Worlds colliding: Aspects of New Zealand conservative Christians' encounter with the law

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A thesis submitted for the degree of
Doctor of Philosophy
of the University of Otago, Dunedin,
New Zealand

14 February 2000

ABSTRACT

This is a study of a particular religious group, "conservative Christians", and their reaction to cultural and legal change in recent decades. Their religious liberty is a key focus. Part I provides the background. Chapter 1 describes the conservative Christian "narrative" of New Zealand—a story of cultural or *de facto* establishment of a generic Christianity followed by a cultural disestablishment of this dominant worldview from the about 1960s. Chapter 2 analyses the characteristic beliefs, denominational composition and worldview of conservative Christians, their attitude to the state and their opposition to the "spirit of the age". Chapter 3 describes the "Wellington worldview", the mindset of those in positions of power and influence in government, law, business, the media and so on. I argue liberal modernist premises are the governing ones. Chapter 4 propounds a model of engagement between the two worlds. Peaceful co-existence is the rule, but occasionally—due to the incompatibility of the two worldviews at certain key points—conflict does, and will occur, between conservative Christians and the state.

Part II comprises a series of case studies involving past, current and potential conflicts between conservative Christians and the state. The aim is to see whether conservative Christian religious practices are either generally accommodated or disregarded by the state. Chapter 5 examines conservative Christian ambivalence toward human rights theory and chronicles instances of conflict between the state and such Christians. Chapters 6 to 8 focus upon a key conservative Christian institution, the family. The United Nations Convention on the Rights of the Child 1989 has been a locus of concern for many conservative Christians concerned at the attenuation of parental authority. The potential impact of the Convention upon two significant parental rights—the parental right to control the religious upbringing of one's children and the parental right of corporal punishment—is evaluated. The next two chapters examine the conservative Christian opposition to the legal acceptance of homosexual practice and the growing legal recognition of homosexual rights. Chapter 9 analyses the freedom of churches to refuse to train and ordain openly-practising homosexual or lesbian candidates for the ministry in light of the legal prohibition upon sexual orientation

discrimination. Chapter 10 explores the extent of conservative Christians' positive religious freedom to challenge the introduction of same-sex marriage.

Part III concludes with some observations on religious tolerance in a post-Christian society.

PREFACE

This study arises from a longstanding personal interest in the relationship between faith and law, church and state, religion and government. I suppose the specific prompts were various talk-back shows on human rights and children's rights I listened to on *Radio Rhema* in 1993-1994. The thesis has given me the opportunity to mull through the connection between my discipline and Christianity and to explore various religious freedom issues arising in contemporary New Zealand. I am grateful to the Faculty of Law, University of Otago, for the privilege of undertaking the research.

The mode of citation style follows the *Otago Law Review* but, in view of the extensive cross-references within chapters, I have modified it slightly by using the short reference method from the *Chicago Manual of Style*.

First and foremost I want to thank my supervisors, Professors Peter Skegg and Stuart Anderson. Peter Skegg has been a thoughtful and careful guide throughout the last five years and, aside from his legal expertise, his insights on contemporary Christianity have been invaluable. Without his moderating influence the final product would have been much the worse. Stuart Anderson has provided crucial structural and directional assistance. I am indebted to both. I should add that the views expressed in the thesis are mine and not to be attributed to them.

I am grateful to many friends and colleagues who have assisted me with my research and writing, some of whom patiently read the draft sections I inflicted upon them. My thanks to, in no set order, Dr John Stenhouse, Dr Chris Gousmett, Dr Brett Knowles, Professor Jonathan Boston, Associate Professor Paul Trebilco, Professor Mark Henaghan, Associate Professor John Dawson, Associate Professor Paul Rishworth, Arnold Turner CMG, Michael Robertson, Bruce Logan and Monsignor Vince Hunt. I remember the late Reverend James Worsfold, *de facto* bishop of the Apostolic Church, and thank him for "commissioning" me to undertake the project.

My grateful thanks to Valmai Bilsborough-York for her truly expert secretarial work, and also to Amanda McDowall and Kirsten Collett who typed the first drafts.

For her constant love, patience and encouragement, to mention just a few of her attributes (see *Proverbs* 31 for the others), I thank my beloved wife, Lidwina.

This thesis is based on the law available to me on 1 January 2000.

Soli Deo Gloria.

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Part I

Chapter 1

INTRODUCTION

I THE AIM AND SCOPE OF THE STUDY

This is a study of a particular group and its reaction to cultural and legal change. The group is conservative Christians. I shall define that term in detail in the next chapter but it will suffice to characterise them now as theologically conservative, usually Protestant, Christians, who adhere to "traditional" moral values. They are critical and (to varying degrees) antagonistic to the prevailing culture and wider society, an environment which they believe is becoming increasingly hostile to traditional Christianity. They are chosen for at least three reasons.

First, they are a numerically large and visible group in New Zealand, totalling many tens of thousands, and a group which has in the last 20 years become politicised. Second, because of their attitude to the state and their occasional counter-cultural stance, they constitute a cadre of religionists likely to test the limits of liberal democratic tolerance and the law over matters of religious exercise. Third, they are a group with which the author is particularly familiar. I identify with that milieu, which makes it both useful and dangerous to critique it. It is useful for I bring the insights and experiences of an insider. The danger is an undue sympathy towards the conservative Christian viewpoint resulting in a lack of criticism where this is merited. Aware of this, I have strived to be as detached and dispassionate as possible.

Within the broad rubric conservative Christianity there are many strands. I shall unravel these later but one distinction needs mention here. The majority of conservative Christians are not active in public or political life. The "silent majority" of "ordinary" Christians seldom write letters to newspapers, protest in the street or lobby Parliament. They may not even be able to clearly articulate their viewpoint. Nonetheless, they form the bulk of this group. A minority are politically active and publicly vocal. This visible public subset (and its spokespeople) is the segment—of necessity—cited throughout this study. The extent

to which they truly represent the rest remains, I concede, a moot point. Their attitudes may well be more polarised and their rhetoric more uncompromising than that of the majority.[1] I shall assume that they do speak for thousands of others and that they do *for the most part* accurately reflect the views of their constituency.

A word on sources and materials. To explain the conservative Christian mindset I have relied upon a few leading publications. A principal one is the newspaper *Challenge Weekly*. This weekly publication captures well the typical conservative Christian view on matters of the moment. Other sources are New Zealand Christian non-denominational periodicals such as *Stimulus*, *Reality*, *Humanity*, *Cutting Edge* and *New Slant* as well as denominational newspapers such as *Crosslink* and *New Zealand Catholic*.

The reader will see frequent reference to overseas Christian writers and commentators, a practice which might initially seem strange. This is perhaps a peculiar feature of New Zealand Christianity, though it may also reflect the wider importation of culture generally. What a leading American or British evangelical extols, cautions or advocates is usually promptly disseminated and re-echoed in equivalent circles in New Zealand. For one thing, Radio Rhema, the nation-wide conservative Christian radio network, carries regular programmes of overseas Christian teachers and preachers. For instance, American psychologist, Dr James Dobson of *Focus on the Family* is as well known, perhaps better known, in New Zealand as he is in his home country.

New Zealand conservative Christians, while they certainly have their own pressing local issues, perceive themselves to be in a common battle with believers of similar ilk in other Western countries. What happens to evangelical Christian parents in California or Pentecostal churches in Queensland is readily assimilated and extended to New Zealand. Contemporary Western Christianity forms a kind of "seamless web" to borrow a phrase from the famous Hart/Devlin debate.[2] Lessons are to be, indeed must be, learnt from overseas: the particularities of the foreign context and the idiosyncrasies of the society from which the message originates are downplayed if not ignored.

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1 I note here the cautionary words of Rhys H Willimas writing about America's so-called "culture war": see "Is America in a culture war? Yes-no-sort of," *Christian Century*, 12 Nov 1997, 1038 at 1041.

2 See Basil Mitchell, *Law, Morality and Religion in a Secular Society* (1970) ch 1 at 15.

The topics chosen in Part 2 of this thesis are largely self-selecting. The case studies—the impact of human rights laws, family and parenting issues and growing legal acceptance of homosexuality—are ones that loom large currently in certain Christian circles. They are not the only ones (abortion and sex education are others) but space permits only limited coverage. This study then is driven by conservative Christians' contemporary agenda. In the past the issues were different (battles over bible-in-schools, prohibition, divorce etc[3]) and in the future the issues will undoubtedly be different (cloning perhaps?).

This study is quite wide ranging and I have used somewhat broad strokes at times. The specialist philosopher, sociologist, historian and so on, may cavil at my generalisations but that is, I believe, unavoidable for the sort of "big picture" cultural analysis and argument attempted here.

Harry Blamires in *The Christian Mind* observed: "There is no thinking without exaggeration."[4] Whereas scholarship cannot endure it, thinking without exaggeration is, he argued, impossible. The scholar evades decisiveness, balances conclusions against rival ones so as to negate conclusiveness, and is "tentative, sceptical, uncommitted." By contrast:

> The thinker hates indecision and confusion; he firmly distinguishes right from wrong, good from evil; he is at home in a world of clearly demarcated categories and proven conclusions; he is dogmatic and committed; he works toward decisive action.[5]

Now Blamires conceded these were pure types (or archetypes), for no scholar can neglect thought and no thinker is devoid of scholarship. This work is of course designed to be one of scholarship and thus, to follow Blamires, exaggeration, generalisation and over-simplification ought to be eschewed. I am mindful of this injunction but I am hopeful the reader will permit the indulgence of some expansive and speculative thinking. The differences will at times be (somewhat) exaggerated, the picture portrayed as rather black and white. This strategy is deliberate and the desire is not to be polemical. Rather, the desire is

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3 See Brett Knowles, "Some Aspects of the History of the New Life Churches of New Zealand 1960-1990", PhD thesis, University of Otago, 1994, chs 5 and 6 for an account of earlier decades' "moral issues". A version of his thesis (without footnotes) was published by Dr Knowles recently: Knowles, *New Life: A History of the New Life Churches of New Zealand 1942-1979* (1999). The Edwin Mellen Press, New York, is to publish the full thesis.

4 Blamires, *The Christian Mind* (1963) at 51.

5 Ibid.

to reveal tensions and conflicts which a more circumspect approach might deny. Where appropriate I will re-introduce the necessary exceptions, qualifications and nuances to present a more accurate picture. One does not want to distort reality but on the other hand, dealing solely with endless shades of grey can be dull.

A model which I have found most helpful is that by a New Zealand Presbyterian scholar, the Rev Dr Harold Turner, who devised a missiological model of cultural analysis.[6] Turner's aim is to re-orient missionary efforts to address not just the "surface culture" (the social practices and customs, including law, which govern a people's existence) but also the "deep culture" of a particular society. The latter refers to the "foundational" or "deep" level of human existence—the basic assumptions, axioms, convictions or worldview, which people live by. The visible surface clashes between conservative Christians and the state may be seen, I argue, as expressions of deeper conflicts of worldview. Chapter 3 will explore this in detail.

The contours of this study are as follows. Part I sets the scene. Chapter 1 describes the conservative Christian narrative, outlining their reaction to cultural disestablishment. Chapter 2 examines in detail the characteristics of conservative Christians and their distinctive worldview. Conservative Christians argue that juxtaposed against this worldview is an opposing, supplanting *zeitgeist* or spirit of the times. Chapter 3 analyses the key tenets of liberal, modernist state, what I call the "Wellington worldview". The next chapter suggests a model of engagement. While peaceful coexistence between the inhabitants of the two "worlds" is the rule, conflict also occurs. This is unsurprisingly given the antithetical nature of the two worldviews and the inability of both sides to always forge an accommodation.

Part II comprises a series of studies of substantive areas of law where the clash of worldviews is played out. Chapter 5 commences this section with an investigation of conservative Christian attitudes towards human rights theory. Conflicts with human rights advocates and enforcement agencies over the last two decades are analysed. The next three

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6 Dr Turner developed this in two essays: Harold Turner, "The Three Levels of Mission in New Zealand" in Patrick (ed), *New Vision: New Zealand* (1993) ch 4 and Turner, "Deep Mission to Deep Culture" in Flett (ed), *Collision Crossroads : The Intersection of Modern Western Culture with the Christian Gospel* (1998) ch 2.

chapters focus on a central concern of conservative Christians, the family. After contrasting Christian and liberal models of the family, Chapter 6 backgrounds the history of and the reaction of conservative Christians to, an important international treaty ratified by New Zealand in the 1990s, the United Nations Convention on the Rights of the Child 1989. Two matters of great significance to conservative Christian parents are selected—the rights of religious upbringing, and corporal punishment of children. Chapters 7 and 8 respectively explore what impact, if any, the United Nations Convention will have upon these two parental prerogatives.

The next two chapters consider the conservative Christian antipathy toward homosexual practice. Will the Human Rights Act 1993 and its prohibition of discrimination based on sexual orientation curtail churches' freedom to ordain whom they wish? I investigate in Chapter 9 whether conservative Christian denominations will be required to ordain openly-practising gay ministers. Chapter 10 changes the focus from the defensive preservation of existing Christian freedoms. Instead, it considers to what extent conservative Christians can influence public policy in the matter of the introduction of same-sex marriage.

Part III draws the study to an end with some final thoughts.

