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Equal, but only Conceptually: Explaining the Phenomenon of Religious Losses in Contemporary Canadian Constitutional Cases Involving Conflicting Rights

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If there is no hierarchy of rights in Canada, then why does freedom of religion so often seem to lose in cases of conflicts with other rights? This article discusses five recent Canadian cases (involving same-sex marriages, controversial medical practices, the wearing of a niqab, and a Christian university's sexual conduct policy) in order to expose how the courts regularly characterize freedom of religion as being conceptually equal to other rights, before ruling against freedom of religion on the facts of the particular cases. This phenomenon within Canadian rights jurisprudence is then justified within the article by reference to a new combination of insights drawn from legal and liberal political theory. Specifically, the article suggests that religious freedom losses in the five cases can be justified because of considerations relating to (1) Rawlsian public reason, (2) third-party harms and dignitary harms, and (3) the special significance of emerging and emancipation rights. Thus, freedom of religion is only equal to other rights at a high level of abstraction; in its application, it is regularly subordinated to other rights in ways that can be defended where one or a combination of the three enumerated considerations is present.

S'il n'existe pas de hiérarchie des droits au Canada, alors pourquoi la liberté de religion semble t-elle si souvent perdante en cas de conflit avec d'autres droits? Dans cet article, nous examinons cinq affaires canadiennes récentes (concernant des mariages entre personnes de même sexe, des pratiques médicales controversées, le port du niqab et la politique relative à la conduite sexuelle dans une université chrétienne) afin d'exposer comment les tribunaux caractérisent régulièrement la liberté de religion comme étant conceptuellement égale aux autres droits, avant de statuer contre la liberté de religion sur les faits de ces affaires particulières. Dans l'article, on justifie ce phénomène que l'on observe dans la jurisprudence canadienne en matière de droits par une nouvelle combinaison d'idées tirées de la théorie juridique et de la théorie politique libérale. Plus précisément, l'article suggère que les pertes de liberté de religion dans les cinq cas peuvent être justifiées par des considérations relatives à (1) la raison publique rawlsienne, (2) les préjudices causés aux tiers et à la dignité, et (3) la signification particulière des droits émergents et d'émancipation. Ainsi, la liberté de religion n'est égale aux autres droits qu'à un haut niveau d'abstraction; dans son application, elle est régulièrement subordonnée à d'autres droits d'une manière qui peut être défendue lorsqu'une ou une combinaison des trois considérations énumérées est présente.

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Introduction

In 2010, I argued that freedom of religion tends to get the "short shrift" in Canadian jurisprudence, and that this right seems to occupy a place that is "second among equals" within the landscape of Canadian rights and freedoms.[1] I made this argument[2] notwithstanding the fact that the Supreme Court of Canada (SCC) has unequivocally stated that there is no hierarchy of rights[3] under the *Canadian Charter of Rights and Freedoms* (*Charter*).[4] However, after studying more recent religious freedom cases

1. Mike Madden, "Second Among Equals? Understanding the Short Shrift that Freedom of Religion is Receiving in Canadian Jurisprudence" (2010) 7:1 JL & Equality 57.
2. *Ibid*.
3. See *Dagenais v Canadian Broadcasting Corporation*, [1994] 3 SCR 835 at para 75, 120 DLR (4th) 12 [*Dagenais*]; see also *Reference Re Same Sex Marriage*, 2004 SCC 79 at para 50.
4. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

from the last ten years (and after then re-reading older cases with a fresh perspective), I have recently begun to suspect that my previous work mischaracterized the conceptual manner in which freedom of religion is viewed by Canadian courts. This article therefore represents an effort to (1) clarify my previous—and perhaps somewhat inadequate—explanation of how freedom of religion is treated in Canadian case law, and (2) go one step further by suggesting how the treatment that freedom of religion actually receives from Canadian courts is justified in principle.

Before considering several specific cases that illustrate tendencies in Canadian religious freedom law since 2010, Part I of this article introduces the general concept of proportionality as a justification for limiting rights in Canadian constitutional law.[5] In Part I, I ultimately suggest that Canadian proportionality frameworks are legitimate general frameworks for resolving cases wherein rights are in tension with one another.

Part II then describes five important Canadian rights-conflict cases since 2010,[6] each of which applies some form of proportionality approach, and ultimately suggests that freedom of religion must yield to the other rights that are at stake in those cases. These cases continue to reinforce the SCC's claim that freedom of religion occupies a place of conceptual equality alongside other *Charter* rights, while nonetheless demonstrating that unrestricted exercises of religious rights cannot be permitted in the cases because of the harms that such exercises would cause to the *Charter* rights or values of others in society: religion is, in a sense, equal-but-subordinate.

Part III then points to several considerations that may justify this phenomenon. I begin by demonstrating how acceptance of public reason theories will cause many of the factors that would otherwise favour freedom of religion in proportionality assessments to be excluded from the assessments. Additionally, consideration of other factors such as third-party harms, dignitary harms, and the importance of promoting emerging or emancipation rights, will each tend to weigh against freedom of religion in specific cases where this right is in conflict with other *Charter* rights or values.

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5. See generally *Charter*, *supra* note 4, s 1; *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes*]; *Dagenais*, *supra* note 3 at paras 76-77; *R v Mentuck*, 2001 SCC 76 at paras 29-33 [*Mentuck*]; *Doré v Barreau du Québec*, 2012 SCC 12 [*Doré*]; and, *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*].

6. *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3 [*SK Marriage Reference*]; *R v NS*, 2012 SCC 72 [*Niqab Case*]; *Kisilowsky v Manitoba*, 2018 MBCA 10 [*MB Marriage Case*]; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 [*TWU BC*]; and, *Christian Medical and Dental Society of Canada v College of Physicians and Surgeons of Ontario*, 2019 ONCA 393 [*ON Physician Case*].

Ultimately, this article argues that freedom of religion is a right that properly benefits from a full measure of protection from Canadian courts at an abstract level, but that certain considerations that are unique to religious freedom cases today will regularly require freedom of religion to yield when this right comes into conflict with other *Charter* rights, for reasons that can be defended and accepted on rational theoretical grounds. In other words, even though freedom of religion often, if not overwhelmingly, tends to "lose" in contemporary contests of competing *Charter* rights, this outcome is justifiable by reference to concepts of proportionality, public reason, and harms, all of which have accepted and established roots in Canadian constitutional jurisprudence and/or in legal and political theory.

I. *Utilitarian proportionality: The model for justifying limits on rights and resolving conflicts of rights*

In order to establish the necessary building blocks for subsequent Parts of this article, I begin in this Part by discussing the general framework that is almost universally used for identifying permissible limitations on rights and for resolving competing rights claims: the proportionality framework. The goals of this Part are to illustrate (1) how proportionality-based reasoning is applied by Canadian courts, (2) where proportionality finds its philosophical roots, and (3) why proportionality represents a legitimate basis for resolving rights claims. Subsequent Parts of this article will then look more closely at specific Canadian religious freedom cases involving proportionality assessments (Part II), and the theoretical justifications that can be marshalled in support of the outcomes of these cases (Part III).

1. *Limiting and reconciling competing rights—Canadian jurisprudence*

The Canadian *Charter* explicitly recognizes that the rights and freedoms contained therein are not absolute.[7] The multi-part test that has been used to determine what limits on rights are demonstrably justified was first articulated by the SCC in *R v Oakes,*[8] and it has remained substantially unchanged through its applications over decades of cases.[9] Under the *Oakes* test, the government, in justifying a limit on a *Charter* right, must prove that there is a pressing and substantial objective for the infringing measure or law.[10] Next, the government must prove that the infringing measure does not interfere with rights in a disproportionate manner while pursuing the pressing and substantial objective.[11] There are three components to

7. *Charter*, *supra* note 4, s 1.
8. *Supra* note 5.
9. See e.g. *Ontario (Attorney General) v G*, 2020 SCC 38 at paras 71-76.
10. *Oakes*, *supra* note 5 at para 73;
11. *Ibid* at para 74; *Ontario (Attorney General) v G*, *supra* note 9 at para 71.

this latter proportionality analysis: (1) the infringement must be rationally connected to the government's objective, (2) the infringing law must not impair *Charter* rights any more than is reasonably necessary, and (3) "the benefits of the infringing measure [must] outweigh its negative effects."[12] If the government can prove all of these elements of the *Oakes* test on a balance of probabilities, then the government's limit on a *Charter* right will be demonstrably justified, and therefore constitutional.

Initially, the *Oakes* test was the only general framework used for considering whether government action that infringed upon Charter rights was constitutional. However, in *Doré v Barreau du Québec,*[13] the SCC set out a subtly different approach for assessing the constitutionality of government action in an administrative law context. The SCC determined in that case that, where a discretionary decision of a government actor engaged a *Charter* right or value, courts should assess the original decision by way of a "proportionality analysis consistent with administrative law principles"[14] rather than through a direct application of the *Oakes* test. In the context of a decision that encroaches on *Charter* rights or values, however, the decision will only be reasonable if it reflects a **proportionate balancing** of the applicable *Charter* rights and the underlying statutory mandate of the administrative decision-maker.[15] Although the *Doré* framework may appear to be different in substance from the *Oakes* framework, the SCC has attempted to dispel this perception in several decisions by characterizing the new framework as being functionally equivalent to the *Oakes* framework.[16] While there is certainly room to debate the extent to which such characterizations are accurate, and to wonder about the utility of applying two different frameworks to different forms of *Charter*-based claims depending on how they arise,[17] it is most important to note for the purposes of this article that both frameworks essentially focus on the same types of cost-benefit proportionality assessments, even if other aspects of the frameworks are somewhat different.

The SCC has also crafted a slightly different, third approach to be used specifically in cases involving direct conflicts between different *Charter*

12. *Ibid*.
13. *Supra* note 5.
14. *Loyola*, *supra* note 5 at para 3.
15. *Ibid* at para 32.
16. *Doré*, *supra* note 5 at para 5; see also *Loyola*, *supra* note 5 at para 40; and see *TWU BC*, *supra* note 6 at para 80.
17. See e.g. Christopher D Bredt & Ewa Krajewska, "*Doré*: All That Glitters Is Not Gold" (2014) 67 SCLR (2d) 339; see also Audrey Macklin, "*Charter* Right or *Charter*-Lite? Administrative Discretion and the *Charter*" (2014) 67 SCLR (2d) 561.

rights. This approach was initially articulated in *Dagenais*[18] in the context of publication bans and consists of the following steps: first, determine whether there is a true conflict of rights that cannot be resolved by some form of accommodation or reasonable alternative measure that avoids the conflict;[19] however, if accommodation will not prevent the conflict, then determine whether the salutary effects of protecting one right outweigh the deleterious effects that would be inflicted upon the other right.[20] In other words, the second part of the *Dagenais* approach requires courts to assess whether the benefits to one right are greater than the harms to the other right. In this sense, the *Dagenais* approach seems to be identical to the proportionality-of-effects analysis that makes up the final component of the *Oakes* test,[21] and to the proportionate balancing of applicable *Charter* rights that takes place within a Doré analysis.[22] All three approaches seem to involve the same type of cost-benefit calculations.

