

# Moral Judgment, Criminal Law and the Constitutional Protection of Religion

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## I. INTRODUCTION

Some of the most elemental aspects of modern criminal justice have their foundation in the relationship between law and religion. The jury, a central component of our imaginary — even if not so prevalent in our lived reality — of criminal justice in Canada, arose when, at the Fourth Lateran Council in 1215, the Pope forbade clergy from participating in the ordeals.<sup>1</sup> Ordeals were necessary because it was inconceivable for one man to stand in mortal judgment (and in this period in the development of the Western legal tradition, most criminal judgment was a mortal matter) of another. Only God had the authority to pass such judgment and the ordeals were the means of discerning God's will. Without the clergy the ordeals were impossible and without the ordeals there appeared to be no means of administering criminal justice. A new form of ordeal, the jury trial, filled the gap thus created in the administration of criminal justice. We carry forward, largely unacknowledged, this religious foundation in the systemic design of the modern Canadian criminal trial.

This deep religious influence touches our core substantive commitments in criminal justice as well. James Whitman has recently shown that the origins of the “reasonable doubt” standard can be traced to a theological concern for protecting the souls of the jurors.<sup>2</sup> To sit in judgment of and convict another individual was always a potential mortal sin; to allay jurors' fears — and, hence, to encourage conviction — they were reassured

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<sup>1</sup> Benjamin L. Berger, “Criminal Appeals as Jury Control: An Anglo-Canadian Historical Perspective on the Rise of Criminal Appeals” (2005) 10:1 Can. Crim. L. Rev. 1.

<sup>2</sup> James Q. Whitman, *The Origins of Reasonable Doubt: Theological Roots of the Criminal Trial* (New Haven: Yale University Press, 2007).

that, as long as they held no *reasonable* doubt, their souls would be safe. Proof beyond a reasonable doubt — originally a device of theological and moral comfort — has not only been constitutionalized through section 11(d) of the *Canadian Charter of Rights and Freedoms*,<sup>3</sup> but has been described as the “silver thread” that runs alongside the golden thread of the presumption of innocence, “forever intertwined in the fabric of criminal law”.<sup>4</sup> Again, only fleetingly glimpsed and sparingly discussed, the interaction of criminal law and religion continues to strongly inform our modern conception of criminal justice.

The introduction of the Charter in 1982 brought about a revolution in the procedural, evidentiary and substantive components of criminal justice in Canada. Indeed, the textual heart of the Charter is concerned with legal rights surrounding the criminal process and a good deal of ink has flown from some very fine pens revealing and analyzing the ways in which the Charter has fundamentally affected the administration of criminal justice in Canada.<sup>5</sup> The story of the Charter’s impact on the rich historical relationship between law and religion has not yet, however, been told. In some ways, given the examples that I have cited, this is not surprising. The jury trial and the demand for proof beyond a reasonable doubt have unmoored from their religious bases and the question, though interesting as an historical matter, may seem of little contemporary moment. There is, however, a way in which this absence of reflection on the post-Charter interaction of criminal law and the constitutional status of religion is conspicuous and, with certain questions of substantive criminal law and religion appearing on the horizon, increasingly so.

The hidden but abiding tension that I am positing between substantive criminal law and religious freedom and equality is really rather neat and can be sharply put. When one takes a conceptual step back, one sees that the constitutional protection of religious freedom and substantive criminal law are both centrally concerned with the role of the state in making and enforcing moral judgments, but are contesting this boundary from opposite directions. On the one hand, the constitutional protection of religious

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<sup>3</sup> Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, [hereinafter “the Charter”].

<sup>4</sup> *R. v. Lifchus*, [1997] S.C.J. No. 77, [1997] 3 S.C.R. 320, at para. 27 (S.C.C.).

<sup>5</sup> See, e.g., Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed. (Scarborough, ON: Thomson Carswell, 2005); Kent Roach, “Twenty Years of the *Charter* and Criminal Justice: A Dialogue Between a *Charter* Optimist, a *Charter* Realist, and a *Charter* Sceptic” (2003) 19 S.C.L.R. (2d) 39; James Stribopoulos, “Has Everything Been Decided? Certainty, the *Charter* and Criminal Justice” (2006) 34 S.C.L.R. (2d) 381; Alan Brudner, “Guilt under the Charter: The Lure of Parliamentary Supremacy” (1998) 40:3-4 *Crim. L.Q.* 287.

freedom and equality, a now-orthodox component of any modern constitutional democracy, is, at core, the quintessential reflection of the modern liberal demand that the state remain withdrawn from the domain of moral judgments and claims about the good life. At its most obvious level, this constraint precludes the state from imposing a particular religious view. More foundationally, however, section 2(a) of the Charter reflects the notion that beliefs and actions linked to judgments that flow from one's sense of the order of things should be left untouched by government. The inclusion of religion as a listed prohibited ground for state-imposed inequality underscores this commitment and reflects the historical tendency for state power to forget this admonition to the detriment of its religious citizens. On the other hand, the substantive criminal law is precisely a domain of moral judgment. It is a field not only concerned with notions of individual moral blame, but one whose very conceptual foundation is that society can judge certain actions to be so morally repugnant as to warrant state actions with fearsome consequences for the individual. As frankly conceded in the list of permissible ends of the federal criminal law power,<sup>6</sup> and despite certain contemporary arguments about the moral neutrality of modern criminal law to the contrary, whatever else the criminal law is doing — and it is always doing many things — it is a domain of law that uses the power of the state to enforce basic societal claims about morality. At this level of analysis, the constitutional protection of religious conscience and the substantive criminal law have been on a conceptual collision course.

The post-Charter silence surrounding these dimensions of our public law commitments is, from this perspective, somewhat remarkable. This is particularly so given the pre-Charter history of Anglo-Canadian criminal law, which includes the famous Hart-Devlin debate<sup>7</sup> and cases

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<sup>6</sup> The criminal law's power to enforce basic societal claims about morality was affirmed post-Charter in *R. v. Marmo-Levine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, at para. 77 (S.C.C.) [hereinafter "*Marmo-Levine*"]. Justices Gonthier and Binnie for the majority state:

The protection of vulnerable groups from self-inflicted harms does not, as Caine argues, amount to no more than "legal moralism". Morality has traditionally been identified as a legitimate concern of the criminal law (*Labatt Breweries*, *supra*, at p. 933) although today this does not include mere 'conventional standards of propriety' but must be understood as referring to societal values beyond the simply prurient or prudish. ...

<sup>7</sup> See Patrick Devlin, "Morals and the Criminal Law" in *The Enforcement of Morals* (London, Oxford and New York: Oxford University Press, 1965), at 1; Patrick Devlin, "Morals and Contemporary Social Reality" in *ibid.*, at 124; H.L.A. Hart, *Law, Liberty, and Morality* (London: Oxford University Press, 1966); H.L.A. Hart, "Immorality and Treason" in Richard A. Wasserstrom, ed., *Morality and the Law* (Belmont, CA.: Wadsworth Publishing, 1971), at 48. The Hart-Devlin

like *Switzman v. Elbling*<sup>8</sup> and *Roncarelli v. Duplessis*<sup>9</sup> that put the use of the penal law as an instrument of moral coercion at the centre of our constitutional consciousness. This paper is intended to begin to tell the story of this relationship between the constitutional protection of religion and the substantive criminal law, to offer some explanations for the relative silence surrounding the interaction of these two fields of law, and to demonstrate the way in which — and why — the issue is now re-emerging so powerfully.

The first step in uncovering this story is to expose a line of Charter authority that, whether by invalidating, condoning or otherwise influencing substantive criminal law, has been concerned with the freedom and equality of religion. This is an important part of our criminal and constitutional legacy and will be addressed in Part II. Yet, at the same time, substantive criminal law under the Charter has weathered an attempt to dull the sharpness of the criminal law's claims to the enforcement of a vision of the "good". This trend has suppressed the potential tension between the criminal law and the constitutional protection of conscientious difference but, as Part III will demonstrate, fissures are opening up and the conceptual friction that I have described is starting to give off heat. I will conclude with some reflections on how to manage conflicts between the immutably normative dimensions of substantive criminal law and our collective commitment to the constitutional protection of religious conscience.

## II. RELIGION AND THE CRIMINAL LAW IN THE CHARTER ERA

When inquiring into the interaction of an aspect of the Charter and an area of substantive law, there is an understandable tendency to engage a kind of flawed synecdoche. The analysis can readily and myopically turn exclusively to the constitutional provision in issue and, even more

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debate was, of course, influential in the decriminalization of homosexual conduct between consenting adults in 1969.

<sup>8</sup> [1957] S.C.J. No. 13, [1957] S.C.R. 285 (S.C.C.) [hereinafter "*Switzman*"].

<sup>9</sup> [1959] S.C.J. No. 1, [1959] S.C.R. 121 (S.C.C.) [hereinafter "*Roncarelli*"]. Although neither *Switzman* nor *Roncarelli* was a criminal or quasi-criminal case, both arose out of situations in which governments attempted to use the force of the penal law for deeply normative ends. Given that both were decided in a pre-Charter era, the protection of conscience in *Switzman* and religion in *Roncarelli* were cast in terms of division of powers and the limits of executive conduct under the rule of law, respectively. Given the factual matrix out of which they arise — the prohibition of expression of communist ideas and the imprisonment of Jehovah's Witnesses for distributing literature — the constitutional significance of both cases is strongly gilded by the broader question of the use of penal law to enforce moral views.

narrowly, to those instances in which a substantive law was challenged as contravening the specific provision in question. The provision itself thereby comes to stand as an emblem for the whole of the “constitutional” impact of a given rights protection. In this way, interested in whether associational rights have affected the criminal law, we look only to those cases in which a claim was made that a criminal law breached section 2(d); or, interested in the impact of the Charter protection of equality on the criminal law, we search for those criminal provisions that have been the subject of a section 15(1) analysis. The presence of a Charter protection has, however, far broader impact on substantive law than this narrow focus on the direct application of a constitutional right would suggest.<sup>10</sup>

This is certainly true of the influence of section 2(a) or religious equality on substantive criminal law. To be sure, those cases in which a criminal law is ruled constitutionally valid or invalid on the basis of section 2(a) are important instances to consider when assessing the influence of the constitutional protection of religious conscience on the criminal law. Indeed, it was through this kind of application in the criminal law arena that section 2(a) received its first and still most influential elucidation. But to begin to tell the story of religious freedoms and criminal law calls for a more expansive gaze. In addition to those cases in which the criminal law has been viewed as a threat to religion, there are important ways in which the substantive criminal law has been used as facilitative or protective of religious freedom and equality. In these instances, aspects of the criminal law have derived principled support from the existence of the constitutional protections of religion, even if the Charter was not directly applied. Finally, there are certain instances in which the constitutional presence of religious freedom and equality has been used as a resource in the interpretation of criminal laws that have only occasional or incidental impact on religious freedom and equality. These three categories differ in terms of the means and directness of legal impact, but all are united in disclosing a conceptually intimate relationship between substantive criminal law and the constitutional protection of religious conscience.

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<sup>10</sup> For the kind of expansive reading of the influence of a constitutional right’s impact on the criminal law for which I am advocating, in this case *Canadian Charter of Rights and Freedoms*, s. 15(1), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, see Christine Boyle, “The Role of Equality in Criminal Law” (1994) 58 Sask. L. Rev. 203.

## 1. Criminal Law and Substantive Constitutionality

Turning first to those instances in which the substance of criminal or quasi-criminal law has been tested against the protection of religious freedom and equality, one is immediately met with the jurisprudential Goliath that still stands at the gateway of not only religious freedoms but the modern approach to the interpretation and application of the Charter, more generally. Given that it established the purposive approach to interpreting the Charter, declared the Charter's sensitivity to both purpose and effect, articulated the doctrine of shifting purpose, and laid the soil from which the law of section 2(a) would grow, it is easy to forget that *R. v. Big M Drug Mart Ltd.*<sup>11</sup> is part of the corpus of post-Charter criminal and quasi-criminal jurisprudence. Chief Justice Dickson broke from the precedent established in *R. v. Robertson*,<sup>12</sup> by holding that the use of penal legislation to enforce a Christian conception of the Sabbath was inconsistent with the core value pursued by section 2(a) of the Charter: "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".<sup>13</sup> Chief Justice Dickson explained that this kind of freedom entails the absence of both constraint and coercion, with coercion including not only "such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction" but also "indirect forms of control which determine or limit alternative courses of conduct available to others".<sup>14</sup> The summary conviction offence at issue in *Big M* offended the goods protected by section 2(a) by "bind[ing] all to a sectarian Christian ideal", thereby working "a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-Christians".<sup>15</sup> Given its objectionable purpose, the law could not be saved by section 1.