A particular interest and emphasis throughout is religious liberty. I am interested in the extent to which the contrasting worldviews of my subject group and the state curtails, or potentially curtails, the religious freedoms of the former. The modern liberal state *may* circumscribe the religious freedom of conservative Christians where the latter's worldview and practices challenge key tenets of liberal theory. The plight of conservative Christians is, in many ways, a test case for any minority group holding a worldview at odds with the dominant societal and governmental one.

II THE CONTEXT: THE NEW ZEALAND RELIGIOUS LANDSCAPE AND CONSERVATIVE CHRISTIANS

Any discussion of religious freedom in New Zealand ought to be placed in context. This section thus briefly outlines the religious landscape of New Zealand.

1 *The conservative Christian narrative*

Much recent legal writing is concerned with "story" or "narrative".[7] Stories are important both for the group itself and for outsiders. For the group, a story builds consensus and strengthens solidarity. For the outsider, a story is less confrontational and more insinuative than a direct plea or demand. Richard Delgado suggests the story "invites the reader to alienate herself or himself from the events described, to enter the mental set of the teller, whose view is different from the reader's own."[8] Furthermore, stories are a particularly effective way to challenge mindsets, they are "useful tools for the underdog because they invite the listener to suspend judgment, listen for the story's point and test it against his or her own version of reality."[9] Christians claim to have a story, indeed *the* story of human existence and history. This "historically particular story [the Gospel] is offered as an alternative to the grand stories (or metanarratives) by which our culture lives."[10]

Conservative Christians have their own distinct story or narrative of New Zealand. A distillation of typical expressions is set out below:

> We were once a blessed, Christian nation. Not everyone was Christian but most were and the rest conceded the Christian ethic should be the rule. We are now in decline. New Zealand has lost its way and forgotten its Christian roots. The crisis is not primarily economic or political but spiritual. "Righteousness exalteth a nation: but sin is a reproach to any people" (*Proverbs* 14:34). Christian ideals and morality are being supplanted by the "spirit of the age" (a secular, humanist, pluralist worldview). A climate has developed which is increasingly antagonistic towards Christian claims of universal, public truth and higher law. The situation, while parlous, is not irredeemable. Christians can and must become active in all spheres, including politics and law, to restore and re-direct the ship of state. New Zealand can be blessed again.

Writing in *Challenge Weekly*, the Rev Arthur Gunn, for example, chronicled the divinely ordered demise of nations and empires throughout history (from Babylon to Greece and Rome and on through to twentieth century France and Germany) who sinned against

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7 See eg Richard Delgado, "Storytelling for oppositionists and others: a plea for narrative" (1989) 87 Mich L Rev 2411; Robert M Cover, "The Supreme Court: Foreword: *Nomos* and Narrative" (1983) 97 Harv L Rev 4.

8 Ibid at 2434-2435.

9 Ibid at 2440.

10 Lawrence Osborn, "The Gospel and Culture" in Flett (ed), *Collision Crossroads* (1998) ch 3 at 35.

God. New Zealand faced the similar prospect of failing to recognise this "inexorable moral law" of *Proverbs* 14:34:

> There was a time when New Zealand, broadly speaking, could be called a righteous nation. The existence of churches throughout the land, even in remote areas, is a testimony to that . . . In those days New Zealanders, Maori and Pakeha, were Christians. Churches were well attended. Bible classes and Sunday schools overflowed with young people and children . . . In these days our nation was exalted among the nations of the world. Small though we were we were greatly admired because of our racial harmony and because of our advanced social and health services. Today all this has gone.[11]

The Christian nation story—perhaps the dominant or majority story—is, as we shall see, no longer ascendant. What was once the prevailing narrative is becoming a "counter-story"[12] jostling with several others for control of the direction of New Zealand.

(a) Historical validity?: "nominalism"[13] and irreligion

How true is the Christian nation story? Some foreign observers have viewed New Zealand as strongly religious: a visiting scholar, André Siegfried, for example, maintained that: "No tradition has remained so strong in New Zealand as the religious one."[14] The rose-coloured perception that early New Zealand was a "golden age" for Christianity is regularly debunked today.

Hugh Jackson, in a much-quoted study, found that "the churchgoing of New Zealanders was mediocre by the standard of the British at home."[15] Indeed, usual

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11 A Gunn, "Righteousness exalts a nation," *Challenge Weekly* ("*CW*"), 25 May 1994, at 16. The editor of *Challenge Weekly*, John Massam, explained the renewed interest and involvement of evangelical Christians in politics this way: "It's new because we're facing a new situation. You see we had a nation, the Western world if you like, based on a Christian premise, and our laws reflected Christian ethics and morality. These were the cornerstones of our society . . . now what has happened is there's been a slow concerted attempt to re-direct our nation so that our values are the opposite of what has been traditional. It's been a slow progressive thing, aided by the media, by film and television and so on": Mike Riddell, "The Divine Right", *New Outlook*, Sept/Oct 1985, 24 at 24. See also Gordon Vick, "New Zealand's Government founded upon Christianity", *CW*, 15 July 1988, at 10 ("We walk away from [the biblical roots of our legal system] at our peril.")

12 Osborn, "The Gospel and Culture", at 38.

13 See Michael Hill, "Ennobled Savages: New Zealand's Manipulationist Milieu" in Barker et al (eds), *Secularization, Rationalism and Sectarianism: Essays in Honour of Bryan R Wilson* (1993) ch 9 at 150.

14 André Siegfried, *Democracy in New Zealand* (1914; 2nd ed and reprint, 1982) ch 24 at 310. He continued: "Churches swarm there; the papers—a decisive proof—never close their columns to ecclesiastical news, and every New Zealand editor must be able on occasion to take up his good theological pen and discuss in a leading article transubstantiation, the rights of the established church, or the legality of ritualism. In shop windows, on the stalls of railway stations, religious books meet the eye, and it is evident that these matters are universally and constantly in people's thoughts".

15 Jackson, "Churchgoing in Nineteenth-Century New Zealand" (1983) 17 NZJH 43 at 51.

church attendees in New South Wales, which had begun life as a penal colony, were a little higher than in New Zealand.[16] John Stenhouse offers this blunt conjecture: "Most settlers came here to get on in life, not to worship God."[17] Michael Hill summarises:

> Despite some early attempts to transplant various Christian denominations to New Zealand on a regional basis—the Church of England in Canterbury, the Free Church of Scotland in Otago, vestiges of which can still be found in regional patterns of religious adherence—no denomination managed to establish claims to a monopoly, and from the mid-nineteenth century there was an acceptance of pluralism and a secular stance on the part of the state. While a majority of the population adopted some form of denominational label, nominalism was evident in the considerably lower proportions that engaged in regular religious activity.[18]

Whilst religious practice may have been tepid, it should be added that churches generally were held in high respect by New Zealanders.[19]

Despite Siegfried's assertion that the "man without a religion"[20] was regarded as a pariah in New Zealand society, it appears that freethought, rationalism and non-religious profession have been viewed from the earliest days with comparative favour. Hill maintains:

> Irreligion has always been accorded a respectable status in New Zealand, and as early as 1880 the country was considered a Mecca of secularity by a group of English free-thinkers, who noted that "there is so much greater freedom for opinions in New Zealand than [in England], that what are called heterodox, do not stand as an insuperable obstacle to high office in the Chief Council of the Country . . . "[21]

The various Freethought, Secular and Rationalist societies that survive from last century continue on today in fairly small numbers. Their modern descendants are the

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16 Ibid at 55-56. Jackson suggests five reasons why New Zealanders were comparatively weaker in this respect: (1) the immigrants were predominantly not from the higher social classes, the more frequent churchgoers; (2) migrants may have come from particular counties or locations in Britain with low churchgoing traditions; (3) greater social homogeneity in New Zealand weakened religious belonging: "At home social divisions went deep and political and religious allegiances reinforced one another." (at 54); (4) the very process of migration and resettlement attenuated the religious practice of many; and (5) geographical mobility within the new colony weakened religious commitment.

17 Stenhouse, "The History of the Christian Movement in New Zealand" in Patrick (ed), *New Vision: New Zealand* (1993) ch 2 at 36.

18 Hill, "Religion" in Spoonley et al (eds), *New Zealand Society: A Sociological Introduction* (1994) ch 18 at 295.

19 Two scholars comment: "Even the large numbers of those who keep away from the churches still vaguely assume their sacred position in society. Those who are not involved in the life of the churches are often apologetic about their lack of religious concern and are hardly ever antagonistic towards the churches." : H Mol and MTV Reidy, "Religion in New Zealand" in Webb and Collette (eds), *New Zealand Society: Contemporary Perspectives* (1973) ch 27 at 275.

20 Siegfried, *Democracy in New Zealand*, at 311.

21 Hill, "Ennobled Savages", at 150.

New Zealand Rationalist Association and the Humanist Society of New Zealand.[22]

2 *Successive Disestablishments of Christianity*

Here I adopt and adapt to New Zealand, the sociologist José Casanova's analysis of the United States.[23] Casanova propounded three disestablishments in that country. The first, constitutional, one occurred at the founding of the Republic and culminated in the First Amendment. A second one involved the secularisation of American higher education after the Civil War. The third disestablishment was the disestablishment of generic Protestantism from the American way of life beginning in the 1960s. This decade saw "the emergence of a pluralistic system of norms and forms of life."[24]

(a) The First Disestablishment: A *de jure* disestablishment (or nonestablishment)

There was both an early commitment to religious freedom and religious equality and a rejection of the notion of a state church.

(i) Religious freedom and religious equality

Interestingly, the signing of Treaty of Waitangi at Waitangi on 6 February 1840 saw the unexpected inclusion of an assurance concerning religious freedom. This came about due to the initiative of the Roman Catholic bishop, Bishop Jean Baptiste Francois Pompallier.[25]

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22 See Beverley Eales, "Humanism" in Donovan (ed), *Religions of New Zealanders*, 2nd ed (1996) ch 13 and Bill Cooke, *Heathen in Godzone* (1998).

23 José Casanova, *Public Religions in the Modern World* (1994) ch 6. For a similar analysis detailing the decline of Protestantism's "cultural hegemony" in America, see James Davison Hunter, *Evangelicalism: The Coming Generation* (1987) ch 7. I developed this analysis in Ahdar, "New Zealand and the Idea of a Christian State" in Ahdar and Stenhouse (eds), *God and Government: The New Zealand Experience* (2000) ch 3 and Ahdar, "A Christian State?" (1998-1999) 13 J L Religion 101.

24 Casanova, ibid at 145.

25 Pompallier's own account is this: "While the speeches were being made on behalf of Captain Hobson and of the chiefs of the Maori tribes, I remained silent; I had nothing to say; they were simply about political matters. One question however interested me deeply, and it was that of religious freedom, about which no one in anyway seemed to trouble themselves. Before the last meeting broke up and it became a question of signing the treaty, I broke my silence. I addressed Captain Hobson, begging him to make known to all the people the principles of European civilisation which obtain in Great Britain, and which would guarantee free and equal protection to the Catholic as to every other religion in New Zealand. My demand was immediately acceded to by Captain Hobson, who made a formal indication of it to all the assembled people, to the great satisfaction of all the Catholic chiefs and tribes, who triumphed in the fact of my presence in the face of the Protestant missionaries and at the speedy compliance with the few words I had spoken.": J B F Pompallier, *Early History of the Catholic Church in Oceania* (1888) at 63.

In response to Pompallier's request for protection of the Catholic Church by the British Government, Hobson, "with much blandness of gesture and expression", replied, "Most certainly", and proceeded to express his regret that the Bishop had not made known his wishes earlier, as in the event the provision "would have been embodied in the treaty."[26] At the behest of the Governor, the Rev Henry Williams, who found the task "something of a tough morsel, requiring care,"[27] took pencil and paper and wrote: "The Governor wishes you to understand that all the Maoris who shall join the Church of England, who shall join the Wesleyans, who shall join the Pikopo or Church of Rome, and those who retain their Maori practices, shall have the protection of the British Government."[28] The note was relayed to the Governor, who in turn passed it on to Pompallier who read it and expressed approval ("Oh, yes, that will do very well", said the Bishop in English.[29]) Williams then read a carefully written statement to the assembly:

> *E mea ana the Kawana, ko nga whakapono katoa, o Ingarani, o nga Weteriana, o Roma, me te ritenga Maori hoki, e tiakina ngatahitia e ia* ("The Governor says the several faiths [beliefs] of England, of the Wesleyans, of Rome, and also the Maori custom, shall be alike protected by him.")[30]

Claudia Orange argues that the English missionaries hoped that the Roman Catholic faith would suffer by association with *ritenga* (what Busby termed "heathen practices") which they attacked as decadent and which they wished to eliminate. She adds:

> The official recognition seemingly granted Maori custom should be seen for what it was—an inclusion arising from sectarian jealousy. It ran counter to nineteenth-century Christian sensitivities, and barely accorded with Normanby's instructions to suppress, by force if necessary, the more extreme Maori usages. This promise to protect Maori custom—a verbal commitment given only by chance—amounted to very little.[31]

In the Imperial Instructions to Governor Hobson, dated 5 December 1840, religious tolerance was listed. Of the 63 clauses one included: "Freedom of worship in any peaceable

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26 T Lindsay Buick, *The Treaty of Waitangi : How New Zealand Became a British Colony*, 3rd ed (1936) at 152. See also Hugh Carleton, *The Life of Henry Williams*, rev ed (1948) at 314.

