli, "The State of Shame: Australian Multiculturalism and the Crisis of Indigenous Citizenship," *Critical Inquiry* 24, no. 2, 1998: 580-581.

discuss differences between LGBTQ subjects and how they may experience the covenant in many ways, as the submissions in the last chapter demonstrated.

We may, as does the dissenting opinion, contend that having an Evangelical law school with the discriminatory covenant promotes diversity within the legal profession. The majority, therefore, resorts to the nebulous idea that statutory decision-makers should promote the values of equality and diversity. Nonetheless, as the dissent suggests, it does not define what it means by these terms. It is clear, however, both from its repudiation of the status-conduct distinction, and the holding that to force persons to renounce their sexual and gender identities is "degrading and disrespectful," that that it operates within a Kantian paradigm. This worldview sees self-respect, and the accompanying avoidance of shame, as a primary good.[38] Nonetheless, the majority does not explain why this treatment is degrading and disrespectful, particularly in this context. The majority is attempting not to judge (hetero)sexist Evangelical Christianity. Specifically, it is trying not to criticize the shame and disgust it sometimes entails. Consequently, it attempts to focus on numbers and equal access to downplay the fact that it disapproves of the CCA. It says the following:

> [Even if] the net result of TWU's proposed law school is that more options and opportunities are available to LGBTQ people applying to law school in Canada — which is certainly not a guarantee — this does not change the fact that an entire law school would be closed off to most LGBTQ individuals because of their sexual identity. Those who can sign the Covenant will be able to apply to 60 more law school seats per year, whereas those 60 seats remain effectively closed to most LGBTQ people. In short, LGBTQ individuals would have fewer opportunities relative to others. This undermines

[38] *LSBC v. TWU*, para. 101.

> true equality of access to legal education, and by extension, the legal profession. Substantive equality demands more than just the availability of options and opportunities — it prevents "the violation of essential human dignity and freedom" and "eliminate[s] any possibility of a person being treated in substance as 'less worthy' than others." *(Quebec (Attorney General) v. A,* 2013 SCC 5, [2013] 1 S.C.R. 61, at para. 138). The public confidence in the administration of justice may be undermined if the LSBC is seen to approve a law school that effectively bars many LGBTQ people from attending.[39]

Note that the passage uses the concept of equal worth. Furthermore, it connects school treatment dignity and freedom. Also intriguing is the majority's choice of sexual identity rather than the more proper legal category of sexual orientation. This paragraph would have been an excellent occasion for a citation from *Egan*. This case caused the constitutional entrenchment of sexual orientation as an analogous prohibited ground of discrimination. The judgement could also have cited *Vriend*. This judgement spoke eloquently upon the harms of institutionalized discrimination and the value of diversity in Canadian constitutional culture. As well, albeit indirectly, *Vriend* discussed the duties incumbent upon legal actors. It is as though the majority wants to orient us away from sex to either an essentialist biological conception of sexual orientation and gender identity or one based entirely upon moral choice rather than physical erotic activity.

The majority makes one reference to erotic activity, which obliquely recalls the history of religious and state-sanctioned discipline of queer sexual practices. In this paragraph, we have no indication of why the CCA may be particularly harmful to queers. The majority, however, reverse the traditional public/private distinction, inverting the famous statement of Pierre Elliott Trudeau, when executing his plan to reform laws governing sex. His reform initiative, which was

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[39] *LSBC v. TWU*, para. 95.

intended to get the state out of the bedrooms of the nation, partially decriminalized (but further regulated) homoerotic conduct. The majority states the following:

> [The decision not to accredit will prevent] the risk of significant harm to LGBTQ people who attend TWU's proposed law school. The British Columbia Court of Appeal accepted that if LGBTQ students signed the Covenant to gain access to TWU "they would have to either 'live a lie to obtain a degree' and sacrifice important and deeply personal aspects of their lives or face the prospect of disciplinary action including expulsion." (para. 172). TWU's Covenant prevents students who are not married to members of the opposite sex from engaging in sexual activity in the privacy of their own bedrooms. It requires non-evangelical LGBTQ students, whom TWU welcomes to its school, to comply with conduct requirements even when they are off-campus, in the privacy of their own homes. Attending TWU's law school would mean that LGBTQ students would have to deny a crucial component of their identity in the most private and personal of spaces for three years to receive a legal education.

The majority fears that TWU cannot be trusted with legal education, unless and until it removes itself from the bedrooms of its students.

The majority states, "Being required by someone else's religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful. Being required to do so offends the public perception that freedom of religion includes freedom from religion."[40] This is the normative core of the judgement. It is also why the majority was wrong (with the greatest of admiration) not to consider the quality of legal education at TWU. Its misgivings recall Kant and Rawls' contention that self-respect, in addition to the concomitant freedom from shame born of morally extraneous characteristics, is a condition that every human being is owed as a matter of

[40] *LSBC v. TWU*, para. 101.

right qua human being. Sexual orientation and gender (identity), offspring of (purportedly) rational and free choice, are a part of this humanity. The use of the word's dignity and freedom in the passage cited above, especially about a defence of substantive equality, bolsters my argument for a Kantian framework in the majority's reasons. So too does the majority's contention that the state always has an interest in promoting the shared values of democracy and human rights.[41] Such values, as the majority implies, protect our independent decision making as moral agents.

Thus, a critical distinction between the majority opinion and that of former Chief Justice McLachlan is their differing conceptions of law and rights. As we will see, the dissenting opinion uses the much older understanding of civil rights, that is, strictly speaking, one has certain legal entitlements under statutory and constitutional enactments. Conversely, the majority opinion seems to rely on a conception of human rights, that is, regardless of context, human beings should have certain legal protections, sexual orientation and gender identity being two of them. They have them because they are human. These are rooted in, though not entirely circumscribed by, positive law.

This is a better way of comprehending the dispute between the majority and the rest of the court concerning the definition and application of "*Charter* rights" as opposed to "*Charter* values". One of the, perhaps justified from a formalistic perspective, problems that the dissenting judges raise is that the SCC majority is defending the law society's interpretation of its broad mandate but also its (un)conscious choice to look to what Ronald Dworkin (infamously) described as "the law beyond the law."[42] Another way of characterizing the law beyond the law

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[41] *LSBC v. TWU*, para. 41.

[42] Dworkin, *Empire,* 400-416.

is exercising (proper) discretion in allowing emotion to influence legal judgements. This vindication of the law beyond the law and the Dworkinian hermeneutic approach challenges both *modus vivendi* liberalism and the hardline public-private distinction that it supports.

The majority uses privacy as a sword against the law school as opposed to a shield to protect it. Privacy is inseparable from shame. The bedroom is only the primary site of erotic activity because sexual expression is considered potentially shameful and disgusting. It reveals human vulnerability. TWU is constructed as disgraceful because it dares to intrude on this sacred (implicitly feminized) space of erotic expression but also, and perhaps more important, emotional intimacy and caring.

Tobin Siebers reminds us that the rhetoric of privacy often comes from power and wealth.[43] There are many cases, for instance, sexual abuse, caregiver abuse of children, the elderly, or the disabled, and domestic violence, in which we do desire that the state and other (parachurch) organizations become concerned with "the bedrooms of the nation."[44] Moreover, there are many persons who rely upon state medical care. For us, a normal private sex life is impossible.[45] Finally, for those on the asexual spectrum, the bedroom, as well as the activities performed therein, can be a place of anxiety and exclusion. Of course, the bedroom metaphor was merely a convenient shorthand for personal autonomy interests. Nevertheless, it is regrettable that the majority did not give an extensive, and, mainly, historically situated, account. True, the majority acknowledges that sexual expression is a crucial component of identity for

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[43] Tobin Siebers, *Disability Theory* (Ann Arbour: Michigan University Press, 2008), 141-160.

[44] Elaine Craig, *Troubling Sex*, Law and Society Series, (Vancouver: UBC Press, 2012), 41*;* Nancy Nason-Clark, and Barbara Fisher-Townsend, *Religion and Intimate Partner Violence: Understanding the Challenges and Proposing Solutions* (Oxford: Oxford University Press, 2017).

[45] Tom Shakespeare, *The Sexual Politics of Disability: Untold Desires* (London: Cassell Publishing, 1997). 35-40.

queers. It does not explain why, however. It simply relies upon contestable evidence of psychological harm.[46]

Bernard E. Harcourt provides the following criticism of an overly abstract harm principle:

> The harm principle is effectively collapsing under the weight of its own success. Claims of harm have become so pervasive that the harm principle has become meaningless: the harm principle no longer serves the function of a *critical principle* because non-trivial harm arguments permeate the debate. Today, the issue is no longer *whether* a moral offense causes harm, but rather what type and what amount of harms the challenged conduct causes, and how the harms compare. On those issues, the harm principle is silent. [Emphasis in original].[47]

He goes on to argue that, "hidden normative dimensions ... do the work in the harm principle, not the abstract, simple notion of harm".[48] It is sensible to consider harm in constitutional law. We require a rich historical context to do this effectively and empathetically, however. Returning to Justice L'Heureux-Dubé's discussion of surfaces and adverse effects discrimination, such historical analysis could have provided an in-depth account of why the CCA may have a greater discriminatory impact upon queers than other groups. Thus, it could have possibly avoided some comments in the dissent to the effect that the CCA does not stigmatize queers. It allegedly asks

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[46] Mariana Valverde, "The Harms of Sex and the Risks of Breasts: Obscenity and Indecency in Canadian Law." *Social and Legal Studies* 8, no. 2 (1999): 186; Lori G. Beaman, *Defining Harm: Religious Freedom and the Limits of the Law*, Law and Society (Vancouver: UBC Press, 2008) 10-30.

[47] Bernard E. Harcourt, "The Collapse of the Harm Principle." *Journal of Criminal Law and Criminology* 90, no. 1 (1999): 109.

[48] Harcourt, "Harm," 185.

the same things of everyone. Justice L'Heureux-Dubé puts this fallacious claim away with sensitivity and insight.

Turning to freedom of religion, the majority finds an infringement. It recognizes the socially embedded nature of religious practice and finds that Evangelicals have an interest in creating a spiritual environment that fosters their growth as Christians.[49] It also acknowledges that Evangelical Christians sincerely believe in the inspired nature of the Bible, and that they have the attending desires to embody its dictates while encouraging fellow believers to behave likewise.[50]

Nevertheless, the majority holds that the freedom to obtain a legal education in an environment that is most conducive to our spiritual maturation, though purportedly protected by freedom of religion, exists at the penumbra of this right. The majority grounds this finding in the applicant's testimony on behalf of TWU. In these affidavits, students express a preference for an Evangelical legal education. They do not espouse a belief that they must have this environment as a requirement of their faith.[51] The majority contrasts the subjective testimony of students who indicate their desire for a law school with the seemingly objective (social) scientific evidence of harm that environments like TWU's cause.[52] The one is subjective (that is, the wrong kind of emotional). The other is objective (that is, the right kind of emotional).

Part of the problem for TWU was the diplomatic way that it attempted to frame its claim as not in direct opposition to queer individuals — as though the CCA existed devoid of historical

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[49] *LSBC v. TWU*, para. 70.

[50] *LSBC v. TWU*, para. 6.

[51] *LSBC v. TWU*, para. 88.

[52] *LSBC v. TWU*, para. 98.

context and was intended to realize much more abstract and worthy goals. From the perspective of TWU's administration, (hetero)sexism could be termed an accidental, but not essential, feature of the covenant.

The majority seems to disbelieve the sincerity of Trinity on this point. This disbelief causes it to make thinly disguised normative judgements. A particularly strong example of this is when it cites a statement from then Chief Justice Mclachlin in the *Wilson Colony* case. She says that courts, when assessing whether an infringement of religious freedom is justified, confront a daunting task because religion is a complex mixture of normative beliefs and culture.[53] Some religious practices are peripheral. Violation of these is minor. Other beliefs and practices are at the core of our spiritual identities. Interference with this undefined core of freedom of religion almost constitutes forced apostasy.

The biggest problem for the majority appears to be the mandatory nature of the CCA and its coercive impacts upon non-Evangelicals. We should note that the majority seems to assume Evangelicals would have no objection to upholding this covenant and would experience little hardship when they do so. Though from the companion case, the majority offers the following instructive excerpt:

> The LSUC's decision only interferes with TWU's ability to operate a law school governed by the *mandatory* Covenant. This limitation is of minor significance because a *mandatory* covenant is not absolutely required to study law in a Christian environment in which people follow certain religious rules of conduct, and studying law in an

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[53] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 89, [2009] 2 SCR 567 [*Hutterian Brethren*]. For criticisms of the way former Chief Justice McLachlin trivializes the communal aspects of religion in this decision, see Howard Kislowicz, Richard Haigh, and Adrienne Ng, "Calculations of Conscience: The Costs and Benefits of Religious and Conscientious Freedom (Canada)," *Alberta Law Review* 48, no. 3 (2011): 680-8.