*Big M* is, thus, an instance of section 2(a) being used to invalidate penal legislation in the name of protecting religious freedom. Although *Big M* would have foundational impact on the interpretation of the Charter as a whole, as well as on the concept of religious freedom embodied in section 2(a), it is worth noting the particular manner in

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<sup>11</sup> [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.) [hereinafter "*Big M*"].

<sup>12</sup> [1963] S.C.J. No. 62, [1963] S.C.R. 651 (S.C.C.).

<sup>13</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 336 (S.C.C.).

<sup>14</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 336-37 (S.C.C.).

<sup>15</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 337 (S.C.C.).

which Dickson C.J.C.'s analysis in the case was influenced by and, as such, spoke directly and meaningfully to the very nature of criminal law. First, Dickson C.J.C. spoke specifically of the evil of this legislation being the attempt to use "the force of the state" to bind all individuals to "values rooted in Christian morality".<sup>16</sup> This objection to the conjunction of particular moral claims and "the force of the state" — with a specifically articulated concern for "direct commands to act or refrain from acting on pain of sanction"<sup>17</sup> — is an objection that drives to the core of the criminal law, the most coercive means at the disposal of the state for enforcing a normative conception of social conduct. In this way, the very casting of the issue in *Big M* invites the question of the relationship between religious freedom and criminal law outlined in the introduction to this paper. Yet there is a degree of ambivalence in the judgment disclosed by the second way in which *Big M* spoke interestingly and directly to the criminal law. Chief Justice Dickson articulated a principled limit on the scope of religious freedom, stating that the freedom contemplated in section 2(a) was "subject to such limitations as are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others".<sup>18</sup> The reference to the parallel rights and freedoms of others portends the conflict of rights jurisprudence that would become the signal feature of religious liberties jurisprudence;<sup>19</sup> but it is the first half of the sentence that is of most interest for present purposes. This list of interests mirrors the list of permissible bases for the use of the federal criminal law power: "public peace, order, security, health and morality".<sup>20</sup> These matters — public safety, order, health and morals — are both the limits of religious freedom and the permissible uses of the criminal law power. Although unelaborated by the Court, there is here a seed of recognition that the nature of the criminal law is tightly imbricated with religious freedom. On the one hand, given its intrinsic permeability to morality and inherently coercive form, criminal law poses the quintessential threat to the freedoms guaranteed in section 2(a). On the other hand, the freedoms guaranteed in section 2(a) will be subject to limitation on bases

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<sup>16</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 337 (S.C.C.).

<sup>17</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 337 (S.C.C.).

<sup>18</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 337 (S.C.C.).

<sup>19</sup> See, e.g., *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772 (S.C.C.) [hereinafter "*Trinity Western*"]; *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710 (S.C.C.).

<sup>20</sup> *Labatt Brewing Co. v. Canada*, [1979] S.C.J. No. 134, [1980] 1 S.C.R. 914, at 933 (S.C.C.). See also *R. v. Malmo-Levine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, at para. 77 (S.C.C.).

identical to the legitimate ends of criminal law. The Court's subsequent ruling upholding Sunday closing laws as justified infringements on section 2(a) confirmed that the boundary between criminal legislation and religious freedom would be a fraught one, largely contested within the terms of section 1.<sup>21</sup>

Cases exploring the constitutionality of criminal and quasi-criminal legislation in light of religious freedoms and equality can be found at all levels of Canadian courts. Certain cases have addressed the constitutionality of truancy laws in light of religious freedoms,<sup>22</sup> an issue that evocatively recalls the dark pre-Charter history of the use of the criminal law against the Doukhobours of the B.C. interior.<sup>23</sup> Other cases have addressed freedom of religion as it applies to the quasi-criminal regulation of hunting and Aboriginal spiritual life.<sup>24</sup> The identification doctrine found in the realm of corporate criminal liability has even been challenged as contrary to section 2(a) when used to incriminate a religious organization.<sup>25</sup> Allow me to draw out in somewhat greater detail two examples of the courts dealing with claims that criminal or quasi-criminal laws are invalid as offensive to religious freedom.

The first, *R. v. S. (M.)*,<sup>26</sup> is interesting both in that it, like *Big M*,<sup>27</sup> involves an argument about freedom *from* religion and also because the Court makes particularly overt claims about the interaction among criminal law, religious freedom, and moral judgment. In *R. v. S. (M.)*, the accused challenged the constitutionality of section 155 of the *Criminal Code*,<sup>28</sup> the incest provision. Among his various grounds was the argument that the rule against incest is a religiously based prohibition arising from Jewish and Christian principles that he did not share and that, as such, it constituted religious coercion through the criminal law. Justice Donald's rejection of this argument, though unceremonious, powerfully expressed a view of the legitimate ambit of the criminal law, a scope that necessarily

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<sup>21</sup> *R. v. Edwards Books and Art Ltd.*, [1986] S.C.J. No. 70, [1986] 2 S.C.R. 713 (S.C.C.).

<sup>22</sup> See, e.g., *R. v. Jones*, [1986] S.C.J. No. 56, [1986] 2 S.C.R. 284 (S.C.C.).

<sup>23</sup> See John P.S. McLaren, "The Doukhobor Belief in Individual Faith and Conscience and the Demands of the Secular State" in John McLaren & Harold Coward, eds., *Religious Conscience, the State, and the Law: Historical Contexts and Contemporary Significance* (Albany: State University of New York Press, 1999), at 117.

<sup>24</sup> *R. v. Jack*, [1985] S.C.J. No. 63, [1985] 2 S.C.R. 332 (S.C.C.).

<sup>25</sup> *R. v. Church of Scientology of Toronto*, [1997] O.J. No. 1548, 116 C.C.C. (3d) 1 (Ont. C.A.).

<sup>26</sup> [1996] B.C.J. No. 2302, 111 C.C.C. (3d) 467 (B.C.C.A.).

<sup>27</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

<sup>28</sup> R.S.C. 1985, c. C-46.

implied limits on conscience-based objections to the application of the criminal law:

I think this argument is utterly specious. The criminal law fundamentally deals with right and wrong. The *Criminal Code* gives expression to our society's moral principles. Section 155 seeks to prevent the harm to individuals and to the community caused by incest. The fact that the offence is rooted in a moral principle developed within a religious tradition cannot support a claim for interference with the freedom to believe or not to believe under the *Charter*.<sup>29</sup>

The other case of unique interest is *R. v. Morgentaler*.<sup>30</sup> The case is remembered and treated primarily as a section 7 fundamental justice case but it must be recalled that the challenge to section 251 of the *Criminal Code*<sup>31</sup> was also framed as a challenge based on section 2(a) of the Charter. Given that the case ultimately turned on the section 7 question and that both Dickson C.J.C. and Beetz J. declined to address the section 2(a) argument,<sup>32</sup> it is not surprising that this dimension of the case is often overlooked. Yet Wilson J., in reasons that have since grown in influence and jurisprudential impact, gave an important place to the analysis of freedom of religion and conscience in the constitutional review of substantive criminal law. Justice Wilson embedded her consideration of section 2(a) within an overarching section 7 analysis, reasoning that “a deprivation of the section 7 right which has the effect of infringing a right guaranteed elsewhere in the Charter cannot be in accordance with the principles of fundamental justice”.<sup>33</sup> She held that the deprivation of section 7 occasioned by section 251 offended section 2(a) of the Charter “because . . . the decision whether or not to terminate a pregnancy is essentially a moral decision, a matter of conscience”<sup>34</sup> and that the conscience at issue in cases of abortion is the conscience of each individual woman. Justice Wilson invoked Dickson C.J.C.'s discussion of freedom of conscience in *Big M*<sup>35</sup> and went on to note that “conscientious beliefs which are not religiously motivated are equally protected” by section 2(a).

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<sup>29</sup> *R. v. S. (M.)*, [1996] B.C.J. No. 2302, 111 C.C.C. (3d) 467, at 483-84 (B.C.C.A.).

<sup>30</sup> [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30.

<sup>31</sup> R.S.C. 1970, c. C-34.

<sup>32</sup> Even the dissent dealt only passingly with *Canadian Charter of Rights and Freedoms*, s. 2(a), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at 156 (S.C.C.).

<sup>33</sup> *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at 175 (S.C.C.).

<sup>34</sup> *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at 175-76 (S.C.C.).

<sup>35</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

“[T]he role,” she argued, “of the state in a democracy is to establish the background conditions under which individual citizens may pursue the ethical values which in their view underlie the good life.”<sup>36</sup> In this case, the criminal law was a threat to the liberty of citizens to pursue their visions of the good life.

*R. v. S. (M.)*<sup>37</sup> and Wilson J.’s reasoning in *R. v. Morgentaler*<sup>38</sup> demonstrate the flip sides of the coin at issue when criminal laws are challenged as contrary to section 2(a). On the one side one finds the moral freedom represented by section 2(a) and, on the other, the moral regulation inherent in the criminal law. Such cases, taking their cue from *Big M*,<sup>39</sup> involve a sense of the threat that the criminal law poses to religion, but also a recognition of the socially constitutive force of the criminal law.

## 2. The Criminal Law as a Means to Religious Freedom and Equality

The impact of section 2(a) of the Charter on substantive criminal law is felt most directly and, hence, appears most robustly in the jurisprudence in cases that conform to the liberal model of negative rights: the government acts as the singular antagonist of the individual and the individual seeks — sometimes successfully, sometimes not — to repel the coercive power of the state by invoking freedom of religion and conscience. This is the picture of freedom and of rights painted in *Big M*<sup>40</sup> and is the most apparent way in which the constitutional protection of religious freedom and equality has affected the criminal law. The presence of section 2(a) and the protection of religion in section 15(1) have had, however, more structurally positive, though less obvious, influences on substantive Canadian criminal law. In particular, there is a narrow range of aspects of contemporary criminal law that reflects the very different image of criminal law as a tool to *secure* and to *facilitate* the enjoyment of religious freedom and equality. In these instances, aspects of criminal law are either supported by or consciously crafted to protect religious conscience.

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<sup>36</sup> *R. v. Morgentaler*, [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30, at 178 (S.C.C.).

<sup>37</sup> [1996] B.C.J. No. 2302, 111 C.C.C. (3d) 467 (B.C.C.A.).

<sup>38</sup> [1988] S.C.J. No. 1, [1988] 1 S.C.R. 30 (S.C.C.).

<sup>39</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

<sup>40</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

A fine example of a substantive criminal law that draws support from the protection of religious freedom and equality is the prohibition on hate speech found in section 319 of the *Criminal Code*.<sup>41</sup> The offence prohibits the wilful promotion of hatred against identifiable groups. As a limitation on the scope of permitted expression, the provision was challenged in *R. v. Keegstra*<sup>42</sup> as contrary to freedom of expression. Mr. Keegstra was a teacher in Eckville, Alberta, who taught his pupils that Jews were “treacherous”, “subversive”, “sadistic”, and that they sought to destroy Christianity. He also taught them that the Holocaust was fabricated by the Jews to gain sympathy and that the Jewish people were responsible for many of the ills of the world.