27 Carleton, ibid, at 314-315.

28 Buick, *The Treaty of Waitangi* at 153; Carleton, *Henry Williams* at 315.

29 Buick, ibid, at 153.

30 William Colenso, *The Authentic and Genuine History of the Signing of the Treaty of Waitangi* (1890) at 32.

31 Claudia Orange, *The Treaty of Waitangi* (1987) at 53.

and orderly manner was to be permitted even if not according to the rites of the Church of England."[32]

The principle of religious equality emerges in the first Parliamentary debates. An important background point must be first mentioned; the New Zealand Constitution Act, enacted at Westminster in 1852, was silent on the question of religion and this seemed to imply equality of religion and absence of a State church.[33]

The opening session of the first sitting day of Parliament, 26 May 1854, witnessed an unexpected debate on the question of an opening prayer.[34] James Macandrew, a Presbyterian from Dunedin, offered to fetch a nearby Anglican parish minister to ensure there should be "an acknowledgement of dependence on the Divine Being". It was "clear to him that the House of Representatives, being the first embodiment of a New Zealand nationality, should be consecrated" and so he proposed a motion to that effect.[35] A counter-motion was immediately put that the House "be not converted into a conventicle, and that prayers be not offered up."[36] A vigorous debate ensued. Some considered such a prayer would seem "to involve the question of a State religion, the very appearance of which ought to be avoided" by the House.[37] Edward Gibbon Wakefield tried to assuage fears by pointing out that in America "where State religion was absolutely repudiated" the practice of opening the Legislative Houses by prayer was allowed.[38] Some members were by now becoming impatient and sought to short-circuit potentially "fruitlessly prolonged" discussion and so Frederic Weld suggested an amendment:

> That this House, whilst fully recognizing the importance of religious observances, will not commit itself to any act which may tend to subvert that perfect religious equality that is recognized by our Constitution, and therefore cannot consistently open this House with public prayer.[39]

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32 A N D Foden, *The Constitutional Development of New Zealand in the First Decade (1839-1849)* (1938) at 86.

33 G A Wood, "Church and State in New Zealand in the 1850s" (1975) 8 J Religious History 255 at 258.

34 For a detailed discussion see Wood, ibid and Allan Davidson and Peter Lineham, *Transplanted Christianity*, 2nd ed (1989) at 80 et seq.

35 (1854) NZPD 4. The motion read: "That it is fit and proper that the first act of the House of Representatives shall be a public acknowledgement of the Divine being, and a public supplication for His favour on its future labours." The motion was seconded by Mackay.

36 Ibid per Dr Lee; seconded by Revans.

37 Ibid at 4 per James Edward Fitzgerald.

38 Ibid at 5.

39 Ibid at 5; seconded by the Hon J Stuart-Wortley.

Wakefield worried that "New Zealand would be singular in this respect among the Christian countries of the earth."[40] Dr Lee responded with doubts as to how the Jew could join with the Christian in a prayer and added: "as the Constitution had very properly rid them of State religion, the House should take care how they voluntarily submitted to it."[41] Weld's amendment was rejected by 20 votes to 10. The House then turned to the original motion and passed it (with no vote count recorded). It read:

> That in proceeding to carry out the resolution of the House to open its proceedings with prayer, the House distinctly asserts the privilege of a perfect political equality in all religious denominations, and that, whoever may be called upon to perform this duty for the House, it is not thereby intended to confer or admit any pre-eminence to that Church or religious body to which he may belong.[42]

The Rev F J Lloyd was introduced, read prayers and never appeared again, the prayer being said thereafter by the Speaker.

In the Legislative Council, the upper house, a resolution on opening prayers to be read by the Speaker was passed on 27 May 1854. Dillon Bell (a Jew from Wellington) successfully opposed a motion for an Anglican to read prayers however. Bell feared this would "interfere with the perfect religious equality which the Constitution recognized" and would be "the thin edge of the wedge."[43]

That same first Parliament, on 28 August 1855, also rejected a vote of £600 for Bishop Selwyn's salary despite a recommendation to this effect from the Colonial Secretary of State, Earl Gray, on 1 July 1854.[44] While the House "fully recogniz[ed] the zeal and energy of his Lordship the Bishop of New Zealand and acknowledg[ed] the valuable services rendered by him on various occasions to the colony" the House could not vote a salary to him "without departing from the principle of perfect civil equality of all the religious denominations—a principle this House has already affirmed and to the maintenance of which it stands pledged."[45]

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40 Ibid at 6.
41 Ibid.
42 (1854) NZPD 6.
43 Ibid at 14.
44 The dispatch is reproduced in Davidson and Lineham, *Transplanted Christianity*, at 88.
45 Ibid at 512-513. (Mr Forsaith being the mover again.) The Bishop's salary was reconsidered on 12 Sept 1855 and the vote against was won by only eight votes to seven: (1855) NZPD 544.

(ii) Nonestablishment

Quite clearly, New Zealand has never had an established or state church.[46] This fact was noted in 1998 by the Court of Appeal.[47] It is perhaps more accurate to described this as "nonestablishment" rather than disestablishment. There were, to be sure, various early regional attempts at religious establishment by the European immigrants. Otago and Southland were Free Church of Scotland settlements. The Otago settlement was begun in 1848 by the Rev Thomas Burns and Captain William Cargill, both of whom were "fervent Free Churchmen" and who "saw themselves as making a godly experiment after the model of the Pilgrim Fathers two centuries earlier."[48] Unfortunately for them their dream of a Free Church theocracy, a "Geneva of the Antipodes" was to founder.[49] Canterbury, led by John Robert Godley was a to be "a new-world exemplar of an Anglican state."[50] Again, hopes were not realised. One could also mention: the West Coast, a Roman Catholic stronghold; the fledging Nonconformist settlement in Albertland in Northland; and the small Scandinavian Lutheran settlements in places such as Dannevirke.[51] All this appears to support Lloyd Geering's argument that what the Europeans brought was not a homogeneous thing called Christianity.[52] Instead, the migrants saw themselves very much in denominational terms, as first Anglicans, Presbyterians, Methodists, Catholics and so on. New Zealand was less of a unified Christian nation and more of "a Christian archipelago—a collection of denominational islands, each with its own shared set of beliefs."[53] There was, at most, a modest preference and financial endowment for the Anglican Church which has led some to describe that Church having "a quasi-establishment role" in the colony.[54] As Antony Wood puts it: "The Anglican Church's pre-eminence was a shadowy affair in

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46 J D Hight and H D Bamford, The Constitutional History of New Zealand (1914) at 378.

47 *Mabon* v *Conference of the Church of New Zealand* [1998] 3 NZLR 513 at 523 per Richardson P.

48 H R Jackson, *Churches and People in Australia and New Zealand 1860-1930* (1987) at 17. See further Peter Mathieson, "1840-1870: The Settler Church" in McEldowney (ed), *Presbyterians in Aotearoa 1840-1990* (1990) at 15 et seq.

49 Allan K Davidson, *Christianity in Aotearoa: A History of Church and Society in New Zealand* (1991) at 34.

50 Jackson, *Churches and People*, at 17

51 See Davidson at 54; Jackson, ibid at 17-18.

52 Geering, *2100: A Faith Odyssey—The Changing Face of New Zealand Religion* (1995) at 8.

53 Ibid at 13. See also Geering, "Pluralism and the future of religion in New Zealand" in Colless and Donovan (eds), *Religion in New Zealand Society*, 2nd ed (1985) at 218.

54 Davidson and Lineham, *Transplanted Christianity*, at 74.

comparison with its position in the home country or in older established colonies of settlement."[55] New Zealand was settled as a British Colony at the time when the principle of non-establishment was gaining favour in Britain and the disestablishment of the Church of England was being seriously debated.[56]

In the nineteenth century there was a substantial formal separation of Church and State. As Lineham notes, the Freethinkers of the 1880s did not need to mount a constitutional campaign for the separation of church and state as "the two were relatively separate" already.[57] Thus Sir Robert Stout, speaking in 1879, could boast:

> It is said we are a Christian nation and the Bible is recognised by the State. I deny both propositions. As a nation we have nothing to do with religion. Every religion has equal rights before the law. None are supported by the State, and our highest offices of state can be held by men not professing the Christian religion. We have had a Jew Premier . . . We are a Christian nation in the sense that a majority of the citizens are Christian, but in no other sense.[58]

One of the few judicial pronouncements affirming the nonestablishment position is this one by the Supreme Court in 1910:

> There is no State Church here. The Anglican Church in New Zealand is in no sense a State Church. It is one of the numerous denominations existing in the Dominion; and, although no doubt it has a very large membership, it stands legally on no higher ground than any other of the religious denominations in New Zealand.[59]

Sir Robert Stout, this time as Chief Justice of the Supreme Court, made what appears to be one of the only judicial statements pronouncing New Zealand to be a secular state in 1917, in *Doyle* v *Whitehead*. The Wellington City Council passed a by-law prohibiting playing golf on Sundays in Town Belt Reserves. Following a complaint from the Ministers'

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55 Wood, "Church and State . . . in the 1850s", at 267.

56 Peter Lineham, "Freethinkers in Nineteenth-Century New Zealand" (1985) 19 NZJH 61 at 71. See also Davidson and Lineham at 72-73 for a discussion of the developments back in Britain. They note (at 73): "This was the environment in which the colonial authorities and the New Zealand settlers shaped the role of government in the colony. They tended to anticipate trends in England, and were unwilling to force on the settlers a religious establishment which they did not want . . ."

57 Ibid at 76.

58 Presidential address to the Otago Education Institute (1879). Quoted by D V MacDonald, "The New Zealand Bible in Schools League", MA thesis, Victoria University of Wellington, 1964, at 9. Reproduced in John Adsett Evans, "Church State Relations in New Zealand 1940-1990, with particular reference to the Presbyterian and Methodist Churches", PhD thesis, University of Otago, 1992, at 3 n 10.

59 *Carrigan* v *Redwood* (1910) 30 NZLR 244 at 253 per Cooper J. See also *Public Trustee* v *Commissioner of Stamps* (1907) 26 NZLR 773 at 779 (Sup Ct) per Cooper J again for his earlier statement. The Court of Appeal affirmed this judgment: ibid.

Association and clergymen of the Presbyterian Church (concerned it seems at the bad example to the young at the adjacent Presbyterian Orphanage) the respondent, who breached this by-law, was charged. A Magistrate acquitted him on the grounds that the by-law was made for no other reason than to enforce Sunday observance and was thus bad in terms of the relevant legislation.[60] The Supreme Court unanimously upheld this finding. Stout CJ declared:

> Considering that the state is neutral in religion, is secular, and that the state has provided for Sunday observance only so far as prohibiting work in public or in shops, &c, is concerned, and not prohibiting games, it cannot be said that this by-law is a reasonable by-law. It has also to be borne in mind that recreation on Sunday is not an offence even in countries where the Christian religion is established.[61]

(b) The Second Disestablishment: A cultural, *de facto* disestablishment

(i) A *de facto* Christian establishment

While New Zealand may not have had a legally established church, or an established religion, it might be argued that there was a *de facto* establishment of Christianity. The sociologist Ivanica Vodanovich asserts, "the New Zealand model . . . combine[d] separation of church and state, with recognition of the state as 'Christian'".[62] She argues that the state was committed to a "non-specific and non-sectarian" Christianity.

The laws and institutions in New Zealand naturally reflected Christian values given the religious composition of the population. Moreover, the governing elite was also predominantly Christian. While public education was ostensibly secular, schools permitted religious, specifically Protestant, teaching on a limited basis under the so-called "Nelson System".[63]

This ingenious scheme was the brainchild of a Nelson clergyman, the Rev J H McKenzie and commenced in 1897. It was argued that as schools were open for five hours a

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60 Section 347(e) of the Municipal Corporations Act 1908 provided: "Inasmuch as it is inexpedient that questions of religion or morals should be regulated by by-law, no by-law shall be valid if a breach thereof would involve a breach only of some religious or moral rule."

61 [1917] NZLR 308 at 314.

62 Vodanovich, "Religion and legitimation in New Zealand: redefining the relationship between church and state" (1990) 3 Brit Rev of NZ Studies 52 at 52.

63 See Colin McGeorge, "On the Origins of the Nelson System of Religious Education" in Gilling (ed), *Godly Schools? : Some Approaches to Christian Education in New Zealand* (1993) at 1. The following account draws from this as well as ch 3 of Ian Breward, *Godless Schools? A Study of Protestant reactions to secular education in New Zealand* (1967).

day, three in the morning and two in the afternoon, a school might declare either the first or last hour of the morning as one designated for voluntary religious instruction. This was possible under the 1877 Education Act since that legislation allowed school buildings to be used on days and at hours other than those used for public school purposes.[64] This enabled religious instruction as well as the statutory minimum four hours of secular education to take place within the customary school hours. The Education Act 1964, which repeated the secular clause, simply formalised this long-standing arrangement: voluntary religious instructors were permitted by school boards to give religious instruction during school hours with parents having the right to withdraw their children from such instruction.[65]

The character of this generic Christianity was Protestant and largely tolerant. Religious persecution was not absent however. Three brief instances must suffice.

New Zealand's treatment of conscientious objectors during both world wars has been criticised. Cookson observed that New Zealand was "exceptional in the total severity of its policy"[66] towards conscientious objectors in World War II compared to other Commonwealth countries and the United States as well.