2. *Utilitarianism and proportionality—underlying theory in support of the Canadian rights resolution frameworks*

Broadly speaking, we might classify all of the above proportionality analyses as being utilitarian or consequentialist in nature. Utilitarianism is a normative ethical theory that takes many forms, and that seeks to answer questions about what is right in a particular situation by assessing what will do the most good for the most people; it is a value-maximization theory concerned with promoting the greatest global extent of benefits while minimizing the greatest global extent of harms.[23] Consequentialism is a broader umbrella term for a family of normative ethical theories (including utilitarianism) that are concerned with judging the moral rightness of an act only on the basis of the consequences that the act produces.[24] In this sense, consequentialism can be distinguished from another major family of normative ethical theories—deontological theories—which suggest that human actions should be guided not so much by the consequences

18. The approach was subsequently endorsed and restated in slightly different terms in *Mentuck*, *supra* note 5, and then again in the *Niqab Case*, *supra* note 6.
19. *Dagenais*, *supra* note 3 at paras 76-77.
20. *Ibid*.
21. See *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 72-78 [*Hutterian Brethren*].
22. See e.g. *Loyola*, *supra* note 5 at para 32.
23. See generally Julia Driver, "The History of Utilitarianism" in Edward N Zalta, ed, *Stanford Encyclopedia of Philosophy* (Stanford: Metaphysics Research Lab, 2020), online: <plato.stanford.edu/entries/utilitarianism-history/> [perma.cc/EN22-6QW6].
24. See generally Walter Sinnott-Armstrong, "Consequentialism" in Edward N Zalta, ed, *Stanford Encyclopedia of Philosophy* (Stanford: Metaphysics Research Lab, 2020), online: <plato.stanford.edu/entries/consequentialism/> [perma.cc/P3DQ-26RN].

that the actions will produce, as by the conformity of the actions to moral norms and standards.[25]

Classical utilitarian theory can be traced predominantly to two philosophers who published their theories during the eighteenth and nineteenth centuries—Jeremy Bentham[26] and John Stuart Mill.[27] According to Mill, "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others."[28] This harm principle starts from the premise that liberty is a good that ought to be maximized, but then acknowledges that one's exercises of individual liberty can cause harm to others—and in such cases, there is justification for placing limits on individual liberty. Although Mill does not state his harm principle in a classically utilitarian way (i.e., if the harm to others outweighs the benefit from a particular exercise of liberty, then that liberty should be restricted), it seems clear that such a formulation could have been implied within Mill's work.

Mill subsequently published an entire treatise on utilitarianism some two years later, which made explicit his consequentialist normative ethical approach.[29] The approach that Mill takes in this treatise has arguably been adopted by the SCC in *Oakes*, *Doré*, and *Dagenais* in the Court's requirements for proportionality analyses that weigh benefits and harms as a means of resolving rights claims.[30] Some of the more generally widespread influence of utilitarian philosophers on judges of the SCC has been noted elsewhere: McCormack's study of SCC citations of philosophers shows that Mill and Bentham are the two most frequently cited philosophers by Canada's apex court, accounting for more than 120 of the 543 citations to philosophers that had been observed within a study

25. See generally Larry Alexander & Michael Moore, "Deontological Ethics" in Edward N Zalta, ed, *Stanford Encyclopedia of Philosophy* (Stanford: Metaphysics Research Lab, 2020), online: <plato.stanford.edu/entries/ethics-deontological/> [perma.cc/KAB5-VZJQ].

26. Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Garden City: Doubleday, 1961) (originally published in 1789).

27. John Stuart Mill, *Utilitarianism*, ed by Roger Crisp (New York: Oxford University Press, 1998) (originally published in 1861); see also, John Stuart Mill, *On Liberty*, ed by Edward Alexander (Peterborough: Broadview Press, 1999) (originally published in 1859).

28. Mill, *On Liberty*, *ibid* at 51–52.

29. Mill, *Utilitarianism*, *supra* note 27.

30. Elements of utilitarian thought are overlappingly present in both the second (minimal impairment) and third (proportionality of effects) parts of the *Oakes* test (*supra* note 5). Both steps of the test weigh the extent of harm done in order to achieve either a government objective (minimal impairment) or other societal benefits (proportionality of effects).

of all SCC cases between 1860 and 2016.[31] In light of this heavy influence of utilitarian thinkers upon the SCC, it is perhaps not surprising that the Court has adopted a utilitarian proportionality framework for resolving rights cases.

There are probably also pragmatic reasons why the SCC relies upon different variants of utilitarian proportionality tests for determining the permissible limits of *Charter* rights. These tests emerge from cases involving real-world problems that are presented to the Court for adjudication. The Court does not have the option in every case to simply "pass" on the difficult questions that the cases require them to answer, so judges must develop a normative and practical analytical approach to answering the questions. While different philosophical, ethical, and moral approaches might all have allure for different reasons, many of these approaches (e.g., deontological approaches that are grounded in religious conceptions of morality) would likely be illegitimate for courts to draw upon, given the religiously neutral or secular role that courts, and other branches of government, are expected to play within Canadian society.[32] Utilitarianism, however, remains accessible to a religiously neutral court; as Driver notes, "[t]he question Bentham asked, 'What use is it?,' is a cornerstone of policy formation. It is a completely secular, forward-looking question."[33] In this sense, a utilitarian proportionality approach may represent the most acceptable option for a secular court.

Additionally, utilitarianism avoids creating the problem of having courts pronounce upon what is (morally) Right—a determination that is probably more contentious than one wherein a court pronounces upon what is good or beneficial in a particular case.[34] Utilitarianism avoids the kind of morally absolute propositions that seem to pervade deontological theories, in a way that may help courts to adjudicate in more minimalist (and therefore potentially more publicly acceptable) ways.[35]

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31. Nancy McCormack, "When Canadian Courts Cite the Major Philosophers: Who Cites Whom in Canadian Caselaw" (2017) 42:2 Can L Libr Rev 9.

32. On the constitutional requirement for state neutrality in matters of religion in Canada, see generally *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16.

33. Driver, *supra* note 23.

34. Bradley Miller, "Proportionality's Blind Spot: 'Neutrality' and Political Philosophy" in Grant Huscroft, Bradley W Miller & Grégoire Webber, eds, *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge: Cambridge University Press, 2014) at 377: "A proportionality test is thought to serve the purpose. Instead of having to dispute contested questions of political philosophy, judges could instead focus on a discrete set of technically worded inquiries."

35. On the benefits of judicial minimalism, see Cass Sunstein, "Foreword: Leaving Things Undecided" (1996) 110:1 Harv L Rev 4 at 8: "Courts should try to economize on moral disagreement by refusing to challenge other people's deeply held moral commitments when it is not necessary for them to do so."

3. *Proportionality as a legitimate framework for Canadian rights resolution cases*

It is important to recognize that a utilitarian approach to resolving rights claims was not inevitable or foreordained: other (e.g., deontological) options could have been developed, and some element of choice was therefore involved in the selection of the current utilitarian proportionality approaches. As one might expect, therefore, these utilitarian proportionality approaches are not universally accepted as legitimate.

Miller, for instance, is strongly critical of judicial proportionality assessments, mainly because (he argues) they move unavoidable and controversial moral evaluations out of view, or off-stage, in a way that makes it difficult or impossible for the public to question and debate the appropriateness of these evaluations.[36] Justice Brennan of the Supreme Court of the United States also voiced this concern, suggesting that references to utilitarian balancing exercises are a mere cover for the hidden personal policy preferences of individual judges.[37] If these critics are correct, then predicting how rights disputes will be decided will be challenging for both ordinary citizens and members of the legal profession: proportionality assessments would amount to just idiosyncratic expressions of a particular judge's personal or political preferences—and would therefore be incapable of offering meaningful guidance to those governed by the law.

Urbina also criticizes judicial balancing and proportionality tests in the context of human rights adjudication, because these tests suggest to judges and to the public that rights are commensurable—or capable of being quantified and compared with one another according to some common scale—when (he argues) this is not the case.[38] Justice Scalia similarly observed that "the scale analogy is not really appropriate, since the interests on both sides are incommensurate. It is more like judging whether a particular line is longer than a particular rock is heavy."[39] Webber echoes this concern about the incommensurability of rights, and he goes further by suggesting that proportionality-styled, rights-limiting frameworks undermine the normative value that rights ought to have

36. Miller, *supra* note 34 at 385.
37. See *New Jersey v TLO*, (1985) 469 US 325 at 369-370: "All of these 'balancing tests' amount to brief nods by the Court in the direction of a neutral utilitarian calculus while the Court in fact engages in an unanalyzed exercise of judicial will. Perhaps this doctrinally destructive nihilism is merely a convenient umbrella under which a majority that cannot agree on a genuine rationale can conceal its differences."
38. Francisco J Urbina, "Incommensurability and Balancing" (2015) 35:3 Oxford J Leg Stud 575.
39. *Bendix Autolite Corp v Midwesco Enterprises Inc*, (1998) 486 US 888 at 897.

and may result in generalized weakness of, and uncertainty about, rights guarantees.[40]

Notwithstanding these criticisms, a significant number of influential scholars tend to accept that utilitarian and proportionality-based approaches to the resolution of rights claims may be the best ways to deal with claims involving true conflicts of rights. Waldron, for instance, suggests that it might be preferable, where possible, to engage in more nuanced calculations about harms and benefits than simply calculations involving raw numbers of affected individuals on both sides of the equation, but he notes that this will often be impossible; proportionality, then, is the best solution in many or most cases.[41] Elsewhere, Waldron also discredits arguments that rights are absolutely (or strongly) incommensurable, and he suggests that rights are often only weakly incommensurable, in the sense that they may not all have values derived from a common scale of measurement, but they are all still capable of being ordered and prioritized according to a set of rules or considerations that balance and weigh the rights against one another.[42]

Aharon Barak, probably the most prominent jurist on the subject of proportionality in constitutional law, also offers compelling defences for the use of proportionality tests. He justifies the use of these tests because they facilitate the resolution of rights claims by recognizing that "[p]rinciples at the same normative level can be considered to be of different social importance" in particular cases.[43] This acknowledgement, according to Barak, allows for flexible and principled decision-making on the basis of the facts relevant to each specific rights claim.[44] While Barak is not blind to the criticisms that others may direct toward the concept of proportionality, he ultimately concludes that "the suggested alternatives are no better. In fact, their defects exceed those of proportionality."[45]

It is apparent that one can use reason and logic to both attack and defend utilitarian proportionality approaches toward resolving rights claims. However, scholars tend to agree that proportionality is widely

40. Grégoire C N Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge: Cambridge UP, 2010) at 89-114; see especially *ibid* at 101: "Even assuming that engaging in all-things-considered balancing and proportionality analyses were possible in the technical sense, doing so would do violence to the idea of a constitution and the guarantee of rights."

41. Jeremy Waldron, "Rights in Conflict" (1989) 99:3 Ethics 503 at 518-519.

42. See generally Jeremy Waldron, "Fake Incommensurability: A Response to Professor Schauer" (1994) 45:4 Hastings LJ 813.

43. Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge: Cambridge UP, 2012) at 350.

44. *Ibid* at 358.

45. *Ibid* at 481.

accepted as the preferred approach to dealing with conflicts of rights and rights limitations. David Beatty notes that proportionality tests are used, to differing extents, within the constitutional and human rights regimes in Canada, the United States, Germany, South Africa, Israel, Japan, Hungary, Australia, and at the European Court of Human Rights,[46] and he concludes strongly from this and other considerations that there can be no question about the legitimacy of using proportionality assessments.[47] Langvatn suggests that there "is now a growing literature that holds this test out as the most suitable test of the public justifiability (or public reason) for rights-infringing acts and measures."[48] Even critics of proportionality accept that "the principle of proportionality is more or less unanimously endorsed,"[49] even if there remains much debate about how proportionality ought to be applied to weigh and balance particular interests in particular cases.[50]

As the above discussion attempts to establish, the general concept of proportionality as a practical and utilitarian approach to resolving rights claims is widely defended by jurists and adopted by constitutional courts. Proportionality is not without its flaws, but it appears to be the best basis (and I accept it as the best basis) for working out the competing relationships between rights themselves, and between rights and other socially valuable interests. Accepting that proportionality is the best, or least worst, framework to use in cases involving these competing relationships, however, is just the first step in determining how individual cases should be decided. In the next Part of this article, analysis of several contemporary Canadian freedom of religion cases will show how the concept of proportionality is used in practice, and how its application tends to disadvantage freedom of religion claims in these cases.

II. *Crimes, weddings, degrees, and deaths: The sites of tension between religious freedom and other* Charter *rights since 2010*

While it may not have been accurate in my previous writing[51] to characterize freedom of religion as a right that is second among equals, it was clearly established in this work that, at least between 1995 and 2010, SCC cases involving freedom of religion tended to require significant

46. David Beatty, *The Ultimate Rule of Law* (New York: Oxford UP, 2004) at 162-163.
47. *Ibid* at 170.
48. Silje A Langvatn, "Taking Public Reason to Court: Understanding References to Public Reason in Discussions about Courts and Adjudication" in Silje A Langvatn, Mattias Kumm & Wojciech Sadurski, eds, *Public Reason and Courts* (Cambridge: Cambridge UP, 2020) 1 at 15.
49. Webber, *supra* note 40 at 88.
50. *Ibid*.
51. Madden, *supra* note 1.

compromise from the religious adherents whose cases were before the Court.[52] Has this phenomenon continued into the present? As discussed in the following sections, given how provincial courts of appeal and the SCC have resolved cases since 2010 involving conflicts between freedom of religion and other *Charter* interests, it seems that religious freedom rights are still regularly, and perhaps overwhelmingly, required to give way.

As a preliminary matter, it is worth noting that this subordination of religion appears to occur regardless of whether the rights in issue are addressed under a traditional *Oakes* analysis,[53] or under the administrative law framework that was set forth in *Doré*[54] for considering government decisions that implicate *Charter* rights and values.[55] The requirement for religion to yield also seems to manifest in the case law regardless of whether freedom of religion conflicts directly with another enumerated *Charter* right,[56] or whether it more indirectly encroaches upon a *Charter* "value"[57] (that is, with an idea that is expressed or implied within the *Charter*, rather than with a cognizable *Charter* right).[58] A more complete

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52. *Ibid* at 86.

53. For instance, the *SK Marriage Reference*, *supra* note 6 at paras 67-100, was decided under a traditional *Oakes*/proportionality analysis. Likewise, the *ON Physician Case*, *supra* note 6 at paras 58-60 and 96-187, was decided on the basis of a traditional *Oakes*/proportionality analysis, although the Court of Appeal for Ontario seemed to question whether this was the appropriate framework (*ibid* at para 60):

> Accordingly, I would leave for another day the question of which standard of review and framework ought to be applied in these circumstances. For the purposes of these reasons, I simply apply the standard and framework chosen by the Divisional Court, which formed the basis of the parties' submissions on appeal. Nevertheless, like the Divisional Court, I would reach the same result applying a reasonableness standard and the *Doré/Loyola* framework.

54. *Supra* note 5.

55. For instance, the *MB Marriage Case*, *supra* note 6 at para 30, and the *TWU BC* case, *supra* note 6 at paras 57-105, both proceeded on the basis of a *Doré* analysis.

56. This type of right-versus-right conflict took place in the *Niqab Case*, *supra* note 6, wherein a witness' right to freely exercise her religion under paragraph 2(a) of the *Charter* by wearing a niqab while testifying in a criminal trial clashed with the accused's right to make a full answer and defence (under section 7 of the *Charter*) by having the witness' face exposed for the purposes of obtaining cross-examination cues from the witness, and of facilitating credibility assessments of the witness.

57. For instance, in *TWU BC*, *supra* note 6, the reasons of Abella, Moldaver, Karakatsanis, Wagner, and Gascon JJ were replete with references to the *Charter* values, including values of equality and human rights (*ibid* at paras 41 and 46), that factored into the decision. In separate reasons, McLachlin CJ (concurring), Rowe J (concurring in the result), and Coté and Brown JJ (dissenting) were all critical in different ways of the majority's reliance on *Charter* values, as opposed to *Charter* rights, to dispose of the appeal.

58. *Charter* values have been described as "those values that underpin each right and give it meaning," and it has been suggested that these values "help determine the extent of any given infringement in the particular administrative context and, correlatively, when limitations on that right are proportionate in light of the applicable statutory objectives" (*Loyola*, *supra* note 5 at para 36). It is beyond the scope of this article to fully canvass the manner in which *Charter* values have been relied upon by Canadian courts generally, but it is worth noting that many courts and academics have been critical of the use of *Charter* values writ large. See e.g. *Gehl v Canada (Attorney General)*, 2017

account of how freedom of religion is treated in leading appellate and SCC cases since 2010 is contained in the sections immediately below.

1. *Provincial Court of Appeal cases*

At the appellate court level, the three most significant cases (in terms of complexity, depth of analysis, and notoriety) since 2010 involving freedom of religion claims that were in tension with other *Charter* rights or values are, arguably, the *SK Marriage Reference*, the *MB Marriage Case*, and the *ON Physician Case.*

The *SK Marriage Reference* originated from a refusal (based on religious grounds) by some Saskatchewan marriage commissioners to solemnize same-sex marriages. The Saskatchewan government had subsequently requested an advisory opinion from the Court of Appeal for Saskatchewan (SKCA) concerning the constitutionality of two contemplated amendments to the provincial *Marriage Act.*[59] Both amendments would have permitted marriage commissioners to refuse to solemnize same-sex marriages out of respect for the religious beliefs of these commissioners.[60]

The SKCA unanimously ruled that the proposed amendments would infringe *Charter* subsection 15(1) equality rights of same-sex couples in ways that could not be justified under section 1 of the *Charter.*[61] The Court quickly found that the contemplated amendments would infringe upon the equality rights of same-sex couples[62] and proceeded to complete a lengthy *Oakes* analysis.[63] This analysis recognized that government compulsion of a marriage commissioner to solemnize same-sex marriages would result in an infringement upon the commissioner's freedom of religion rights under paragraph 2(a) of the *Charter.*[64] The Court then gave a full measure (i.e., 13 paragraphs) of consideration to the freedom of religion interests that were at stake in the case[65] and noted transparently how conflicting freedom of religion and equality rights needed to be reconciled.[66] This recognition of the importance of freedom of religion as a right that cannot automatically be trumped by equality rights reinforces the notion that the different rights have—at least in the abstract—the same value and importance. This point

ONCA 319, per Lauwers and Miller JJA (concurring), at paras 76-83 (for a forceful caution against reliance on *Charter* values in constitutional adjudication); see also Macklin, *supra* note 17.

59. *SK Marriage Reference*, *supra* note 6 at paras 1-2.
60. *Ibid* at para 2.
61. *Ibid* at paras 101 and 162.
62. *Ibid* at paras 39 and 41-45.
63. *Ibid* at paras 53-100.
64. *Ibid* at paras 53-65.
65. *Ibid* at paras 54-66.
66. *Ibid* at para 66.

was made even more explicit by the SKCA's description of how rights reconciliation must unfold: "This assessment must, of course, proceed on the basis that the *Charter* does not create a hierarchy of rights and that neither s. 2(a) interests nor those interests arising under s. 15(1) are, by definition, more worthy of being safeguarded than the other."[67]

However, the Court found that the contemplated amendments did not minimally impair the equality rights of same-sex couples.[68] Furthermore, in the final stage of its proportionality analysis, the Court found that the harms of the law would outweigh its benefits:[69] gay and lesbian couples "could be shunned,"[70] the harms could "ripple through friends and families of gay and lesbian persons and the public as a whole,"[71] and the rule of law could be weakened by commissioners who attempt to shape their office's role "to make it conform with their personal religious or other beliefs."[72]

The *SK Marriage Reference* as a whole, then, does two important things: first, it demonstrates one Canadian court's commitment to treating all *Charter* rights as having the same conceptual value; and, second, it illustrates how, at a more concrete and factual level, the benefits gained by individual exercises of religious rights can be outweighed by the harms that such exercises inflict upon the equality rights of others.

The *SK Marriage Reference* was followed in 2018 by a substantially similar case—the *MB Marriage Case.*[73] In that case, the government of Manitoba withdrew a religious marriage commissioner's registration to solemnize marriages because the commissioner refused to solemnize same-sex marriages.[74] At the Court of Appeal for Manitoba (MBCA), the Court found that the government's decision amounted to more than trivial or insubstantial interference with the commissioner's freedom of religion,[75] but it nonetheless held that the decision was reasonable.[76] The MBCA found that the commissioner's right to religious freedom was in conflict with the equality rights of same-sex couples and non-Christian couples (whose marriages the commissioner also refused to solemnize).[77] No actual same-sex or non-Christian couples were identified

67. *Ibid*.
68. *Ibid* at paras 85-88.
69. *Ibid* at paras 90-99.
70. *Ibid* at para 94.
71. *Ibid* at para 96.
72. *Ibid* at para 97.
73. *MB Marriage Case*, *supra* note 6.
74. *Ibid* at para 2.
75. *Ibid* at para 63.
76. *Ibid* at para 91.
77. *Ibid* at paras 75-76.

as having been harmed by the commissioner's refusal to solemnize certain marriages, but the MBCA nonetheless characterized the conflict between *Charter* religious and equality rights in this case as being real, and not simply hypothetical.[78] In considering how to balance these competing rights in a reasonable way, the MBCA confirmed that the harm to equality rights would be "very significant and genuinely offensive,"[79] and therefore upheld the application judge's decision.