In reviewing the history of hate propaganda legislation, Dickson C.J.C. emphasized the historical link between hate-speech laws and the suppression of anti-Semitic and Nazi propaganda, and identified the objective of section 319 as the prevention of discrimination against and harms to the dignity of minority groups, as well as the avoidance of a social message insidiously promoting a sense of the “racial or religious inferiority”<sup>43</sup> of some members of the community. In upholding the limit on expressive rights as justified under section 1, Dickson C.J.C. drew support for the provision from sections 15 and 27 of the Charter, which reflect a “strong commitment to the values of equality and multiculturalism, and hence underline the great importance of Parliament’s objective in prohibiting hate propaganda”.<sup>44</sup> In particular, the criminal prohibition on hate speech was consistent with the recognition “that Canada possesses a multicultural society in which the diversity and richness of various cultural groups is a value to be protected and enhanced”.<sup>45</sup> Section 319 reflected Parliament’s legitimate choice to “reduce racial, ethnic and religious tension in Canada” by “suppress[ing] the wilful promotion of hatred against identifiable groups”.<sup>46</sup>

The prohibition of hate speech thus stands as one example of a use of the substantive criminal law to attempt to protect and facilitate religious equality and freedom in Canada. The theory of such provisions is that true equality and meaningful liberty cannot be achieved in a society in which members of discrete minorities are subject to public

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<sup>41</sup> R.S.C. 1985, c. C-46.

<sup>42</sup> [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.).

<sup>43</sup> *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697, at 747-48 (S.C.C.).

<sup>44</sup> *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697, at 755 (S.C.C.).

<sup>45</sup> *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697, at 757 (S.C.C.).

<sup>46</sup> *R. v. Keegstra*, [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697, at 758 (S.C.C.).

degradation and an atmosphere of legally abetted intolerance. On this view, the criminal law has a positive role to play in creating a tolerant, hospitable social environment conducive to the full recognition of the dignity of others. At no point in *R. v. Keegstra*<sup>47</sup> did the Court invoke section 2(a) of the Charter, nor was this overtly treated as an instance of a “conflict of rights” of the form we have become used to seeing in the section 2(a) jurisprudence. Rather, in *R. v. Keegstra* we find an instance in which the criminal law is actively deployed as an instrument in the structuring of a public space in which religious and cultural diversity can flourish without fear or discrimination. This is an arena in which the Charter’s commitment to equality and multiculturalism — raised here in a case of religious and cultural intolerance — buttressed the constitutionality of an aggressive and highly contentious criminal law.

In such cases, we are up against a somewhat different but no less interesting form of claim about the relationship between religion and the criminal law than we saw with challenges to the constitutionality of criminal laws on the basis of section 2(a). The majority decision in *R. v. Keegstra*<sup>48</sup> drips with approval for the morally constructive use of the criminal law. As applied to religious freedom and tolerance of religious difference, this is an attempt to use the force of the criminal law to secure the normative difference that is characteristic of tolerance for religious cultures. This is fascinatingly precarious terrain for the criminal law to tread in a liberal democracy, as was made eminently clear in *R. v. Zundel*.<sup>49</sup> Only two years after *R. v. Keegstra*, the majority of the Court invalidated section 181 of the *Criminal Code*,<sup>50</sup> the false news provision. In a case involving the attempt to use the criminal law to limit the expression of virulent anti-Semitism, the majority found that, even if section 181 was designed to promote the kind of social and religious tolerance upon which the constitutionality of the statute in *R. v. Keegstra* turned, in this case the legislation failed at the proportionality stage. The reasoning found in Cory and Iacobucci JJ.’s spirited dissent is of most interest for present purposes. The dissenting justices emphasize that the provision in question “provides protection, by criminal sanction, not only to Jewish Canadians but to all vulnerable minority groups and individuals”.<sup>51</sup>

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<sup>47</sup> [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.).

<sup>48</sup> [1990] S.C.J. No. 131, [1990] 3 S.C.R. 697 (S.C.C.).

<sup>49</sup> [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731 (S.C.C.).

<sup>50</sup> R.S.C. 1985, c. C-46.

<sup>51</sup> *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731, at 809 (S.C.C.).

The argument for the use of the criminal law in the protection of religious freedom and equality could not have been made more sharply and passionately:

The tragedy of the Holocaust and the enactment of the Charter have served to emphasize the laudable s. 181 aim of preventing the harmful effects of false speech and thereby promoting racial and social tolerance. In fact, it was in part the publication of the evil and invidious statements that were known to be false by those that made them regarding the Jewish people that [led] the way to the inferno of the Holocaust. The realities of Canada's multicultural society emphasize the vital need to protect minorities and preserve Canada's mosaic of cultures.<sup>52</sup>

Again, one does not find a direct application of the right to freedom of religion or religious equality in this dissent. Instead, one finds a strident defence of a substantive criminal law that draws support from the ethic of religious freedom and tolerance reflected in the Charter.

The laws prohibiting hate speech and false news are emblematic of this second relationship between the constitutional protection of religious liberties and the substantive criminal law. Similar sentiments can be found in other, less visibly and hotly debated, aspects of contemporary criminal law. For example, Parliament's statement of the principles of sentencing includes a direction that the fact that a crime was motivated by religious bias, prejudice or hate should be treated as an aggravating factor. Although not conventionally thought of as an aspect of substantive criminal law, such sentencing directions are reasonably conceived of as normative "riders" on substantive laws, outlining the circumstances of an offence that ought to attract particular social disapprobation. No doubt enacted for historical reasons unlinked to notions of expansive religious tolerance, other examples of this affirmative use of the criminal law can nevertheless be found in certain substantive criminal offences that specifically protect religious gatherings and the conduct of religious ceremonies.<sup>53</sup> Furthermore,

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<sup>52</sup> *R. v. Zundel*, [1992] S.C.J. No. 70, [1992] 2 S.C.R. 731, at 820 (S.C.C.).

<sup>53</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 176. See *R. v. Skoke-Graham*, [1985] S.C.J. No. 6, [1985] 1 S.C.R. 106 (S.C.C.) [hereinafter "*Skoke-Graham*"], in which the offence of disturbing religious worship was considered by the Supreme Court of Canada. This is a fascinating case from Nova Scotia in which the Court was faced with six accused who were charged with having repeatedly insisted on kneeling to receive communion, rejecting a diocesan directive that communion should be received by parishioners while standing rather than kneeling. In each instance, the priest asked the accused to stand, at which point they returned to their seats without receiving communion. Although the courts below convicted, the Supreme Court allowed the appeals, entering acquittals. Justice Dickson, writing for the majority, reasoned that the brevity and peacefulness of the "disturbance" meant that it did not constitute "disorder" and, hence, could not found a conviction

in 2001, Parliament amended section 430 of the *Criminal Code*,<sup>54</sup> adding subsection (4.1):

(4.1) Every one who commits mischief in relation to property that is a building, structure or part thereof that is primarily used for religious worship, including a church, mosque, synagogue or temple, or an object associated with religious worship located in or on the grounds of such a building or structure, or a cemetery, if the commission of the mischief is motivated by bias, prejudice or hate based on religion, race, colour or national or ethnic origin,

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
- (b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

Speaking to this provision before Parliament, Ms Sarmite Bulte, Parliamentary Secretary to the Minister of Canadian Heritage, characterized this as a “very serious offence” that was designed to “better protect from hatred those who have become vulnerable because they belong to a group distinguished by factors such as race, religion or ethnic origin”.<sup>55</sup> The facilitative role of the criminal law with respect to religious freedom was most apparent when Ms Bulte explained that the government’s chief concern was that “[s]uch mischief would create fear among worshippers of a specific religion and divert them from the practise of their religion”.<sup>56</sup>

In all of these cases, the substantive criminal law, though not directly subject to Charter scrutiny, derives support and authority from the constitutional protection of religious conscience. This is a less visible, though no less significant, influence of religious freedom and equality on the substantive criminal law.

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under (then) s. 172. In separate concurring reasons, Wilson J. took a somewhat different tack, but also concluded that the activities in question were not of the sort contemplated by Parliament in creating this crime. She also argued that there were sound policy reasons to resist an interpretation of the provision that would “make the criminal law available as a tool for the enforcement of liturgical practice or the settlement of liturgical disputes” (at 134). The case is also interesting insofar as the Court concluded that an offence with explicitly religious purposes that “serves the needs of public morality” (at 115) was *intra vires* the federal government by virtue of the criminal law power.

<sup>54</sup> R.S.C. 1985, c. C-46.

<sup>55</sup> *House of Commons Debates*, No. 095 (October 16, 2001), at 1235 (Sarmite Bulte).

<sup>56</sup> *House of Commons Debates*, No. 095 (October 16, 2001), at 1235 (Sarmite Bulte).

### 3. The Constitutional Protection of Religion as an Interpretive Resource in the Criminal Law

This last category of possible influences of the constitutional protection of religion on the criminal law involves neither claims that criminal laws interfere with religious liberty or equality nor arguments garnering support for criminal laws from constitutional commitments to religious diversity and equality. Instead, what I have in mind are those ways in which the constitutional protection of religion might be seen to influence the judicial interpretation and construction of those myriad criminal law concepts that rely upon assumptions about what is of social value, what affects our perception of events, and what moulds our reactions to the events that take place in the world, rendering them subjectively genuine or objectively reasonable, as the case may be. This arena of subtle influence has, perhaps, the greatest potential for impact on the day-to-day application of the criminal law but is, as yet, the least judicially explored.

Though an evidence case, *R. v. Gruenke*<sup>57</sup> provides an example of this kind of interpretive influence of the constitutional protection of religion. In that case, the majority of the Court concluded that, although a class privilege for religious communications was not required by virtue of section 2(a), a case-by-case privilege for religious communications could be recognized when “the individual’s freedom of religion [would] be imperilled by the admission of the evidence”.<sup>58</sup> Chief Justice Lamer reasoned that the appropriate means of taking account of section 2(a) in the application of the common law of evidence was to allow the case-by-case criteria, or “Wigmore factors”, to “be informed . . . by the *Charter* guarantee of freedom of religion”.<sup>59</sup> What we see here is the application and interpretation of the common law being influenced by the presence of the Charter protection of religious freedom; this is so independently of the rule that the common law should be developed in keeping with those more general, elusive and protean “*Charter* values”.<sup>60</sup> Though it is drawn from the realm of criminal evidence, *R. v. Gruenke* shows with

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<sup>57</sup> [1991] S.C.J. No. 80, [1991] 3 S.C.R. 263 (S.C.C.).

<sup>58</sup> *R. v. Gruenke*, [1991] S.C.J. No. 80, [1991] 3 S.C.R. 263, at 290 (S.C.C.).

<sup>59</sup> *R. v. Gruenke*, [1991] S.C.J. No. 80, [1991] 3 S.C.R. 263, at 290 (S.C.C.).

<sup>60</sup> *R. v. Salituro*, [1991] S.C.J. No. 97, [1991] 3 S.C.R. 654, at 675 (S.C.C.); see *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, 2007 SCC 27, at para. 81 (S.C.C.) [hereinafter “*HEU*”], for a list of Charter values. See text accompanying note 95, below.

clarity and transparency the manner in which the interpretation of common law tests is influenced by the constitutional protection of religion.

As Christine Boyle argued in her 1994 article assessing the role of equality in criminal law, the principal locus for this kind of soft interpretive effect of a Charter right on substantive criminal law is in the criminal law's use of objective "reasonableness" tests.<sup>61</sup> It is now perhaps trite to observe that whenever the law employs the "reasonable person" as a diagnostic for determining acceptable conduct, it relies upon a fiction constructed with assumptions and judgments about normativity. In a society committed to multiculturalism and religious pluralism, the issue thus arises: is the reasonable criminal law actor a religious person? Do the beliefs, commitments and world views that comprise religious conscience have relevance when assessing whether a person acted reasonably? And, in particular, does the presence of the Charter protection of religious freedom in section 2(a) and religious equality in section 15(1) guarantee to the citizen that this should be so?

These questions are, in my view, one of the frontiers in thinking about the relationship between the constitutional protection of religion and the substantive criminal law. This is an area in which we are beginning to witness the seed planted by Dickson C.J.C. in *Big M*<sup>62</sup> — the creeping recognition that the morality pursued by the criminal law may circumscribe the moral freedom guaranteed by section 2(a) — coming to fruition. Crimes that involve objective forms of *mens rea* and defences that test the accused's conduct against that of a "reasonable person" all potentially raise this question of how to conceive of the objective actor and the impact, if any, of section 2(a) on the construction of this hypothetical subject. One imagines, for example, the adjudication of a claim of necessity or duress being informed by a religiously or culturally influenced sense of the range of "reasonable alternatives".<sup>63</sup> As I will demonstrate below, the fraught law of provocation shows that the

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<sup>61</sup> Christine Boyle, "The Role of Equality in Criminal Law" (1994) 58 Sask. L. Rev. 203, at 212.