Next, the New Zealand government consistently suppressed certain Maori religious movements led by charismatic prophets unafraid to mix the political and religious.[67] Often these religious movements drew a parallel between themselves as Maoris and the *Hurai* (Jews). Maori were viewed antipodean Israelites, even one of the "lost tribes of Israel". Charismatic Maori prophets built upon this Hebrew model, casting Maori as a faithful remnant whose fortunes would be restored in a hoped-for millennium. The yoke of the Pakeha oppressors would be broken and the land and *mana* restored. We can but simply list a few of the better-known movements here: the *Pai Marire* or (or *Hauhau*) led by Te Ua Haumene; Te Kooti, who survived the decimation of the *Hauhau* to form the Ringatu faith; Rua Kenana Hepetika who founded a group of *Iharaira* (or Israelites) and established a

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64 Section 84(3).

65 Sections 77 to 79. The "Nelson system" provision was first enacted in the Religious Instruction and Observances in Public Schools Act 1962.

66 J E Cookson, "Illiberal New Zealand The Formation of Government Policy as Conscientious Objection. 1940-1" (1983) 17 NZJH 120 at 120.

67 The following account is drawn from Hill, "Religion", at 296-298; Geering, *Faith Odyssey*, at 7-8; Manuka Henare; "Christianity: Maori Churches" in Donovan, (ed), *Religions of New Zealanders*, ch 9 at 124-125; John Garrett, *Footsteps in the Sea: Christianity in Oceania to World War II* (1992) ch 5 at 123-125; Davidson, *Christianity in Aotearoa*, ch 13 at 128-129.

theocracy at Maungapohatu in the Urewera; and, finally, Tihupotiki Wiremu Ratana, a faith healer and founder of the Ratana Church. Rua proved to be a sufficient thorn in the Government flesh that an Act was passed to combat him, and the activities generally of *tohunga* (healers, experts, priests).[68] The Tohunga Suppression Act 1907 made it a criminal offence for *tohunga* to practice on the "superstition and credulity" of Maoris or to profess to possess supernatural healing powers.[69] Voyce, in a detailed study, concluded: "This Act [was] typical of the response of the colonial government to the perceived threat from a traditional or revitalised tribal religion."[70] As it was, the Act was, in Voyce's view, a failure since Maori were reluctant to inform on *tohunga* and thus invite supernatural retribution.[71]

Finally, one cannot ignore various spasms of intra-Christian sectarian conflict between Protestants and Catholics. It would be altogether surprising and wishful thinking to believe Old World suspicions, bigotries and antagonisms stayed at "home" in Europe when the settlers came.[72] I have already noted the testiness evident at the signing of the Treaty of Waitangi.

A major battlefield was education. The churches began their own schools at first. Abolition of the provinces in 1876 meant there was a need for a national policy of education and a clarification of the roles of church and state. The debate on education in the late 1870s was conducted "against a background of increasing sectarian tension."[73] The passage of the Education Act 1877 is an important and fascinating story which has been well documented by historians.[74] It established a national system of education that was to be "free, secular and compulsory." The famous "secular clause" read: "The school shall be kept open five days in each week for at least four hours, two of which in the forenoon and two in the afternoon shall be consecutive, and teaching shall be entirely of a secular character."[75] By a

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68 Davidson, ibid, at 128.

69 Section 2. The penalty for a first offence was a maximum fine of £25, or imprisonment up to six months.

70 Malcolm Voyce, "Maori Healers in New Zealand: The Tohunga Suppression Act 1907" (1989) 60 Oceania 99 at 116.

71 Ibid at 98. The Act was denigrated by Sir Geoffrey Palmer recently in his *New Zealand's Constitution in Crisis* (1992) at 66-67.

72 See Davidson, *Christianity in Aotearoa*, at 85. See also Michael King, *God's Farthest Outpost* (1997).

73 Davidson, ibid, at 65.

74 Ian Breward, *Godless Schools?;* Davidson, ibid, ch 7 and John Mackay, *The Making of a State Education System* (1967).

75 Section 84 (2) of the Education Act 1877.

vote of 35 to 19, the House of Representatives deleted from the Bill the provision for religious exercises. The Legislative Council attempted to resurrect the provision but failed. Scholars emphasise that the secularity of the national education programme was not due primarily to anti-religious sentiment or the advocacy of secularism but rather was an attempt to defuse sectarian strife.[76] Ian Breward observed:

> Careful study of the debates and divisions shows that there was very little doctrinaire secularism among members. Although [some] members of the Legislative Council . . . signed a protest against the secular provisions of the act, others saw parliament's action as a necessary way of distinguishing the sacred from the secular, or at the very least as a practical political solution to the educational tensions caused by denominalisation.[77]

While doctrinaire secularism may not have been the major impetus, secularists and rationalists, such as Alfred Dommett and Robert Stout,[78] were nonetheless at the fringes exercising some influence.

(ii) The 1960s watershed: a sea change— the crumbling of the *de facto* establishment

The *de facto* Christian establishment seems to have been still intact in the 1960s. For example, Ivor Richardson concluded his comprehensive 1962 survey of the religious dimension of New Zealand laws by rejecting the view that Christianity was part of New Zealand law or that New Zealand was a Christian State. As he put it:

> If this means that the doctrines and principles of Christianity are legally binding on all citizens or that the political apparatus of government is subject to the mandates of the Christian religion, then the statement is incorrect.[79]

He continued however:

> Nevertheless there is a certain amount of truth in the statement that Christianity is part of our law. In the first place, the Christian religion has played an important part in shaping our culture, our tradition, and our law. As Lord Sumner pointed out in *Bowman* v *Secular Society Ltd* [1917] AC 406, 464-465, the family is built on Christian ideals, and

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76 Geering, *Faith Odyssey*, at 10; Davidson, *Christianity in Aotearoa*, at 65.

77 Breward, *Godless Schools?* at 18. See also ibid at 102.

78 See Breward, ibid, at 7 ("by placing the mighty machinery of education exclusively in the hands of ecclesiastics, it affords opportunities, whether likely to be laid hold or not, for the exercise of priestcraft and the gradual renewal of the subjection of the human mind, to its influence . . ."; Dommett) and 103 (secular education was "a mighty weapon against survivals of superstition"—a view expounded by Stout in the 1877 debate) respectively.

79 I L M Richardson, *Religion and the Law* (1962) at 61.

> Christian ethics have made a tremendous impact on the development of our law, as is only natural considering the majority of New Zealanders come from a Christian background.[80]

The reflection of the Christian ethic and a diffuse Christianity continued, suggest some, until the 1960s.[81] At around that point there took place, as I shall call it, the second disestablishment. The first disestablishment, as we have seen, was the legal and constitutional one which occurred in the 1840 and 1850s. The second one, more difficult to definitively pinpoint, was and is the cultural or *de facto* disestablishment of generic Protestantism from its perch.

The "cultural hegemony,"[82] to adopt the sociologists' phrase, which Christians enjoyed (or at least believed they enjoyed) until recently has been eroded. The Rev Bruce Patrick articulates this concern:

> For many years, as long as Christendom prevailed across the Western world, the Church was comfortable in a New Zealand in which a Christian worldview largely prevailed. Since the 1960s however there has been a steady shift to a secular, now post-modern worldview, and the Church is seen as marginalized.[83]

The 1960s is usually chosen as the decade ('the religiously desolate decade"[84]) in which a "paradigm shift" or change of worldview took place in New Zealand.[85] "From the sixties onwards things changed rapidly", suggests Veitch.[86] A nation that was "nominally

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80 Ibid.

81 See Vodanovich, at 52.

82 See Casanova, *Public Religions in the Modern World* at 137; Hunter, *Evangelicalism*, ch 7 at 187 et seq, for discussions of the decline in a Protestant cultural hegemony in America in the twentieth century. By "hegemony" is meant rule by ideas not force alone. Cooperation is secured by the consent of the led, "a consent that is secured by the diffusion and polarisation of the world view of the ruling class.": Thomas R Bates, "Gramsci and the Theory of Hegemony" (1975) 36 J History of Ideas 351 at 352.

83 Patrick, "After the 1997 Congress", in Patrick (ed), *The Vision New Zealand Congress 1997* (1997) ch 1 at 32-33.

84 Brian Carrell, *Moving Between Times—Modernity and Postmodernity: A Christian View* (1998) at 15.

85 Murray Robertson, "New Zealand as a Mission Field: The Paradigm Shift" in Patrick (ed), *The Vision New Zealand Congress* (1993) ch 3. Sociologist, Ivanica Vodanovich, "Religion and Legitimation", at 52 and 58 confirms this. She argues that the values and ethical ideals of denominational Christianity which provided the basis of the "normative consensus" predominated "until the late 1960s." The term 'paradigm shift' is of course drawn from Thomas Kuhn, *The Structure of Scientific Revolutions*, 2nd ed (1970). Casanova, *Public Religions*, at 145, identifies the 1960s as the decade of the disestablishment of Protestantism from the American way of life.

86 James Veitch, "Christianity: Protestants Since the 1960s" in Donovan (ed), *Religions of New Zealanders*, ch 7 at 90.

Christian since its founding" became "a post-Christian society" then argues another.[87] Bishop Brian Carrell explains that the 1960s would prove

> to be the decade in which the form of Christianity identified with European nations for over 1300 years, and with their former colonies such as New Zealand for more than a century, began to go into rapid decline. This decade would in fact witness the demise of Christendom, arguably a more obvious end in this country than in any other Western nation.[88]

Of course the process had in fact begun at least as early as the Enlightenment.[89] Modernity has slowly but surely gathered momentum with, as Christians see it, a rapid acceleration in the late twentieth century. Christians were able to benefit from the cultural capital of centuries of Christendom but both the structural process of secularisation and the undermining effects of modernist ideas (scientific naturalism, liberal rationality, evolution and so forth) is finally come to fruition.

The second disestablishment and the loss of their cultural dominance means the Christian worldview is no longer the prevailing one. There is a stubborn persistence among some conservative Christians, and perhaps some non-Christians, of the notion that New Zealand is a Christian nation. In terms of the history and traditions upon which people draw, the influence is, as Richardson noted earlier, unmistakably Christian. But in a formal legal sense the state is, and has been from the beginning, secular. The cultural picture is coming into alignment too. Lloyd Geering argued in 1985 that this vague public attachment to the idea of New Zealand as a Christian nation was becoming more tenuous as each year went by. He asserted:

> New Zealand is properly described today, not as a Christian state, but as a secular state. It means on the one hand that there is full religious freedom for all its citizens. No citizen is penalized because of his religious convictions . . . To refer to New Zealand as a secular state

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87 Robertson, "The Paradigm Shift," at 46.

88 Brian Carrell, "New Culture, New Challenge" in Patrick (ed), *New Vision New Zealand* (1993) ch 3 at 49. Carrell reiterated this in "Addressing a Secular Society" in Patrick (ed), *The Vision Congress 1993* (1993) ch 6. At 75 he comments: "In a nutshell, the term 'Christendom' no longer describes Western society. Secularism has advanced so rapidly over the last three decades since the 1960s, that it is a different landscape. We now live in a nation in which fewer and fewer people know less and less about God and care less and less about the gospel."

89 See Carrell, "New Culture", at 49-50: "The acids of modernity" are to be traced to the Enlightenment which "subtly shifted the centre of European spirituality from heaven to earth, from God to nature, from revelation to reason, from hope in the future to life in the present, from an aspiration to become divine to a preoccupation with becoming more human, from worship of the transcendent to obsession with the transient."

> means on the other hand that the state itself is not committed to or allied with any religious tradition or ideology and therefore no religious group enjoys a privileged position.[90]

"The chief trend", wrote Lloyd Geering in 1983, "is the withdrawal of New Zealanders from active participation in any clearly recognizable religious group of institution."[91] Geering's assessment-cum-prophecy is accurate if we measure religious conviction in terms of tangible external proxies such as church attendance and census figures for religious adherence. The levels of church attendance are low and declining. The most recent census figures show a decline for the mainline churches, growth for the "sect-like" conservative charismatic churches, growth in non-Christian faiths (inspired by immigration) and spectacular increasing in the irreligious category. By "irreligious" we should more accurately refer to: (1) the "nones"[92]—those who stated they were in the "No Religion" category; and possibly also (2) the "Object to State" respondents. The largest single category in 1996 was the "nones" (867,264).[93] If we add the "Object to State" group (256,593) we see that around a third of all New Zealanders, 1.1 million people, are content to officially state their non-commitment to or rejection of religion entirely.

The assumption of an inexorable secular future for New Zealand is questionable though. Religion of a particular kind may be declining (namely, the institutional variety) but religious revival, diversity and innovation ensure new varieties spring forth to supply people's inherent desire for the transcendent or ultimate.[94] New Zealand's disproportionate number of esoteric and innovative religious groups (its "cultic milieu") is well documented. Moreover, whilst the "nones" eschew traditional, organised forms of religious activity, they may often accept supernaturalism and seek spiritual guidance or solace in a variety of haphazard forms.[95] Donovan suggests: "Even if New Zealand society has become predominantly secular, then, it will not necessarily stay that way. Supernatural belief

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90 Geering, "Pluralist Tendency," at 217-218.

91 Geering, "New Zealand enters the Secular Age," at 173.

92 See the important essay by Hill and Zwaga, "The 'Nones' Story: A Comparative Analysis of Religious Nonalignment" (1989) 4 NZ Sociology 164.

93 1996 Census: see Statistics New Zealand, *New Zealand Official Yearbook 1998*, 101st ed (1998) at 121.