> environment infused with the community's religious beliefs is preferred, not necessary, for prospective TWU law students [emphasis added].[54]

Hence, the CCA is less worthy of protection because it infringes upon personal autonomy, and autonomy is the value that sustains freedom of religion. As Benjamin L. Berger comments, "religion has force in the eyes of the law to the extent that it is aligned with autonomy and choice… the clear and consistent jurisprudential message has been that religion has constitutional relevance because it is an expression of human autonomy and choice."[55] Though Berger may be less sanguine concerning the alleged epistemic violence that liberal political theory can do to religion than I am,[56] we agree that those deploying the law should be more mindful of this doctrine's historical origins and the harm it does to collective ways of life.[57]

A supporter of the CCA could simply respond that compulsion is not an incentive to the religious life. Instead, it is intrinsic to it. Previous chapters argued that this position is immoral, considering our deeper commitment to human dignity and the mitigation of unjustified shame. I shall offer further reasons for this contention below. Consequently, I do not disagree with the majority in this respect. My point is this: as open and compassionate as members of a liberal society wish to be, on occasion, depending upon the context, they must take a strong ethical position against illiberal behaviour. The present case is one of these instances. With admiration, therefore, the majority opinion, whatever its merits, also represents a failure of nerve.

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[54] *Trinity Western University v. The Law Society of Upper Canada*, 2018 SCC 33, para. 7, [2018] 2 SCR. 453.

[55] Benjamin L. Berger, "Law's Religion: Rendering Culture (Canada)." *Osgoode Hall Law Journal* 45, no. 2 (2007): 277.

[56] Berger, "Rendering Culture," 289, 301.

[57] Berger, "Rendering Culture," 309.

While the majority refuses to define precisely where TWU's accreditation denial lies on this spectrum, it is confident that the decision is far short of forced apostasy. We can detect the faintest hint of resentment on the part of the majority. It thinks TWU is behaving irrationally. As well, it is claiming privileges not sought by other religious communities. It is clear, from the way the majority dichotomously constructs religion and sexual orientation, that it views living by a communal religious ethos as a choice, thereby less worthy of constitutional protection, and sexual orientation as an intrinsic part of the self, worthy of more. The majority cites the seminal religious freedom case of *Big M Drug Mart* for the proposition that religious freedom must sometimes be limited to protect the fundamental freedoms of others.

Because the passage in *Big M Drug Mart* is discussing the classic scenario in which a religious group becomes violent or unruly, there is a subtle, perhaps unintentional, suggestion that the CCA enacts a form of institutionalized violence. The majority's statement that the law society was entitled to consider its public image — that is, the members and the public could take accreditation to mean that freedom of religion does not also guarantee freedom from religion (that is, irrational coercion and gross interference with autonomy) — strengthens my contention that the majority stresses fear concerning possible violence. This feminist shift explains the language of care, self-esteem, and harm. Aware of the vituperous language levelled at this judgement by their colleagues, the majority reassures us that the covenant enacts concrete and not abstract injury.[58] The majority offers no definition of the two types of harm or how they differ.

Moreover, the majority refuses to consider TWU's equality claim independently. It claimed that the law society discriminated against it based on its Evangelical identity. The University also argued the decision not to accredit the proposed program violated its freedom of

[58] *LSBC v. TWU*, para. 103.

association. The LSBC did not protect the rights of individuals to associate with one another. *Charter* protects the right of freedom from association with persons whose conduct we consider objectionable. In TWU's administration's opinion, the decision infringed freedom of expression. It prevented members from living together in a manner that expresses a philosophical perspective. For those who believe in the CCA, this environment has positive pedagogical and spiritual consequences.[59] The majority says that, though these rights may be infringed, the same conceptual framework applies for its limitation; ergo, an analysis of freedom of religion suffices for all of them.

While attempting not to make normative judgements concerning the CCA, by phrasing its disagreement with the CCA in the language of harm, risk, and inequitable barriers, the majority creates a judgement that emphasizes human dignity in legal education. This judgement, however, does not give adequate weight to the communal nature of religion and the extent to which it makes higher order claims on its adherents' moral lives. It presents religion as a choice and sexual orientation as a natural and essentialized identity. It also uses diversity as a master discourse. This concept helps to define and delineate the boundaries of acceptable difference.[60]

THE MCLACHLIN JUDGEMENT

The opinion of former Chief Justice Mclachlin has two virtues over the majority. First, she gives greater weight to the rights that are engaged. Second, she recognizes that this decision unavoidably involves a normative judgement. She disagrees with the majority that a law school

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[59] *LSBC v. TWU*, para. 76-78.

[60] Valerie Stoker, "Zero Tolerance? Sikh Swords, School Safety, and Secularism in Québec," *Journal of the American Academy of Religion*, 75, no. 4, (2007): 88; Gerald Kernerman, *Multicultural Nationalism: Civilizing Difference, Constituting Community* (Vancouver: UBC Press, 2005), 96.

with a CCA is at the penumbra of religious freedom. She objects to the way the majority characterizes the decision to attend law school with an Evangelical ethos in volitional language. She suggests that an attempt to strive for compulsory heterosexuality is at the core of Evangelical and, by extension, the university's, religious character.[61] She believes that freedom of expression and association, though not necessarily requiring a separate analysis, must be considered as part of the freedom of religion discussion.[62] She echoes the contention of TWU that the CCA helps members associate in a particular way. This association nurtures its faith and expresses the same to the wider community. The former Chief Justice reminds us that many of the most prestigious institutions of higher learning in Canada began as denominational affiliates. Furthermore, education is often a vital part of religious life.[63]

Unlike the majority, she characterizes the discrimination in this case as only applying to married queer couples, thereby diminishing the importance of historical and contextual analysis.[64] She finds that it was reasonable for the law society to deny the application because of the moral imperative to condemn discrimination and encourage respect for law.[65] Though these concerns are implicit in the majority's reasons, Former Chief Justice Mclachlin's reasons are the most persuasive. They consider the expressive dimensions of state conduct for both (hetero)sexist Evangelicals and queers. Additionally, they account for the inevitable loss experienced when we must adjudicate between claims of expressive harm. Before we proceed, it is enlightening to recall the following definition of expressive harm:

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[61] *LSBC v. TWU*, para. 131-133.

[62] *LSBC v. TWU*, para. 122.

[63] *LSBC v. TWU*, para. 130.

[64] *LSBC v. TWU*, para. 138.

[65] *LSBC v. TWU*, para. 137.

> An expressive harm is one that results from the ideas or attitudes expressed through a governmental action rather than from the more tangible or material consequences the action brings about. On this view, the meaning of a governmental action is just as important as what that action does. Public policies can violate the Constitution not only because they bring about concrete costs but because the meaning they convey expresses inappropriate respect for relevant constitutional norms. Expressive harms are therefore social rather than individual. Their primary effect is not the tangible burdens they impose on particular individuals but the way in which they undermine collective understandings.[66]

It seems that former Chief Justice Mclachlin would not object to the characterization of the Law Societies' objectives as ensuring the anti-subordination principle and creating a legal environment which is not poisoned by autonomy compromising shame. Greater historical context and philosophical clarity may have been helpful. This lack of explanation has been a central concern around which I have built this dissertation.

The Majority and Mclachlin Opinions Defended Based on Unjust Shame

The outcome of the plurality was correct because "the distinctive professional obligations of lawyers are intimately bound up with respect for law and the legal system".[67] The underlying moral aspiration that should animate respect for the positive regime of human rights within Canada is the avoidance of shame, which is apart from, though no more crucial than, fidelity to law as such. I must reiterate my ontological position on the relationship between shame and dignity. S*hame is the biological and material manifestation of a metaphysical postulate (that is,*

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[66] Richard H. Pildes, "Why Rights are not Trumps: Social Meanings, Expressive Harms, and Constitutionalism," *Journal of Legal Studies* 27, no. 52 (1998): 755.

[67] Wendell W. Bradley, *Lawyers and the Fidelity to Law* (Princeton, NJ: Princeton University Press, 2010), 9.

human dignity). This separation between dignity and shame corresponds to the Kantian dichotomy between the noumenal and phenomenal realm of experience. Because Kant is astute when he says that human subjectivity cannot access the noumenal realm (or, "things-in-themselves") our analysis is on firmer epistemological ground if we focus our attention on reactions and behaviours that manifest the absence or presence of an ontological assumption, rather than trying to define this supposition a priori*, based on abstract and often ahistorical and decontextualized criteria*. In this specific case, context justified the denial of TWU's proposal.

> Nevertheless, as Richard Moon comments in the following passage:
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> The state's commitment to sexual-orientation equality, even though framed in secular or civic terms, must be understood as a rejection of the belief that homosexuality is wrongful. While the state may avoid passing direct judgment on the truth of a particular religious belief (as religious truth), it cannot avoid doing so indirectly, when determining public policy. When the legislature decides that a particular activity should be either supported or restricted, it does not frame its judgment in terms of what God has or has not commanded. But unless we hold on to some artificial distinction between public and religious morality, the legislature's judgment must be seen as a repudiation of a religious belief that is held by some in the community.[68]

The best normative justification for denying TWU's application was the need to prevent unjustified shame based on morally extraneous characteristics. The law societies were morally obligated to deny accreditation to TWU's proposed law school. Much in the majority judgement is praiseworthy, particularly its use of dignitary language. Nevertheless, the most persuasive

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[68] Richard Moon, "Conscientious Objections by Civil Servants: The Case of Marriage Commissioners and Same-Sex Civil Marriages," in Benjamin L Berger, ed. *Religion and the Exercise of Public Authority* (Oxford: Hart Publishing, 2016), 153.

argument against the law school, which the majority implicitly advances, is the following one. Because the CCA places unjust and extensive restrictions on sexual integrity (and especially that of queers), which the Canadian Constitution has come to see as essential to the dignity of the human person, TWU — so long as it had a mandatory CCA prohibiting same-sex sexual behaviour — was not an appropriate place for the teaching of constitutional law.

. Ronald Dworkin's argument in *Justice for Hedgehogs* that a liberal society cannot survive without an overarching commitment to the moral equality of all persons; and that all other liberties and the lion's share of our values are born of this preeminent commitment, persuades me.[69] Imposed sexual and gender restrictions amount to objectification, on the one hand, and involuntary servitude, on the other. Because rights pertaining to our autobiographical core are crucial but subject to change, contracts should abrogate them only in the rarest of cases and, specifically, not in the context of legal pedagogy. Such extinguishment requires a subject to have knowledge of herself and limit her prospects in a manner that is neither possible nor desirable. In ideal circumstances, contractual obligations have normative force owing to the equality of the parties, free and informed consent, and detrimental reliance.[70] The bargaining power of TWU students is unequal, particularly concerning coveted law school places.

Moreover, while persons often assumed that students would apply to law school with a (relatively) specific sexual orientation and gender (identity), this is not always the case. A change in sexual orientation, gender, or religious conviction may be profound enough to vitiate many informed choices. Is a woman who comes out as lesbian in the third year of law school to

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[69] Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: The Belknap Press of Harvard University Press, 2011), 1-23, 191-210, 331-74.

[70] John McCamus*, The Law of Contracts,* (Toronto: Irwin Law, 2015), 31-33; T. M. Scanlon, *What We Owe to Each Other* (Cambridge, MA: The Belknap Press of Harvard University Press, 1998), 309.

transfer, possibly losing her co-op and professional connections, or continue wearing the iron mask of compulsory heterosexuality? Is a formerly cisgender man (currently in a cross-sex relationship) who has come out as a transgender woman, but who has a partner willing to stay with her during her transition, supposed to experience gender dysphoria while studying for her criminal law final, or risk alienating her intimate partner, likely a significant source of psychological support during this challenging time?

These cannot be acceptable circumstances in an institution charged with teaching the equal worth of all persons. One of the purposes of human rights protection is to prevent us from making deliberative choices that compromise moral personality. Though this circumstance would have a different impact on account of power and privilege, in principle, it would be just as disrespectful of my status as an (aspiring) autonomous agent, were I to contractually forswear sexual relations with women under conditions of externally imposed constraint. I am currently gay, and I view this as a crucial part of my identity. Nevertheless, this may change, and I should be free to explore being bi or straight. Similarly, though I am Christian now, and this is unlikely to change, it would be immoral to prevent me from converting to Wicca.