In the process of articulating this decision, the MBCA rejected the commissioner's argument that the revocation of his registration created a hierarchy of rights wherein equality would have precedence over religion.[80] The Court found that the application judge's decision "clearly indicates that a balancing of rights occurred, as opposed to the creation of a hierarchy. […] The Decision is reasonable. It reflects a considered balancing of the *Charter* protections in issue, accommodating both interests in a proportionate manner and in accord with the fundamental values protected by the *Charter.*"[81]

In this case, as in the *SK Marriage Reference*, a Canadian appellate court again confirmed the equal importance that all *Charter* rights have as a general matter, but again found that the harm to equality rights of certain individuals that would flow from a commissioner's free exercise of his religious rights was disproportionate. In other words, these two marriage commissioner cases illustrate how religious and equality rights start from the same positions of value in cases of rights conflicts, but also how real-world fact scenarios can give substance to cost-benefit calculations in ways that drive courts to find in favour of equality interests at the expense of religious rights.

The final Canadian appellate case since 2010 that merits consideration here is the *ON Physician Case*.[82] In that case, several religious physicians sought to have the College of Physicians and Surgeons of Ontario's ("the College") policy on effective referrals declared unconstitutional as an infringement of their freedom of religion.[83] The policy required any physician who objected on religious grounds to performing abortions, prescribing contraceptives, providing medical assistance in dying, and offering certain other forms of care that may be religiously contentious, to provide patients with effective referrals to other health care providers who

78. *Ibid* at para 75.
79. *Ibid* at para 77, citing *SK Marriage Reference*, *supra* note 6 at para 41.
80. *Ibid* at paras 80-92.
81. *Ibid* at para 91.
82. *Supra* note 6.
83. *Ibid* at para 2.

could deliver the requested medical care.[84] The religious physicians were unsuccessful in their applications for declarations of unconstitutionality at the Divisional Court level.[85] They therefore appealed to the Court of Appeal for Ontario (ONCA).

The ONCA saw this case as one involving a conflict between the *Charter* section 7 rights of patients (to access health care) and *Charter* religious freedom rights of physicians,[86] and engaged in an *Oakes* analysis to dispose of the appeal.[87] In assessing whether the College's policy minimally impaired the *Charter* rights **of objecting physicians**, the ONCA focused at length on the "rejection, shame and stigma" that **patients** would feel when denied medical services on time-sensitive issues,[88] noting that—on the evidence—these were "not theoretical" harms.[89] The Court concluded that the College's policy was minimally impairing of objecting physicians' rights.[90] In the final step of its *Oakes* analysis, the ONCA discussed the burden that the effective referral policy created for objecting physicians but ultimately concluded that "patients should not bear the burden of managing the consequences of physicians' religious objections."[91] The ONCA found that the harms to physicians caused by the policy were outweighed by the harms to patients that the policy prevented.[92]

The *ON Physician Case* was perhaps less explicit than the two marriage commissioner cases in terms of its affirmation of the equal status of all *Charter* rights as a starting point for its analysis. However, the ONCA gave significant consideration to the matter of the objecting physicians' freedom of religion in a way that suggested the importance of the right. The ONCA was also clearly concerned about the section 7 *Charter* interests of patients that were in tension with the religious rights of the objecting physicians, and it seemed to be similarly concerned about patients' equality rights (even if these were not explicitly mentioned).[93] While all of these rights may have held the same value to the Court as a general matter, the particular facts and evidence in this case led the Court

84. *Ibid* at paras 14-27.
85. *Ibid* at para 5.
86. *Ibid* at para 166.
87. *Ibid* at paras 96-187.
88. *Ibid* at para 132.
89. *Ibid* at para 133; see also *ibid* at para 161.
90. *Ibid* at paras 160-161.
91. *Ibid* at para 185.
92. *Ibid* at para 187.
93. See, for instance, *ibid* at para 123, where the ONCA appears concerned about the same types of historical marginalization and oppression (of pregnant women and of seriously disabled patients) that often forms the subject matter of *Charter* subsection 15(1) litigation.

to conclude that the religious rights of objecting physicians needed to be compromised in order to avoid greater harms to the rights and interests of vulnerable patient groups.

2. *SCC cases*

At the SCC level, two cases since 2010 stand out for their consideration of freedom of religion rights that were in conflict with other *Charter* rights: the *Niqab Case* (2012) and *TWU BC* (2018).

The *Niqab Case* centred on the question of whether a Muslim sexual assault complainant should be permitted to wear her niqab on the witness stand in accordance with her right to freely exercise her religion, notwithstanding the impact that wearing the niqab might have on the accused men's *Charter* rights to make a full answer and defence.[94] The SCC majority in this case (there were separate concurring and dissenting opinions that will not be discussed here for the sake of brevity) decided to remit the case to the court of first instance for reconsideration,[95] but in the process, it essentially described how the case should be decided upon reconsideration.

Chief Justice McLachlin, writing for the majority, quickly acknowledged that religious and fair trial *Charter* rights seemed to conflict in this case and affirmed that a court must first attempt to "resolve the claims in a way that will preserve both rights."[96] However, the majority then telegraphed its suspicion that this type of resolution may be impossible in the *Niqab Case.*[97] The Chief Justice then considered how a proportionality analysis might unfold in this case upon reconsideration, as she identified—but purported not to weigh—the potential harms on both sides of the conflicting rights equation.[98] She first noted that "it is difficult to measure the value of adherence to religious conviction, or the injury caused by being required to depart from it,"[99] and she seemed to suggest

94. *Niqab Case*, *supra* note 6 at paras 5-9. The right of an accused to make a full answer and defence to criminal charges is protected under s 7 of the *Charter*: see *R v Mills*, [1999] 3 SCR 668 at para 69.

95. *Niqab Case*, *supra* note 6 at para 13.

96. *Ibid* at para 32.

97. *Ibid* at para 33:

> On the facts of this case, it may be that no accommodation is possible; excluding men from the courtroom would have implications for the open court principle, the right of the accused to be present at his trial, and potentially his right to counsel of his choice. Testifying without the niqab via closed-circuit television or behind a one-way screen may not satisfy N.S.'s religious obligations. However, when this case is reheard, the preliminary inquiry judge must consider the possibility of accommodation based on the evidence presented by the parties.

98. *Ibid* at paras 34-45.

99. *Ibid* at para 36. This statement echoes an earlier statement by McLachlin CJ in *Hutterian Brethren*, *supra* note 21 at para 89:

> There is no magic barometer to measure the seriousness of a particular limit on a religious

that factors such as the number, identity, and gender of the individuals present in the room during the witness' testimony would all need to be considered in quantifying the harm to NS's religious rights.[100] The Chief Justice also noted the broader harm that may flow from any requirement for NS to remove her niqab while testifying: similarly situated victims and witnesses in the future may be deterred from reporting crimes, which would represent a cost to those individuals and to the public as a whole.[101]

Chief Justice McLachlin then stressed the importance of effective cross-examination and credibility assessments as elements of the right to a fair trial, which she described as "a fundamental pillar without which the edifice of the rule of law would crumble."[102] The deployment of this dramatic metaphor may represent a turning point in the decision, wherein it begins to seem obvious how the majority thinks that the rights-balancing ought to be performed by the court of first instance. The majority concludes its proportionality guidance in very strong, and probably conclusive, language: "it may be ventured that where the liberty of the accused is at stake, the witness's evidence is central to the case and her credibility vital, the possibility of a wrongful conviction must weigh heavily in the balance, favouring removal of the niqab."[103]

The SCC majority's reasons in the *Niqab Case* represent a statement from Canada's apex court that freedom of religion cannot automatically be trumped by another right. The majority stresses that efforts must be made to reconcile competing rights claims and explains over some 11 paragraphs why any approach that creates a firm rule giving one right precedence over another in a case like this must be rejected.[104] In this sense, like the two marriage commissioner cases, the *Niqab Case* goes to

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practice. Religion is a matter of faith, intermingled with culture. It is individual, yet profoundly communitarian. Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others.

100. *Niqab Case*, *supra* note 6 at para 36.

101. *Ibid* at para 37.

102. *Ibid* at para 38.

103. *Ibid* at para 44. Notwithstanding the majority's apparent acceptance of the importance of seeing a witness' face as part of the need to ensure a fair trial (if not for the purpose of credibility assessments, at least for the purpose of permitting trial counsel to act on subtle visual cues as part of cross-examination), it is worth noting that the empirical validity of arguments linking trial fairness with one's ability to see a witness' demeanour has been called into question by a number of scholars. See e.g. Natasha Bakht, "In Your Face: Piercing the Veil of Ignorance about Niqab-Wearing Women" (2015) 24:3 Soc & Leg Stud 419; see also Karl Laird, "Confronting Religion: Veiled Witnesses, the Right to a Fair Trial and the Supreme Court of Canada's Judgment in R v N.S." (2014) 77:1 Mod L Rev 123.

104. *Niqab Case*, *supra* note 6 at paras 46-56.

great lengths to dispel any notion that a hierarchy of rights exists within the *Charter*. However, it seems evident from the majority's reasons that they viewed the harms to the two accused whose fair trial rights could be compromised, and to all members of society who share a common interest in the conduct of fair criminal trials, as being greater than the harms to a religious witness who must remove her niqab. Once again, at the level of specific facts within specific cases, a Canadian court saw the weight of religious interests as relatively light in comparison with the weight of other *Charter* interests.

The last religious freedom case since 2010 meriting discussion here is the *TWU BC case*.[105] That case arose when the Law Society of British Columbia (LSBC) decided not to approve a proposed law school at an evangelical Christian institution, Trinity Western University, where there would have been a mandatory Covenant applicable to all students that prohibited any sexual relations outside of the sanctity of marriage "between a man and a woman."[106] The *Charter* protection at play in the case was the religious freedom of Trinity Western University, and of prospective students who may have attended the proposed law school (collectively, "the Claimants"),[107] which was in tension with the LSBC's statutory mandate of "upholding and maintaining the public interest in the administration of justice."[108] A majority of the SCC (there were four sets of reasons between the nine judges who decided the appeal, but again, only the majority opinion is discussed here for the sake of brevity) accepted that "promoting equality by ensuring equal access to the legal profession, supporting diversity within the bar, and preventing harm to LGBTQ law students were valid means by which the LSBC could pursue its overarching statutory duty."[109]

The majority did not characterize this case as one that involved conflicting *Charter* rights, even though it may have been possible to argue that the subsection 15(1) equality rights of LGBTQ individuals were implicated in the LSBC's decision, as members of a group whose

105. This case has been the subject of extensive commentary in academic circles. See e.g. Alice Woolley & Amy Salyzyn, "Protecting the Public Interest: Law Society Decision-Making after Trinity Western University" (2019) 97:1 Can Bar Rev 70; Barry W Bussey, "Law Matters but Politics Matter More: The Supreme Court of Canada and Trinity Western University" (2018) 7:3 Oxford JL & Religion 559. For a particularly personal and candid analysis of the decision, see Diana Ginn & Kevin Kindred, "Pluralism, Autonomy and Resistance: A Canadian Perspective on Resolving Conflicts between Freedom of Religion and LGBTQ Rights" (2017) 12:1 Religion & Human Rights 1.
106. *TWU BC*, *supra* note 6 at para 6.
107. *Ibid* at para 2.
108. *Ibid* at para 40.
109. *Ibid*.

conduct (and, in many ways, identity) was targeted by the University's Covenant in a discriminatory manner. Nonetheless, it seems clear from the LSBC's efforts to make a decision that promoted equality, supported diversity, and prevented harm to LGBTQ law students, and from the SCC majority's acceptance of this basis for the LSBC's decision, that the case was fundamentally about resolving a conflict between religious freedom and equality objectives[110]—both of which find expression in the *Charter*.