94 See Peter L Berger, "Secularism in Retreat", *National Interest*, Winter 1996-97, at 3.

95 Donovan, "Zeal and Apathy: The Future" in Donovan (ed), Religions of New Zealanders, ch 18, at 267.

systems, far from slipping further and further out of sight, may yet come into greater prominence."[96]

The 1999 Massey University study, "Religion in New Zealand" (part of the International Social Survey Programme) revealed some interesting findings.[97] Some 61 percent of New Zealanders believe in God, or at least in "a Higher Power of some kind". Most (60 percent) also believed in life after death and in heaven (55 percent), with many further believing in religious miracles (40 percent) and in hell (35 percent). Superstition was not absent with more than 40 percent believing fortune-tellers really can foresee the future and with more than 30 percent believing a person's star sign at birth, or horoscope, can affect the course of their future. The authors concluded:

> New Zealand is generally regarded as a very secular country, and this view is supported by the relatively low level of active involvement in religion of most New Zealanders. However, it would be wrong to conclude from this that New Zealanders are not religious or that religion is not important in New Zealand society. A sizeable minority of New Zealanders describe themselves as religious, pray regularly and regularly attend religious services. Furthermore, the majority of New Zealanders believe in God, pray at least once a year and attend a religious service at least as frequently.[98]

(c) Manifestations of the downgrading of Christianity: marginalisation

> In general . . . the church has lived with the politicisation resultant upon the Constantinian revolution from the fourth century until the twentieth in the way that the principal traditions of Christianity have taken for granted their right, whenever they can get it, to a position of special privilege and political power. They have seen establishment as normality, and have forgotten how late it came in Christian history.[99]

Some Christians in New Zealand think that they still live in *corpus Christianum* or Christendom. [100] The mindset is a hard one to eradicate and is often called "Constantinianism"—the assumption that Christians should rule. An American theologian, Stanley Hauerwas suggests:

> [S]omething has already gone wrong when Christians think they can ask, "What is the best form of society or government?" This question assumes that Christians should or do have social and political power so they can

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96 Donovan, ibid at 267.

97 "Religion in New Zealand", Department of Marketing, Massey University, January 1999. The survey was conducted in 1998 with 996 respondents and had a margin of error of 3 percent.

98 Ibid at 4.

99 Adrian Hastings, *Church and State—The English Experience* (1991) at 8.

100 See by contrast, for example, supra, the observations by the Revs Brian Carrell, Bruce Patrick and Murray Robertson which reflect their awareness of the emergence of a new, post-Christian era.

> determine the ethos of society. That this assumption has long been with us does nothing to confirm its truth.[101]

Many urge this mindset to be abandoned.[102] As Christians, we would be "more relaxed and less compulsive about running the world if we made our peace with our minority situation, seeing this neither as a dirty trick of destiny nor as some great new progress but simply as the unmasking of the myth of Christendom, which wasn't true even when it was believed."[103] Relaxing does not come easily to many Christians, however, who fear for the dire consequences to society should Christians not govern—anarchy or totalitarianism or, at the very least, the emergence of a neo-pagan culture.

The Christian viewpoint is typically treated today as just another opinion or partisan interest to put alongside with the others. Christians are politely (and sometimes not so politely) listened to, but their views are not automatically deferred to. One notorious instance occurred in March 1998. The Museum of New Zealand, *Te Papa*, ran a controversial exhibition which contained two works highly offensive to many Christians. The "Virgin in a Condom" statue (a 7.5 cm statue of the Virgin Mary clad in a contraceptive) and a contemporary version of Leonardo da Vinci's, *The Last Supper*, with a topless woman at the centre of the table in place of Christ. Notwithstanding Catholic (and other religious) protests—and even an attack on the statue—the Museum refused to withdraw the exhibits.[104] In a pluralist society where the Museum acted as "a forum within a varied social and cultural mix", the chances of one cultural or social group being offended was "a daily risk" and so

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101 "A Christian Critique of Christian America" in Pennock and Chapman (eds), *Religion, Morality and the Law: NOMOS XXX* (1988) ch 5 at 121.

102 See also eg Francis Schaeffer, *A Christian Manifesto* (1981) at 121: "The whole 'Constantine mentality' from the fourth century up to our day was a mistake . . . Making Christianity the official state religion opened the way for confusion till our own day."

103 Hauerwas, "A Christian Critique", at124 (quoting John Howard Yoder, *The Priestly Kingdom: Social Ethics as Gospel* (1984) at 158).

104 See "Virgin statue on show despite attack", *Sunday Star-Times*, 8 March 1998, at A2; "Violent and personal threats to museum staff over 'Virgin'", *Otago Daily Times*, 10 March 1998, at 2; "Virgin statue stays—Protests ignored", *Sunday Star-Times*, 15 March 1998, at A1; "Te Papa's fingers burnt in outrage over condom art," ibid, at A5. The statue was by British artist, Tania Kovats, while the painting, entitled *Wrecked*, was by Sam Taylor Woods; both works appearing in the exhibition, *Pictura Britannica*. The statue was repeatedly attacked, but not destroyed, over the ensuing weeks, leading to arrests of three protesters on three separate occasions. Protests were not confined to Roman Catholics (although these made up the majority). For example, the Rev Graham Capill, the leader of the Christian Heritage Party protested, as did Muslim leaders.

censorship would simply be inappropriate, defended senior Museum officials.[105] Compared to (what Christians perceive as) the unquestioned acceptance of conservative religious ideas in the era of cultural ascendancy, this looks like and is experienced as a downgrading of religion, a marginalisation. An application to invoke the long-disused criminal prohibition against blasphemous libel was rejected by the Solicitor General. Such a prosecution, he said, would be inconsistent with the New Zealand Bill of Rights Act's protection of freedom of expression.[106]

Interestingly, the 1999 Massey Survey surveyed its sample on the *Te Papa* controversy. Opinions were fairly evenly divided with 35 percent supporting the Museum's decision with 45 percent disagreeing with it. Some sympathy for Christian sensibilities was indicated:

> Half of those surveyed considered the artworks blasphemous (particularly the statute in a condom), but only a third were offended by them. Nevertheless, 75% of respondents agreed that, while they were not personally offended, they could understand how some Christians would have been, and 70% agreed that the Museum would never have displayed a Tiki or a statue of the Maori Queen in a condom.[107]

Various laws in the social, domestic and family arena implicitly reflected Christian values—or, more accurately, "traditional" or "conservative" Christian mores. To take some brief examples, marriage was seen as a lifelong union of two members of the opposite sex, divorce was difficult to obtain, abortion similarly, and homosexual relations between males were subject to criminal sanction. Liquor sales were restricted by time and venue, gambling outlets were likewise quarantined. The laws governing these areas show a declining Christian imprint. Marriage is still a union between a man and a woman but there is pressure (to be discussed at length in Chapter 10) to change the legal definition of marriage to permit same-sex couples to be legally wed. De facto couples are seeking greater equality with legally married couples in terms of state benefits and recognition. Divorce has been replaced

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105 "Virgin statue on show despite attack," *Sunday Star-Times*, 8 Mar 1998, at A2; "Museum refuses to remove exhibit," *Otago Daily Times*, 9 Mar 1998, at 2.

106 See "No prosecution over exhibits," *Otago Daily Times*, 28 March 1998, at 35. National Party MP, John Banks, and Fr P. Denzil Meuli had sought permission to prosecute under s 123 of the Crimes Act. Solicitor-General, John McGrath, refused the Crown's consent saying the principle of freedom of expression was the main factor against allowing prosecutions to proceed.

107 Massey Survey, "Religion in New Zealand", at 3.

with no-fault "dissolution". Abortion is easily obtained if the rising annual statistics are a reliable guide.[108] Sexual relations between homosexual adults are no longer a criminal offence and sexual orientation is a prohibited ground for discrimination along with the traditional grounds (race, religion, sex, nationality etc). The gaming laws have been liberalised and new forms of gambling—casinos, Lotto, Keno, sports betting—have proliferated. Decriminalisation of marijuana is a serious subject for debate as is the legalisation of a restricted form of euthanasia.

At their core, many conservative Christians are affronted by the thought that they have become "just another quaint subculture."[109] A downgrading of Christianity to, at best, mere parity with other value systems and worldviews is perhaps more devastating than outright confrontation and rejection. T S Eliot once objected: "When the Christian is treated as an enemy of the State, his course is very much harder, but it is simpler." He continued: "I am concerned with the dangers to the tolerated minority; and in the modern world, it may turn out that the most intolerable thing for Christians is to be tolerated."[110]

(d) The response: awakening from the slumber

The question for Christians is, "Where to from here"?[111] One strategy is acceptance of one's minority situation and a strategic retreat into a religious enclave of holy living. The preferred response of most conservative Christians, however, is social engagement and transformation as well as personal conversion and transformation of individuals. Transformative-minded Christians in New Zealand have belatedly realised the parlous position they are in as a minority within a post-Christian culture. The "high ground" is to be reclaimed. They believe that New Zealand can be, in a specially defined sense, a Christian

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108 In 1996 there were 14,805 abortions performed in New Zealand, whereas in 1990 there were 11,173 abortions and in 1994, 12,835. See *Report of the Abortion Supervisory Committee* (for the year ended 30 June 1997) at 20. In 1998 the abortion total dropped very slightly from the previous year (15,208 in 1977) to 15,029. See "Supervising body seeks change to abortion law", *Press*, 22 Dec 1999, at 11.

109 Casanova, *Public Religions*, at 156.

110 T S Eliot, *Idea of a Christian Society* (1939) at 23.

111 Andrew Howie, "Orthodoxy and Ethics in a Pluralist Society" in Trebilco (ed), *Considering Orthodoxy* (1995) ch 7 at 168 posits four Christian responses: (1) Accommodation (the liberal response); (2) Domination (the Constantinan impulse); (3) Separation and; (4) Interactive Distinctiveness. Brian Carrell, *Moving Between Times*, at 165-166, has a similar four-fold classification of options for the future.

nation again. New Zealand is to be transformed by the Gospel for the glory of God.[112] How is this to be achieved however?

Theocracy is definitely not favoured.[113] Whilst there are occasional theocratic overtones to be detected in some conservative Christians' more strident utterances, few, if any, advocate a Christian theocracy. The "Christian Reconstructionists" or "Theonomists"—who desire Old Testament Mosaic law to be applied as a blueprint for contemporary society—have had a negligible impact in New Zealand.[114] Aside from the Rev Richard Flinn of the North Shore Reformed Church (who published his strongly pro-theonomy *Issacharian Report* for a couple of years[115]) the Theonomist prescription found few, if any, takers.[116] Vehement criticism of the Reconstructionists unites Christians at divergent ends of the spectrum.[117]

Instead, the transformatist urge is expressed in democratic form. New Zealand Christians would be quick to affirm John Stott's characterisation of democracy as Biblically-sound and "the wisest and safest form of government yet devised."[118] As "Why Christians should be involved in politics", the statement signed by 47 New Zealand prominent evangelicals indicates, democracy is a given.[119] To the charge that they wish to theocratically impose their Christian values and beliefs upon an unwilling populace, conservative Christians disavow this claim. "It is not", admonished one correspondent to *Challenge Weekly*, "for humankind to usurp God's prerogative of punishing sin, and unless we admire the examples of contemporary Iran or medieval Europe, we should do better to await the

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112 See eg "Waikanae Declaration," Patrick (ed), *The Vision New Zealand Congress 1997,* (1997) at 20.

113 For overseas disavowals see John Stott, *Issues Facing Christian,* 2nd ed (1990), at 48; Schaeffer, *A Christian Manifesto*, at 120-121; Carl F H Henry, *The Christian Mindset in a Secular Society* (1984) at 106-107 and 114-115.

114 This despite the visit of two leading theonomists, Gary North and R J Rushdoony, to the Coalition of Concerned Citizens in 1986: see Craig Young, "The New Zealand Religious Right and Armageddon Theology," *New Zealand Monthly Review*, March 1987, 9 at 10.

115 The *Issacharian Report* appeared as a supplement in several issues of *Challenge Weekly* in 1987. See eg the Reports in *CW*, 8 May 1987 (featuring two articles by Rushdoony) and *CW*, 12 June 1987 (article by Gary North).

116 See the article "Millennium now, say some activists," *CW*, 1 June 1989, at 10-11. The article notes (at 11): " In New Zealand, reconstructionism is still rather small and mainly confined to Reformed churches. Its main voice until it folded a couple of years ago was Richard Flinn's *Issacharian Report.*" The article went on to quote cautionary words by a leading Kingdom theology advocate, the Rev Brian Hathaway.

117 Compare Barry Smith, *Final Notice* (1987) at 364-365 with Viv Grigg, "Transforming the Soul of a Nation" in Patrick (ed), *The Vision New Zealand Congress 1997* (1997) ch 13 at 235.

118 Stott, *Issues Facing Christians*, at 40. See further Henry, *Christian Mindset*, at 97-128.

119 *Reality*, Oct-Nov 1996, at 33.