Particularly owing to context, the previous sexual ethics obligations in the CCA were not morally binding; for they were wrong. Nevertheless, the most persuasive argument in favour of obeying the CCA was detrimental reliance. Because, as a collective undertaking, members rely on each other to perform the covenant, and disobedience to that covenant by one member may impede the spiritual growth of another, out of respect for one's fellow members, one should uphold the covenant. While this argument is somewhat persuasive concerning queer sexuality and gender expression on campus, as well as imprudently or excessively communicating information regarding this to objecting community members, at most, this would be a duty of

virtue. It would not be a duty of right. A person cannot detrimentally rely on the off-campus conduct of their fellows' students and colleagues to create a Christian environment. While queer students at Trinity should respect the sensitivities and moral convictions of others out of courtesy, these may be overwritten by the countervailing (possibly superordinate) virtues of honesty and integrity.

Behavioural restrictions of the type TWU contemplated are inappropriate within the context of legal education. They require aspiring lawyers to treat their fellow students as means to their spiritual development rather than persons capable of setting their ends. Interference with the religious freedom of TWU is justified. The legal profession has an interest in upholding the equality of all persons as a constitutional *Grundnorm.* Freedom is doubtless important. Insofar as freedom and moral equality conflict, however, the latter ought to supersede the former within the context of legal education. Moral equality is a lexically prior condition for the exercise of freedom.[71] Justice McIntyre (as he then was) in the seminal equality case of *Andrews v. Law Society of British Columbia*, correctly states that: "The section 15(1) guarantee is the broadest of all guarantees. It applies to and supports all other rights guaranteed by the *Charter*."[72]

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[71] Immanuel Kant, *Groundwork for the Metaphysics of Morals,* trans. Allen W. Wood, Rethinking the Western Tradition (1797; repr., New York: Yale University Press, 2002), 46; [Ak.: 4:429]. *Québec (Attorney General) v. A,* 2013 SCC 5, para. 138, [2013] 1 SCR. 61 (CanLII). Despite its problems, therefore, this means I would prefer a return to the explicit dignitary-based framework set out in *Law v. Canada (Minister of Employment and Immigration*), [1999] 1 SCR. 497, 170, paras. 51-64, D.L.R. (4th) (CanLII). I recognize that not everyone subscribes to a Kantian version of respect for persons, but similar convictions can be independently arrived at from rule, utilitarian considerations, virtue ethics, or indeed, the theological notion that human beings are created in the image of God. Charles Taylor, *Dilemmas and Connections: Selected Essays* (Cambridge, MA: Harvard University Press, 2011), 328-29.

[72] *Andrews v. Law Society of British Columbia* [1989) 1 SCR 1 43, 185, 10 CHRR D/5719 (CanLII).

[72] Carissima Mathen and Michael Plaxton, "Legal Education, TWU and the Looking Glass," in *Religious Freedom and Communities*, ed. Dwight Newman (Markham, ON: LEXIS-NEXIS, 2016), 242.

With or without enforceable behavioural restrictions (hetero)sexism will exist at TWU to a greater or lesser degree, depending on the context. This is true of every social setting, especially every law school, which are by no means always harbingers of egalitarianism and progressive thought. This argument is not meant to suggest that the law can or should make direct interventions to redress this problem. Nonetheless, TWU crossed an ethical Rubicon when deciding to propose a law school with (hetero)sexist disciplinary measures. Whatever other meritorious goals the covenant may be attempting to achieve, it expresses indefensible animus toward a constitutionally protected group. This indefensible animus is at the heart of the classical conception of discrimination, and this practice is anathema to legal education.[73] This contention does not mean that all legal education ought to be the same, or that it is even required always to espouse liberal political values. Still less does it mean one ought to prevent persons who oppose homoerotic conduct and gender diversity or religious individuals, on that basis alone, from becoming lawyers.

It does mean, however, that a legal institution should refrain from discrimination as a matter of principle, whether the Constitution applies to it and its functions or not. Recognition of sexual and gender equality further manifests what Cass Sunstein calls the anti-caste principle but what is more accurately called the anti-subordination principle: the idea that it is impermissible for state actors to condone, participate in, or otherwise facilitate, the disadvantage of certain groups flowing from (perceived) morally extraneous characteristics.[74] Law students are trained to be state actors. Even in private practice, their first duty is to uphold the law. We should not have a law school with a disturbingly Orwellian understanding of equality. TWU's previously

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[73] Richard J. Arneson, "What Is Wrongful Discrimination?" *San Diego Law Review* 43, no. 4 (2006): 777.

[74] Cass Sunstein, "The Anticaste Principle," *Michigan Law Review* 92 (1984): 2440-55.

mandatory CCA in effect, though perhaps not in explicit wording, communicated the message that all persons are equal , but some are more equal than others.[75] Within the context of law school, this impoverished conception of equality was troubling because the moral equality of all persons arguably is the assumption that most justifies the ideal of the rule of law.[76]

We should be protected from the harmful psychological effects coming from being the object of shame, disgust, fear, and anger. Human rights laws, therefore, should act as a type of "shame shield." There are two main Kantian explanations to illuminate the wrongs of discrimination. They are aspects of the same principle. The first argues that it is impermissible to convey a message through law that demeans subjects by treating them in a way that communicates they are less worthy of equal respect and concern than their peers. Specific grounds have constitutional protection because societies have come to recognize that they are essential to human dignity. Because of this fact, they are likely to become profound sources of shame. Relevant to an expressivist account of discrimination is the idea that we must pay attention to the meaning identities accrue based on history, in addition to the way that uneven power relationships shape characters and our interactions with others.[77]

The second view holds that this equal respect and concern comes from a particular set of deliberative freedoms that subjects should not have to consider when pondering the kind of life

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[75] George Orwell, *Animal Farm: A Fairy Story* (1945; repr., Boston: Houghton Mifflin Harcourt, 2009), 192.

[76] Lord Thomas Bingham, *The Rule of Law* (London: Allen Lane, 2010.), 55-9;, F. C DeCoste *On Coming to Law: An Introduction to Law in Liberal Societies*, 3rd ed. (Markham, Ont.: LexisNexis, 2011), 178.

[77] *Québec (Attorney General) v. A,* 2013 SCC 5, para. 138, [2013] 1 SCR. 61 (CanLII); *Withler v. Canada (Attorney General),* 2011 SCC 12, paras. 36-9, [2011] 1 SCR. 396 (CanLII).; *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, para. 19, [2015] 2 SCR. 548 (CanLII).

they wish to lead.[78] Deliberative freedoms are distinct from, yet interwoven with, the actual ability to do something.[79] Despite its problems, though I agree with the dignitary-based language of much Kantian human rights discourse, I find my shame-based approach helpful.

First, it unifies the expressive and liberty-based accounts of discrimination. Second, and related, it captures the extent to which discrimination is an embodied and phenomenological experience better than the dignitary-based approach, thereby challenging the pseudo-Cartesian split between mind and body. Third, it reinforces our intuitive judgement that discrimination is often highly gendered. Fourth, it reminds us that whatever else discrimination is or does, it (un)intentionally subordinates individuals or groups in unequal power relationships, mainly, though not exclusively, through emotions. Though shame is also a social construct, unlike dignity, it has some cross-cultural phenomenological and physiological effects (for example, the act of blushing and shrunken posture). These are more easily measured, and they correlate to psychologically maladaptive behaviour. Grounding human rights law upon the principle of minimizing shame unifies the expressive and liberty-based accounts of discrimination. Shame communicates a message that demeans the equal worth of another. It also compromises our freedom by creating adverse physiological and psychological states. Over time, these can develop into maladaptive coping strategies that not only disable critical parts of our autonomy but also limit our ability to deliberate concerning our choices, even in the absence of explicit barriers.

Because disability, often correlated with physical weakness and gender instability, has been such a profound occasion for shame, it is useful to use it to describe something

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[78] Sophia Moreau, "What is Discrimination?" *Philosophy and Public Affairs* 38, no. 2 (2010): 147.

[79] Moreau, 148.

misunderstood about the deliberative theory of discrimination: it protects against contingency and guards choice as such, not the number of opportunities. It is repugnant to exempt an institution from disability non-discrimination provisions simply because an applicant was non-disabled when the institution hired her. We do not protect persons with disabilities from vocational and educational discrimination because they cannot improve their conditions. Instead, discrimination based on ability stereotypes is *per se* wrong. The same applies to sexual orientation. Whether someone is born queer or chooses to be that way is morally irrelevant. Like religious conversion, it is also not a capricious choice.[80] Thus, if the law school opted not to comply with accessibility requirements, because, based on its sincere reading of the Bible, persons with disabilities should not participate as lawyers but should, instead, be the benevolent objects of others' charity, it would be no answer to disabled applicants that they can attend one of the many other accessible law schools.

Minimizing (hetero)sexism by appealing to "traditional sexuality and the need for a diversity of thought" is roughly equivalent to the statements "white supremacists have traditional views concerning race relations, and their diverse perspectives on the fact of cultural difference ought to be respected," and, "ableism is a traditional and philosophically grounded perspective regarding embodiment." Thus, when supporters of TWU use diversity to defend their perspective, they are, to use a famous parable of Jesus, putting new wine in old wineskins (Matt. 9:14-17, Mk. 2:18-22, Lk. 5:33-39). Persons who espouse such views also do not behave according to the Golden Rule. They do not accord to others the equal respect and concern they

[80] Moreau, 147.

would likely desire, were circumstances to change and they too find themselves no longer in positions of relative privilege (Matt. 7:12; Lk. 6:31; Lev. 19:18).[81]

As Cory J, as he then was, stated in Vriend:

> It is easy to say that everyone who is just like 'us' is entitled to equality. Everyone finds it more difficult to say that those who are 'different' from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any . . . group is less deserving and unworthy of equal protection and benefit of the law all minorities and all of . . . society are demeaned.[82]

Once we compromise on one ground of discrimination, we compromise on all of them. Advancements in equality law notwithstanding, law often worsens inequality. Legal education should not foster it.

FREEDOM OF RELIGION AND MORAL MATURITY: JUSTICE ROWE'S JUDGEMENT

The most striking feature of Justice Rowe's judgement is the emphasis he places on maturity and the proper role of the judicial actor. His focus on achieving adult moral development, in turn, leads him to implicitly shame TWU's administration for not behaving as autonomous adults should. Justice Rowe appears to think law students ought to experience shame when they fail to internalize what he considers to be fundamental liberal principles. Also, judges ought to be ashamed if they extend freedom of religion beyond its purpose. Justice Rowe does not explicitly acknowledge, that his definition of freedom of religion is highly Protestant.

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[81] I, of course, do not mean to imply that the Golden Rule somehow unique to be ideological construction styled "Judeo-Christian civilization:" it is found in almost every culture. Joyce Hertzler, "The Golden Rule and Society," in *Ethics: Contemporary Readings*, Routledge Readings in Contemporary Philosophy, eds. Harry J. Gensler, Earl W. Spurgin, and James C. Swindal (New York: Routledge, 2005), 158-67.

[82] *Vriend,* para. 65.

Such religious bias in the judgment reinforces a strong shame-based division between the public and the private spheres. His assessment undervalues the communal character of religious freedom and downplays the importance of education in shaping our moral character. While our moral habituation primarily takes place in childhood, there is little principled reason why it should not extend to higher education. Notwithstanding these reservations, Justice Rowe's opinion helps us understand the connection between respecting persons as autonomous individuals and not interfering with their sexual choices to preserve a specific conception of the common good.

Justice Rowe purports to resolve the rights balancing issues by a historical and purposive analysis of freedom of religion.[83] Curiously, considering that he finds against freedom of religion in this case, he suggests that such a circumscription exercise is necessary, particularly when protections conflict. His interpretation of section one ensures that adjudicators are not overly eager in finding *Charter* infringements. Such judicial enthusiasm has arguably increased the amount of court discretion in the balancing stages of the *Oakes* analysis (discussed in Chapter 3), thereby weakening the promises entrenched in the Constitution.[84] Justice Rowe's reasoning is clear and candid. It exemplifies how judicial methods use emotion to place rigid boundaries upon our otherwise messy experience.[85] He returns to *Big M Drug Mart.* Reading its advice in historical context, he argues the essence of freedom of religion, though it has communal dimensions, rests in personal volition concerning a particular set of normative commitments (that

[83] *LSBC v. TWU*, paras. 178-185.
[84] *LSBC v. TWU*, paras. 184-194.