The majority gave due consideration to the religious freedom rights that were affected by the LSBC's decision and recognized the importance of both the individual and communitarian aspects involved in practicing one's religion.[111] The majority then proceeded to engage in a harm-benefit weighing assessment in order to determine whether the LSBC's decision proportionately balanced the statutory objective with the Claimants' *Charter* interests, as required by the *Doré* framework.

In considering the harms to the Claimants' rights, the majority noted that "the limitation in this case is of minor significance" because it only prevented students from "studying law in their *optimal* religious learning environment where everyone has to abide by the Covenant."[112] Essentially, the majority concluded that an enforced Covenant was, for the Claimants, a nice-to-have rather than a need-to-have condition for their studies.[113]

In contrast, the majority found that the Covenant would cause numerous harms to members of the LGBTQ community and to the broader public—harms that the majority characterized as "*concrete*, not abstract, harms to LGBTQ people and to the public in general."[114] Both the individual and collective elements of these harms were discussed at length.[115] When all of these harms were considered in the aggregate, the SCC majority seemed to be most troubled by their sense that the "Covenant is a commitment to *enforcing* a religiously based code of conduct, not just in respect of one's own behaviour, but also in respect of other members of the TWU community."[116] Because the Covenant was really, for the majority, all about projecting one's religious beliefs onto others, the majority found that the LSBC's decision did **not** represent "a serious limitation on the religious rights of members of the TWU community."[117] In contrast, being

110. Ginn & Kindred, *supra* note 105 at 4.
111. *TWU BC*, *supra* note 6 at para 64.
112. *Ibid* at para 87 (emphasis in original).
113. *Ibid* at paras 88 and 90.
114. *Ibid* at para 103 (emphasis in original).
115. Ibid at paras 93, 95, and 98.
116. *Ibid* at para 99.
117. *Ibid* at para 102.

"required by someone else's religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful."[118] The majority found that the LSBC's decision to refuse to approve the University's law school represented a proportionate balance.[119]

The *TWU BC* case is interesting (and similar in certain ways to the *MB Marriage Case* and the *ON Physician Case*) in that it involves tension between the clear religious *Charter* **rights** of identifiable claimants (the University and a representative potential student) on the one hand, and the less clear *Charter*-protected equality **values** of a group that was not directly a party to the litigation (the LGBTQ community) on the other hand. In spite of this reality, the SCC majority, like the courts in all of the previous cases discussed above, ultimately concluded that the benefits of protecting religious rights to their fullest was outweighed on the specific facts of the case by the harms that would result to others from such a decision—in this case to members of the LGBTQ community and the public. Although the SCC majority did not reassert the Court's position that there is no hierarchy of rights under the *Charter* in *TWU BC*, this omission can perhaps best be explained by recalling that the majority did not frame the case as one involving a direct conflict of rights in the first place.

3. *Religious rights in Canada—generally equal, but specifically losing*

As the above overview of five key religious freedom cases in Canada suggests, Canadian courts continue to make strong efforts to reinforce the conceptually equal status of all *Charter* rights and to engage with religious freedom issues in detailed ways. It seems from these cases that, where religious *Charter* rights are in tension or conflict with other *Charter* rights or values, Canadian courts begin from the conceptual position that no right should automatically prevail over another right. However, as the cases discussed in this Part show, once courts are forced to descend from the abstract of rights guarantees into the particular facts of the cases, it appears as if the factors that weigh against protecting religious rights to their full extent tend to carry more weight than the factors weighing in favour of protecting religious rights.[120] In Part III, below, I offer an account as to why this tendency in the jurisprudence is justifiable as a matter of persuasive

118. *Ibid* at para 101.
119. *Ibid* at para 104.
120. See Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014) at 137 (wherein the author notes that Canadian courts affirm the importance of religious identity when finding infringements on freedom of religion, but tend to weigh religious considerations lightly when conducting proportionality analyses).

theory. For the time being, however, I have tried to illustrate how freedom of religion is viewed conceptually by Canadian courts as a right worthy of equal protection alongside other rights, but how the right is nonetheless one that courts are willing to see compromised in specific cases in order to achieve proportionate balances between competing rights and interests in those cases.

Before going further, I must acknowledge that my analysis only considers a small number of notorious Canadian cases since 2010, and only ones decided at the level of appeal/apex courts. Thus, one might be concerned about drawing widespread general conclusions from my analysis. This is a fair concern. For the purposes of the discussion that follows in this article, however, it is not important to quantify exactly how widespread the phenomenon (of stressing the importance of religious freedom before requiring that it yield to other rights and interests) might be. Rather, it is only important to acknowledge that the phenomenon exists in some or many cases, and that it is therefore worthwhile to expose and contemplate the phenomenon.

There is also, perhaps, a more epistemic concern with my analysis: we can probably never know what value Canadian judges internally place on religious freedom rights. A more cynical critic might suggest (as I implicitly suggested in previous work)[121] that Canadian courts simply pay lip service to the notion of a non-hierarchical set of rights that includes freedom of religion, before they consciously subordinate religious rights to any other rights that are at stake in a case. Again, for the purposes of the discussion that follows (attempting to justify the outcomes in these cases in broadly accepted terms that are grounded in legal and liberal political theory), no level of absolute certainty as to how Canadian judges personally value freedom of religion alongside other rights is needed. I am far more concerned here with what judges do than with what they think.

III. *Justifying religious losses: Public reason, third-party and dignitary harms, and emancipation rights*

Having shown in Part I how proportionality represents an appropriate general framework for assessing rights claims, and having demonstrated in Part II how freedom of religion tends to be the right that must yield when Canadian proportionality assessments are completed in contemporary cases of conflicting *Charter* rights or values, I now consider how it may be justifiable or legitimate for proportionality assessments to lead so commonly to such results in spite of the conceptually equal status of

121. See generally Madden, *supra* note 1.

freedom of religion alongside other *Charter* rights. If freedom of religion truly is equal in value to other rights, then how can we accept so many losses on the religious side of the conflicts in contemporary cases?

1. *Public reason and the exclusion of religious considerations*

One justification for the phenomenon in Canadian case law involves the concept of public reason. As Solum notes, "it was John Rawls who brought this idea into play in contemporary political philosophy,"[122] mainly in *Political Liberalism*,[123] wherein Rawls dedicates an entire chapter to the subject of public reason.[124] For Rawls, one of the keys to success in promoting justice and stability in a pluralistic society was through legitimacy, which required an exclusive reliance by certain actors in certain contexts on a form of discourse that he referred to as public reason.[125]

Public reason, according to Rawls, should be applied to "questions concerning constitutional essentials and matters of basic justice."[126] It applies to all government actors (including legislators, administrators, and judges) in their official capacities, and it applies to citizens more generally when advocating politically in public forums.[127] A justification that is properly grounded in public reason must consist only of appeals "to presently accepted general beliefs and forms of reasoning found in common sense, and the methods and conclusions of science when these are not controversial."[128] Arguments by way of public reason are, to Rawls, necessary as a matter of legitimacy because "political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideals acceptable to them as reasonable and rational."[129] In other words, "in discussing constitutional essentials and matters of basic justice we are not to appeal to comprehensive religious and philosophical doctrines—to what we as individuals or members of associations see as the whole truth,"[130] because such appeals cannot be

122. Lawrence B Solum, "Public Legal Reason" (2006) 92:7 Va L Rev 1449 at 1467.
123. John Rawls, *Political Liberalism*, expanded ed (New York: Columbia UP, 1993).
124. *Ibid* at Lecture VI, "The Idea of Public Reason."
125. *Ibid* at 217: "since the exercise of political power itself must be legitimate, the ideal of citizenship imposes a moral, not a legal, duty—the duty of civility—to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason."
126. *Ibid* at 252.
127. *Ibid*.
128. *Ibid* at 224.
129. *Ibid* at 217.
130. *Ibid* at 224-225.

endorsed as rational by other citizens who share contradictory or divergent religious or moral views.

Many scholars since Rawls have attempted to expand, limit, or otherwise adapt Rawls' conception of public reason in different ways,[131] but these scholars are all generally preoccupied with a common concern about identifying the types of arguments that are legitimate or acceptable as justifications for exercises of public power.[132] Many of these scholars seem to agree that religiously and morally based justifications for exercises of public power will be problematic because they will be incapable of being accepted by all members of the public, who may not all share the same religious or moral comprehensive doctrines.[133]

Although there is substantial disagreement about whether it is fair to require religious citizens to refrain from justifying their political positions in terms of religious arguments as a blanket rule,[134] a compelling rationale for this dimension of public reason theory can be advanced within the narrower context of actions taken by government actors in their official capacities. Solum, for instance, proposes a concept of public **legal** reason, wherein "legal officials should offer only public reasons for their official actions in official contexts."[135] Solum further suggests that stability and legitimacy problems will inevitably arise if this requirement of public legal reason is not respected:

> [I]t is one thing to be asked to accept an authoritative decision based on contestable evidence that dioxin causes cancer. It is quite another to be asked to accept that God's plan requires that women be subservient—or, for that matter, for a believer to be asked to accept a decision based on the premise that God does not exist. […] Given the fact of pluralism, many or most citizens will regard any legal decision that rests on deep and controversial premises of religious or moral doctrines as illegitimate in the sense that it lacks reasonable justification.[136]

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131. See e.g. Solum, *supra* note 122, especially at 1472-1482 (introducing a subset of public reason that he refers to as "public legal reason"); see also Langvatn, *supra* note 48 at 13-35 (summarizing six different major variants of public reason theory).

132. Melissa Yates, "Rawls and Habermas on Religion in the Public Sphere" (2016) 33:7 Philosophy & Soc Criticism 880 at 881: "As a consequence of the fact of pluralism, most theorists maintain that coercive law should not be justified on grounds that presuppose one particular world-view."

133. See e.g. Rawls, *supra* note 123 at 224-225; see also Jürgen Habermas, "Religion in the Public Sphere" (2006) 14:1 European J Philosophy 1 at 9; and see Andrew F March, "Rethinking Religious Reasons in Public Justification" (2013) 107:3 American Political Science Rev 523 at 524.

134. See e.g. Yates, *supra* note 132 at 881-888, describing both the split-identity objection to this conception of public reason (i.e., the objection that religious citizens must present a public persona that is different from their private and more religious persona) and the asymmetry objection (i.e., the objection that religious citizens face more difficulty in justifying their political positions than non-religious citizens, because the latter are free to drawn upon their secular comprehensive doctrines, while the former are prohibited from drawing upon their religious comprehensive doctrines).