Lord's return."[120] To be sure, some conservative Christians have advocated such, but the dominant strategy is attainment of a Christian nation consistent with democratic principles. A Christian nation, if it occurs at all, must come from below not be imposed coercively from above. There can be no return to *corpus Christianum.*

Rational argument informed by Christian wisdom and directed to all citizens' innate sense of what is true and right is the way.[121] Christians of this ilk essentially retain the theocratic (or more accurately Christocratic) end but insistent on democratic means to this end. They are theonomists, small "t", in the sense that they believe in the universal application of God's law. Christian morality and ethics are applicable for everyone, not just Christians, for two reasons. First, God as Creator knows His created beings best and His laws fit the human beings He has made.[122] Second, and relatedly, is the slightly self-serving reason that a nation's obedience brings prosperity and blessing but disobedience brings cursing and divine judgment. The organisers of the 1972 Jesus March explained the permissiveness-judgment link in these terms:

> There is widespread reluctance in the community generally to affirm or accept any absolute moral standards. The increase in crime, violence, indecency, drunkenness, drug addition, sexual permissiveness, illegitimacy, and venereal disease is alarming evidence of a moral landslide which could finally result in the decay and collapse of our society, or in the judgement of God on the nation of New Zealand.[123]

Christians themselves, along with everyone else, will suffer if God's laws are spurned and evil is tolerated. Christians for their *own* sake, let alone others, cannot be indifferent to the moral state of the nation. The oft-quoted biblical text here is, to repeat, *Proverbs* 14:34:

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120 Letter by J W Early, Christchurch, "Living in a pagan world", *CW*, 23 Aug 1985, at 16: "Unlike Old Testament Israel, we are in no position to rule on God's behalf . . . Christians living in a secular democracy cannot proclaim if our standards are not reflected in law." Howie, "Orthodoxy and Ethics in a Pluralist Society", at 168, argues: "the [domination] method is an inappropriate response to the problems of pluralism, as it involves expecting people to act on the basis of presuppositions that they do not believe in."

121 Stott, *Issues Facing Christians Today*, suggests: "We should educate the public conscience to know and desire the will of God . . . [Christians should] reason with people about the benefits of Christian morality, commending God's law to them by rational arguments." See also Henry, *Christian Mindset*, at 115: "Moral justification in the public order must be civil rather than theological, even though the civil is privately informed by the theological." See "Why Christians should be involved in politics," at 35.

122 John Hitchen, "Involved in politics . . . why?" in Patrick (ed), *The Vision New Zealand Congress 1997* (1997) ch 10 at 191; "Why Christians should be involved in politics," at 36.

123 Quoted in John Adsett Evans, "The New Christian Right in New Zealand" in Gilling (ed), *"Be Ye Separate": Fundamentalism and the New Zealand Experience* (1992) 69 at 75.

"Righteousness exalteth a nation: but sin is a reproach to any people."[124] Some conservative Christians are quick to locate the cause for some current crisis—drought or power cuts[125]—with flagrant public flouting of God's law such as the Hero Parade. More sophisticated conservative Christians point to social disintegration due to the corrosive consequences of unrestrained liberalism—New Zealand is "reaping the whirlwind" of high modernity.[126]

The transformatist strategy has necessitated a radical shift in attitude to culture on the part of conservative Christians. For the larger part of the twentieth century, a prominent feature of Western evangelicalism (including New Zealand) was disengagement from the world, especially politics, and concentration instead on personal salvation and holy living. This quietist period (from around World War I to about the 1970s) has been described as "The Great Reversal."[127] Abandoning the legacy of social involvement and reform of their forbears such as Wesley, Wilberforce and Finney, evangelicals retreated into a defensive fortress. Social transformation was the task for the theological liberals pursuing the "Social Gospel".[128] Christians of the separatist kind still maintain this "escapist" attitude, as the prominent British evangelical John Stott dubs it.[129]

However, to repeat, the bulk of conservative Christians today tend to be transformatist and socially active: "engagement"[130] with the world, not escape, is their preferred response. The beleaguered and inward-looking posture of earlier decades is conceded to be a mistake.[131] Jesus commended His disciples to be "in the world" but "not of the world"[132] which increasingly means vigorous, comprehensive engagement in the culture.

In New Zealand, John Adsett Evans argues that the Jesus Marches in 1972 were a significant turning point. From about this point conservative Christians "were prepared to be

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124 Evans, "New Christian Right," at 98 fn 46 notes this scriptural text "provided a biblical warrant for the law to be used in support of Christian moral principles."

125 The Auckland Hero Parade of 1995 was linked to the drought that summer: See I J Thrower, Mangere East, (letter), "God is warning us", *CW*, 3 May 1995, at 2. The crippling Auckland central city power-cuts in February/March 1998 were likewise linked to that year's Hero Parade.

126 Brian Carrell, "Reaping the whirlwind" (1986) 6 Stimulus 31.

127 See Stott, *Issues Facing Christians*, at 6.

128 This is associated with Walter Rauschenbusch, an American theologian. See Stott ibid at 6-7.

129 Stott, ibid, at 14.

130 Stott, ibid. See also Paul Windsor, "A Church Split Apart", *Reality*, Dec 1999/Jan 2000, at 23.

131 See Hathaway et al, "Thy Kingdom come," *CW*, 1 June 1989, at 7-8; Mike McMillan, "A Bigger Ghetto or a Brighter Bride?" *Reality*, Oct-Nov 1998, 23 at 28.

132 *John* 17:11-19.

like their more liberal counterparts and be more political in the pursuit of their aims."[133] The movement from quietism to activism was to be accelerated by the homosexual law reform issue in 1985 (to be explored in detail in Chapter 9).

The Vision New Zealand Congresses of the 1990s are an important crystallisation and significant furthering of this trend. Influenced by the popularisation of "Kingdom theology" (which rejected the dualistic sacred/secular compartmentalism, in favour of the extension of the Kingdom of God over every area of life)[134] Vision New Zealand was founded on 27 September 1990.[135] Three Congresses, the inaugural one in 1993 and others in 1997 and 1999 have seen hundreds of Christian activists, lay and clerical, gather to discuss mission strategy for a post-Christian New Zealand.[136] The Congress motto is: "Calling the Whole Church to take the Whole Gospel to the Whole Nation to the Whole World." The formal distillation of the Congress, *The Waikanae Declaration 1993* (and its revision in 1997) state: "God calls the Church to be agent for change in society". It acknowledged "the tendency to retreat into a comfortable ghetto. We confess we have failed to present adequately the whole gospel to New Zealanders . . ." There is stress upon "transforming every aspect of life" and an acknowledgement that "too often we have proclaimed a truncated gospel."[137]

Many New Zealand conservative Christians then have forsaken their political quietism and launched forth into the public square. The homosexual law reform debate was the final straw which led, in time, to a conservative Christian political consciousness and the formation of conservative Christian political parties. Casanova refers to the "deprivatization" of religion, namely, "the process whereby religion abandons its assigned place in the private

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133 Evans, "New Christian Right," at 75.

134 See Brian Hathaway et al, "Thy Kingdom Come," *CW*, 1 June 1989, at 7-8.

135 The founding date according to a leading figure, the Rev Dr Bruce Patrick. See Patrick, "Introduction: New Vision" in Patrick (ed), *The Vision Congress 1993* (1993) ch 1 at 20.

136 The inaugural Vision New Zealand Congress was held at Waikanae on 25-28 January 1993. Some 300 Christians attended including "heads of denominations, ministers, pastors, lay leaders, theologians, educationalists, service agency leaders and people from many other spheres of life and Christian service. Nearly every denomination was represented: *The Waikanae Declaration* 1993. Its proceedings are published: Patrick (ed), *The Vision Congress 1993* (1993) as well as preliminary papers: Patrick (ed), *New Vision New Zealand* (1993). The second New Zealand Congress also saw around 300 Christians meet at Waikanae from 20-24 January 1997, including for the first time, a "strong Catholic delegation": *Vision Congress 1997*, at 26-27. Its preparatory papers are published (Patrick (ed), *New Vision New Zealand Volume II* (1997)) as well as the Conference papers, Patrick (ed), *The Vision New Zealand Congress 1997* (1997). The third congress involved around 300 people again at Waikanae from 17-22 January 1999.

137 The 1993 *Declaration* is found in *Vision Congress 1993*, at 14-18. The 1997 *Declaration* (reproduced in *Vision Congress 1997*, at 16-24) repeats these statements.

sphere and enters the undifferentiated public sphere of civil society to take part in the ongoing process of contestation, discursive legitimation and redrawing of the boundaries."[138] The emergence of a conservative Christian presence in New Zealand public life in the last decade is unmistakable.

138 Casanova, *Public Religions*, at 65-66. The central thesis of his study is that there is a "deprivatisation" of religion occurring globally: "[R]eligious traditions around the world are refusing to accept the marginal and privatized role which the theories of modernity as well as the theories of secularization had reserved for them." Ibid at 5.

Chapter 2

CONSERVATIVE CHRISTIANITY

This chapter examines the principal subject group of this thesis, the "conservative Christians". Precisely who are these people, what do they believe in and stand for, and what is their distinctive "worldview"?

I DEFINING THE "CONSERVATIVE CHRISTIAN"

To describe the conservative Christian (hereafter "CC"[1]) it is necessary first to explain a divide which has occurred in modern Western Christianity.

1 The Great Divide: Christian "conservatives" versus "liberals"

Within Christianity scholars discern a split between two broad groups variously defined as "conservatives", "orthodox", "traditionalists", on the one hand, and "liberals", "progressives", "radicals" on the other. In the leading empirical study, sociologist Robert Wuthnow surveyed American Christianity since the 1940s and found a "religious restructuring" or "realignment" taking place.[2] Believers were being polarised into "conservatives" and "liberals", a split that transcended denominational barriers.[3] The two kinds of Christian could be seen within particular denominations and not just between denominations.[4] This restructuring into a conservative/liberal divide has, to some, largely replaced the old historic divides and hostilities between Protestant and Catholic, Christian and Jew, even believers and non-believers.[5] The basis of this split shall be explored in detail later but for now, we can adopt James Davison Hunter's analysis. There is, he maintains, a deep cleavage in American culture based on fundamentally differing worldviews. These

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1 The abbreviation "CC" is used instead of "cC" for the sake of elegance. I use CC to refer to "conservative Christianity" or "conservative Christian", the context indicating which is meant.

2 *The Restructuring of American Religion: Society and Faith Since World War II* (1988). Wuthnow's update is *Christianity and Civil Society: The Contemporary Debate* (1996) at 48 et seq.

3 For a recent attempt to bridge the gap see eg Richard G Hutcheson and Peggy L Shriver, *The Divided Church: Moving Liberals and Conservatives from Diatribe to Dialogue* (1999).

4 See Basil Mitchell, *Faith and Criticism* (1994) at 1.

5 See James Davison Hunter, *Culture Wars: The Struggle to Define America* (1991) at 132 and Douglas Laycock, "Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the

antagonistic moral visions take expression as "polarizing impulses or tendencies," one toward "orthodoxy", the other toward "progressivism"[6]. The "orthodox" are committed to:

> *an external, definable, and transcendent authority*. Such objective and transcendent authority defines, at least in the abstract, a consistent, unchangeable measure of value, purpose, goodness, and identity, both personal and collective. It tells us what is good, what is true, how we should live, and who we are. It is an authority that is sufficient for all time.[7]

The "progressivists", by contrast, tend to view truth "as a process, as a reality that is ever unfolding."[8] They have:

> a strong tendency to translate the moral ideas of a religious tradition so that they conform to and legitimate the contemporary *zeitgeist* . . . what all *progressivist* worldviews share in common *is the tendency to resymbolize historic faiths according to the prevailing assumptions of contemporary life.*[9]

Like many dichotomies there is the problem of blurring and the reality of intermediate situations.[10] Some recent work even denies the claim that there is a clear divide between conservatives and progressives: the imagery of "two monolithic camps" has been fanned by the media and some political leaders, but is "overdrawn", if not "simply false".[11] Moreover, there may be more than one axis or continuum to consider. Those who are "liberal" on one set of issues may not necessarily be "liberal" on other issues.[12] This complicates the analysis considerably.

An important point to note is that the conservative/liberal (or orthodox/progessivist) split is really a polarisation into "pure" or "ideal" types. There is, and always will remain, a large "middle" group, greater in size probably to the sum of either extreme, which refuses to be identified with either polarised "camp". As Wuthnow stressed again recently "the liberal-

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Late Twentieth Century" (1996) 80 Minn L Rev 1047 at 1088.

6 Hunter, *Culture Wars*, at 43.

7 Ibid at 44 (original emphasis).

8 Ibid at 44.

9 Ibid at 44-45 (original emphasis).

10 Ibid at 105.

11 Nancy J Davis and Robert V Robinson, "Religious Orthodoxy in American Society: The Myth of a Monolithic Camp" (1996) 35 JSSR 229. They found the religiously orthodox to be "conservative" on social issues of sexuality, reproduction and schooling of children but "moderate" or "liberal" on gender, race and economic issues. There was not the coherence around a single ideological position that Wuthnow and Hunter suggest.

conservative continuum is in fact a continuum. People in the middle may lean slightly to the left or the right. But they are nevertheless in the middle."[13]

A similar restructuring of Christianity has occurred in New Zealand. The conservative/liberal split is readily apparent but the subject of relatively little published research.[14] David Arrowsmith's 1978 study is one of the few to document the divide.[15] Certainly the schism is not a novel one. As church historian Peter Matheson notes: "The dialogue of the deaf in contemporary, post-modernist New Zealand between 'liberals' and 'evangelicals' would appear to have deep roots in our history."[16] Matheson details the "battle royal" that raged within New Zealand Presbyterianism in the late nineteenth century. "From an extraordinarily early period", he recounts, "dialogue between 'liberal' and 'conservative' broke down within Presbyterianism, and was replaced by fierce polemics and a string of heresy trials which were to culminate in that of Lloyd Geering in our century."[17] The point about this phenomenon being a continuum is borne out as well: "Many of course, not least the laity, sought to maintain a middle course, but the tendency to polarisation is clear enough."[18] The Rev Stuart Lange, secretary of Presbyterian AFFIRM, explained the third, middle group within contemporary New Zealand Presbyterianism this way:

> The third perspective is the so-called "middle of the road" perspective. These middle of the road people are *neither* thorough-going liberals *nor* card-carrying evangelicals and they would [not] want to be labelled as *either* . . . The middle of the road people are influenced by *both* orthodox and liberal approaches. On the core doctrines of the faith the middle of the road people may in themselves be essentially "orthodox". But they are often "liberal" in their understanding of scriptural authority, and "liberal" to the extent that they would not want to insist on orthodoxy in anyone else . . . this middle perspective is quite happy to live in a theologically pluralistic church, in fact they may really *believe* in a broad church, they really

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12 Rhys H Williams, "Is America in a culture war? Yes—no—sort of", *Christian Century*, 12 Nov 1997, 1038 at 1041.