<sup>62</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

<sup>63</sup> See, e.g., Alison Dundes Renteln, *The Cultural Defense* (Oxford and New York: Oxford University Press, 2004), in which the author argues for the formal recognition of a cultural defence. Such a defence must, at minimum, guarantee "not only that cultural evidence be admitted into the courtroom, but also that the cultural logic must be taken seriously" (at 14). Renteln argues from the premise that, for all people, "culture shapes cognition and conduct", concluding that "[i]n pluralistic societies, it is especially vital that judges acknowledge variation in motives to better understand the behavior of individuals who come before them" (at 6). It should be noted that Renteln is interested in the "cultural defence" as it is raised both within and beyond the criminal law.

imaginative leap required is a small one. Indeed, the legitimacy of taking account of the religious beliefs of an accused who claims to have been provoked to kill is a live issue in substantive criminal law, largely because the beliefs that form the basis of these claims grate so powerfully against what should be our fierce commitment to gender equality. In this respect, the “soft” influence of religious freedom on the substantive criminal law puts us squarely against the hard issue that I suggested is coming to characterize the relationship between criminal law and the constitutional protection of religion: when does the moral liberty assured by section 2(a) give way to the moral imperatives of society at large as reflected and enforced by criminal law?

### III. RELIGION AND THE CRIMINAL LAW AT ODDS

Thus far, I have shown that there is a story to be told about the relationship between the constitutional protection of religion and substantive Canadian criminal law. This relationship has been more or less subtle and has demanded some excavation to reveal. This story has been an interesting one, in part, because it has disclosed different faces of an interplay between the socially constructive ends of the criminal law and religion/religious liberty as an object of social construction. When the influence of sections 2(a) and 15(1) of the Charter has taken the form of arguments for the constitutional invalidity of criminal law, I have argued that the underlying dynamic is one wherein the moral freedom suggested by the protection of religious conscience has been tested against the morally constitutive role of substantive criminal law. The second form of influence — the use of the constitutional protection of religious freedom and equality as a resource from which to draw support for criminal laws — has inverted this dynamic, snapping the normative force of the criminal law squarely behind and in aid of the moral and cultural diversity sought by religious freedom and equality. When the law is called upon to interpret and apply the quotidian concepts of substantive criminal law with religious freedoms in mind, which of these two dynamics will prevail is a question left open: will concepts such as “reasonableness” be an instrument of circumscription, as suggested in *Big M*,<sup>64</sup> or is this precisely the place at which the arguments for a religiously inclusive sense of “ordinary” lived experience is most pressing?

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<sup>64</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

Once this charged dynamic at play in the relationship between substantive criminal law and the constitutional protection of religion has been uncovered, it appears somewhat remarkable that there has been so little jurisprudential and scholarly debate on this area of Criminal-Constitutional law. Despite the social crucible that this dynamic represents, since *Big M*,<sup>65</sup> principled engagements with the difficult issues that characterize the interaction between substantive criminal law and religion have been comparatively few. In those cases in which this interaction has been addressed, the issues have not been cast as I have suggested and the stakes that I have described have not been explicitly drawn out for scrutiny and discussion.

But the ground now seems to be shifting. Cases are emerging in which claims of religious freedom and equality are putting hard questions to substantive criminal law. I want to look particularly to two contemporary examples, both of which show a slightly different face of the surfacing moral dynamic that subtends this relatively unexamined area. Before doing so, a word or two is in order about why this issue, largely dormant for so long, has now become so volatile. Why is it that, in the past few years, we are seeing so much more clearly the fraught entanglement of the protection of religious liberties and the substantive criminal law?

### 1. Accounting for the Awakening

It is an inherently perilous undertaking to attempt to provide causative explanations for the emergence of legal issues at a given point in the jurisprudential life of a country. Furthermore, satisfying explanations are more likely to lie in the mouths of social historians rather than theorists of constitutional and criminal law. Nevertheless, as one looks at this incipiently fraught relationship between substantive criminal law and the constitutional protection of religious liberties, certain trends in the law on both sides of the aisle are, at minimum, suggestive of why the provocative moral dynamic that exists between these two areas at the level of theory seems to be manifesting in lived reality.

Over the last 15 years or so, substantive criminal law has weathered something of a muting of its moral urgency. Viewed against this trend, *R. v. S. (M.)*<sup>66</sup> is precisely an interesting case because Donald J.'s unabashed assertion that the criminal law "gives expression to our society's moral

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<sup>65</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

<sup>66</sup> [1996] B.C.J. No. 2302, 111 C.C.C. (3d) 467 (B.C.C.A.).

principles” stands firmly against the main current of judicial statements about the nature of criminal law in the Charter era. In a number of dimensions of substantive criminal law, the courts have sounded a general retreat from more overt forms of the claim that, whatever else it is also doing, the criminal law is essentially engaged in communicating and enforcing societal norms. To be sure, the courts have confirmed, not resiled from, the facial legal position that a valid criminal law may pursue moral ends, the position reflected in Rand J.’s definition of the criminal law power articulated in the *Margarine Reference*.<sup>67</sup> Indeed, in *R. v. Malmo-Levine*,<sup>68</sup> the Supreme Court of Canada reaffirmed this definition of the Federal criminal law power as it nominally rejected the notion that the harm principle — that classic liberal block on morals legislation — was a principle of fundamental justice.<sup>69</sup> I say “nominally” because, despite its statements about the legitimacy of morals regulation, the Court in *R. v. Malmo-Levine* ultimately leaned on the existence of harm and, in doing so, fell into line with the general pattern in the contemporary interpretation of the criminal law. This pattern is most apparent in the realm of indecency and obscenity, areas of substantive criminal law whose application seems to call most plainly for a kind of case-by-case moral judgment. Yet even in this most overtly moral of criminal arenas, the recent case of *R. v. Labaye*<sup>70</sup> has marked the culmination of a transformation of the standard for both obscenity and indecency “from a community standards test to a harm-based test”.<sup>71</sup> The test for indecency and obscenity now “amounts to a test of harm incompatible with society’s proper functioning”.<sup>72</sup>

Of course, as the Court itself accepted in *R. v. Malmo-Levine*,<sup>73</sup> the substitution of harm for community standards does not eradicate the moral content of criminal law but, rather, leaves it to the second-order

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<sup>67</sup> *Reference re Dairy Industry Act (Canada) S. 5(a)*, [1948] S.C.J. No. 42, [1949] S.C.R. 1 (S.C.C.), aff’d [1951] A.C. 179, [1950] 4 D.L.R. 689 (P.C.). Justice Rand held, at 50 (S.C.R.), that a valid criminal law required a prohibition, a penalty and a valid criminal law purpose; he further explained that “[p]ublic peace, order, security, health, morality; these are the ordinary though not exclusive ends served by that law”.

<sup>68</sup> [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571 (S.C.C.).

<sup>69</sup> *R. v. Malmo-Levine*, [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571, at para. 74 (S.C.C.).

<sup>70</sup> [2005] S.C.J. No. 83, [2005] 3 S.C.R. 728 (S.C.C.).

<sup>71</sup> *R. v. Labaye*, [2005] S.C.J. No. 83, [2005] 3 S.C.R. 728, at para. 20 (S.C.C.).

<sup>72</sup> *R. v. Labaye*, [2005] S.C.J. No. 83, [2005] 3 S.C.R. 728, at para. 23 (S.C.C.).

<sup>73</sup> [2003] S.C.J. No. 79, [2003] 3 S.C.R. 571 (S.C.C.).

question of what “counts” as a harm.<sup>74</sup> Although the majority in *R. v. Labaye* suggests the solution that the harm must be “grounded in norms which our society has formally recognized in its Constitution or similar fundamental laws”,<sup>75</sup> this answer really just begs the question that I am identifying as key to contemporary thinking on this side of the religion-criminal law equation: what are the appropriate limits of the criminal law? As a device of moral enforcement, the criminal law is powerfully illiberal;<sup>76</sup> yet we live under the profound ethical influence of a quintessentially liberal document, the Charter. Courts have been caught in the resulting cross-currents. As a result, whether by opting for more objective-sounding language of harm in criminal offences or by attempting to extract the question of moral blame from the law of criminal defences,<sup>77</sup> courts have attempted to shuffle the overtly moral dimensions of the criminal law to the next room like that bilious old uncle at a family gathering. Doing so, however, has merely emphasized the gap between the irreducibly moral components of the criminal law and the normatively cleansed reasoning found in criminal judgments. Faced with this gap, serious thought is again being given to the moral limits of the criminal law.<sup>78</sup>

<sup>74</sup> Another way of characterizing this same point would be to say that reliance on the harm principle nevertheless leaves open the question of the *magnitude* or *seriousness* of harm necessary to warrant criminal sanction. See Alan Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* (Berkeley and London: University of California Press, 1995), at 211. Brudner’s position is that “disrespect for another’s freedom . . . and not the infliction of harm is the gravamen of crime”.

<sup>75</sup> *R. v. Labaye*, [2005] S.C.J. No. 83, [2005] 3 S.C.R. 728, at para. 30 (S.C.C.). Chief Justice McLachlin is, here, elaborating upon an idea in Sopinka J.’s decision in *R. v. Butler*, [1992] S.C.J. No. 15, [1992] 1 S.C.R. 452, at 493 (S.C.C.), wherein he stated that harm to values might count as harms capable of supporting an obscenity conviction, but only if the materials in question “undermine another basic *Charter* right” or if the moral disapprobation “has its basis in *Charter* values”.

<sup>76</sup> To say this is not to deny that other aspects of the criminal law reflect and enforce certain key liberal commitments such as defence of rights — property and personal — and respect for freedom and autonomous choice. See Alan Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence* (Berkeley and London: University of California Press, 1995), at 211ff.

<sup>77</sup> *R. v. Ruzic*, [2001] S.C.J. No. 25, [2001] 1 S.C.R. 687, at para. 41 (S.C.C.): “Once the elements of the offence have been established, the accused can no longer be considered blameless. This Court has never taken the concept of blamelessness any further than this initial finding of guilt, nor should it in this case.” For critical reflection on the Court’s use of the concept of moral involuntariness as the new lodestar in criminal defences, see Stanley Yeo, “Challenging Moral Involuntariness as a Principle of Fundamental Justice” (2002) 28 *Queens L.J.* 335; Benjamin L. Berger, “Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Law” (2006) 51 *McGill L.J.* 99.

<sup>78</sup> See, e.g., J. Paul McCutcheon, “Morality and the Criminal Law: Reflections on Hart-Devlin” (2002) 47:1 *Crim. L.Q.* 15, concluding, at 38, that “it must be accepted that it is legitimate and appropriate to take moral considerations into account in determining the contents of the criminal law”.

A notably parallel set of questions is being asked in the realm of the constitutional protection of religion. Looked at from within the culture of Canadian constitutionalism, religion appears primarily as a matter of individual flourishing and an expression of autonomy and choice.<sup>79</sup> Operating with this understanding of religion in hand, the Court has recently adopted an unprecedentedly expansive reading of section 2(a), holding that it protects against all non-trivial interferences with the sincerely held faith-based convictions of an individual, irrespective of the views of any larger community of belief.<sup>80</sup> This construction of section 2(a) ensures that the courts will not be put in a position of having to judge the authenticity or merit of religious belief or the inherent acceptability of religious practice. With this holding, the Court has also sidelined the question of *internal* limits on freedom of religion, a question that has troubled the Court's section 2(a) jurisprudence since an inherent limit was first implied in *Big M*.<sup>81</sup> But this move away from internal limits also became something of a case of jumping out of the frying pan and into the fire. However justifiable, this expansive protection of religious conscience means that all questions of religious freedom raised under section 2(a) effectively become issues of justified state limitation under section 1 of the Charter. Furthermore, as a prohibited ground of discrimination listed in section 15(1) of the Charter, religion, like other identity-based grounds, is entitled to the respect of the state and equal protection and benefit of the law. Yet religious identity is, in certain important ways, distinct from many other forms of identity.<sup>82</sup> Definitionally *cultural*, religion not only shapes one's sense of self and community, but also shapes beliefs and motivates action. The demand to give equal protection to a world view complete with beliefs and practices — some of which might grate strongly against law's own symbolic commitments, including its sense of authority and value — raises its own unique challenges and poses sharply the question of limits on religious tolerance.