135. Solum, *supra* note 122 at 1473.

136. *Ibid* at 1477; see also Benjamin L Berger, "Understanding Law and Religion as Culture: Making Room for Meaning in the Public Sphere" (2006) 15:1 Const Forum Const 15 (wherein the author

This view aligns closely with Habermas' view that, in the formal public political sphere (as opposed to the informal public political sphere), only secular justifications for exercises of power ought to be offered.[137] In a Canadian context (specifically relating to the *ON Physician Case*), it also accords with Moon's argument that a person's "beliefs concerning civic issues, such as the rights and interests of others and the just arrangement of social relations, even if grounded in a religious system, must be subject to the give-and-take of ordinary politics."[138]

It would probably be unnecessary, however, even within this narrower sphere of actions taken by government actors acting in their official capacities, to exclude **all** arguments that are connected with religion from political discourse. As March astutely points out, such arguments come in wide varieties of form and substance, and they tend to differ in the extents to which they might adversely affect the legitimacy of public decisions: these arguments often "involve greater or lesser degrees of appeals to revelatory or clerical authority"[139] and will only sometimes "require unintelligible or unreasonable self-sacrifice of fellow citizens."[140] March argues on this basis, convincingly (I think), that we can "in good faith object to certain modes of using religious arguments in certain areas of political decision making (e.g., on sexuality and marriage) while not objecting to others (e.g., on social justice)."[141]

A conclusion that at least some religiously based political arguments (when advanced or accepted by public officials acting within their official capacities) can justifiably be excluded as a matter of public legal reason makes sense from a legitimacy perspective. If the foundation of legitimacy truly requires, as Rawls suggests that it does, a reliance only on "principles and ideals acceptable to [all citizens] as reasonable and **rational**,"[142] then the invocation of many religious arguments will be problematic because religion is, in many ways, inherently irrational. On this point, I agree with Leiter, who suggests that one of the distinctive features of religion is its

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suggests that—when law conflicts with religion in a way that cannot otherwise be resolved—law ought to prevail because law is ultimately necessary in order for individuals to live together in society, in contrast with religion).

137. Habermas, *supra* note 133. For a similar argument, see Bruce MacDougall & Donn Short, "Religion-Based Claims for Impinging on Queer Citizenship" (2010) 33 Dal LJ 133, wherein the authors argue that religious rights should not be protected when doing so would encroach upon the (equality) rights of others within the public sphere.

138. Richard Moon, "The Conscientious Objection of Medical Practitioners to the CPSO's 'Effective Referral' Requirement" (2020) 29:1 Const Forum Const 29 at 31.

139. March, *supra* note 133 at 525.

140. *Ibid*.

141. *Ibid*.

142. Rawls, *supra* note 123 at 217 (emphasis added).

insulation from evidence: "the distinctively religious state of mind is that of faith—that is, believing something *notwithstanding the evidence and reasons* that fail to support it or even contradict it."[143] Leiter expands upon this characterization of religion by noting that religious beliefs "do not answer ultimately (or at the limit) to evidence and reasons, as these are understood in other domains concerned with knowledge of the world. Religious beliefs, in virtue of being based on 'faith,' are insulated from ordinary standards of evidence and rational justification, the ones we employ in both common sense and in science."[144]

If this characterization of core religious beliefs is valid—and I think that many religious adherents would accept it as such—then one can see how religious arguments that fit within the characterization run afoul of public legal reason's requirement of rationality. Where such arguments are offered to justify government decisions, and where some or many members of the population cannot agree that the arguments are grounded in rationality, then the decisions will be perceived as illegitimate.[145] Such illegitimacy "undermines the basis for reconciliation";[146] it prevents citizens who disagree on fundamental questions of religion and morality from finding ways of living harmoniously together in a just and stable society.[147]

An awareness of this broad conception of public legal reason can be seen in some of the cases discussed above in Part II, in two different ways. First, in at least one case—the *SK Marriage Reference*—we can see obvious concern on the part of the Court about a potential transgression of the ideal of public legal reason:

> Persons who voluntarily choose to assume an office, like that of marriage commissioner, cannot expect to directly shape the office's intersection with the public so as to make it conform with their personal religious or other beliefs. […] Marriage commissioners do not act as private citizens when they discharge their official duties. Rather, they serve as agents of the Province and act on its behalf and its behalf only. Accordingly, a system that would make marriage services available according to the personal religious beliefs of commissioners is highly problematic.[148]

143. Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton UP, 2013) at 39 (emphasis in original).
144. *Ibid* at 34.
145. Solum, *supra* note 122 at 1477.
146. *Ibid* at 1478.
147. Rawls, *supra* note 123 at 4.
148. *SK Marriage Reference*, *supra* note 6 at paras 97-98.

As this excerpt illustrates, the SKCA seemed unwilling to enforce religious rights over equality rights if doing so would permit public officials to imbue their public decision-making (e.g., about whose marriages they would solemnize) with their own personal religious convictions. Although the SKCA did not explicitly refer to the concept of public reason, the Court's expressed concern (that public officials should not make decisions on the basis of their private personal religious beliefs) is one that is central to conceptions of public legal reason.

The second way in which public reason theory makes itself felt within the cases discussed in Part II is less obvious because it relates more to what is **not** said within the respective decisions than to what is said. Specifically, I refer here to the tendency within proportionality analyses (like the final component of the *Oakes* test) for courts to focus more on the costs that a religious rights claimant would hypothetically need to incur in order to avoid a rights conflict, rather than on the costs that the religious rights claimant would actually incur if their right were not fully protected by the courts.[149] The former cost, which courts seem willing to grapple with, is typically a monetary, time, or convenience cost—a cost that can be understood and explained by reference to public reason. The latter cost is a far more abstract and spiritual cost—the cost of not living fully in accordance with deeply held religious beliefs. Courts seem unwilling in the cases discussed above to do more than briefly identify that there may be some spiritual costs (which are not easily amenable to discussion as a matter of public reason),[150] before moving back to a discussion of more tangible (but arguably less relevant, from the claimant's perspective) costs that can be fully canvassed as a matter of public reason.[151] This reliance by courts on only arguments or costs that are grounded in public reason

149. See *MB Marriage Case*, *supra* note 6 at para 81 (where the MBCA is focused more on the relatively low cost associated with the commissioner's alternatives, like registering as a religious officiant or obtaining temporary appointments for the purposes of individual marriage ceremonies, rather than on the subjectively high degree of harm that the commissioner would experience if required to solemnize marriages contrary to his religious beliefs); see also *ON Physician Case*, *supra* note 6 at paras 173–186 (where the ONCA extensively considers the practical costs of hiring new staff or changing one's medical specialty to avoid a rights conflict but does not engage deeply with the subjective spiritual costs that physicians will face if they must be complicit in practices that their religions forbid).

150. See e.g. Blair Major, "Religion and Law in *R v NS*: Finding Space to Re-Think the Balancing Analysis" (2015) 32:1 Windsor YB Access Just 25 at 30.

151. See, for instance, *ON Physician Case*, *supra* note 6 at para 165 (where the ONCA briefly described the spiritual harm that objecting physicians would face as "the burden and anxiety associated with a choice between their deeply-held religious beliefs and complicity in acts which they regard as sinful"), and at paras 173–186 (where the ONCA discusses in much more detail the more tangible costs of practical options available to objecting physicians, like changing their practice structure or specialization, in order to avoid a rights conflict).

causes a metaphorical lightening of the proportionality scales on the side of freedom of religion: since the subjective spiritual costs that will be incurred by the claimant cannot be explained or quantified in terms of public reason, these costs seem to be acknowledged but then discounted altogether from the proportionality calculus.[152]

While individual claimants may feel that the different courts' adherence to principles of public legal reason work unfortunately to their disadvantage, the practice is probably defensible in pursuit of broader legitimacy goals. Placing substantial or dispositive weight on a spiritual harm that a claimant will unquestionably experience, but that many/most other members of society cannot understand because they do not share the same religious belief system, will tend to cause legitimacy problems—problems that Solum notes have highly undesirable consequences:

> A regime of illegitimate authority can be oppressive, ineffectual, or both. It can be oppressive because the reliable imposition of sanctions without voluntary cooperation requires legal institutions that provide pervasive monitoring and frequent punishment, and it can be ineffectual because rates of coerced compliance are likely to be lower than rates of voluntary cooperation with legitimate authority. Moreover, the evil of illegitimacy is not limited to the realm of the practical. Legitimacy reconciles citizens to the binding force of law; illegitimacy undermines the basis for reconciliation and hence the moral worth of citizenship.[153]

In other words, if courts render decisions in rights-conflict cases on the basis of non-public legal reasons, then the result could be a weakening of respect for and compliance with the law across society. Exclusive resort to forms of public legal reason by the courts is therefore a desirable reality, even if it tends to contribute to a pattern of religious freedom losing in contemporary cases involving rights-conflicts.

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152. See Major, *supra* note 150 at 30-31 (discussing the *Niqab Case*):
> Physical consequence that is empirically demonstrable (albeit it potential rather than actual) weighs much more strongly for the court than spiritual consequence. This framework for giving order to rights through the balancing analysis presumes a fundamental division between physical and non-physical consequences. The fact that a risk of physical harm outweighs a sure spiritual harm is itself a profound statement of philosophical commitment that reflects a hierarchy of values.

153. Solum, *supra* note 122 at 1477-1478.

2. *Third-party and dignitary harms—tilting the scales away from religion*

The tendency for freedom of religion to lose in cases of conflicting rights can also be justified by reference to concepts of third-party harms[154] and dignitary harms, as will be explained below.

Proportionality analyses, like the ones used in resolving Canadian rights-conflict cases, are all about utilitarian weighing of harms and benefits. In more straightforward cases, the deciding court's task of summing the harms and benefits, and ruling so as to maximize net benefits and minimize net harms, is clear. The *Niqab Case* comes close to being this type of straightforward case, where fair trial *Charter* rights of two known co-accused were in conflict with the religious freedom *Charter* right of a known witness, and where it would have been possible to hear evidence from all concerned parties as to the impact of a decision on their rights. These straightforward cases involve consideration of basic third-party harms; that is, they are concerned not only with harms and benefits as between the government and the individual rights claimant in the case, but also with harms that other people (third parties) might experience if the rights claimant were to prevail.[155] These cases also tend to deal with variants of harm that are not particularly controversial or difficult to recognize—like the material harm of being convicted for an offence after an unfair trial (as in the *Niqab Case*).

Other cases are far less straightforward because of complicating third-party harm issues. First, even though there may not be a specifically identified third party whose circumstances are being assessed in the cases, there may be a massive group of potential third parties whose rights would be affected by the court's decision. In such cases (like the *SK Marriage Reference*, the *MB Marriage Case*, the *ON Physician Case*, and *TWU BC*), courts are nonetheless willing to consider the harms that these groups will

154. Third-party harms involve shifting the burdens of one's exercise of a right onto others. In the United States, it is said that "[a]n important constitutional principle for mediating between religious freedom and the public good is that religious accommodations should not shift substantial harm to others" (Nelson Tebbe, Micah Schwartzman & Richard Schragger, "When Do Religious Accommodations Burden Others?" in Susanna Mancini & Michel Rosenfeld, eds, *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge: Cambridge University Press, 2018) 328 at 329).