13 Wuthnow, *Contemporary Debate*, at 59.

14 But see John Adsett Evans, "The New Christian Right in New Zealand" in Gilling (ed), *"Be Ye Separate": Fundamentalism and the New Zealand Experience* (1992) at 69-106.

15 David Arrowsmith, "Christian Attitudes Towards Public Questions in New Zealand in 1975", MA thesis, Political Studies, University of Auckland, 1978.

16 Peter C Matheson, *"A Time of Sifting": Evangelicals and Liberals at the Genesis of New Zealand Theology* (1991) at 1.

17 Ibid at 8.

18 Ibid at 1.

value people being able to choose from a *range* of convictions.[19]

The fracturing is of course not confined to Presbyterians. For instance, the New Zealand Methodist monthly, *Crosslink*, has a regular "Crossfire" feature where liberal and conservative Methodists debate controversial issues of the day in an effort to convince the uncommitted "middle" Methodist reader.

What is the reason for this split? In one sense, the tension between traditional and liberal views within a religious tradition is ancient.[20] One explanation for the divide is the difference between "centrifugal" and "centripetal" forces in the reading of religious texts.[21] Liberals tend to emphasise the former (the truth, its meaning and spirituality are more complex than first thought; meanings open out in new ways), whereas conservatives emphasise the former (in the face of the increasing complexities of life a return to simple core answers are better). Perhaps a more promising line is to see the split in terms of reaction or engagement with the contemporary culture and its prevailing worldview. Peter Berger pinpoints what I regard as the key here:

> Some [religious people] have defined modernity as the enemy, to be fought whenever possible. Others have, on the contrary, seen modernity as an invincible world-view to which religious beliefs and practices should adopt themselves. In other words, *rejection* and *adaptation* are two strategies open to religious communities in a world understood to be secularized.[22]

Religious conservatives typically prefer to confront the world "head-on".

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19 Transcript of a lecture by S Lange reprinted in *Presbyterian AFFIRM Newsletter*, September 1998, at 11 (emphasis in original).

20 The clash between the Saducees and Pharisees in Jesus' day is but one example: David Kettle, "Bearings on the sea of faith" (1997) 5 Stimulus 3 at 3.

21 Wuthnow, *Contemporary Debate*, at 63 (drawing upon work by Northrup Feye).

22 Peter L Berger, "Secularism in Retreat" *National Interest*, Winter 1996/1997, 3 at 4. Berger is not posing these two strategies as exhaustive alternatives. In his influential work, *The Social Reality of Religion* (1969) he explains that rejection and accommodation really "ideal-typical options". He points out (at 152-153): "Obviously there are various intermediate possibilities between these two ideal-typical options, with varying degrees of accommodation and intransigence."

2 *Defining the conservative Christian*

(a) General

The term "conservative Christian" is by no means a novel designation.[23] It has been used in various senses and with different connotations, the epithet "conservative" referring to the theological, political, economic or cultural stance of the adherent. My use of the expression CC then may not correspond with the way others use the term. I wish to adopt a purely "stipulative definition" of "conservative Christian": for the purpose of this thesis the term CC means what I want it to mean and nothing else.[24] The epithet "conservative", small "c", is used not because such persons are politically right-wing or conservative (although they often are) but because it aptly describes a certain mindset or attitude of these persons toward their faith and its relationship with culture. Theologically, they are certainly conservative insofar as they wish to conserve the best, most authentic, pure or orthodox version of the faith. The "conservative" label is also a useful label and superior to either say "evangelical" or "orthodox" since it is sufficiently broad to embrace a number of diverse movements and denominations within Christianity. The defining and essential characteristics of CC can be broken down into four interrelated convictions.

(i) Submissiveness to authority

First, CCs defer to and endeavour to faithfully obey "authority", so defined. For the Protestant CC, the ultimate authority is Scripture (*sola scriptura*), for the Roman Catholic CC it is Scripture *and* Tradition.[25] Wuthnow summarises the dichotomy between religious orthodox and progressives this way:

> In simplest terms, orthodox believers hold to the view that God exists, that the Bible is an authoritative source of divine truth, and that there are absolute standards of right and wrong that apply to everyone, whereas progressives are less sure of the existence of God, convinced that they must seek their own truth from a variety of

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23 See eg Mitchell, *Faith and Criticism* at 2; Evans, "New Christian Right"; Arrowsmith, "Christian Attitudes", ch 5; Brett Knowles, "Some Aspects of the History of the New Life Churches of New Zealand 1960-1990", Ph D thesis, University of Otago, 1994.

24 See Mitchell, *Faith and Criticism*, at 1 for this use of stipulative definitions.

25 See *Catechism of the Catholic Church* (Liberia Editrice Vaticana) (1994) at para 82: "the Church . . . 'does not derive her certainty about all revealed truths from the holy Scriptures alone. Both Scripture and Tradition must be accepted and honored with equal sentiments of devotion and reverence.'".

> sources, and persuaded that moral questions must be decided on situational and relativistic grounds.[26]

CCs, particularly Protestant ones, typically take the Bible literally and view it as, in a very real sense, the infallible or inerrant Word of God.[27] When CCs insist that the Bible is taken literally they do not mean that all passages are taken at face value as eye-witness, newspaper accounts.[28] This would be better described as "literalism", something Evangelicals (a term to be explained shortly) reject.[29] Rather, CCs are alert to the use of symbolism, allegory, figurative and poetic forms of expression where the context so indicates. James I Packer explains that interpreting Scripture literally means that "the proper, natural sense of each passage (i.e., the intended sense of the writer) is to be taken as fundamental; the meaning of texts in their own contexts, and for their original readers, is the necessary starting-point for enquiry into their wider significance."[30] The analogy in law would be the "plain meaning" or "ordinary meaning" approach to words in statutory interpretation. This too is commonly referred to as the literal rule.[31]

CCs will depart from the literalist interpretation when the context so requires. The point about the preference for a literal approach to sacred texts is that it best displays, to CCs, an attitude of obedience or faithfulness to authority. God's Word is just that, the Word of God, and so it is to be taken literally—unless indications are clearly to the contrary. Scripture is taken literally since to do so is, in their view, to take it reverently and seriously.[32]

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26 Wuthnow, *Contemporary Debate*, at 55.

27 Evans, "New Christian Right", at 95 fn 11. See James Barr, *Fundamentalism* (1997) ch 3 at 40 et seq for helpful explanation.

28 J I Packer, *'Fundamentalism' and the Word of God* (1958) at 104.

29 Ibid at 104.

30 Ibid at 102.

31 See eg Sir Rupert Cross, *Statutory Interpretation* (1976) at 1 and 13. Cross, at 1, cautions: "The essential rule is that words should generally be given the meaning which the normal speaker of the English language would understand them to bear in their context at the time when they were they were used. It would be difficult to over-estimate the importance of this rule because the vast majority of statutes never come before the courts for interpretation."

32 William Shepard in an essay about both Islamic and Christian 'fundamentalism", makes a valuable observation in this regard: "More important—and this may be the 'truth behind' the charges of literalism—both groups of 'fundamentalists' want to take literally, or at least *very seriously*, elements in the Scriptures and traditions that their modernist opponents would either reject or reinterpret. Examples in the Christian case would be supernaturalism, original sin, and blood atonement". W Shepard, "'Fundamentalism' Christian and Islamic" (1987) 17 Religion 355 at 362 (emphasis added).

(ii) Moral absolutist

Second, CCs are moral and ethical absolutists.[33] Recall Wuthnow's observation quoted earlier—CCs hold "that there are absolute standards of right and wrong that apply to everyone".[34] David Arrowsmith in his New Zealand study observed that CCs "invoked a tradition of personal morality which upheld an unchallengeable set of ethical precepts."[35] The Women's Editor of *Challenge Weekly*, the weekly New Zealand CC newspaper, expresses a typical CC view:

> God has left us no doubt about his standards, for his Word is full of instructions from Exodus with the giving of the Ten Commandments to the last letter in the New Testament. His commands are positive and have not changed nor deviated from their first pronouncement. There are no degrees of right and wrong. God expects his children to be holy, and he does not allow excuses for wrong behaviour.[36]

(iii) Restorationist

Third, CCs are restorationists. Sometimes this takes a nostalgic turn. They do not want to merely retain or conserve the best of tradition but they desire a return to a purer, atavistic form of Christianity.[37] Some CCs see this as only occurring within a separated enclave. For others the Christendom model beckons; there is overt yearning for a return to some "Golden Age" where society was ordered in accordance with God's will as mediated through believers in positions of influence. We encountered this Constantinian impulse in the last chapter. Increasingly however, as we saw, CCs seek a fresh approach in what is perceived as an entirely new era. Rejecting the Christendom model they seek to transform or restore society.

(iv) Oppositional

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33 See generally, Oliver Barclay, "The nature of Christian morality" in Kaye and Wenham (eds), *Law, Morality and the Bible* (1978) pt 1, ch 1, at 130.

34 Wuthnow, *Contemporary Debate*, at 55. Douglas Laycock discerns that one of the fundamental dividing lines in modern religious conflict is "approximately between those who believe God has laid down eternal and inflexible moral laws that govern both their public and private behaviour, and those who do not." Laycock, "Continuity and Change", at 1088. By contrast, religious and secular progressives believe that "No God handed down in eternally unchanging form all of the moral rules associated with traditional religion." Ibid at 1077.

35 Arrowsmith, " Christian Attitudes", Introduction, at viii.

36 Betty Scott, "Observance of Right and Wrong", *Challenge Weekly ("CW")*, 28 Feb 1991, at 9.

37 See eg Arrowsmith, "Christian Attitudes", at viii.

Fourth, and related to (iii), CCs are reactionary and oppose the prevailing ethos or "the spirit of the age". They are antagonistic, in varying degrees, to this unredeemed and rebellious sector of God's creation and the miscreant spirit is described variously as modernism, secularism, humanism or simply "permissiveness".[38] Mitchell, for instance, notes: "Traditionalists will often be suspicious of what passes as 'modern knowledge and determined not to assimilate Christianity to the prevailing secular worldview".[39]

There are further, *secondary* characteristics of CC which I shall list separately. These traits or convictions are often associated with CC but, in my view, are not necessary elements of CC. They are instead better viewed as frequent correlates with CC—prevalent but not intrinsic to all CCs. First, to reiterate from Chapter 1, CCs exhibit much international comity with overseas CCs. The transnational flavour of CC is pronounced (and similar to international socialism or marxism). Second, there is an uncompromising "either/or", "black or white" attitude to many social and ethical issues. Third, many CCs display a siege mentality. There is often an embattled, defensive, even paranoid quality to their rhetoric. As we shall see, there is frequent recourse to "domino theories" and "ratchet" effects. Things are inexorably changing for the worse, yet disaster typically comes in small insidious increments, not in one foul swoop. Allowing one step will lead, if unchecked to others, unless CCs nip the ruinous process in the bud. This attitude resonates with a particular eschatological position held (eschatology refers to the study of "final things" or the "end times"). Many CCs see these as the "last days" prior to the second coming of Christ whereupon the divine millennium of God's Kingdom will commence. Under this apocalyptic and pessimistic view, society is on a slippery slope to inevitable decline. Fourth, there is among many CCs an anti-globalisation stance, one which is often vented against the United Nations. Again, this has an eschatological root: the apocalyptic fear of a demonic totalitarian world government is traceable to the anti-Christian world oppressor or "beast" described in chapter 13 of the book of *Revelation*.

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38 Arrowsmith, ibid at viii and 119.

39 Mitchell, *Faith and Criticism*, at 3.

There is, further, the observable link between CC and political conservatism. In recent times many CCs have found more affinity with right-of-centre political interests. But CCs have not always, historically, supported right-wing politics. The link is a common modern one but by no means a necessary one. Second, CCs are typically economic individualists and supporters of free enterprise capitalism.[40] But again the connection is not a necessary one.

(b) Cultural interaction

Within the broad rubric CC there appear to be two distinct strains in terms of cultural engagement. First, there is a separatist or counter-cultural strain that seeks to maintain a religious and social enclave against the corruptive forces of secular society. Second, there is a transformative strain that seeks not disengagement but rather conversion of society to bring it into harmony with God's will. In terms of H Richard Niebuhr's renowned typology of Christian responses to culture,[41] these two strains correspond to Niebuhr's "Christ Against Culture"[42] and "Christ The Transformer of Culture" [43] respectively.