[85] Bernard E Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (Cambridge, MA Harvard University Press, 2011), 240.

is, subjective and autonomously chosen) beliefs.[86] For Justice Rowe, using the now classic distinction proposed by Isaiah Berlin, freedom of religion is a negative liberty. The government must not unreasonably constrain our ability to hold and manifest religious beliefs.[87]

This does not require the state to facilitate religious practice, particularly when other countervailing interests are at stake. Once more, it is critical to note how diversity functions as a tool of emotional quarantine. The traditional Kantian aesthetics for conceptualizing space, time, and desire supports this discourse of quarantine. Additionally, it is a classically Protestant way of constructing religious experience and proper observance that, had it been accepted by the majority, carries the potential to marginalize non-Christian religions further. This reasoning continues the erroneous perception that true religion values orthodoxy over orthopraxy.[88] Robert Orsi explains that "[t]he study of lived religion is not about practice rather than ideas, but about ideas, gestures, imaginings, all as media of engagement with the world. We cannot separate lived religion from other practices of everyday life, from the ways that humans do other necessary and important things, or from other cultural structures and discourses (legal, political, medical, and so on)."[89] Lori G. Beaman extrapolates, "[t]he messy business of lived religion compounds the difficulty of defining it. Like law, religion written and religion, as we live it are two rather different phenomena. This difference, of course, does not make it any easier when trying to define religion to make determinations about religious freedom."[90]

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[86] *LSBC v. TWU*, para. 219.

[87] Isaiah Berlin, *Four Essays on Liberty* (London: Oxford University Press, 1969), 15-22.

[88] Meredith McGuire, *Lived Religion: Faith and Practice in Everyday Life* (Oxford: Oxford University Press, 2008).

[89] Robert Orsi, "Is the Study of Lived Religion Irrelevant to the World We Live In?" *Journal for the Scientific Study of Religion* 42, no. 2 (2003): 172.

His approach endorses the split between act and identity that has been a particularly persistent and pernicious trope. This trope has entrenched (hetero)sexism at what William E. Connolly helpfully calls the "visceral register" of experience. These ideas are not defensible. Once again, subjects do not possess experience. They are constituted in and through such experience.[91] The tactic works well, if we appreciate it from the law-as-governance perspective. It interpolates subjects as responsible, strong-willed, and self-determining. These legal constructions can also choose and maintain their adult religious beliefs, without recourse to externally imposed authority. In other words, one of Justice Rowe's main contentions is very Kantian. He seems to believe that the CCA functions as a crutch for emotionally immature persons, who lack the affective fortitude to cultivate and persist in their convictions. For Justice Rowe, this is a primarily solitary endeavour.

Justice Rowe's judgement recalls Kant's belief that public persons have a perfect duty to obey laws. Nonetheless, they are free in matters of conscience or the *forum internum*. In all but extreme cases, it is unclear how a state could directly influence such a space. Normative beliefs, if they are to have a meaningful role in orchestrating the symphony of our moral universe, are inseparable from (collective) manifestations. A result of having a right is the freedom to manifest it and society's duty to respect it.[92]

Justice Rowe observes that there are many non-Christians at the school. As well, according to its mission statement and the words of its enabling statute, the institution is for

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[90] Lori G Beaman, "Defining Religion: The Promise and the Peril of Legal Interpretation," in *Law and Religious Pluralism in Canada*, ed. Richard Moon (Toronto: UBC Press, 2008), 200-10.

[91] Joan W. Scott, "The Evidence of Experience." *Critical Inquiry* 17, no. 4 (1991): 773-97.

[92] *Ontario Human Rights Comm. v. Simpsons-Sears*, [1985] 2 SCR, para. 22, 23 DLR (4th) 321, 536 (CanLII).

everyone, regardless of their beliefs or behaviour.[93] Hence, freedom of religion, in this specified context, perhaps any, may not be used as a sword to compel religious observance.[94] The notable exception Justice Rowe gives is the case in which parents may compel religious practice by having rights over their children's upbringing. He argues that this does not apply in the current case for two reasons. First, a legal education does not relate to crucial matters of moral habituation. Second, and more critical to the outcome of Justice Rowe's opinion, future law school students are not children. Consequently, they should be able to tolerate and negotiate considerable amounts of diversity with the maturity of an imagined ideal legal subject.[95] Justice Rowe's opinion attempts to circumnavigate larger emotional and philosophical tensions within Canadian constitutional culture through recourse to traditional applications of legal methods, in addition to the concomitant jurisprudential fetish of bright line distinctions.

Unlike the majority, Justice Rowe does not condone overemphasis upon the difference between the core of rights and their penumbra. For him, rights are either infringed or not. Owing to this understanding, he argues that the majority attempts to have it both ways. It says that there is a violation of the *Charter of Rights*, but that it is not severe.[96] Every (genuine) rights violation is serious. In the present case, Justice Rowe finds no violation. Consequently, TWU does not deserve a compelling justification. He demands that a stringent justificatory standard fetter the otherwise unbridled discretion of state actors and the judiciary. Its task is to police the boundaries of acceptable conduct and emotional expression for the state and other members of the judiciary.

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[93] *LSBC v. TWU*, para. 241.

[94] *LSBC v. TWU*, para. 251.

[95] *LSBC v. TWU*, para. 250.

[96] *LSBC v. TWU*, para. 234.

Though the judgements against TWU have crucial differences in their approaches, they can be encapsulated by the following quotation from the judgement of Justice Rowe: "I agree that "a right designed to shield individuals from religious coercion cannot be used as a sword to coerce [conformity to] religious practice".[97] Infringements are especially warranted when religious practices impede a component of our identity that is, in the plurality's view, implicitly more essential than religion. The images of sword and shield remind us that the social construction of religion often holds that "authentic religion" is violence-free and contributes to social cohesion. Conversely, "inauthentic religion" contributes to violence and social disequilibrium, thereby warranting the intervention of the law. Though subtle, throughout the majority opinion and the concurrence of Justice Rowe, there is a suggestion that TWU is not authentically Christian. The moral harm caused to them is minimal when weighed against the larger public interest. I also, with the greatest of respect, side with the dissenting opinion on the point of coercion.

Though the majority is insistent that the law society is not telling TWU how it should operate, they are, in effect, doing so. The approval of the law societies was determinative of the British Columbia Ministry of Advanced Education's disapproval. I merely recognize that moral loss is a tragic, though inevitable, part of democratic life. When confined to this case, the loss was defensible. Notwithstanding this contention, having canvassed the law society submissions in the last chapter and taken care to criticize their often extreme affective temperature, it is unfortunate that none of the justices commented upon them. Additionally, it is regrettable that the majority found the decision-making processes undertaken by the law societies to be an example of democratic discourse, which the majority of the submissions were not.

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[97] *LSBC v. TWU*, para. 251.

Looking forward to the dissent, it is useful to review criteria for public shame, specifically as they relate to the production of common-sense moral knowledge, which Paul Saurette outlines in his book *The Kantian Imperative*. He argues that appeals to common sense have the five following assumptions: 1) common-sense is universally shared; 2) but we can distort it; 3) it is possible to remove these distortions and reveal its self-evident nature; 4) the belief that this recognition justifies common-sense; 5) that it is, therefore, morally binding on all and especially on those wishing to have public trust.[98] Saurette says that shame, as a primary means of modern control, has three main characteristics — publicity, the correction of someone's pretensions to a position or prerogative he does not possess, and the denunciation of him against a common standard of conduct, especially concerning his official duties.[99] When authors of laws implicitly conceive of them as sources of civic cohesion, failure to comply with both the spirit and the letter of the law places one outside the imagined communities of laws by virtue of shame.[100] An inherent misogyny powers this Kantian common-sense motivated shame. Failure to exercise public reason in the restraint of passion is to act like a woman.

THE GHOST OF (HETERO)SEXISM'S PAST: THE DISSENTING OPINION

The dissenting opinion is an elegant plea for a return to the previous feeling-rules of Canadian constitutional culture (that is, the persistent script of judicial dispassion). As well, it is an elegy

[98] Paul Saurette, *The Kantian Imperative: Humiliation, Commonsense, Politics* (Toronto: University of Toronto Press, 2005), on our 47.

[99] Saurette, 12-14.

[100] Saurette, at 10; Benjamin L. Berger, "Belonging to Law: Religious Difference, Secularism, and the Conditions of Civic Inclusion." *Social and Legal Studies* 24, no. 1 (2015): 47-64. Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983), 4.

to the myth of liberal neutrality.[101] With much respect for the immense skill and dedication of Côté and Brown JJ., the judgement, whatever its formalistic merits, exhibits many of the (hetero)sexist tactics exemplified by the Alberta Court of Appeal judgement in *Vriend*. It has none of the empathy Justice Cory demonstrates. Also, it gives TWU far greater scope than the court accorded it in 2001. Most concerning is the frequency with which it uses shame and implicit masculinity. Consistent with what we saw before, the judgement purports to define the issue at stake in the broadest possible terms (opposing the majority's rather narrow construction).

The decision begins in the following way:

> [The parties] call upon this Court to decide who controls the door to "the public square." In other words, accepting that the liberal state must foster pluralism by striving to accommodate difference in the public life of civil society, where does that state obligation — that is, where does that public life — begin? With a private denominational university? Or with a judicially reviewable statutory delegate charged by the provincial legislature to regulate the profession and entry thereto in the public interest?[102]

The dissenting opinion deploys the traditional liberal rhetoric of public and private, which has historically benefited those in a position of privilege; but it also marginalizes our religious, sexual, and emotional selves. Moreover, it implicitly makes the supposedly queer-bias-free society the norm that conflicts with the new religious other whom we must tolerate. While taking a traditional negative-liberty approach, again exciting our fears of violence, it says that the decision of the majority transforms the *Charter* into a sword to compel private institutions rather

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[101] Terry A. Maroney, "The Persistent Cultural Script of Judicial Dispassion," *California Law Review* 99 (2011): 634-46.

[102] *LSBC v. TWU*, para. 260.

than the shield for them it was designed to be.[103] The dissent positions the law as a value-neutral umpire in a dispute between two decontextualized and equally situated minority groups. It turns religion and sexual orientation into a personal trouble rather than a societal issue.[104]

The dissent criticizes the majority for its reliance on *Charter* values (that is, perhaps, human rights that go beyond strict positive legal entitlements). Additionally, it expounds upon this suspicion of universal human rights within *modus vivendi* liberalism. It cites Mary Ann Waldron. She admonishes courts not to produce social consensus but to protect our right to live together in peace.[105] This *modus vivendi* liberalism is said to flow from the state's duty of neutrality in matters of belief and nonbelief.

This neutrality is said to protect our equal dignity before and under the law.[106] There are three common arguments criticizing neutrality, all of which have their origins in queer and feminist thought. First, contra Thomas Nagel, there is no "view from nowhere" with which to ground a conception of neutrality (though I concede the validity of his argument that in some cases we should strive for this and attempt to be fair and consistent).[107] Second, our conception of neutrality is often informed by (concealed) hegemonic social relations, excluding less powerful groups. Third, the boundaries of acceptable neutrality, especially regarding freedom of

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[103] *LSBC v. TWU*, para. 338.

[104] *LSBC v. TWU*, para. 291; C. Wright Mills, *The Sociological Imagination* (New York: Oxford University Press, 1959), 8.

[105] *LSBC v. TWU*, para. 265.

[106] Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014), 10-11, 41-54; see also Bruce Ryder, 'The Canadian Conception of Equal Religious Citizenship" in Richard Moon, ed., *Law and Religious Pluralism in Canada* (Vancouver, UBC Press, 2008); Richard Moon, "Freedom of Religion under the Charter of Rights: the Limits of State Neutrality." *University of British Columbia Law Review* 45, no. 2 (2012): 495-521.

[107] Thomas Nagel, *The View from Nowhere* (Oxford: Oxford University Press, 1986), 3; Shannon Winnubst, *Querying Freedom* (Indianapolis: Indiana University Press, 2006), 23-57.

religion, are intimately linked to what is considered normal. But there is a further problem with religious neutrality.[108]

I agree with Lori G. Beaman when she argues that, though the attempt at greater acceptance of religious variety is laudable, it is inevitable that courts will make disguised normative judgements concerning the contents or proper scope of a religious belief based on their conception of sincerity or the degree to which a religious adherent feels compelled to follow something.[109] I agree that tolerance must imply suffering the things we do not like.[110] My concurrence on this point notwithstanding, institutionalized and coercive (hetero)sexist shame, given its historical pedigree, and, particularly within the context of legal pedagogy, exceeds the limits of what Canadian constitutional culture ought to tolerate. It appears that the dissent deploys the familiar and inaccurate trope that queer equality is a secular value and something which we cannot independently derive from scriptural reflection as well as theological study.[111] Respectfully, it also confuses neutrality concerning the various doctrines that inform our political judgements, as well as the balance that ought to exist between them, and fundamental values that structure a constitutional culture.

Differing from the innovation in privacy logic found in the majority opinion, the dissenting Justices argue that the federal *Charter* and the *British Columbia Human Rights Code*

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[108] Lori G. Beaman, "The Myth of Religious Pluralism, Diversity and Vigour: The Constitutional Privileging of Protestantism in the United States and Canada," *Journal for the Scientific Study of Religion* 43, no. 3 (2003): 318.