The world in which the law now operates is, of course, also one characterized by deep religious diversity of a form not felt even when

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<sup>79</sup> Benjamin L. Berger, "Law's Religion: Rendering Culture" (2007) 45:2 Osgoode Hall L.J. 277.

<sup>80</sup> *Syndicat Northcrest v. Amselem*, [2004] S.C.J. No. 46, [2004] 2 S.C.R. 551 (S.C.C.), at para. 43.

<sup>81</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

<sup>82</sup> For an excellent discussion of the identity-based components of religious freedom and equality, see the work of Richard Moon, particularly "Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*" (2005) 29 S.C.L.R. (2d) 201, at 213-19.

*Big M*<sup>83</sup> was decided. Furthermore, as both *Chamberlain*<sup>84</sup> and the academic commentary attest, conceptions of secularism have become increasingly contested and the assignation of religion to private life has proven unstable. Some religious communities are making claims to increased legal self-determination, while others are calling out and objecting to the felt-oppressiveness of constitutional liberalism. Many of the legal cases that have emerged as a result have taken the juridical form of a conflict of rights or Charter values, most frequently pitting religious freedom against the powerful constitutional commitment to equality and autonomy. Such cases have put into question the aesthetically desirable but pragmatically implausible claim that there is no hierarchy of rights, while forcing deep public thought about the nature of our commitment to various constitutional goods and the lengths to which we will go to protect them. The legal analysis of religious freedom has, thus, shifted attention increasingly to the question of how to manage conflicts of rights and how to conceive of the limits of religious freedom. Indeed, from *Trinity Western*<sup>85</sup> to *Multani*<sup>86</sup> and the *Same-Sex Marriage Reference*<sup>87</sup> the single question that has defined contemporary constitutional protection of religion under the Charter has been that of defining the limits of religious freedom.

In the end, then, when one looks at the modern fixations of both the substantive criminal law and the constitutional protection of religion, it seems hardly surprising that these two areas would soon meet. At the same time that the criminal law has become a site for debate about the limits of moral regulation, the question that has occupied thought in the realm of religious freedoms and equality is the question of the justified limits on normative difference. These questions are contesting the same boundary from different sides. Both questions are interested in the capacity of the law to make moral judgments and impose them upon those who might not agree with or conform to those judgments. Both questions put liberal public law in the uncomfortable position of having to confront its willingness to be illiberal. It is only very recently that these interesting

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<sup>83</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

<sup>84</sup> *Chamberlain v. Surrey School District No. 36*, [2002] S.C.J. No. 87, [2002] 4 S.C.R. 710 (S.C.C.).

<sup>85</sup> *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772 (S.C.C.).

<sup>86</sup> *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] S.C.J. No. 6, [2006] 1 S.C.R. 256 (S.C.C.).

<sup>87</sup> *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698 (S.C.C.).

convergent questions have crystallized across this as-yet relatively untested boundary. Now that they have, in the words of Henry V, the game is afoot.

## 2. A Preliminary Note: The Charter as False Comfort

Before turning to two examples that display this moral dynamic at play in the interaction of the constitutional protection of religion and the substantive criminal law, a general comment is in order about the role of the Charter and Charter reasoning in such cases.

In his important book on the role of moral principles in the conduct of constitutional self-government in the United States, Christopher Eisgruber identifies certain fallacies that plague the interpretation of constitutional law and, in so doing, impede our capacity to see clearly the stakes of and nature of constitutional law and reasoning.<sup>88</sup> The “aesthetic fallacy” inheres in the belief that a constitution is coherent, non-redundant and rationally consistent.<sup>89</sup> Instead, he argues, judges should recognize that the constitution reflects a set of political compromises and, as such, leaves gaps and contains inconsistencies. To this, I would add the consequential observation that the aesthetic fallacy prevents one from seeing that a constitution may generate as many conflicts as it appears to resolve.

This last observation points to a way in which Canadian constitutional jurisprudence has laboured under something akin to the aesthetic fallacy. In so very many areas of Canadian law, an attempt is made to palliate moral contention by recourse to Charter rights or values. The admonition to develop the common law in keeping with Charter values is well established.<sup>90</sup> More recently, the Court has held that the Charter itself “should be interpreted in a way that maintains its underlying values and its internal coherence”.<sup>91</sup> Indeed, in *R. v. Labaye*,<sup>92</sup> mentioned briefly above, McLachlin C.J.C. conceded the difficulty inherent in defining the types of harms cognizable in criminal indecency but sought to resolve this difficulty by answering that, to support a criminal conviction based on indecency, the harm must be “grounded in norms which our society has

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<sup>88</sup> Christopher L. Eisgruber, *Constitutional Self-Government* (Cambridge: Harvard University Press, 2001).

<sup>89</sup> Christopher L. Eisgruber, *Constitutional Self-Government* (Cambridge: Harvard University Press, 2001), at 113-15.

<sup>90</sup> *R. v. Salituro*, [1991] S.C.J. No. 97, [1991] 3 S.C.R. 654 (S.C.C.).

<sup>91</sup> *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, 2007 SCC 27, at para. 80 (S.C.C.).

<sup>92</sup> [2005] S.C.J. No. 83, [2005] 3 S.C.R. 728.

formally recognized in its Constitution or similar fundamental laws”.<sup>93</sup> In so doing, she sought to resolve the second-order moral debate about what “counts” as harm by resort to the values enshrined in the Constitution.<sup>94</sup>

There are two principal problems with advancing Charter rights and values as means of resolving moral disputes, the second more intractable than the first. Most obviously, this elevation of the Charter as not just a legal instrument but an expression of the core values of the community takes the scope and content of these values off the table for debate — they have already been decided and can be found in the Charter. But perhaps many are prepared, as I am, to engage in a defence of those values as just and good. The much more problematic aspect of this prevalent move brings us back to the aesthetic fallacy. The invocation of the Charter as a mechanism of resolving moral contention assumes a coherence within and among those values that simply does not exist. What are these elusive “Charter values”? In *HEU*, the Court listed “[h]uman dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy” as among these values.<sup>95</sup> Not only are these concepts tremendously porous and, thus, eminently open to the kind of normative contestation that the offer of the Charter as a device of resolution seeks to avoid, but there is ample room within these values, and in the variety of rights from which they flow, for claims that involve conflicting Charter values or (as we have so often seen in recent years) conflicting Charter rights. To give but the most patent example, the concepts of equality and liberty have certain fundamental cross-currents such that the claim that one must be protected readily provokes a claim that the other is being diminished. The point is that, rather than being resolved by the invocation of such values, the most difficult questions of constitutional and criminal law arise precisely when the content and interaction of rights and principles like “equality”, “autonomy” and “human dignity” are at issue.

As much as anything else, the two examples of recent fraught intersections of the constitutional protection of religion and substantive criminal law that follow demonstrate how *little* recourse to the Charter

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<sup>93</sup> *R. v. Labaye*, [2005] S.C.J. No. 83, [2005] 3 S.C.R. 728, at para. 30 (S.C.C.). See also note 75 above and accompanying text.

<sup>94</sup> There is something of an irony in this aspect of *R. v. Labaye*, [2005] S.C.J. No. 83, [2005] 3 S.C.R. 728 (S.C.C.). Chief Justice McLachlin takes pains to distinguish the moral and legal meanings of indecency, confining the Court’s interest to the first; yet when the test for indecency is posed, the legal and moral are pushed back together. The test turns on offence to core community values, which are the moral principles found in basic legal documents.

<sup>95</sup> *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] S.C.J. No. 27, 2007 SCC 27, at para. 81 (S.C.C.).

resolves. Almost any assertion of criminal misconduct involves claims that the autonomy, liberty, human dignity and equality of a victim or set of victims was harmed or put in jeopardy. The core rights and values found in the Charter are thus engaged. Equally, the threat of criminal sanction necessarily carries with it a threat to the autonomy, liberty, human dignity and, often, equality of the accused. Again, the core rights and values found in the Charter are thus engaged. When, as we find in these examples, religious freedom is on the table, the conundrum is further deepened. When it comes to normative debate, the Charter conjures much but resolves little.

In this vein, the following examples demonstrate the way in which looking to the interaction of constitutional and criminal law can tell us a great deal about the nature of each. But, for present purposes, the most palpable lesson from the cases that follow is the way in which the intersection of substantive criminal law and religious liberties — with its inherent and evocative potential for cross-cutting claims about moral freedom — puts us uniquely and squarely against hard questions of genuine moral judgment.

### 3. Religion and Provocation

The first example of the extrusion of the moral dynamic between religious freedom and substantive criminal law that I offer arises in the modern crucible of criminal law — the working out of the balance between subjective fault and the criminal law's demands for objectively reasonable conduct. The defence of provocation is an acutely problematic creature of history and necessity. Its history lies in the criminal law's protection of norms of male honour and offence,<sup>96</sup> a history that still plagues this defence's disproportionate use to partially excuse male violence against women.<sup>97</sup> Accordingly, the defence has been forcefully

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<sup>96</sup> See Janey Greene, "A Provocation Defence for Battered Women Who Kill" (1989) 12 *Adel. L. Rev.* 145; JaneMaree Maher *et al.*, "Honouring White Masculinity: Culture, Terror, Provocation and the Law" (2005) 23 *Austl. Feminist L.J.* 147 (arguing not only that the provocation defence preserves very particular norms of male behaviour, but that it has the potential to condemn and exclude other forms of masculinity associated with non-Western cultures).

<sup>97</sup> See Don Stuart & Ronald J. Delisle, eds., *Learning Canadian Criminal Law*, 9th ed. (Scarborough, ON: Carswell, 2004), at 1045 and David Winkler, "Comments on the Defence of Provocation" in Gerry Ferguson & Stanley Yeo, eds., *The Law of Homicide, Provocation and Self-Defence: Canadian, Australian and other Asia-Pacific Perspectives* (Victoria: Centre for Asia-Pacific Initiatives, 2000) 85, at 88. Both authors also note, however, that the defence tends not to be successful. See also Nicola Cheyne & Susan Dennison, "An Examination of a Potential Reform to the Provocation Defence: The Impact of Gender of the Defendant and the Suddenness Requirement"

attacked as a threat to gender equality in a number of ways, including its apparent condoning of sudden violence as an expected reaction to some forms of affront<sup>98</sup> and the very narrow range of emotions that it has classically recognized as the basis for a partial excuse.<sup>99</sup> Of course, nothing prevents the existence of provoking circumstances from being factored in when arriving at a just sentence — and herein lies its source in necessity. The provocation defence established in section 232 of the *Criminal Code*<sup>100</sup> is, in many ways, best seen as a pseudo-sentencing provision whose real effect is to mitigate the potential harshness of the minimum sentences associated with murder. Indeed, the only effect of the defence of provocation is to reduce murder to manslaughter, thereby opening up the full range of sentencing options; otherwise put, provocation exists specifically and exclusively as a response to a minimum sentence for murder. Cogent arguments based on one or both of these features have been advanced to abolish or substantially revise the provocation defence.

But the dimension of this defence that is of interest as a flashpoint for the moral dynamic between the constitutional protection of religion and the socially constructive role of the criminal law lies neither in history nor in necessity but, rather, in the analytic structure called for in assessing claims of provocation. In the law of provocation one finds an example of the third form of interaction of law and religion described above, the influence of the imperative of religious freedom and equality on the interpretation of basic criminal law concepts. Specifically, what effect, if any, should the religious belonging of an accused have on the construction

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(2005) 12:2 *Psychiatry, Psychology and Law* 388, at 388-89, in which the authors note a gender bias in “the differing outcomes for male and female defendants invoking the defence”.

<sup>98</sup> See, e.g., Stella Tarrant, “The ‘Specific Triggering Incident’ in Provocation: Is the Law Gender Biased?” (1996) 26 *West. Aust. L. Rev.* 190.