155. There is an abundance of commentary on the concept of third-party harms in American religious freedom literature. See e.g. Jonathan C Lipson, "On Balance: Religious Liberty and Third-Party Harms" (2000) 84:3 Minn L Rev 589; Kathleen A Brady, "Religious Accommodations and Third-Party Harms: Constitutional Values and Limits" (2017) 106:4 Ky LJ 717; and, Stephanie H Barclay, "First Amendment 'Harms'" (2020) 95:2 Ind LJ 331.

suffer and weigh them against the benefits that would accrue to religious claimants if their rights were fully upheld.[156]

Given the utilitarian nature of proportionality assessments, the impact of third-party harms on a case may be dispositive. To be clear, no Canadian court has (to my knowledge) justified limits on freedom of religion, or found against freedom of religion in a competing rights case, **solely** on the basis of a numerical superiority of adversely affected third parties when compared to positively affected religious rights claimants. However, it stands to reason that the net harms will be counted as objectively higher than the net benefits (in a way that sways the proportionality assessment) if courts identify a large group of harmed third parties on one side of the equation, and only a single benefitting rights claimant (or a small group of benefitting claimants who have a narrow religious interest that they seek to advance) on the other side of the equation.

It strikes me as entirely defensible and consistent with the concept of proportionality to consider the interests of all the different people who will be adversely affected by a claimant's exercise of their religious rights, and to aggregate this suffering on one side of the proportionality calculation. The ideal proportionality assessment, in a world of perfect information, would presumably take into account every individual rights-benefit and rights-harm that would be caused by a decision—no matter how indirect or remote—in order to make the most informed decision possible in terms of its consequences.[157] To take all reasonably foreseeable third-party harms into account, instead of just the harms to known and identified third parties, therefore seems to be a step toward this ideal proportionality assessment. In the final analysis, as long as we accept that a utilitarian proportionality assessment is the best (or least worst) mechanism for resolving rights claims, then we ought to want these assessments to be informed by as

156. In the *SK Marriage Reference*, *supra* note 6 at para 96, for instance, the SKCA identified "the gay and lesbian community at large," "friends and families of gay and lesbian persons," and "members of the public" all as third parties who would suffer harm from upholding the religious rights of marriage commissioners. In the *ON Physician Case*, *supra* note 6 at para 121, the ONCA identified "patients with financial, social, educational or emotional challenges; patients who are old, young, poor or addicted to drugs; patients with mental health challenges or physical or intellectual disabilities; [and] patients facing economic, linguistic, cultural or geographic barriers," among others, as third parties whose rights would be harmed by upholding the religious rights of objecting physicians.

157. The challenge, of course, lies in the fact that perfect information is unavailable to real-world judges; these individuals must instead identify, collect, and analyze (usually with the assistance of the parties' counsel) the best available (but always incomplete) information when weighing proportionality claims. To complicate matters, the ideally neutral processes of identifying, collecting, and analyzing information may actually be influenced by various biases that compromise neutrality and precipitate more political than strictly legal decision-making (on this point, see Miller, *supra* note 34 at 385, and *New Jersey v TLO*, *supra* note 37 at 369-370).

many of the known or foreseeable consequences as possible—even if taking all of these consequences into account tends to mean that religious rights claimants will often need to compromise in cases involving conflicts with other rights.

Although this consideration of third-party harms may seem to "stack the deck" against religion in competing rights cases, and although such third-party harms seem to have been influential in weighing against religion within all of the cases discussed above in Part II, it is not necessarily the case that non-religious third-party harms will always be greater than the first-party harms experienced by religious claimants. In this sense, the concept of third-party harms is rights-neutral: one would expect a court to rule in favour of a religious right if failing to do so would cause major harms to many religious adherents, in order to protect a small group of third parties from minor harms. To offer a concrete example, it would pervert the doctrine of third-party harms to require fifteen niqab-wearing witnesses to unveil on the witness stand in order to protect the fair trial rights of a man who is accused of a non-criminal motor vehicle offence: the (third-party) harm to the single accused person in this non-criminal case is just not as weighty as the (first-party) harm to the multiple religious rights claimants.

Thus, consideration of third-party harms can justify rulings against religious freedom in contemporary rights-conflict cases only because of the ways in which religious claims manifest in these cases, not because of some overarching rule of priority that subordinates religious harms to other harms: the contemporary cases (including all of the cases discussed in Part II, except the *Niqab Case*) often involve religiously based assertions, or "complicity claims,"[158] about how others should live their lives—and these assertions have a harmful impact on large numbers of others who feel shame and stigma when the religious claims are advanced or validated.[159] Where this third-party effect of a religious claim is smaller or non-existent, then there is clearly less ground for justifying a subordination of the religious right to the other right at issue in the case.

However, it is not just the **number** of third-party harms that tends to have impact in cases where freedom of religion is in tension with other

158. Cases wherein religious adherents claim that they have a right to refrain from doing anything that would make them complicit in actions by others that they characterize as sinful are often referred to as cases involving "complicity claims": Sandra Fredman, "Tolerating the Intolerant: Religious Freedom, Complicity, and the Right to Equality" (2020) 9:2 Oxford JL & Religion 305 at 305.

159. For a well-reasoned discussion of the stigmatizing harms that can be felt in this type of case—addressing the *TWU BC* factual situation—see Elaine Craig, "TWU Law: A Reply to Proponents of Approval" (2014) 37:2 Dal LJ 621, especially at 634-637 and 655-657.

rights; it is also the nature of these harms, which often manifest as dignitary harms (rather than as just material harms). In the cases discussed above in Part II, one might characterize an LGBTQ couple's challenges (in terms of time, cost, and inconvenience) in finding a non-objecting marriage commissioner, or a patient's similar challenges in finding a non-objecting physician, or a co-accused's conviction after an unfair trial, or an LGBTQ individual's more limited access to law school seats when compared to a married heterosexual individual, all as possible **material** costs associated with upholding religious rights in each of the five respective cases. **Dignitary** harms,[160] in contrast, include suffering from shame and stigma,[161] a sense of isolation,[162] being degraded or disrespected,[163] and other such harms,[164] as seen in all the cases discussed in Part II except the *Niqab Case* (where dignitary harms did not arise).[165]

NeJaime and Segal, in what remains probably the most relevant and influential article on the subject of dignitary harms suffered by third parties when religious adherents invoke religious freedom rights, argue that the concept of dignitary harms first "became clear during the civil rights movement, when denials of service at lunch counters were understood as meaning-making transactions"[166] intended to humiliate. These authors note that the socially constructed meanings of refusals to serve (or to include, etc.) in the context of religiously based complicity claims are harmful to the dignity interests of others, as "actions that address third parties as sinners in ways that can stigmatize and demean."[167] Additionally, in many

160. Such harms are also sometimes referred to as expressive harms: see generally Eva Brems, "Objections to Antidiscrimination in the Name of Conscience or Religion: A Conflicting Rights Approach" in Susanna Mancini & Michel Rosenfeld, eds, *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge: Cambridge University Press, 2018) 277.

161. *ON Physician Case*, *supra* note 6 at paras 132-133.

162. *TWU BC*, *supra* note 6 at para 98.

163. *Ibid* at para 101.

164. For a thorough account of the different ways in which religious objections to the conduct of others can create dignitary harms for women, see Louise Melling, "Religious Refusals and Reproductive Rights: Claims of Conscience as Discrimination and Shaming" in Susanna Mancini & Michel Rosenfeld, eds, *The Conscience Wars: Rethinking the Balance between Religion, Identity, and Equality* (Cambridge: Cambridge University Press, 2018) 375.

165. I have suggested here that dignitary harms did not arise in the *Niqab Case* mainly because the concept, as described in this article, refers only to dignitary harms to others that result from a rights-holder exercising their rights. Although the witness in the *Niqab Case*, N.S., likely had strong dignitary interests (related to her religion, culture, and gender) that all motivated her efforts to testify while wearing her niqab, her religious freedom claim would not likely have caused dignitary harms to the accused persons who were on trial in that case.

166. Douglas Nejaime & Reva B Siegel, "Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics" (2015) 124:7 Yale LJ 2516 at 2574-2575.

167. *Ibid* at 2575-2576.

cases, a religious claimant's meaning is actually explicit and targeted, not just socially constructed, in even more harmful ways. NeJaime and Segal recount, for instance, the example of a same-sex couple who were refused service at a bakery when the bakery owners told the couple, "[we] don't do same sex weddings because [we] are Christians and being gay is an abomination."[168] They also recount the example of a mother of six children who sought emergency contraception from a Walgreens pharmacist, and who was refused assistance when the pharmacist reportedly told her, "You're a murderer! I will not help you kill this baby. I will not have the blood on my hands."[169]

In these cases, as in the *SK Marriage Reference*, the *MB Marriage Case*, the *ON Physician Case*, and *TWU BC*, religious adherents act, or seek a right to act, toward others in ways that signal how these others are less worthy of consideration and respect—are less equally human—because of their sins. In the *ON Physician Case*, the ONCA describes how one of the objecting physicians refused to provide transition-related care to a transgendered patient: the physician told the patient, "I believe that God has created us male and female, and that choosing to change your gender is working against how God has made you."[170] In the *SK Marriage Reference*, the SKCA summarized the objections of numerous religious intervenors who opposed the idea of same-sex marriages as follows: the objecting commissioners believe that "a same-sex union is sinful (to put it mildly—some also say unhealthy, perverse, etc.) and that to officiate in the ceremony would give the appearance of approval of, and might serve to encourage, such a sinful lifestyle."[171] The SKCA was quick to comment that "to refuse to perform a same-sex marriage on this basis without doubt expresses *condemnation* of same-sex unions and practices as socially harmful and perverse."[172]

Dignitary harms like these that materialize when religious adherents communicate messages of rejection or disgust toward other marginalized individuals in society are powerful and oppressive, in part because of the legacy of discrimination that these other individuals have often tended to face: "This harm is unlike that of a business turning away a customer

168. *Ibid* at 2576 (quoting Rachel C, "Review for Sweet Cakes" (17 January 2013), online: *YELP* <www.yelp.com/user_details?userid=a4fuAn84fRddJTt7jJEo7g> [http://perma.cc/7VBA-CY7P]).
169. *Ibid* at 2576 (quoting National Women's Law Center, "Pharmacy Refusals 101" (24 April 2012) at 2, online (pdf): <nwlc.org/wp-content/uploads/2015/08/pharmacy_refusals_101_7_24_15_final_clean_0.pdf> [http://perma.cc/4UJG-Z6PE]).
170. *ON Physician Case*, *supra* note 6 at para 141.
171. *SK Marriage Reference*, *supra* note 6 at para 140.
172. *Ibid* at para 142 (emphasis in original).

merely for lack of appropriate attire, as this harm is set against a history of discrimination."[173] Canadian courts, in the cases discussed above, have recognized and seem to be influenced by this legacy of discrimination and the accumulated harm that it has visited upon members of marginalized groups.[174] This recognition was particularly evident in the *SK Marriage Reference*, wherein the SKCA noted not only that gays and lesbians had faced historical discrimination in general,[175] but more pointedly that members of these communities had faced extensive discrimination predominantly at the hands of religious adherents: "The evidence before us clearly establishes that religious disapproval of same-sex relationships is hardly restricted to marriage commissioners. Indeed, it is fair to say that **religious belief is at the root of much if not most of the historical discrimination against gays and lesbians."**[176]

It is perhaps an unacknowledged recognition of this relationship between religion and historical discrimination against certain marginalized groups in other cases (specifically, *TWU BC* and the *ON Physician Case*) that causes the courts in these cases to forcefully discuss, and seemingly place significant weight upon, the dignitary harms that marginalized individuals would suffer if the religious rights in the cases were fully protected.[177] Equality-related dignitary harms just seem to count for more in the proportionality analyses than many of the material harms that a religious claimant might experience if their rights were not protected, and than almost all of the spiritual harms that they might experience (but that are seldom meaningfully discussed by the courts, perhaps because these harms cannot be explained by reference to public reason, as I have suggested above).