[109] Lori G Beaman, "Defining Religion: The Promise and the Peril of Legal Interpretation," in *Law and Religious Pluralism in Canada*, ed. Richard Moon (Toronto: UBC Press, 2008), 200-10.

[110] Bernard Williams, "Tolerating the Intolerable," in *The Politics of Toleration in Modern Life, ed.* (Durham, NC: Duke University Press, 2000), 65.

[111] Janet R. Jacobsen, “Beyond Tolerance: Sexual Diversity and Economic Justice,” in *Religion and Sexuality: Diversity and the Limits of Tolerance,* eds. Heather Shipley, Pamela Dickey Young and Tracy J. Throthen (Vancouver: UBC Press, 2015) 21-44.

do not apply to TWU as a private institution, especially concerning matters of religion.[112] As well, unlike Justice Rowe's construction of TWU's enabling statute, the university is denominational. It is not, ergo, for everyone.[113] In part owing to this circumstance, the dissenting Justices believe that the Law Society did not enjoy "roving" — notice how this metaphor is used to set limits and imply irrationality — jurisdiction to enforce human rights norms.[114] They disagree with former Chief Justice Mclachlin that there is an overarching imperative for Law Societies to condemn discrimination and encourage respect for the law.

Were there such an obligation, it would not override the countervailing religious freedom interests.[115] The legislature of British Columbia has vested the human rights tribunal with this task. Further, were such human rights balancing in the Law Society's mandate, both the *Same-Sex Marriage Reference* and the *Civil Marriage Act* prohibit the state from denying a benefit to individual persons or groups because they object to queerness. It also states that it is not against the public interest to hold the cross-sex definition of marriage.[116] I have dealt with the falsity of this contention in Chapters 2, 3, and 4. I will note, once again, that in the discourse of Canadian statutory interpretation, provincial human rights codes enjoy quasi-constitutional status, governing all exercises of statutory interpretation and administrative discretion. Were I to accept this argument, the CCA does far more than express simple opposition to same-sex marriage.

As well, I question the assumption that the CCA does not discriminate against women. It attempts to restrict access to abortion.[117] Access to abortion is a precondition of respecting the

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[112] *LSBC v. TWU*, para. 291.

[113] *LSBC v. TWU*, para. 261.

[114] *LSBC v. TWU*, para. 291.

[115] *LSBC v. TWU*, para. 268.

[116] *LSBC v. TWU*, para. 339-340.

moral autonomy women deserve as of right. Some feminists may seek to lovingly persuade their sisters (not to) have an abortion. If feminism is to me anything, however, it must advocate (at a minimum) the right of every woman to exercise conscientious control over her own body. Abortion restrictions are an invasion of sexual integrity and an affront to women's dignity as moral persons.[118] We cannot be a feminist and seek to institutionally curtail queer sexuality. Sanctions against queer sexuality stem from the desire to exert patriarchal control over women's bodies. Likewise, we cannot, for the same reasons, punish those in common-law relationships. Nevertheless, strictures against common-law relationships, abortion and homoerotic behaviour are not morally equivalent. They have different degrees of harm owing to their specific histories and power imbalances. I do accept, however, that loving persuasion may be it an appropriate feminist response to sexual behaviour we may find objectionable. Disciplinary measures, at least within the context of legal education, is not an appropriate or loving response.

Observe how tolerance and accommodation govern subjects to diffuse conflict and create a consensus based upon masculinist forbearance:

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[117] "Advancing the notion that there can be many "feminisms" has served the conservative and liberal political interests of women seeking status and privileged class power who were among the first group to use the term "power feminists." They were also the group that began to suggest that one could be feminist and be anti-abortion. This is another misguided notion. Granting women the civil right to have control over their bodies is a basic feminist principle. Whether an individual female should have an abortion is purely a matter of choice. It is not anti-feminist for us to choose not to have abortions. But it is a feminist principle that women should have the right to choose." bell hooks, *Feminism is For Everybody: Passionate Politics* (New York: Routledge, 2014), 114. Dr. hooks prefers her name to be spelled without capitalization.

[118] Judith Jarvis Thomson, "A Defense of Abortion," *Philosophy and Public Affairs* 1, no. 1 (1971): 47–66.; John Martin Fisher, "Abortion, Autonomy, And Control Over One's Body," *Social Philosophy and Policy* 20, no. 2 (2003): 286-306; John Martin Fisher, "Abortion and Ownership." *The Journal of Ethics* 17, no. 4 (2013): 275-304.; Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Knopf, 1993), 217.

> Further, even were the "public interest" to be understood broadly, as the LSBC contends, accreditation of TWU's proposed law school would not be inconsistent with the public interest, so understood. Tolerance and accommodation of difference serve the public interest and foster pluralism. Acceptance by the LSBC of the unequal access effected by the Covenant would signify the accommodation of difference and of the TWU community's right to religious freedom and not a condonation of discrimination against LGBTQ persons. Approval of the proposed law school is, therefore, not inconsistent with "public interest" objectives of maintaining equal access and diversity in the legal profession, and indeed, it promotes those objectives.[119]

This passage confuses difference as a social fact and a normative principle. No doubt, TWU would increase diversity within the legal profession. The question is, is that diversity with a mandatory (hetero)sexist covenant the kind of contribution we want for Canadian constitutional culture? Under these very limited circumstances, it is not.

If such a constitutional culture is to be healthy, it cannot be neutral regarding inculcating the moral equality of all persons in the state actors who are charged to defend it. The equal dignity of all persons is not a principle concerning which a liberal state can be neutral, in the same way that the state can (purport to) be neutral concerning whether secular humanism, Scientology, Sikhism, or the Society of Friends, constitutes the best account of the good life. Equality, including queer equality, is logically prior to, and, informs the conditions of, state neutrality, insofar as such a thing is even partially attainable.[120] Moreover, the claim that the role of courts is not to foster social consensus is incoherent. Even the position that there be no social

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[119] *LSBC v. TWU*, para. 269.

[120] *Andrews v Law Society of British Columbia* [1989) 1 SCR 1 43, at 185, 10 CHRR D/5719.

consensus is, in fact, a social consensus, and it is one that has traditionally benefited the powerful. Social order cannot exist without hegemony. The illusion that it can, or that we should strive for a power-free philosophically neutral state, obscures the questions of how power operates in addition to whether it is just for it to continue to do so in the way that it has.[121] (Hetero)sexism is qualitatively different from permitting Kirpans in schools or celebrating Kwanzaa.

State neutrality governs subjects by interpolating them as masculine actors who can manage social conflict. As well, it masks the violence endemic to legal ordering. Referring to Bernard E. Harcourt again, it supposes that we can create a fictive ideal of order by managing chaos with the right sort of masculine prudence.[122] The dissenting Justices engage in a systematic exercise of statutory interpretation, spanning nearly 30 paragraphs. They want to contest the conclusion of the majority that the Law Society of British Columbia had jurisdiction to consider factors other than the educational competencies of graduates to license and to article. They construct the statute narrowly. In contradistinction to the majority's opinion, they envision a much less grand role for the Law Society and self-regulating professions generally.

An outstanding example of traditional legal method — complete with Latin terminology — is the following two paragraphs:

> [Our] interpretation [which restricts the powers of the Law Society to the supervision of lawyers and articled students] respects the express limits to the LSBC's rulemaking powers. Section 11 of the LPA grants the LSBC rule-making powers "for the governing

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[121] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity,* 2nd Ed. Feminism/Postmodernism (New York: Routledge, 1997), 142.

[122] Bernard E. Harcourt, *The Illusion of Free Markets: Punishment and the Myth of Natural Order* (Cambridge, MA: Harvard University Press, 2011), 240.

> of the society, lawyers, law firms, articled students and applicants, and for the carrying out of [the LPA].” The powers are thus limited to the regulation of the legal profession and its constituent parts, extending no further than the licensing process — the doorway to the profession. Any exercise of the LSBC’s discretion for a purpose extending beyond the express limits set out by s. 11 would be *ultra vires*.[123] More particularly, the Rule does not grant the LSBC authority to regulate law schools. Applying the maxim of statutory interpretation *expressio uninus est exclusio alterius* (“to express one thing is to exclude another”), we can presume that the legislator did not intend to include the governing of law schools among the LSBC’s rule-making powers at s. 11. The scope of its mandate is limited to governance of “the society, lawyers, law firms, articled students and applicants.” Had the legislator intended to grant the LSBC supervisory powers over law schools, it would have explicitly provided for such a significant grant of authority.[124]

If we recall Lon Fuller’s definition of law as the aspiration to bring human conduct under rules,[125] the dissenting judgement is shaming lawyers in support of accreditation refusal, and their colleagues on the court, for not behaving as they should and being affected by improper emotional considerations. By extension, as Justice McClung did in *Vriend*, they are accusing their colleagues of judicial activism and subverting the authentic democratic project.
Using traditional legal method, especially Latin terminology, makes their interpretation seem value neutral, ahistorical, and emotion free. Whatever the merits of this hermeneutic endeavour, statutory interpretation is an enterprise involving passion and the application of political principles. As we have seen, the dissenting judgement acknowledges the role of political

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[123] *LSBC v. TWU*, para. 281.
[124] *LSBC v. TWU*, para. 282.

[125] Lon L. Fuller, *The Morality of Law*, rev. ed. (New York: Yale University Press, 1969), 96-100.

principles in other places, yet it appears to hold that this is separate from statutory construction. Based on the theory of situated phenomenological hermeneutic ontology I have been advancing, this cannot be the case, however the appearance of objectivity may bolster the cultural prestige of law. In a curious move, the dissenting judgement constructs TWU community members as central and strangers to Canada's constitutional culture, when it cites a seminal case in Canadian administrative jurisprudence.

The dissent states the following, worrying that improper discretion may jeopardize law's cultural prestige:

> This… principle [of properly circumscribed and wisely exercised discretionary power] lies at the heart of this Court's decision in *Roncarelli v. Duplessis*, 1959 CanLII 50 (SEE), [1959] S.C.R. 121, where, despite the Quebec Liquor Commission's broad statutory discretion to cancel permits for the sale of alcoholic liquors, the Commission's decision to revoke Mr. Roncarelli's permit was "beyond the scope of [its] discretion" because the reasons therefore (Mr. Roncarelli's actions in support of Jehovah's Witnesses) were "totally irrelevant to the sale of liquor" (p. 141). The Court elaborated by way of a statement which continues to guide administrative decision making to this day: In public regulation of this sort there is no such thing as absolute and untrammelled "discretion," that is that action can be taken on any ground or for any reason that can be suggested to the mind of the administrator; no legislative Act can, without express language, be taken to contemplate an unlimited arbitrary power exercisable for any purpose, however capricious or irrelevant, regardless of the nature or purpose of the statute. . . . "Discretion" necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear

> departure from its lines or objects is just as objectionable as fraud or corruption. [p. 140.][126]

First, this citation is a clever one because some consider Justice Rand, the author of these words, to be a Canadian judicial maverick, as one commentator has put it. [127] Many years before the *Charter*, he bravely used the BNA act to create an implied Bill of Rights, at the centre of which was the struggle between The Watchtower Bible Society (Jehovah's Witnesses) and the explicitly Catholic and oppressive Québec provincial government of Premier Duplessis. In the conventional liberal story, this oppressive and autocratic regime fell to the progressive forces of the Quiet Revolution.[128] A principal architect of this project was none other than Pierre Elliott Trudeau, the driving force behind the repatriation of Canada's constitution and the adoption of the *Charter*. At the same time, therefore, this reference analogizes TWU to Jehovah's Witnesses in Québec (who were a beleaguered and insular minority at the time) and constructs the assumed secular nonrational majority as persecutory. It also makes the rights of Evangelicals appear more venerable and authentically Canadian.

In contrast to what the dissenting justices see as the innovative and irrational approach of the majority, their figuring of Evangelicals goes back to (perceived) emotionally neutral first principles. This analogy does not withstand scrutiny. The Duplessis persecution of Jehovah's Witnesses was typically intended to exclude them from public life for the sole reason that they expressed views intensely critical of the Catholic majority. They were not seeking to establish a

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[126] *LSBC v. TWU*, para. 275.

[127] William Kaplan, *Canadian Maverick: The Life and Times of Ivan C. Rand* (Toronto: University of Toronto Press, 2009).

[128] David Seljak. "Why the Quiet Revolution Was "Quiet": The Catholic Church's Reaction to the Secularization of Nationalism in Québec after 1960." *Historical Studies*, no. 62 (1996): 109-24.