<sup>99</sup> See, e.g., Jeremy Horder, *Provocation and Responsibility* (Oxford: Carendon Press, 1992), at 192; Isabel Grant, Dorothy Chunn & Christine Boyle, *The Law of Homicide* (Scarborough, ON.: Carswell, 1999), at §6.2; Victoria F. Nourse, “Passion’s Progress: Modern Law Reform and the Provocation Defense” (1997) 106:5 *Yale L.J.* 1331 (advocating a more nuanced approach to emotion in the law of provocation and, ultimately, arguing that the defence should be retained but only in those instances in which the accused’s emotional judgments mirror those of the law). See also Adrian Howe, “Provocation in Crisis — Law’s Passion at the Crossroads? New Directions for Feminist Strategists” (2004) 21 *Austl. Feminist L.J.* 53 (arguing for the abolition of the provocation defence owing to the manner in which it entrenches male privilege); Stanley Yeo, “The Role of Gender in the Law of Provocation” (1997) 26:4 *Anglo-American L. Rev.* 431 (arguing that the law of provocation has an untapped potential to take account of the realities of women as well as men); Caroline Forell, “Gender Equality, Social Values and Provocation Law in the United States, Canada, and Australia” (2006) 14 *Am. U.J. Gender Soc. Pol’y* 27 (arguing that modern social norms have worked their way into the law of provocation in all three jurisdictions and, as such, reform of the law of provocation may not be as necessary as is often assumed).

<sup>100</sup> R.S.C. 1985, c. C-46.

of the reasonable person? In *R. v. Hill*<sup>101</sup> and *R. v. Thibert*,<sup>102</sup> the Supreme Court of Canada has explained that a successful defence of provocation demands that three criteria be established: (1) that there was a wrongful act or insult sufficient to deprive an ordinary person of self-control; (2) that the accused actually acted on this wrongful act or insult; and (3) that the killing happened “on the sudden and before there was time for passions to cool”. The contentious aspect of this test has been the first prong. In particular, in light of the statutory language demanding that the insult be sufficient to deprive an “ordinary person” of self-control, but given the countervailing imperative to treat culpability for murder as a matter of subjective fault,<sup>103</sup> of what relevance are the personal characteristics of the accused? The Supreme Court has answered that the *standard of self-control* must be a dominantly objective test, but that to properly assess the *gravity of the insult*, the ordinary person must “share with the accused such other factors as would give the act or insult in question a special significance”.<sup>104</sup>

What no doubt appeared as but a sliver of subjectivity injected into the law of provocation has been driven open by the recently asked question of whether the cultural and, specifically, religious views of the accused should be considered in assessing the gravity of the insult.<sup>105</sup> As argued above, this particular question is so explosive in the context of provocation because, unlike the kinds of attributes contemplated and used as examples by the Court in *R. v. Thibert*<sup>106</sup> (race, primarily), religious belonging is a somewhat unique form of identity characteristic. That a person possesses the “feature” of being religious imports the possibility for a wide range of thickly normative assumptions about a just and good “order of things”, assumptions that will gild a given set of events with “special significance”

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<sup>101</sup> [1986] S.C.J. No. 25, [1986] 1 S.C.R. 313 (S.C.C.).

<sup>102</sup> [1996] S.C.J. No. 2, [1996] 1 S.C.R. 37 (S.C.C.).

<sup>103</sup> *R. v. Martineau*, [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633 (S.C.C.).

<sup>104</sup> *R. v. Thibert*, [1996] S.C.J. No. 2, [1996] 1 S.C.R. 37, at para. 18 (S.C.C.).

<sup>105</sup> The literature debating the “cultural defence” is vast. For a variety of perspectives on the role of culture in the law of provocation, see, e.g., Helen Power, “Provocation and Culture” (2006) *Crim. L. Rev.* 871; Alison Dundes Renteln, “The Use and Abuse of the Cultural Defence” (2005) 20 *Can. J.L. & Soc.* 47; Anne Phillips, “When Culture Means Genders: Issues of Cultural Defence in the English Courts” (2003) 66:4 *Mod. L. Rev.* 510; Stanley M.H. Yeo, “Power of Self-Control in Provocation and Automatism” (1992) 14 *Sydney L. Rev.* 3. See generally Alison Dundes Renteln, *The Cultural Defence* (Oxford and New York: Oxford University Press, 2004); Elaine M. Chiu, “Culture as Justification, Not Excuse” (2006) 43:4 *Am. Crim. L. Rev.* 1317; Doriane Lambelet Coleman, “Individualizing Justice through Multiculturalism: The Liberals’ Dilemma” (1996) 96 *Colum. L. Rev.* 1093.

<sup>106</sup> [1996] S.C.J. No. 2, [1996] 1 S.C.R. 37 (S.C.C.).

and will do so in a manner that puts value judgments at the core of the controversy.<sup>107</sup> Provocation is already a normatively problematic defence. Yet if the beliefs and judgments that inform the accused's perception of an act or insult as wrongful conflict with core public commitments, another layer of complexity is added. In such situations, the role of the criminal law in enforcing a moral vision is apparent and the consequent challenge is deciding where the line will be drawn between the moral coerciveness of criminal law and the moral freedom suggested by our commitment to religious pluralism.

The two appellate courts that have recently taken up this question have adopted very different postures. In *R. v. Nahar*,<sup>108</sup> the accused was charged with the murder of his wife. At trial, he argued that he was provoked by aspects of her behaviour, including her smoking, drinking and the fact that she socialized with other men. In particular, he claimed he was provoked because this behaviour was "completely at odds with the culture and tradition of the Sikh community in which they were raised".<sup>109</sup> He argued that, in the circumstances of the case, the ordinary person should be a person from that cultural background "to whom Ms. Nahar's ongoing behaviour, and what she said and did immediately before Mr. Nahar stabbed her, would have been as significant as it was to Mr. Nahar".<sup>110</sup> Although the appeal from conviction was ultimately dismissed, the B.C. Court of Appeal agreed that the culture and/or religion of the accused is relevant to assessing the gravity of insult. Referring to Cory J.'s reasoning in *R. v. Thibert*,<sup>111</sup> the Court concluded that "factors that give an act or insult a special significance could be said to include the implications of an accused person having been raised in a particular culture".<sup>112</sup>

Justice Doherty considered this issue in *R. v. Humaid*.<sup>113</sup> In that case, the accused, who killed his wife, Aysar Abbas, claimed that he was provoked by a comment she made that he took to be an admission of

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<sup>107</sup> Value judgments in addition, that is, to the core judgment about the use of violence problematically and not-so-tacitly assumed in the very defence of provocation. As Murphy J., dissenting from the judgment of the Australian High Court, stated, "the ordinary or reasonable man simply does not kill if he is provoked" (*R. v. Moffa* (1976-77), 13 A.L.R. 225, at 244 (Aust. H.C.)).

<sup>108</sup> [2004] B.C.J. No. 278, 20 C.R. (6th) 30 (B.C.C.A.).

<sup>109</sup> *R. v. Nahar*, [2004] B.C.J. No. 278, 20 C.R. (6th) 30, at para. 2 (B.C.C.A.).

<sup>110</sup> *R. v. Nahar*, [2004] B.C.J. No. 278, 20 C.R. (6th) 30, at para. 30 (B.C.C.A.).

<sup>111</sup> *R. v. Thibert*, [1996] S.C.J. No. 2, [1996] 1 S.C.R. 37 (S.C.C.).

<sup>112</sup> *R. v. Nahar*, [2004] B.C.J. No. 278, 20 C.R. (6th) 30, at para. 34 (B.C.C.A.).

<sup>113</sup> [2006] O.J. No. 1507, 37 C.R. (6th) 347 (Ont. C.A.), leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 232 (S.C.C.).

infidelity. Mr. Humaid, who was Muslim, had led expert evidence at trial to the following effect:

Dr. Ayoub testified that the Islamic culture was male dominated and placed great significance on the concept of family honour. Infidelity, particularly infidelity by a female member of a family, was considered a very serious violation of the family's honour and worthy of harsh punishment by the male members of the family.<sup>114</sup>

The trial judge, however, had instructed the jury that they should not regard the ordinary person as sharing the accused's religion, culture or customs. Justice Doherty found no error in this regard,<sup>115</sup> reasoning that, in the absence of evidence specifically linking the accused to these sets of beliefs, to ascribe these characteristics to the accused "is an invitation to assign group characteristics to the appellant based on what can only be described as stereotyping".<sup>116</sup> Accordingly, he reasoned that, "[a]ssuming that an accused's religious and cultural beliefs that are antithetical to fundamental Canadian values such as the equality of men and women can ever have a role to play"<sup>117</sup> in the provocation analysis, the evidence adduced in this case could be of no assistance to the accused.

Although he concluded that the issue of whether religious beliefs should be part of the legal construction of the ordinary person should be left to another case in which the issue squarely arose, Doherty J. did not leave the tone of skepticism in this last statement unexplored. In his *obiter* comments he expressed, in no uncertain terms, his view — contrary to that of the B.C. Court of Appeal — that the religious beliefs of an accused should be relevant in the assessment of provocation only when that religion or those beliefs are the very target of the wrongful act or insult. In so doing, he laid his finger on precisely the deep issue of

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<sup>114</sup> *R. v. Humaid*, [2006] O.J. No. 1507, 37 C.R. (6th) 347, at para. 67 (Ont. C.A.), leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 232 (S.C.C.).

<sup>115</sup> Justice Doherty also found, however, that there was, on the evidence, no air of reality to the defence of provocation.

<sup>116</sup> *R. v. Humaid*, [2006] O.J. No. 1507, 37 C.R. (6th) 347, at para. 83 (Ont. C.A.), leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 232 (S.C.C.). Justice Doherty went on to explain that "[i]ndividual free choice and individual responsibility for those choices are at the core of the Canadian notion of criminal responsibility. Verdicts that are the product of stereotyping are no less offensive because they benefit the accused." Although he did not cast it in this way, Doherty J.'s concerns are consistent with a legitimate anxiety about such claims about culture as essentialist and reinforcing orientalist narratives when not subjected to critical examination in each case.

<sup>117</sup> *R. v. Humaid*, [2006] O.J. No. 1507, 37 C.R. (6th) 347, at para. 82 (Ont. C.A.), leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 232 (S.C.C.).

moral diversity versus moral enforcement raised by the intersection of religion and substantive criminal law:

. . . It is arguable that as a matter of criminal law policy, the “ordinary person” cannot be fixed with beliefs that are irreconcilable with fundamental Canadian values. Criminal law may simply not accept that a belief system which is contrary to those fundamental values should somehow provide the basis for a partial defence to murder.<sup>118</sup>

Of course, as I have argued above, the invocation of “fundamental Canadian values” marks, rather than eradicates, the essential issue raised by religion in the defence of provocation. The telling point, rather, is that beneath Doherty J.’s statement is a judgment about the role of the criminal law in forcefully pursuing our moral commitment to gender equality. Yet this question was already present before religion became an issue for the defence. As Kent Roach has observed, the defence of provocation already “embrace[s] as part of the ordinary person, a culture of masculinity that is possessive, short-tempered, and violent”.<sup>119</sup> The general tendency, however, to focus upon the facially neutral concept of “loss of control” obscured the need to grapple with the moral function of the criminal law, a state of affairs that is much more comfortable in a liberal world. The entrance of religious diversity onto the criminal law scene crystallized the hard question about the justified moral reach of the criminal law and provoked this strident claim for the criminal law’s role in creating a common morality of gender equality.

On the other side of the equation, the abstract ideal of moral diversity promised by the constitutional protection of religion, is happily embraced as a marker of any good liberal democracy. Yet, when mixed with substantive criminal law, the constitutional protection of religion must squarely face its own hard question: the limits of religious freedom

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<sup>118</sup> *R. v. Humaid*, [2006] O.J. No. 1507, 37 C.R. (6th) 347, at para. 93 (Ont. C.A.), leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 232 (S.C.C.). For a proposal advocating the continued use of the law of provocation, but a use calibrated to the “equality-seeking” aspect of the Charter, see Camille A. Nelson, “(En)raged or (En)gaged: The Implications of Racial Context to the Canadian Provocation Defence” (2002) 35 U. Rich. L. Rev. 1007.