In many ways, it is appropriate for dignitary harms to weigh heavily in proportionality calculations. A material harm (e.g., an extra financial cost) can be conceptually and practically offset (e.g., by an award of human rights damages) in many cases without overwhelming or enduring consequences. The costs of suffering dignitary harms are less clear, may endure for longer periods, and are perhaps incapable of ever being offset. Being told by a religious service provider at a critical point in one's life (e.g., at the time of marriage, or when in need of serious medical

173. Marvin Lim & Louise Melling, "Inconvenience or Indignity? Religious Exemptions to Public Accommodations Laws" (2014) 22:2 JL & Pol'y 705 at 721.
174. See e.g. *ONCA Physician Case*, *supra* note 6 at para 123.
175. *SK Marriage Reference*, *supra* note 6 at para 45: "The historical marginalization and mistreatment of gay and lesbian individuals is well known."
176. *Ibid* at para 145 (emphasis added).
177. *TWU BC*, *supra* note 6 at para 101; *ON Physician Case*, *supra* note 6 at para 123.

attention) that one's identity is so repugnant that the service provider must refuse assistance is potentially so damaging to individual dignity that one will never fully overcome the harm. In this sense, an emerging judicial recognition of weighty dignitary harms in conflicting rights cases that involve freedom of religion is entirely appropriate and consistent with the underlying rationale of proportionality assessments.

3. *The special importance of emerging and emancipation rights*

A final justification that can be offered for the pattern of religious losses in contemporary rights-conflict cases—despite the conceptually equal status of religious freedom alongside other *Charter* rights—draws upon the concept of emerging or emancipation rights and sketches out a special place of importance for these rights in particular contexts.

Emancipation rights, according to Brems, are a distinct set of anti-discrimination and autonomy rights that are "intended to correct a legacy of structural discrimination of specific groups and to provide to members of such groups equal opportunities and equal enjoyment of their human rights. Concretely, these include among others women's rights, children's rights, the rights of ethnic and cultural minorities, the rights of persons with disabilities, and LGBT rights."[178] The basic premise behind Brems' concept of emancipation rights is that formal legal change often precedes more meaningful and necessary cultural change in relation to equality rights and non-discrimination.[179] Because of this reality, Brems argues, legal institutions must privilege emancipation rights over other rights during the periods when culture change lags behind legal change, if other options are unable to resolve rights conflicts in specific cases.[180]

Brems' theory is simple and intuitive. It also fits nicely within the broader utilitarian proportionality framework. Consider, for instance, the difference between the following two scenarios: (1) a right for an individual, whose rights have never been in serious jeopardy, is fully upheld; and (2) a right for an individual, whose rights have historically been disregarded, and whose rights continue to be regularly challenged or undermined, is fully upheld. In comparing these scenarios, it is important to acknowledge that the incremental value of one additional act of rights-recognition is not going to be equal in every case, because the appreciation of goods in life tends to follow the law of diminishing marginal utility.[181] Thus, the

178. Brems, *supra* note 160 at 278.
179. *Ibid* at 277-278.
180. *Ibid* at 302.
181. Herbert Hovenkamp, "Marginal Utility and the Coase Theorem" (1990) 75:4 Cornell L Rev 783 at 798: "Most people probably experience declining marginal utility of income—each dollar added to

greatest incremental benefit here will probably result from scenario (2), because the value of one additional act of rights-recognition will tend to be higher for individuals whose rights enjoy less respect as a starting point. In Canadian conflicting rights cases wherein religious individuals who form part of dominant or more powerful groups attempt to assert religious claims against individuals who form part of historically mistreated groups, the rights of the latter individuals would be emancipation rights that Brems suggests should be protected as a priority under her theory, **and** they would also be rights that tend to yield the greatest incremental benefit as a matter of utilitarian (and marginal utility) theory when they are protected.

The analysis that flows from consideration of emancipation rights in these two scenarios (which obviously track the factual circumstances of the *SK Marriage Reference*, the *MB Marriage Case*, *TWU BC*, and, to a possibly lesser extent, the *ON Physician Case*) does not suggest that freedom of religion is a lesser right than other rights in all contexts. Rather, it simply suggests that freedom of religion (for the predominantly Christian rights claimants in the cases just mentioned) is the more historically well-established and protected right when compared to the equality rights of LGBTQ community members, seriously disabled patients who seek medical assistance in dying,[182] or other similarly disadvantaged people whose rights were at stake in those particular cases. In these specific contexts, there are strong arguments, as a matter of both emancipation rights theory and utility/utilitarian theory, to privilege the emerging right over the established right. Courts should not shy away from relying on these justifications that weigh against religious freedom rights in certain cases: "[e]xplicitly acknowledging that the rights of one party will be diminished in order to protect the rights of the other may be uncomfortable but should result in more transparent decision-making, with a truer accounting of the costs and benefits involved."[183]

However, courts must also guard against any kind of routinization of the privileging of non-religious rights over religious rights. For instance, the minority religious rights of a group that seeks to use a park for communal outdoor prayer are perhaps far less protected as a general

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their wealth gives them a marginally lower level of individual satisfaction than a previous dollar."

182. Although I am suggesting here that seriously disabled patients may have an equality-based right to access MAiD, it is worth noting that some disability advocacy groups have suggested the opposite: that the equality rights of seriously disabled individuals are violated when society permits these individuals to access MAiD. See e.g. Inclusion Canada, "Press Release: MAiD Bill Violates Equality Rights of People with Disabilities" (28 February 2020), online: <inclusioncanada.ca/2020/02/28/medical-assistance-in-dying-bill-violates-equality-rights-of-people-with-disabilities-it-must-be-stopped/> [perma.cc/P7SR-BL9T].

183. Ginn & Kindred, *supra* note 105 at 20.

matter than the free expression rights of non-religious right-wing group members who seek to use the same park for a public protest against any immigration policy that allows members of the religious minority to enter Canada. In such a case, the emerging or emancipation right is clearly the religious right, and it should justifiably be accorded a measure of privilege as a result.

Conclusion

This article does not make any single deep claim; rather, it attempts to establish a series of relatively shallow factual, theoretical, and legal claims in sequence, in an effort to build a final argument that is novel and perhaps controversial in what it suggests. The first claim is that a utilitarian proportionality framework, notwithstanding the many flaws that one might find with it, is nonetheless a logical and legitimate framework for resolving Canadian fundamental rights cases. The second claim is that, when proportionality analyses of different types are actually applied to difficult Canadian cases at the level of appeal courts and the SCC, we see that Canadian courts place freedom of religion conceptually on par with all other *Charter* rights, but also that Canadian courts tend to require freedom of religion to yield in specific cases when this right conflicts with other *Charter* rights and values. The final (and potentially most disruptive) claim is that this tendency to value freedom of religion equally with other rights in the abstract while subordinating it to other rights in numerous concrete cases is justifiable by reference to concepts of public reason, third-party and dignitary harms, and the special importance of emerging human rights.

One problem with building an argument from sequential claims as I have done in this article is that, if one of the early claims fails, then the foundation for the remainder of the argument is compromised. Along these lines, one might suggest that this entire article is really just a long-winded defence of utilitarianism in general, and that the article's claims must all be rejected if one does not subscribe to a utilitarian world view. I would like to think that the claims advanced in this article are much narrower and more nuanced than simply being justifications for the adoption of a wholesale utilitarian world view. This article takes no position on the merits of utilitarianism as a comprehensive normative ethical theory. To the extent that it endorses a utilitarian approach, the endorsement should be understood as applying only to proportionality assessments used to resolve rights claims—and even then, only because no superior mechanism for resolving such claims has yet been developed. If we accept that utilitarian proportionality assessments represent the most

workable general framework for resolving rights claims, at least until a more widely-accepted framework comes along, then the foundation upon which this article rests is solidly intact.

However, there is more at stake here when we discuss controversial matters of religious freedom than just questions about how logically sound, or robust, one's argument might be. The potential for unintended wounds and further polarization runs high in such discussions. And so, just as Rawls' concept of public reason strives to promote reconciliation within a society characterized by the fact of reasonable pluralism,[184] I aspire within this article to present a justification for religion's losing tendency in contemporary Canadian case law that is capable of being accepted by all of Canadian society. When I argue here that the results in contemporary Canadian rights-conflict cases are justifiable, this is not because religious rights, or religious people, are somehow less deserving of equal respect and consideration than other rights or people. Rather, it is because I believe that Canadian law has settled upon a fair general framework for resolving rights claims in a diverse society (the proportionality framework), and that when this framework is applied to the types of religious rights cases that seem to find themselves before the courts today, the balance of harms will often disfavour the religious rights. These outcomes are not likely to be embraced by religious rights claimants on the losing side in any particular case. However, it might provide some comfort to religious adherents to consider how the justifications that have been advanced in this article could be used to their advantage in different cases to protect their own rights. For instance, encroachments upon their religious rights that cannot be framed in terms of public legal reason should be prohibited; likewise, proportionality assessments should weigh in favour of religious rights claimants if they suffer large third-party or dignitary harms collateral to another individual's exercise of a fundamental right, and the special significance of religious freedom as an emerging or emancipation right could be invoked under appropriate circumstances in order to protect religious rights in priority over other rights.

In many ways, then, it is important for all of us to understand the justifications for the losing phenomenon in contemporary Canadian religious freedom case law. On the one hand, secular society must remember that religious rights are conceptually worthy of equal protection and respect alongside other rights, and that religious rights will not be compromised by the courts except in extreme cases (like the ones that seem to end up in front of appeal courts and the SCC) wherein exercises of

184. Rawls, *supra* note 123 at 4.

the religious rights would cause disproportionate harm. On the other hand, all of society would likely benefit if religious adherents truly believed that adjudication of their rights claims can happen in accordance with fair and legitimate principles that the religious adherents can accept. By thinking about the justifications for contemporary religious freedom losses, and how these these justifications might change or disappear entirely if only a few facts in each case were to change, perhaps some small measure of reconciliation or rapprochement on this divisive topic can be achieved within Canadian society. It is a modest hope—but one that should not be abandoned.