Watchtower Bible Society law school, which either prohibited Catholics and or severely curtailed their beliefs, in a context where Catholics would have been a non-majoritarian group and would have been subject to severe prejudice at the hands of Jehovah's Witnesses. Relatedly, religious affiliation has no bearing on the ability to hold a liquor license. Conversely, though reasonable persons may differ as to the manner, degree or kind of their interconnectivity, the elimination of discriminatory access barriers and the fitness of an inequitable environment in which to conduct constitutional pedagogy, do have some bearing on each other.

I agree with the dissenting justices that freedom of religion often concerns religious relationships. Persons live out their beliefs in dialogue with others. Nevertheless, they are wrong when they suggest religion is totalizing as well as pure. One does not find its "true essence" in whatever persons in a position of hegemony have determined it to be.[129] Though I agree with the learned Justices' criticism of the majority because the latter does not give proper weight to what is at stake for some members of TWU's community, I must depart from their assessment that documents like the CCA are new or unfamiliar to the legal system.

With admiration, I also must object to the characterization of the covenant as a document that does not single out queers because it also prohibits non-matrimonial cross-sex coupling. Discrimination cases are contextual. They should consider historical relationships between groups and the meanings that have traditionally been expressed by those past relationships. As Deborah Hellman reminds us in the following quotation:

> Whether distinguishing among people demeans any of those affected is determined by the social context in which the action occurs. In our [American] culture, ordering African Americans to the back of the bus is conventionally understood as denigrating. This is not

[129] Lori G. Beaman, "Battle over Symbols: The Culture of the Majority Versus the Religion of the Minority," *Journal of Religion and Law* 28, no. 1 (2012): 78-99.

> because there is something worse about the back of the bus, however. Teenagers covet that spot. Ordering blacks to the back of the bus is dramatically different because it is blacks that are ordered to the back and because of the history of racial segregation in public transport and much else in this country. In addition, the fact that one orders blacks to the back makes a difference in what one does—ordering (rather than requesting, for example) has a greater potential to demean.[130]

Mandatory celibacy means something different in the context of heteronormative relationships than queer ones. The discrimination is worse. Because the dissenting judgement calls for a return to (what it sees as) proper legal method, it is useful to point out that its contention that the CCA does not single queers out is not supportable when using its method of analysis. It is a principle of contract law that anything cited in that contract becomes part of an interpretive guide to that contract.[131] The CCA references Paul's letter to the Romans (1: 26-7) as justification for the prohibition against homoerotic conduct. I applaud their call for greater empathy to those who have religious beliefs, including Evangelicals within the legal profession. This understanding must also apply to queers and queer Evangelicals.

Though this judgement may be commendable for how it adroitly applies legal method and attempts to reflect upon the metaethics of constitutionalism, as well as the political principles that (ought to) guide liberal democracy, it uses masculinist shaming tactics in a manner and to a degree that is unhelpful. It also perpetuates heterosexual hegemony born out of an erroneous conception of state neutrality, lacking nuanced historical context. This judgement, is, in turn, a

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[130] Deborah Hellman, *When is Discrimination Wrong?* (Cambridge, MA: Harvard University Press, 2008), 27.

[131] John McCamus, *The Law of Contracts*, (Toronto: Irwin Law, 2015), 717-19.

larger rebuke of the changing feeling-rules within Canadian constitutional culture and an implicit plea for the return of (hetero)sexist legal method.

The majority's symbolic reference to the bedroom, the prospect of forced denial concerning crucial parts of one's identity, and its contention that to behave according to someone else's religious dictates in sexual matters is degrading and disrespectful, point to sex. Nevertheless, we should understand that many varieties of Christianity have entrenched profound sexual shame as a cultural norm. Without appreciating Christian sex-negativity, our analysis of this case becomes impoverished. The SCC's interpretation of neutrality prevents the Court from making this inquiry. The result of this preclusion is the invocation of inequitable barriers without understanding the full extent of why they are inequitable, delineation exercises that trivialize religious experience, and *fiats* of judicial method. All the decisions in this case do not give adequate weight to the role of shame in shaping the law and the phenomenological nature of religious experience. This neglect allows the court to minimize the emotional shifts occurring within Canadian constitutional culture.

Conclusion
Breaking the Stained-Glass Closet

Sooner or later, happily or unhappily, almost everyone fails to control his or her sex life. Perhaps as compensation, almost everyone sooner or later also succumbs to the temptation to control someone else's sex life. Most people cannot quite rid themselves of the sense that controlling the sex of others, far from being unethical, is where morality begins. Shouldn't it be possible to allow everyone sexual autonomy, in a way consistent with everyone else's sexual autonomy? As simple as this ethical principle sounds, we have not come close to putting it into practice. The culture has thousands of ways for people to govern the sex of others—and not just harmful or coercive sex, like rape, but the most personal dimensions of pleasure, identity, and practice….. Not only do we do this; we congratulate ourselves for doing it. To do otherwise would require us to rethink much of what passes as common sense and morality. It might as well be admitted that sex is a disgrace. We like to say nicer things about it… but the possibility of abject shame is never entirely out of the picture — Michael Warner[1]

I had thought, before I began [my story entitled shame], that what I had on my hands was an almost excessively masculine tale, a saga of sexual rivalry, ambition, power, patronage, betrayal, death, revenge. But the women seem to have taken over; they marched in from the peripheries of the story to demand the inclusion of their own tragedies, histories, and comedies, obliging me to couch my narrative in all manner of sinuous complexities, to see my "male" plot refracted, so to speak, through the prisms of its reverse and "female" side. It occurs to me that the women knew precisely what they were up to—their stories explain, and even subsume, the men's. Repression is a seamless garment; a society which is authoritarian in its social and sexual codes, which crushes its women beneath the intolerable burdens of honour and propriety, breeds repression of other kinds as well. By contrast: dictators are always—or at least in public, on other people's behalf—puritanical. So, it turns out that my "male" and "female" plots are the same story…— Salman Rushdie[2]

One can summarize my normative argument against TWU's formerly mandatory covenant with the following deduction: lawyers ought to be educated in an ethical environment that upholds the spirit and the letter of the law. Shame based on constitutionally protected characteristics is a *malum in se*. It also perpetuates historical disadvantage and stereotyping. These two things undermine the ideal of all citizens being morally equal. Such circumstances *ipso facto* diminish the quality of legal education. TWU could not properly teach the ideal of equality. It had a covenant (contract of adhesion) that discriminated on constitutionally protected ground(s).

[1] Michael Warner, *The Trouble with Normal: Sex, Politics, and The Ethics of Queer Life*, Paperback ed. (Cambridge, MA: Harvard University Press, 2000), 1.

[2] Salman Rushdie, *Shame* (1983, repr. London: Vintage Books, 1995), 173.

Lawyers and the public deserve barrier-free and high-quality legal education; ergo, TWU ought to not provide legal education with the mandatory covenant.

Even though our society is still replete with pride, (shame) and prejudice, it is no longer, quoting Jane Austen, "a truth universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife."[3] History and culture inevitably affect our perceptions,[4] and narrative necessitates normative judgement.[5] Far from being an abstract approach removed from, and incapable of redressing, practical concerns, social constructionism best accords with our mundane experience. The pseudo-Cartesian split between reason and emotion is both empirically false and normatively troubling. Despite this well-supported contention, the cultural script of judicial dispassion[6] remains an ideal within Canadian constitutional culture. Notwithstanding this claim, we have used the dispute concerning TWU's proposed law school as a case study to demonstrate the changing feeling rules[7] within Canadian constitutional culture over roughly 23 years, from approximately 1995 to 2018.

Specifically, we have focused on shame as an often-harmful technique of moral discipline and emotional regulation, showing how Canadian constitutional culture deploys shame

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[3] Jane Austen*, Pride and Prejudice*, 3rd Edition, ed. Donald Gray (1813, repr. 2001, New York, New York: Norton Publishing, 2001), 3.

[4] Joan W. Scott, "The Evidence of Experience." *Critical Inquiry* 17, no. 4 (1991): 773-97.

[5] Hayden White, *The Content of the Form: Narrative Discourse and Historical Representation* (Baltimore: Johns Hopkins University Press, 1987), 24.

[66] Terry A. Maroney, "The Persistent Cultural Script of Judicial Dispassion," *California Law Review* 99 (2011): 634-46; Terry A. Maroney, "Emotional Regulation and Judicial Behavior." *California Law Review* 99, no. 6 (2011),1 501; Kathryn Abrams and Hila Kerentf, "Who's Afraid of Law and the Emotions?" *Minnesota Law Review* 94 (1997): 2001-8; Kathryn Abrams, *Hearing the Call of Stories*, (California Law Review 79, 1991), 971; Kathryn Abrams, "The Progress of Passion," *Michigan Law Review 100*, (2002), 1602; *The Passions of Law*. ed. Susan A. Bandes. (New York: New York University Press. 1999), 367.

[7] Arlie Russell Hochschild, "Emotion Work, Feeling-rules, and Social Structure," *American Journal of Sociology* 85, no. 3 (1979): 533.

to determine who will belong to law and who will be (partially) beyond its boundaries.[8] A crucial aspect of the struggle to define its parameters are disputes over what it means to act reasonably, in addition to how such assumed rationality is supposed to affect our interpersonal relations. The intersection between religion and sex creates much legal conflict. Such strife occurs, at least in part, because we regard both phenomena as essential aspects of ourselves and troubling sources of passion. The image of the sodomite is a useful shorthand to bear in mind when we discuss the intersection between queerness and Christianity. It offers a convenient distillation of Christianity's role in maintaining patriarchal control over (women's) bodies through a divinely ordained androcentric gender hierarchy and dehumanisation of queers by subjecting them to immoral shame.

Kant's philosophy is an enlightening heuristic that helps us to comprehend four things. First, it aids us when we tried to uncover some of the assumptions within Canadian constitutional culture. Second, the ambivalences in Kantian philosophy concerning sex, religion, and feelings allow us to access more clearly Canada's complicated relationship with its Christian origins. Third, it provides a compelling framework through which we can critique (hetero)sexism and defend a robust and context-dependent ideal of substantive gender equality. Fourth, it gives the analysis we need to critique the harmful aspects of shame. Nonetheless, shame is a necessary feature of a Kantian perspective. Kant's questionable reliance upon shame is a tragic flaw, though it is perhaps unavoidable. It can unravel what is noble in his moral vision.

This project has emphasised the social construction of reality, but it has still used the strategy of starting from our deeply held moral intuitions as vital sources of knowledge for

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[8] Paul Saurette, *The Kantian Imperative: Humiliation, Commonsense, Politics* (Toronto: University of Toronto Press, 2005), 47.

applied ethics. It is beneficial to continually appraise our theoretical speculations against are considered moral intuitions to achieve reflective equilibrium between the world as it is and the world as we believe that it ought to be. Concepts are never stable, and where there is power, there is also resistance. This does not mean that our choices are a static, and largely untenable, ontology, on the one hand, and a distant posture of irony mixed with fatalism, on the other. I follow Peter Sloterdijk in being critical of a certain strand of intellectual discourse which may be labelled "postmodern cynicism".[9] As Avigail Eisenberg reminds us, an identity's social construction does not deprive it of significance and the right to be respected.[10] My (in)decent proposal is that we strive to discuss and foster those beliefs and practices which increase freedom and equality for the greatest number of persons, recognizing that we also operate within profound conditions of constraint.

I have not attempted to offer a justification for refusing TWU that would apply outside the ethical norms that animate the legal profession within 21st-century Canada. Fortunately, however, it is not necessary to transcend this context. The gut-feeling many persons have that discrimination on any characteristic not related to academic merit in legal education is objectionable finds support in the deeper principles and traditions of our political culture, which lawyers are uniquely called to defend. Conversely, gut-feelings concerning the moral inferiority of queerness find little support in either contextual judgement or the deeper principles of our political culture.

Our basic intuition concerning the moral equality of all persons, especially their attending rights to be treated with equal concern and respect, requires that we undertake reasonable

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[9] Peter Sloterdijk, *The Critique of Cynical Reasons*, trans. Michael Eldred (Minneapolis: University of Minnesota Press, 2001), 3-12.

[10] Avigail Eisenberg, *Reasons of Identity: A Normative Guide to the Political and Legal Assessment of Identity Claims* (Oxford: Oxford University Press, 2003), 30-1.

measures to avoid shaming them owing to morally irrelevant characteristics. Shame can become a toxic and volatile emotion, which actually and metaphorically effaces equal interactions between imperfectly rational beings. Fostering these exchanges within legal education is essential. This aspiration is necessary because the law is a potent emotional tool by which we can enhance or exacerbate the toxic consequences of shame. The problem that this dissertation does not resolve is that the state's commitment to sexual orientation protection and gender equality cannot avoid shaming those who consider the transgression of traditional sexual and gender mores as sinful.