<sup>119</sup> Kent Roach, *Criminal Law*, 3d ed. (Toronto: Irwin Law, 2004), at 296. Power concurs, arguing that “the defence is gendered and heterosexist, and thus cultural, in so far as it privileges paradigmatically heterosexual, male violence” (Helen Power, “Provocation and Culture” (2006) *Crim. L. Rev.* 871, at 877), concluding further that, as such, “reform is ultimately doomed” (at 872). In a similar vein, De Pasquale argues that “provocation is itself a dominant cultural defence” and has always been an inherently “cultural” defence insofar as it is “replete with heterosexist cultural judgments” (Santo De Pasquale, “Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy” (2002) 26.1 *Melbourne U.L. Rev.* 110, at 111).

and equality. Despite the Court's expansive reading of the scope of section 2(a), Dickson C.J.C.'s words in *Big M* begin again to echo in our ears:

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.<sup>120</sup>

The very context and structure of substantive criminal law forces the issue of this "subject to". Recall that the language of "public safety, order, health, or morals" precisely echoes the valid purposes of the criminal law as outlined in the *Margarine Reference*<sup>121</sup> and other cases. It is also always the case that allegations of criminality are predicated on alleged affronts to the parallel rights and freedoms of others and violations of the fundamental values entrenched in the Charter. Those who would approach religion in provocation in the way that Doherty J. did in *R. v. Humaid*<sup>122</sup> are also, then, making deep claims about the legitimate scope of the criminal law — a judgment about the nature of religious freedom and equality and their interaction with other constitutional rights and values that, if defensible, is far from manifest. It is as though Dickson C.J.C.'s foundational statement about the limits of religious freedom predicted its interaction with the morally constructive force of the criminal law.

#### 4. Religion and Polygamy

A second example of a recent appearance of the friction between the moral regulation inherent in the criminal law and the moral freedom suggested by the constitutional protection of religion is the emergence of questions concerning the criminal prohibition of polygamy. Whereas the example of provocation was an example of the way in which religious difference can raise issues about the construction of substantive criminal law concepts, the issue of polygamy revolves around the justifiability of a law criminalizing practices that might be motivated by religious beliefs. As such, this example is useful in drawing forward other aspects of the possible interaction between substantive criminal law and the constitutional

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<sup>120</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 337 (S.C.C.).

<sup>121</sup> *Reference re Dairy Industry Act (Canada) S. 5(a)*, [1948] S.C.J. No. 42, [1949] S.C.R. 1 (S.C.C.), aff'd [1951] A.C. 179, [1950] 4 D.L.R. 689 (P.C.).

<sup>122</sup> [2006] O.J. No. 1507, 37 C.R. (6th) 347 (Ont. C.A.), leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 232 (S.C.C.).

protection of religion, including the pivotal role that section 1 analyses will play. The polygamy issue is also a valuable focal point, however, because arguments in support of the criminal prohibition of polygamy are so encrusted with the attempt, discussed above, to bury the morally coercive nature of criminal regulation under a language of harm and harm-reduction. Even a light excavation of the debate lays bare, however, the fundamental moral dynamic that I have been pointing to in this paper.

The debate around the criminal prohibition of polygamous relationships has most recently crystallized around the community of Bountiful, British Columbia.<sup>123</sup> The members of this community in southeastern British Columbia belong to the Fundamentalist Church of Jesus Christ of Latter Day Saints, a group whose polygamous lifestyle led to a fissure with the mainstream Mormon Church. For nearly 20 years, the B.C. Crown has struggled with the question of whether members of the community should be charged pursuant to section 293 of the *Criminal Code*,<sup>124</sup> which creates an indictable offence for anyone practising, celebrating, assisting in, or otherwise being a party to “any form of polygamy”.<sup>125</sup> In 1990, a police investigation of this community resulted in the recommendation that charges be laid under this provision. However, on the strength of legal opinions that section 293 would be struck down as an unconstitutional constraint on the religious liberties guaranteed in section 2(a) of the Charter, the Crown chose not to proceed. The community of Bountiful again came to the forefront of media and legal attention when, in 2006 and in response to allegations that adults in

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<sup>123</sup> For a broad canvassing of various legal and social issues surrounding polygamy in Canada, see generally Status of Women Canada, “Polygamy in Canada: Legal and Social Implications for Women and Children — A Collection of Policy Research Reports” by Angela Campbell *et al.* (November 2005), online: Status of Women Canada <[http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/200511\\_0662420683\\_e.pdf](http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/200511_0662420683_e.pdf)>.

<sup>124</sup> R.S.C. 1985, c. C-46.

<sup>125</sup> Polygamy was first criminalized in Canada in 1890, with *An Act further to amend the Criminal Law*, S.C. 1890, c. 37, s. 11, and subsequently appeared in the first *Criminal Code*, S.C. 1892, c. 29, s. 278. Along with a general prohibition of “polygamy” and “any kind of conjugal union with one or more persons at the same time”, these early provisions specifically proscribe “what among persons commonly called Mormons is known as spiritual or plural marriage”. This express reference to the Mormon religion, which disappeared from the Code with the comprehensive amendments in 1953-54 (*Criminal Code*, S.C. 1953-54, c. 51), was a product of “the influence of American law, which was trying by means of the criminal law to stamp out a resurgence of the practice of polygamy among members of the Mormon community, especially in the state of Utah” (Canada, Law Reform Commission of Canada, *Bigamy*, Working Paper No. 42 (Ottawa: Law Reform Commission of Canada, 1985), at 22.) For an engaging and thorough account of the history of polygamy in the United States, see Sarah Barringer Gordon, *The Mormon Question: Polygamy and Constitutional Conflict in Nineteenth-Century America* (Chapel Hill, N.C.: University of North Carolina Press, 2002).

positions of “trust or authority” were engaging in sexual contact with young girls in the community, the RCMP recommended that individuals in Bountiful be charged with sexual exploitation, contrary to section 153 of the *Criminal Code*.

After Crown Counsel reviewed the evidence in the case and concluded that there was not a “substantial likelihood of conviction”, the Ministry of Attorney General appointed Mr. Richard Peck, Q.C., as a special prosecutor, tasked with reassessing the evidence and considering all potential criminal and quasi-criminal charges, including polygamy.<sup>126</sup> On August 1, 2007, the Criminal Justice Branch of the Ministry of Attorney General announced Mr. Peck’s recommendation. He agreed with the Crown’s earlier assessment of the evidence, found that none of a range of possible other offences were applicable, and recommended that the Attorney General refer the issue of the constitutionality of section 293 of the *Criminal Code*<sup>127</sup> to the B.C. Court of Appeal.<sup>128</sup> In the summary of conclusions in his report to the Attorney General, Mr. Peck expressed the view that, given that “[r]eligious freedom in Canada is not absolute” but, rather, “*subject to reasonable limits necessary to protect ‘public safety, order, health, or morals or the fundamental rights and freedoms of others’*”, there is a “good case for upholding s. 293 as compliant with the *Charter*”.<sup>129</sup>

Mr. Peck is precisely correct, of course, that the issue of the criminalization of polygamy puts us squarely into the centre of Dickson C.J.C.’s statement in *Big M*<sup>130</sup> about the limits of religious freedom. The courts that consider this issue will first have to ask whether there is a breach of section 2(a). Under the prevailing approach to freedom of religion, the breach seems evident: so long as polygamy is sincerely felt by the members of the community to be an aspect of their religious conscience, a criminalization of this practice is more than a trivial

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<sup>126</sup> Partway through his work, Mr. Peck asked that his mandate be expanded to include considering whether a constitutional reference, rather than criminal charges, should be pursued.

<sup>127</sup> R.S.C. 1985, c. C-46.

<sup>128</sup> Following receipt of Mr. Peck’s report, Attorney General Wally Oppal asked Vancouver lawyer Leonard Doust to again review the issue. Reporting back to the criminal justice branch of the Ministry of Attorney General in early April 2008, Mr. Doust concurred with Mr. Peck, concluding that a constitutional reference to the B.C. Court of Appeal — rather than a prosecution — was the best course of action. At the time of writing, Mr. Oppal had not yet announced a decision as to how the government would proceed.

<sup>129</sup> *Report of the Special Prosecutor for Allegations of Misconduct Associated with Bountiful, B.C.*, Summary of Conclusions.

<sup>130</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295 (S.C.C.).

interference and the breach of section 2(a) is, thus, made out. The result will turn entirely on whether the courts find that this limit on religious freedom can be demonstrably justified under section 1. Whatever the ultimate result, the polygamy issue is manifestly about the limits of the moral freedom suggested by section 2(a) of the Charter.

However, as I have suggested in this paper, what is less obvious in the debate but no less true is that the issue also poses the difficult and uncomfortable question of the limits of the criminal law. Given the symbolic freight carried by the institution of marriage, a symbolic dimension made so manifest in the same-sex marriage debates, the assessment of the constitutionality of the crime of polygamy necessarily puts us in the liberally awkward position of contemplating the use of the most extreme force of the state to enforce a particular — and particularly powerful — view of ethical life. Part of the criminal law since before the first *Criminal Code* in 1892 and, to this day, listed alongside offences specifically concerned with the institution of marriage and provisions directed at abortion, libel, and hate propaganda, the criminal prohibition of polygamy is, at first blush, a matter of morality and social value.

But as is so often the case when modern liberal society begins to blush at apparent moral regulation, there is a vigorous flight to the language of harm. This is particularly so in the case of Bountiful, given that the question of polygamy was raised in the context of allegations of sexual interference with children, a harm that the criminal law is justifiably confident in targeting.<sup>131</sup> Yet questions of harm to children can be —

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<sup>131</sup> For a review of some of the posited harms to children, see Nicholas Bala *et al.*, “An International Review of Polygamy: Legal and Policy Implications for Canada” in *Polygamy in Canada: Legal and Social Implications for Women and Children — A Collection of Policy Research Reports* by Angela Campbell *et al.* (November 2005), online: Status of Women Canada <[http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/200511\\_0662420683-2\\_1\\_e.html](http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/200511_0662420683-2_1_e.html)>; Angela Campbell, “How Have Policy Approaches to Polygamy Responded to Women’s Experiences and Rights? An International, Comparative Analysis” in *Polygamy in Canada: Legal and Social Implications for Women and Children — A Collection of Policy Research Reports* by Angela Campbell *et al.* (November 2005), online: Status of Women Canada <[http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/200511\\_0662420683-1\\_1\\_e.html](http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/200511_0662420683-1_1_e.html)>. Bala *et al.* state, in their executive summary, that there is evidence that

suggests that polygamy has significant negative effects on children, as children of polygamous families are more likely to experience emotional difficulties and have lower educational achievement than children in monogamous families. Questions have also been raised about high levels of child abuse, neglect and exploitation in polygamous families. In Fundamentalist Mormon communities in North America, a significant number of reports indicate that adolescent girls and young women are being coerced, physically but more commonly psychologically, into polygamy.

The authors also note in their concluding analysis and recommendations, however, that “there are significant limitations to the existing social science research on polygamy in terms of methodology

and, had there been sufficient evidence in this case, presumably would have been — addressed with other offences in the *Criminal Code*<sup>132</sup> specifically targeting this evil. Polygamy is no more inherently connected with the abuse of children than are other forms of family organization. To turn to a discussion of sexual harm to children is, in this sense, to sidestep the question of polygamy itself.

Yet the section 1 analysis demands that the courts define the objective of the criminalization of polygamy and the prevention of harm will, no doubt, be raised as a candidate. To this end, the other form of harm that is invoked when the issue of polygamy is raised is harm to women. This claim can take one of two forms. The first is that women involved in polygamous relationships suffer a degree of physical and psychological harm that demands the criminalization of this form of family organization.<sup>133</sup> However, this argument has an intrinsic overbreadth,

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and sample size". Campbell raises real concerns about potential abuse to children in some polygamous communities but concludes that "ambiguity exists within the research examining children in polygamous families. In some scenarios, these children did not seem to be adversely affected by their polygamous family structure. But some research also suggests that polygamy might place children in harm's way, for example, by isolating them socially, or by subjecting them to potentially hateful relationships between co-wives." For a complex picture of the impacts of polygamy on children, see Stephanie Forbes, "Why Just Have One? An Evaluation of the Anti-Polygamy Laws Under the Establishment Clause" (2003) 39 Hous. L. Rev. 1517, at 1544-45.