Nevertheless, we should do everything ethical to decrease the effects of shame based on religious objections to homoerotic behaviour. A way that we can lessen shame is to have legal judgements that pay closer attention to the law as a cultural force in the regulation of subjects' religious experience. Such increased nuance may necessitate a greater description of the historical context informing legal and religious doctrines, like the contextual analysis undertaken in Chapter 3. Additionally, it is imperative to strengthen research concerning masculinity's influences upon popular and academic stereotypes of legal practice and religious experience. Moreover, we should contest the laws' tendency to create essentialized identities that do not reflect the messiness of life. The desire to possess rigid characters feeds our unfortunate propensity to shame one another.

Running through the history surveyed, philosophical literature objecting to homoerotic behaviour, some aspects of court cases for and against queer equality, the submissions concerning TWU's proposed law school, and some passages of *Law Society of British Columbia v. Trinity Western University,* there is frequently a lack of kindness, respect, and empathy. Whatever our position regarding queer rights and their intersection with religious freedom, these

are virtues that we can endeavour to cultivate. My phenomenological Kantian shame-based approach to discrimination provides some resources for undertaking this task while also illuminating some difficulties we encounter when trying to do so.

Sometimes Law Reaches a (Partially) Right Answer

I have adopted Berger's model of a cross-cultural encounter to describe the relationship between law and religion. I appreciate his argument for staying the cultural force of the law in certain instances. I also agree with the need to analyse religion with sensitivity and compassion, though I note the need for cross-cultural deference is attenuated in this case. TWU's CCA is anything but foreign to contemporary culture. Instead, several of the stipulations espouse things we have come to reject through a long and contentious process of moral deliberation. Queers rightly and finally have won.

While I do acknowledge the historical limitations and dangers of Kantian political philosophy when it is applied overzealously and with a lack of respect, I do not agree with Bernard Williams, when he says that Kantian philosophy, "is not involved enough; it is governed by a dream of a community of reason that is too far removed, as Hegel first said it was, from social and historical reality and any concrete sense of a particular ethical life."[11] I disagree with him on this point because my shame-based constructivist modifications to the spirit of Kantian ethics begin to gesture to the ways we may take greater account of the historical and emotional complexities of everyday life. Shame, and to a lesser extent, dignity, are inevitably historical and relational concepts.

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[11] Bernard Williams*, Ethics and the Limits of Philosophy* (London: Routledge, 2006), 197.

Ironically, given the context, to be an accredited place of legal learning, law schools must apply the Golden Rule (Matt. 7:12; Lk. 6:31; Lev. 19:18).[12] This is not simply a criticism of TWU's administration based on a "what would Jesus do" argument. The point here is that the decision of the SCC may be less coercive than it seems. It can be justified on grounds internal to TWU's own mandate. Whatever the university's leadership used to profess concerning the equality of queers, the covenant enacted discriminatory barriers. These were a just measure of the administration's attitude on this subject. As R. M. Hare suggests, "'If we were to ask of a person 'What are his moral principles ?'the way that we could be most sure of an answer is by studying what he did."[13] This good advice also has scriptural precedent (Matt.: 23:3; I Pet. 5:1). Whatever else the CCA does or does not do, and however often it is enforced, it enacts an environment of discrimination or fear of the same, that the SCC has said is equivalent to the experience of discrimination.[14]

Discrimination based on queerness should offend our intuitive sense of justice because it betrays a lack of kindness. Unjust discrimination not only harms the victims of it; it also injures perpetrators. Though I recognize the differences between the Queer Liberation Movement in Canada and the African American Civil Rights Movement in the United States, the Rev. Dr. Martin Luther King Jr's. description of segregation in this quotation from his Birmingham Jail letter is extremely perceptive. He criticizes the two main wrongs and harms of discrimination —

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[12] I, of course, do not mean to imply that the Golden Rule somehow is unique to the ideological construction styled "Judeo-Christian Civilization:" it is found in almost every culture. Joyce Hertzler, "The Golden Rule and Society," in *Ethics: Contemporary Readings*, Routledge Readings in Contemporary Philosophy, eds. Harry J. Gensler, Earl W. Spurgin, and James C. Swindal (New York: Routledge, 2005), 158-67.

[13] R.M. Hare, *The Language of Morals* (Oxford: Clarendon Press 1952), 1.

[14] *Vriend v. Alberta*, [1998] 1 SCR. 493, at para. 102, 156 DLR (4th) 385.

a feeling of shame and a feeling of ontological apartheid separating the victim from the rest of humankind. He says the following:

> Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority. To use the words of Martin Buber, the great Jewish philosopher, segregation substitutes an "I - it" relationship for the "I - thou" relationship and ends up relegating persons to the status of things. So, segregation is not only politically, economically, and sociologically unsound, but it is morally wrong and sinful. Paul Tillich has said that sin is separation. Isn't segregation an existential expression of man's tragic separation, an expression of his awful estrangement, his terrible sinfulness?[15]

Substantive equality, and the Kantian perspective it sometimes supports, is an important, though imperfect, ideal to prevent the unfortunate condition of existential separation that marginalized persons frequently experience. It stops ordeals of malignant paternalism, like the one Nelson Mandela suffered when white colonial South African prison guards forced him to wear shorts because he was black.[16] No human being should be unjustly degraded or "sealed into… Crushing objecthood."[17] The figure of the sodomite allows us to empathize with how this may feel.

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[15] Martin Luther King Jr., "Letter from Birmingham Jail," in *Applied Ethics: A Multicultural Approach*, 6th ed, eds. Larry May and Jill B. Delston (1963; repr., New York: Routledge, 2016), 237.

[16] Hellman, S. Nelson Mandela, *The Long Walk to Freedom* (New York: Little, Brown and Company, 1995), 387.

[17] Franz Fanon, *Black Skin, White Masks,* trans. Charles Lam Markmanm (London: Pluto Press, 1986), 109.

Hence, I follow Benjamin Golder in his commitment to Foucault's general theories, while still contending that Foucault himself (at least as evidenced by his later writings and actual political engagement) saw the deployment of rights as an effective form of counter-conduct, notwithstanding their tendency to reproduce the *status quo* with periodic liberal facelifts.[18] Though I realize that moral judgements are contingent, I agree with Rainer Forst that, despite the need to be sceptical of Reason as a metaethical abstraction, a finite conception of reason, which frequently has the capacity to briefly and partially transcend its historical horizon, is essential for the intelligibility of any emancipatory project.[19] Bluntly, there would be little point in academic research without an imminent and pragmatic conception of reason. Thus, while acknowledging the limitations of legal training and language, I also hope that a more nuanced form of "rights-talk" may be one among many crucial practices of a more democratic form of citizenship.[20]

Concluding Thoughts Apropos of Kafka

Among the many lessons I cherish from Sunday school is that the Gospels often express things in parables. There are limits to rational discourse and the extent to which such discourse may persuade us, especially concerning theological and ethical insights. These parables require much meditation and careful discernment. Jean-Paul Sartre is perceptive when he has one of his characters claim that "hell is other people." Much of life's existential torment comes from the

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[18] Ben Golder, *Foucault and the Politics of Rights* (Stanford, CA Stanford University Press, 2015), 21; Richard T. Ford, "Beyond Difference: A Reluctant Critique of Legal Identity Politics, "in *Left Legalism/Left Critique,* Wendy Brown and Janet Halley, eds. (Durham, NC: Duke University Press, 2002), 22.

[19] Rainer Forst, *Normativity and Power: Analyzing Social Orders of Justification*, trans. Ciaran Cronin (Oxford: Oxford University Press, 2017), 6-7.

[20] Karen Zivi, *Making Rights Claims: The Practice of Democratic Citizenship* (Toronto: Oxford University Press, 2012), 65-72.

often-excessive shame we experience because of them.[21] The torture of unjustified shame tends to scar us more deeply the longer we have worn the iron mask of a devalued identity. As Victor Hugo showed us in the introduction, persons need to be loved and respected for who they are and, sometimes, despite who they are to flourish. No one wants others to regard her as a not quite human. As the quotation from *Frankenstein* in chapter 1 demonstrated, when persons demean us like this, we often become the demons that they expect us to be.

Francis Reginald Scott provides the following quotation that directly states something at which I have been hinting throughout this dissertation; namely, that though constitutions have an aesthetic dimension in the phenomenological sense that Berger discusses, they also have an aesthetic dimension in the more common usage:

> [A] constitution confronts a society with the most important choices, for in the constitution will be found the philosophical principles and rules which largely determine the relations of the individual and cultural groups to one another and to the state. If human rights and harmonious relations between cultures are forms of the beautiful, then the state is a work of art that is never finished. Law thus takes its place, in its theory and practice, among man's highest and most creative activities.[22]

The ever-unfinished endeavour to create a society in which no one suffers under unjust shame is more than a quest to redress past wrongs, though this is a crucial aspect of it. It also needs the courage to imagine an admittedly utopian ideal for a more beautiful future. As well as such optimism, we require bravery. It is necessary, though always unpleasant, to remind ourselves of

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[21] Jean-Paul Sartre, "No Exit," trans. Stuart Gilbert, in *No Exit and Three Other Plays* (1946; repr., New York: Vintage International, 1989), 45.

[22] Francis Reginald Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto: University of Toronto Press, 1977), ix.

discrimination's turpitude and the attending ugly injuries it often causes to those whom we do not always comprehend completely.

In one of the most poignant, clever, and disturbing 20th-century novellas, *The Metamorphosis*, Franz Kafka tells the story of a salesperson, Gregor Samsa, who awakes one morning to find that he is a rather large and unappealing insect. He initially regards this experience with a detached curiosity. He does not link his former human consciousness and that of the insect. With his family and friends' support, he struggles to maintain his humanity, despite his strange accident. Their sympathy, though not entirely meritorious, allows him to retain a measure of human speech and positive emotions, such as kindness and humour. Gradually, however, as their resentment owing to his complete dependence upon them for care, in addition to his disgusting excreta, appearance and physical embodiment, increases, they quarantine him to his bedroom. This treatment first makes him feel indignation because of his conviction that, even though he may now be a bug, there is still an essential part of him that remains human.

Eventually, the shame owing to his insectoid state causes him to renounce his humanity altogether. He is confined in his room, much like a real closet or the metaphorical queer one. Forgotten by his family as a contemptuous inconvenience, the protagonist perishes from starvation. As well, *The Metamorphosis* was published in the middle of World War I. World War I began the collapse of the (colonial) modernist project, and with it, the idea of moral certainty. I have always taken it to mean that, though the Kantian may or may not be right that human beings have innate dignity, based on one abstract quality or another, if such an *a priori* quality does exist, concrete manifestations of it in human activity are very fragile things. They can disappear in an instant, like the unfortunate situation in which Gregor Samsa finds himself. He goes to bed

a moral person. He wakes up less than nothing. Kafka reminds us that shame is an embodied experience that impacts our very skin, or exoskeleton, in the case of his miserable antihero.[23]

Notwithstanding social advancement, often to experience oneself excluded, is to feel that there is an insect sleeping inside oneself. This alien is, sometimes, hungry and waiting to be triggered, eager to cannibalize our humanity." To paraphrase John Donne, no person is an island unto herself. Once we compromise on one ground of discrimination, we compromise on all of them. It is time to exercise the poltergeist of the sodomite from the common law. Such an exorcism will help us come closer to the world in which more marginalized persons can declare — echoing Kermit the Frog — "I am green, and it'll do fine, it's beautiful! and I think it's what I want to be."[24]

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[23] Franz Kafka, "The Metamorphosis,*"* in *The Metamorphosis and Other Stories*, trans. Joyce Crick. (Oxford: Oxford University Press, 2009), 29-74.

[24] Jim Henson performing as Kermit the Frog, *Bein' Green,* Jim Henson, Joe Raposo, 1970, Arts Music Inc, Track 13 on *Sesame Street: Platinum All-Time Favorites,* January 1st, 1995.

Appendix: TWU's Statement of Faith and Community Covenant

Statement of Faith

As a Christian University, Trinity Western University openly espouses a unifying philosophical framework to which all faculty and staff are committed without reservation. The university identifies with and is committed to historic orthodox Christianity as expressed by the official Statement of Faith.

What we believe:

1. God's gospel originates in and expresses the wondrous perfections of the eternal, triune God.

We believe in one God, Creator of all things, holy, infinitely perfect, and eternally existing in a loving unity of three equally divine Persons: the Father, the Son and the Holy Spirit. Having limitless knowledge and sovereign power, God has graciously purposed from eternity to redeem a people for Himself and to make all things new for His own glory.

2. God's gospel is authoritatively revealed in the Scriptures.

We believe that God has spoken in the Scriptures, both Old and New Testaments, through the words of human authors. As the verbally inspired Word of God, the Bible is without error in the original writings, the complete revelation of His will for salvation, and the ultimate authority by which every realm of human knowledge and endeavour should be judged. Therefore, it is to be believed in all that it teaches, obeyed in all that it requires, and trusted in all that it promises.