<sup>132</sup> R.S.C. 1985, c. C-46.

<sup>133</sup> Nicholas Bala *et al.*, "An International Review of Polygamy: Legal and Policy Implications for Canada" in *Polygamy in Canada: Legal and Social Implications for Women and Children — A Collection of Policy Research Reports* by Angela Campbell *et al.* (November 2005), online: Status of Women <[http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/200511\\_0662420683-2\\_1\\_e.html](http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/200511_0662420683-2_1_e.html)>, also reviews some of the social science literature suggesting these types of harms, concluding that "[p]olygamous relationships appear significantly more likely than monogamous relationships to be characterized by physical and emotional abuse of women. Many women in polygamous unions experience a diminished sense of self-worth and suffer from competition with the other wives." Angela Campbell, "How Have Policy Approaches to Polygamy Responded to Women's Experiences and Rights? An International, Comparative Analysis" in *Polygamy in Canada: Legal and Social Implications for Women and Children — A Collection of Policy Research Reports* by Angela Campbell *et al.* (November 2005), online: Status of Women <[http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/200511\\_0662420683-1\\_1\\_e.html](http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/200511_0662420683-1_1_e.html)> draws a more cautious lesson from the research, stating in her conclusion on women's experiences in polygamy that

it is difficult to draw a single, clear conclusion as to whether life in a polygamous marriage is harmful to women. Whether women suffer or benefit from plural marriage actually seems to be the improper query through which to investigate the consequences of polygamy for women, since it is far too general. It implies that women in polygamy share uniform realities, regardless of the communities and cultures in which they live, and regardless of the particular relationships formed within their families.

For other scholarly articles (also cited in Campbell's report) that present a complex picture of the effects of polygamy on women, see David L. Chambers, "Polygamy and Same-Sex Marriage" (1997) 26 Hofstra L. Rev. 53, at 73-74 and Stephanie Forbes, "Why Just Have One? An Evaluation of the Anti-Polygamy Laws Under the Establishment Clause" (2003) 39 Hous. L. Rev. 1517, at 1542-43.

criminalizing possible loving, non-abusive polygamous marriages. To be sure, the question of the incidence of physical harms to women involved in polygamous relationships is a matter of the utmost concern for the criminal law. But, again, with sufficient evidence these types of harms can be addressed with prosecutions for more specifically tailored offences. It should be borne in mind that there is a long history and ample contemporary evidence of appalling rates of violence against women in the context of monogamous marriage, yet it is this abhorrent conduct, not this form of marriage, that has become the subject of the criminal law's attention.

The second form of harm to women that can be argued is a symbolic or communicative one and this form of harm, by contrast, maintains a requisite specificity around polygamy.<sup>134</sup> This argument is that, in their very numerical and structural inequality, polygamous relationships that involve multiple wives send the message that women are less worthy of respect and concern, which, in turn, results in an attitudinal harm that damages gender equality at a broad social level.<sup>135</sup> This is something of a familiar argument, found as it is in the jurisprudence surrounding indecency and obscenity. The equally familiar reply is to object that such an assertion denies that women in such relationships have full liberty or are able to make genuine choices.<sup>136</sup> As I alluded to when discussing the internal contestability of Charter values, arguments about the need to protect the broad value of equality can nearly always be met with some form of

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<sup>134</sup> Although there are certainly those who would argue that monogamous marriage is indelibly patriarchal and, as such, sends a similarly negative message about the status of women.

<sup>135</sup> See, e.g., Beverley Baines, "Equality's Nemesis?" (2006) 5 J.L. & Equality 57; Lisa M. Kelly, "Bringing International Human Rights Law Home: An Evaluation of Canada's Family Law Treatment of Polygamy" (2007) 65 U.T. Fac. L. Rev. 1, at 12 ("While the economic, health and child-related harms of polygyny are important factors to consider, this article's argument for the non-recognition of polygyny stems from the gender discriminatory and patriarchal nature of the practice."). Nicholas Bala *et al.*, "An International Review of Polygamy: Legal and Policy Implications for Canada" in *Polygamy in Canada: Legal and Social Implications for Women and Children — A Collection of Policy Research Reports* by Angela Campbell *et al.* (November 2005), online: Status of Women <[http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/200511\\_0662420683-2\\_1\\_e.html](http://www.swc-cfc.gc.ca/pubs/pubspr/0662420683/200511_0662420683-2_1_e.html)> also make this argument, stating in their executive summary that "[t]he practice of polygamy is . . . contrary to notions of gender equality that are fundamental to Canadian society".

<sup>136</sup> See, e.g., Michele Alexandre, "Big Love: Is Feminist Polygamy an Oxymoron or a True Possibility?" (2007) 18 Hastings Womens L.J. 3, at 5, in which the author "invokes the concept of cultural feminism to advocate for both the acceptance of women's choices and the protection of Muslim women who choose to live in polygamy". For the author, "what matters . . . is the fact that women who choose polygamy, like those who make any other legitimate choice, must be protected" (at 4). Part of Alexandre's argument is a call to ensure that Muslim practices of polygamy reflect a "women-centric" (at 6) approach whereby "women's desires and wishes serve as a foundation for any system of polygamy" (at 6).

objection that appeals to the value of liberty. The point is not to deny the need to concern ourselves with communicative harms but, rather, that once abstracted to the level of harm to values, the debate becomes overtly and porously normative.

With a return to normative judgment, we are left in much the same structural position as would have been the case had we taken the criminalization of polygamy for what it appears to be: a use of the criminal law to protect a cultural commitment to monogamous marriage, a commitment itself still deeply influenced by the norms of a particular Christian cultural milieu out of which, after all, section 293 itself historically emerged.<sup>137</sup> Although one formulation of the issue is packaged in modern liberal terms, the issue remains whether or not it is legitimate to use the criminal law to enforce a particular normative vision and, in so doing, to limit the freedom to pursue a way of life predicated on a different moral outlook. Are we really so far from Dickson C.J.C.'s central concern in *Big M* — that this provision “takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike”<sup>138</sup> — or is it simply that a larger group of Canadians are less willing to compromise their symbolic and normative commitment to monogamous marriage than they are comfortable with stores being open on Sundays? That there are dimensions of meaningful difference between these two cases is certain. Yet whatever else is also going on, there is a robust dimension of moral coercion at play in the criminalization of polygamy, a kind of coercion that abrades the protection of a meaningful margin of moral appreciation implied in the constitutional protection of religious freedom and equality. However the question of the criminal prohibition of polygamy is resolved, the answer will be a response to this underlying tension.

To be sure, both the prevailing way of talking about the criminal law and the force of constitutional analysis will seek to launder the issue of this underlying moral tension; issues of social value will be cast as questions of harm and minimal impairment. But the conjunction of crime,

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<sup>137</sup> See note 125, above. See also Robert Leckey, “Profane Matrimony” (2006) 21:2 C.J.L.S. 1. In a rich and compelling analysis that demonstrates the ways in which civil marriage and religious marriage have been and continue to be involved in a complex and mutually defining relationship, Leckey shows the untenability of the commonly made contemporary claim (made, in fact, by the Supreme Court of Canada in *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, [2004] 3 S.C.R. 698 (S.C.C.)) that civil and religious marriage are entirely distinct institutions.

<sup>138</sup> *R. v. Big M Drug Mart Ltd.*, [1985] S.C.J. No. 17, [1985] 1 S.C.R. 295, at 337 (S.C.C.).

sex, family and religion inherent in this issue makes this fundamental dynamic between moral judgment and moral freedom an unavoidable feature of public debate on this question, whether overtly identified or not. In this way, what makes polygamy such a provocative issue is that it exposes both the stubbornly moral inflection of our criminal law and certain limits on our tolerance for deep religious difference, two aspects of the culture of the Canadian rule of law that are so obviously salient but with which we are far from comfortable.

#### IV. CONCLUSION: FREEDOM OF RELIGION AND THE CRIMINAL LAW

In this paper I have sought to draw out something of a hidden relationship between the constitutional protection of religion and the substantive criminal law. I have endeavoured to demonstrate that, although comparatively little jurisprudential and scholarly attention has been devoted to this topic, there is, in fact, an interesting story to be told about the interaction of substantive criminal law and the constitutional protection of religion since the introduction of the Charter. In beginning to tell this story, I have pointed to three formal ways in which substantive criminal law has interacted with religious freedom and equality over the past 25 years: a select number of cases have overtly tested substantive criminal laws against section 2(a) of the Charter; in certain instances substantive criminal law has been used in aid of the protection of religious freedom and equality; and in other, more subtle ways, the guarantee of religious freedom and equality has been a resource for the interpretation of substantive criminal law concepts.

But more than simply narrating this story, I have been concerned with drawing out a simple but rich subtending dynamic between criminal law and religion in the Charter era. The constitutional protection of religion is, at its core, an offer of a certain moral freedom, whereas criminal law is irreducibly about moral regulation. In this respect, these two aspects of our legal culture reflect powerfully competing ethics in the modern liberal constitutional state. On the one hand, we are strongly dedicated to the idea that the state should remain agnostic on the kinds of basic value judgments made by individuals and groups in society. On the other hand, the criminal law is a forceful expression of some of the most essential moral judgments of dominant Canadian society. There is,

thus, a deeply provocative tension in this relationship between the constitutional protection of religion and substantive criminal law.

This tension has lain largely unseen for much of the past 25 years. Part of the explanation for the hiddenness of this dynamic has been our devotion to two other stories that palliate the tension that I have tried to expose. In the Charter era, substantive criminal law has been increasingly talked about in the morally stripped language of harm. The story here is that, although no doubt at one time a vehicle of moral coercion, the criminal law has been unmoored from bare questions of value. The story about religious freedom and equality builds from this general way of thinking about state law and holds that, with only the most extreme and complex exceptions, under the Charter we have developed a relatively robust tolerance for the kind of lifestyle and value differences inherent in religious diversity. This is the story of legal multiculturalism and religious accommodation that is predicated on a sense of law as highly malleable and largely instrumental. In the result, we have two comforting stories that veil what I am pointing to as our agonal commitments to law — perhaps most particularly constitutional and criminal law — as an agent of moral freedom and of moral constraint.

In recent years, however, cracks have been starting to appear in both of these stories, disturbing our comfort. I have pointed to two recent instances in which religious difference has clashed with substantive criminal law in a way that pushes this underlying moral dynamic to the forefront. When faced with issues like the role of religious difference in approaching the defence of provocation and the constitutionality of the polygamy offence, the friction between the moral force of the criminal law and the guarantee of moral liberty that inheres in section 2(a) produces a heat that cannot be ignored. And, despite the resulting discomfort, this is, to my eye, a good thing. These points of friction reveal much about both aspects of our legal culture and, thereby, encourage us to reason more honestly and more complexly about both the nature of the criminal law and the limits on religious freedom and equality, both of which are keenly felt, even if not spoken about.

The tension that I have identified reflects a deep liberal ambivalence about the role of value in the law; indeed, it is an ambivalence reflected in the Charter itself, a document of great moral ambition but one that also reflects a concern for moral modesty. With increased religious diversity likely to raise this tension more frequently before the courts, what should be done? What jurisprudential posture should be taken? In truth, there is no legal “fix” to the dynamic I have identified; this is not a

tension that judges can dissipate with just the right judgment in a given case or a novel jurisprudential approach. But there is, nevertheless, a practical call implicit in my discussion. It is the call for transparency in what may be at stake in the meeting between religion and criminal law, and modesty in the use of the force of law. There is little basis to suspect that speaking in an uncritical language of harm and tolerance reduces moral conflict. On the other hand, there is ample basis to conclude that thus veiling the conflict prevents meaningful debate on the issues truly at stake. What we need in our jurisprudence is for judges to identify and speak to the importance of the values being pursued in the criminal law, to — where possible — stay criminal law's violent hand in the imposition of these judgments and, in their reasons, to lay bare the broader social debate that must be had.