3. God's gospel alone addresses our deepest need.

We believe that God created Adam and Eve in His image, but they sinned when tempted by Satan. In union with Adam, human beings are sinners by nature and by choice, alienated from God, and under His wrath. Only through God's saving work in Jesus Christ can we be rescued, reconciled and renewed.

4. God's gospel is made known supremely in the Person of Jesus Christ.

We believe that Jesus Christ is God incarnate, fully God and fully man, one Person in two natures. Jesus—Israel's promised Messiah—was conceived through the Holy Spirit and born of the virgin Mary. He lived a sinless life, was crucified under Pontius Pilate, arose bodily from the dead, ascended into heaven and sits at the right hand of God the Father as our High Priest and Advocate.

5. God's gospel is accomplished through the work of Christ.

We believe that Jesus Christ, as our representative and substitute, shed His blood on the cross as the perfect, all-sufficient sacrifice for our sins. His atoning death and victorious resurrection constitute the only ground for salvation.

6. God's gospel is applied by the power of the Holy Spirit.

We believe that the Holy Spirit, in all that He does, glorifies the Lord Jesus Christ. He convicts the world of its guilt. He regenerates sinners, and in Him they are baptized into union with Christ and adopted as heirs in the family of God. He also indwells, illuminates, guides, equips and empowers believers for Christ-like living and service.

7. God's gospel is now embodied in the new community called the church.
We believe that the true church comprises all who have been justified by God's grace through faith alone in Christ alone. They are united by the Holy Spirit in the body of Christ, of which He is the Head. The true church is manifest in local churches, whose membership should be composed only of believers. The Lord Jesus mandated two ordinances, baptism and the Lord's Supper, which visibly and tangibly express the gospel. Though they are not the means of salvation, when celebrated by the church in genuine faith, these ordinances confirm and nourish the believer.

8. God's gospel compels us to Christ-like living and witness to the world.
We believe that God's justifying grace must not be separated from His sanctifying power and purpose. God commands us to love Him supremely and others sacrificially, and to live out our faith with care for one another, compassion toward the poor and justice for the oppressed. With God's Word, the Spirit's power, and fervent prayer in Christ's name, we are to combat the spiritual forces of evil. In obedience to Christ's commission, we are to make disciples among all people, always bearing witness to the gospel in word and deed.

9. God's gospel will be brought to fulfillment by the Lord Himself at the end of this age.
We believe in the personal, bodily and glorious return of our Lord Jesus Christ with His holy angels when He will bring His kingdom to fulfillment and exercise His role as Judge of all. This coming of Christ, at a time known only to God, demands constant expectancy and, as our blessed hope, motivates the believer to godly living, sacrificial service and energetic mission.

10. God's gospel requires a response that has eternal consequences.
We believe that God commands everyone everywhere to believe the gospel by turning to Him in repentance and receiving the Lord Jesus Christ. We believe that God will raise the dead bodily and judge the world, assigning the unbeliever to condemnation and eternal conscious punishment and the believer to eternal blessedness and joy with the Lord in the new heaven and the new earth, to the praise of His glorious grace. Amen.

Adopted by the TWU Board of Governors – Nov. 6, 2009
Available online at URL:
https://www.twu.ca/sites/default/files/statement_of_faith_without_signature.pdf

Community Covenant Agreement[1]

Our Pledge to One Another

Trinity Western University (TWU) is a Christian university of the liberal arts, sciences and professional studies with a vision for developing people of high competence and exemplary character who distinguish themselves as leaders in the marketplaces of life.

1. The TWU Community Covenant
The University's mission, core values, curriculum and community life are formed by a firm

[1] I have omitted TWU's biblical citations. This is the current version of the Community Covenant, as of January 5th, 2020.

commitment to the person and work of Jesus Christ as declared in the Bible. This identity and allegiance shapes an educational community in which members pursue truth and excellence with grace and diligence, treat people and ideas with charity and respect, think critically and constructively about complex issues, and willingly respond to the world's most profound needs and greatest opportunities.

The University is an interrelated academic community rooted in the evangelical Protestant tradition; it is made up of Christian administrators (including the members of the Board of Governors), faculty and staff who covenant together to form a community that strives to live according to biblical precepts, believing that this will optimize the University's capacity to fulfil its mission and achieve its aspirations.

The community covenant is a solemn pledge in which members place themselves under obligations on the part of the institution to its members, the members to the institution, and the members to one another. In making this pledge, members enter into a contractual agreement and a relational bond. By doing so, members accept reciprocal benefits and mutual responsibilities, and strive to achieve respectful and purposeful unity that aims for the advancement of all, recognizing the diversity of viewpoints, life journeys, stages of maturity, and roles within the TWU community. It is vital that each person who accepts the invitation to become a member of the TWU community carefully considers and sincerely embraces this community covenant.

2. Christian Community

The University's acceptance of the Bible as the divinely inspired, authoritative guide for personal and community life is foundational to its affirmation that people flourish and most fully reach their potential when they delight in seeking God's purposes, and when they renounce and resist the things that stand in the way of those purposes being fulfilled. This ongoing God-enabled pursuit of a holy life is an inner transformation that actualizes a life of purpose and eternal significance. Such a distinctly Christian way of living finds its fullest expression in Christian love, which was exemplified fully by Jesus Christ, and is characterized by humility, self-sacrifice, mercy and justice, and mutual submission for the good of others.

This biblical foundation inspires TWU to be a distinctly Christian university in which members and others observe and experience truth, compassion, reconciliation, and hope.

TWU envisions itself to be a community where members demonstrate concern for the well-being of others, where rigorous intellectual learning occurs in the context of whole person development, where members give priority to spiritual formation, and where service-oriented citizenship is modeled.

3. Community Life at TWU

The TWU community covenant involves a commitment on the part of all members to embody attitudes and to practise actions identified in the Bible as virtues, and to avoid those portrayed as destructive. Members of the TWU community, therefore, commit themselves to:

- cultivate Christian virtues, such as love, joy, peace, patience, kindness, goodness, faithfulness, gentleness, self-control, compassion, humility, forgiveness, peacemaking, mercy and justice
- live exemplary lives characterized by honesty, civility, truthfulness, generosity and integrity
- communicate in ways that build others up, according to their needs, for the benefit of all

- treat all persons with respect and dignity, and uphold their God-given worth from conception to death
- be responsible citizens both locally and globally who respect authorities, submit to the laws of this country, and contribute to the welfare of creation and society
- observe modesty, purity and appropriate intimacy in all relationships, reserve sexual expressions of intimacy for marriage, and within marriage take every reasonable step to resolve conflict and avoid divorce
- exercise careful judgment in all lifestyle choices, and take responsibility for personal choices and their impact on others
- encourage and support other members of the community in their pursuit of these values and ideals, while extending forgiveness, accountability, restoration, and healing to one another.

In keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions:

- communication that is destructive to TWU community life and inter–personal relationships, including gossip, slander, vulgar/obscene language, and prejudice
- harassment or any form of verbal or physical intimidation, including hazing
- lying, cheating, or other forms of dishonesty including plagiarism
- stealing, misusing or destroying property belonging to others
- sexual intimacy that violates the sacredness of marriage between a man and a woman
- the use of materials that are degrading, dehumanizing, exploitive, hateful, or gratuitously violent, including, but not limited to pornography
- drunkenness, under-age consumption of alcohol, the use or possession of illegal drugs, and the misuse or abuse of substances including prescribed drugs
- the use or possession of alcohol on campus, or at any TWU sponsored event, and the use of tobacco on campus or at any TWU sponsored event.

4. Areas for Careful Discernment and Sensitivity

A heightened level of discernment and sensitivity is appropriate within a Christian educational community such as TWU. In order to foster the kind of campus atmosphere most conducive to university ends, this covenant both identifies particular Christian standards and recognizes degrees of latitude for individual freedom. True freedom is not the freedom to do as one pleases, but rather empowerment to do what is best. TWU rejects legalisms that mistakenly identify certain cultural practices as biblical imperatives, or that emphasize outward conduct as the measure of genuine Christian maturity apart from inward thoughts and motivations. In all respects, the TWU community expects its members to exercise wise decision-making according to biblical principles, carefully accounting for each individual's capabilities, vulnerabilities, and values, and considering the consequences of those choices to health and character, social relationships, and God's purposes in the world.

TWU is committed to assisting members who desire to face difficulties or overcome the consequences of poor personal choices by providing reasonable care, resources, and environments for safe and meaningful dialogue. TWU reserves the right to question, challenge or discipline any member in response to actions that impact personal or social welfare.

Wise and Sustainable Self-Care

The University is committed to promoting and supporting habits of healthy self-care in all its members, recognizing that each individual's actions can have a cumulative impact on the entire community. TWU encourages its members to pursue and promote: sustainable patterns of sleep, eating, exercise, and preventative health; as well as sustainable rhythms of solitude and community, personal spiritual disciplines, chapel and local church participation, work, study and recreation, service and rest.

Healthy Sexuality

People face significant challenges in practicing biblical sexual health within a highly sexualized culture. A biblical view of sexuality holds that a person's decisions regarding his or her body are physically, spiritually and emotionally inseparable. Such decisions affect a person's ability to live out God's intention for wholeness in relationship to God, to one's (future) spouse, to others in the community, and to oneself. Further, according to the Bible, sexual intimacy is reserved for marriage between one man and one woman, and within that marriage bond it is God's intention that it be enjoyed as a means for marital intimacy and procreation. Honouring and upholding these principles, members of the TWU community strive for purity of thought and relationship, respectful modesty, personal responsibility for actions taken, and avoidance of contexts where temptation to compromise would be particularly strong.

Drugs, Alcohol and Tobacco

The use of illegal drugs is by definition illicit. The abuse of legal drugs has been shown to be physically and socially destructive, especially in its potential for forming life-destroying addictions. For these reasons, TWU members voluntarily abstain from the use of illegal drugs and the abuse of legal drugs at all times.

The decision whether or not to consume alcohol or use tobacco is more complex. The Bible allows for the enjoyment of alcohol in moderation, but it also strongly warns against drunkenness and addiction, which overpowers wise and reasonable behaviour and hinders personal development. The Bible commends leaders who abstained from, or were not addicted to, alcohol. Alcohol abuse has many long-lasting negative physical, social and academic consequences. The Bible has no direct instructions regarding the use of tobacco, though many biblical principles regarding stewardship of the body offer guidance. Tobacco is clearly hazardous to the health of both users and bystanders. Many people avoid alcohol and/or tobacco as a matter of conscience, personal health, or in response to an addiction. With these concerns in mind, TWU members will exercise careful discretion, sensitivity to others' conscience/principles, moderation, compassion, and mutual responsibility. In addition, TWU strongly discourages participation in events where the primary purpose is the excessive consumption of alcohol.

Entertainment

When considering the myriad of entertainment options available, including print media, television, film, music, video games, the internet, theatre, concerts, social dancing, clubs, sports, recreation, and gambling, TWU expects its members to make personal choices according to biblical priorities, and with careful consideration for the immediate and long-term impact on one's own well-being, the well-being of others, and the well-being of the University. Entertainment choices should be guided by the pursuit of activities that are edifying, beneficial and constructive, and by a preference for those things that are "true, noble, right, pure, lovely,

admirable, excellent, and praiseworthy," recognizing that truth and beauty appear in many differing forms, may be disguised, and may be seen in different ways by different people.

5. Commitment and Accountability

This formal covenant applies to those that serve the TWU community, that is, administrators, faculty and staff employed by TWU and its affiliates. Unless specifically stated otherwise, expectations of this covenant apply to both on and off TWU's campus and extension sites. Sincerely embracing every part of this covenant is a requirement for employment. Employees who sign this covenant also commit themselves to abide by campus policies published in their respective Faculty and Staff Handbooks.

TWU welcomes all students who qualify for admission, recognizing that not all affirm the theological views that are vital to the University's Christian identity. While students are not required to sign this covenant, they have chosen to be educated within a Christian university that unites reason and faith. The TWU community is committed to preparing students for a life of learning and service, including by developing a spiritual dimension through exposure to a reflective and caring, Christ-centred community that encourages a Christ-like way of life. Ensuring that the integrity of the TWU community is upheld may at times involve taking steps to hold one another accountable to the mutual commitments outlined in this covenant. As a covenant community, all members share this responsibility. The University also provides formal accountability procedures to address actions by community members that represent a disregard for this covenant. These procedures and processes are outlined in the Staff, and Faculty Handbooks and will be enacted by designated representatives of the University as deemed necessary.

Available online at URL:
https://www.twu.ca/sites/default/files/community_covenant_june_25_2019.pdf

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