CCs have traditionally been preoccupied with issues of personal morality (parental rights, abortion and contraception, homosexuality, pornography, sex education and so on) in the private sphere (the home, school and church). These are the issues closest to their heart, quintessentially arenas where the CC should be free to practise the faith unhindered by an intrusive state. "I will preach about *Playboy* because that is a moral issue, but not about starvation for that is a political issue,"[44] is graphic and extreme example of this mindset. This personal, private versus socio-political, public morality division still remains but has been rapidly closing. Some CCs have recently rekindled their social concern and have come to denounce structural injustices as well.

(c) Denominational profile

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40 Arrowsmith, "Christian Attitudes", at ix and 116.
41 H Richard Niebuhr, *Christ and Culture* (1951).
42 Ibid at ch 2.
43 Ibid at ch 6.
44 Quoted (and strongly denounced) in Bronnert, "Social Ethics" in *Law, Morality and the Bible*, ch 5 at 216.

The CC is usually Protestant but not exclusively so. The defining characteristics—deference to authority, moral absolutism, anti-modernist stance and so on—which single out the CC can embrace Roman Catholics as well. As noted earlier the religious realignment transcends the old denominational boundaries. Both in attitude and in respect of particular issues (preservation of the family, pro-life issues, homosexuality etc) some (conservative) sectors of Catholicism overlap with Protestant conservatives.[45]

The overlap has begun to take visible form in the last two decades. There are various terms to describe the new public coalition of CCs. Some refer to it as the "new ecumenism", a fresh dialogue and a mobilisation of activists rather than the old-style ecumenism which sought denominational unification.[46] Others prefer the term suggested by Francis Schaeffer: "co-belligerence".[47] Commonalities are more readily perceived than differences, "especially when the fury of anti-Christian forces around us deprives us of leisure for intra-Christian polemics."[48] As Charles Colson once colourfully put it: "When the barbarians are scaling the walls, there is no time for petty quarrelling in the camp."[49] While some doubt whether the historic doctrinal differences (ones which saw much blood spilled) can be dismissed as "petty", the basic strategy is considered sound. Bishop Brian Carrell recommended the concept for New Zealand at the first *Vision New Zealand* Conference in 1993:

> When Christianity is more or less accepted as the faith of the nation, a society can afford the luxury of competing denominations. But when the grey cloud of secularism descends upon a people, Christians have to stand together (or at least respect with integrity the differences between them) and affirm one another publicly and sincerely as brothers and sisters in Christ.[50]

The second Vision Conference in 1997 was to see the welcoming of a significant Catholic delegation. To Bruce Patrick this was a signal that "the Berlin Wall of New Zealand

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45 See John Stenhouse, "Fundamentalism and New Zealand Culture" in Gilling (ed,) *Be Ye Separate,* at 5: "Roman Catholic Christians could adopt strikingly similar positions to Protestant fundamentalists, and for many of the same reasons."

46 See Hunter, *Culture Wars*, at 97-104.

47 See Alister McGrath, *Evangelicalism and the Future of Christianity* (1993) at 176.

48 Harold O J Brown, "Unhelpful Antagonism and Unhealthy Courtesy" in Armstrong (Gen ed), *Roman Catholicism: Evangelical Protestants Analyze What Unites and Divides Us* (1994), ch 7 at 177.

49 Quoted in Armstrong, ibid, at 241 fn 22.

50 Brian Carrell, "New Culture, New Challenge" in Patrick (ed), *New Vision, New Zealand* (1993) ch 3 at 57.

Christendom" was weakening and relationships were being "built of common ground, of which there is much." [51]

My focus is conservative *Christianity* not religious conservatives generally. Nonetheless, it is worth noting that orthodox, traditional or conservative adherents of other faiths—Orthodox Jews, devout Muslims, Jehovah's Witnesses and the Church of Latter Day Saints of Jesus Christ (Mormons), share many of the same concerns with CCs. The emergence of the so-called "Religious Right"[52] is of course just an extension of the principle of collaboration against the common enemy to include a wider circle of anti-modernist religionists. What are in one sense unnatural alliances become sensible and pragmatic collaborations which need no more justification than "the dictum that 'an enemy of an enemy is a friend of mine.'"[53] Figure 1 endeavours to capture the group CC:

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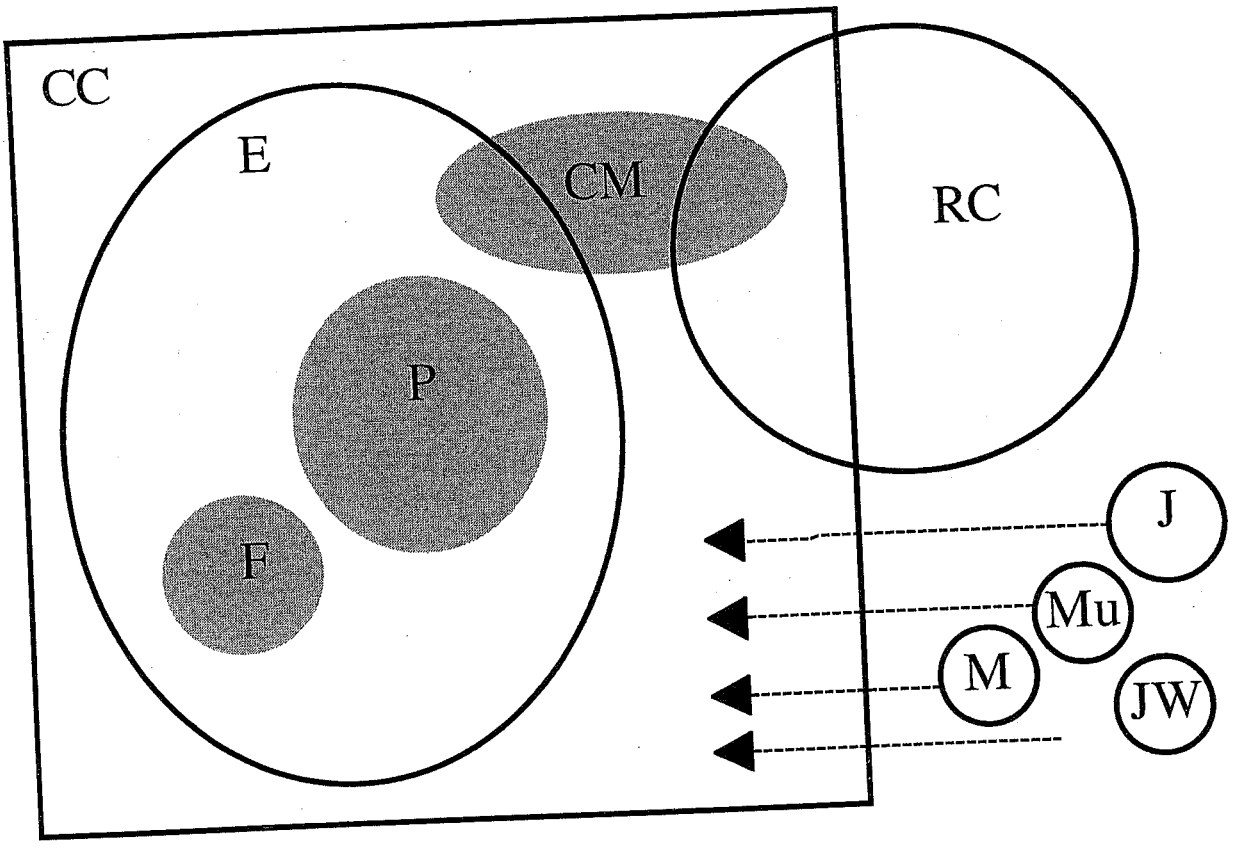
51 Patrick, "After the 1997 Congress" in Patrick (ed), *The Vision New Zealand Congress 1997* (1997) ch 1 at 30. John Massam, editor of *Challenge Weekly*, was prepared to declare a truce between Catholics and Protestants a decade earlier: see "The holy wars have ended", *CW*, 14 Dec 1986, at 2.

52 See Evans, "New Christian Right", at 94 fn 4 (the term leaves open the possibility of concerted political activity of Christians with non-Christians and avoids the troublesome issue of whether the beliefs of the group are in fact "Christian").

53 Hunter, *Culture Wars*, at 104. Lesslie Newbigin puts a more principled case for co-operation between Christians and people of other faiths and ideologies in his *The Gospel in a Pluralist Society* (1989) ch 14 at 180-181.

Figure 1: Conservative Christianity



CC comprises, principally, Evangelicals (E). Indeed, when the reader sees the term "CC" the initial mental image should be that of an Evangelical. Conservative Roman Catholics (RC) also are included. Within Evangelicalism are: Fundamentalists (F) and Pentecostals (P) and Protestant Charismatics (CM representing the Charismatic Movement). Charismatics are also to be found in Catholicism hence the overlap there. Sharing many of the CC concerns but not within Christianity are conservative Jews (J), Muslims (Mu), and (from a CC perspective) heterodox sects such as Jehovah's Witnesses (JW) and Mormons (M).[54] The circles are not to scale, but do give a very rough indication of relative significance and influence of each group.

CC can be thought of as a fast flowing river which has various tributaries.[55] The mingling of the streams can produce eddies and vortices which are the debates and

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54 Mormonism or more properly the Church of Jesus Christ of Latter Day Saints is classified here as a non-Christian faith although I acknowledge Mormons themselves vigorously seek inclusion in the Christian fold.

55 Here I borrow from and adapt McGrath's description of the streams with Evangelicalism: see *Evangelicalism*, at 17.

disagreements within CC. Nonetheless, there is a central flow the source of which is the trinitarian God of the Nicene creed.

Regarding Christian churches and denominations we see the conservative/liberal split is not along denominational lines. There are some denominations which are virtually wholly made up of CCs. All the Pentecostal denominations (Assembly of God, New Life, Elim, Apostolic Churches, to mention the major ones) are CC, as are the Open Brethren, Salvation Army, Reformed and Seventh Day Adventist Churches are examples. Of the more traditional or "mainstream" churches there are to be found significant "wings" or sub-groupings of conservative Christians in all. Anglicans, Presbyterians, Methodists and Roman Catholics all have sizeable, identifiable numbers of members of conservative temper, as does (particularly) the Baptist Church. In some churches the conservatives have their own formal conservative associations: Anglican AFFIRM,[56] Presbyterian AFFIRM and the Presbyterian Westminster Fellowship[57] and Methodist AFFIRM are examples. Whilst there are conservative elements within all denominations, the "reverse is however not true: liberal Christians are not drawn from all denominations."[58] Liberal Christians simply would not fit into many of the avowedly conservative or fundamentalist fellowships. Again, the caveat must be repeated that while it is correct to talk of a "divide", the extremes of conservative and liberal are just that; the majority of members of the mainstream churches are grouped in the middle of the continuum and eschew any self-identifying label. The polemics and activism of both conservative and liberal camps is not for them.

A mark of evangelicals (and perhaps CCs generally) is their propensity to form interdenominational, parachurch organisations. Reflecting foreign influences the transdenominational institutions of CC in New Zealand are as much transplants as the churches were themselves. Early organisations such as SPCS (Society for the Promotion of Community Standards) and SPUC (Society for the Protection of the Unborn Child) are of

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56 AFFIRM stands for Anglicans For Faith, Intercession, Renewal and Mission. It is a partnership of Church Army, Anglican Renewal Ministries, Church Missionary Society, Latimer Fellowship, SOMA and South American Missionary Society. Presbyterians have borrowed the AFFIRM label for their own umbrella conservative sub-group.

57 The Westminster Fellowship was formed in 1950 declaring its belief in the "infallible truth and divine authority of Holy Scripture" and the acceptance of the Westminster Confession and Catechisms. See Davidson, *Christianity in Aotearoa* (1990) at 164.

British origin. Later movements and organisations reflect an American ancestry, the homeschooling movement and "Promise Keepers", a men's spiritual revitalisation movement, being two recent examples.

It would be tedious to attempt to list all the public corporeal expressions of CC for its faces are both varied and numerous. Brief non-exhaustive examples are set out in Table 1 below:

Table 1: Conservative Christian Institutions

Field	Organisation, Institution, Movement
Media	Radio Rhema, *Challenge Weekly* newspaper, Christian Broadcasters Association (television)
Education	Bible in Schools League, Independent Christian Schools Association, NZ Home Schooling Association, NZ Education Development Foundation
Youth	YFC (Youth for Christ), YWAM (Youth With A Mission), Scripture Union, ISCF (Inter-Schools Christian Fellowship), TSCF (Tertiary Students Christian Fellowship), Navigators
Evangelism	OAC (Open Air Campaigners), Gideons, Full Gospel Businessmen's Fellowship, Women's Aglow
Social Change	SPCS, SPUC, WCTU (Women's Christian Temperance Union)
Politics	Coalition of Concerned Citizens, Christian Heritage Party, Future New Zealand (formerly Christian Democrats), Strategic Leadership Network

(d) Evangelicalism[59]

As I pointed out earlier, the largest group within conservative Christianity are the Evangelicals. Evangelicalism, also known as Evangelical Protestantism, is, as George Marsden puts it, a diverse coalition which includes "any Christians traditional enough to affirm the basic beliefs of the old nineteenth-century evangelical consensus."[60] What are these basic beliefs? Marsden argues they include:

> (1) The Reformation doctrine of the final authority of the Bible, (2) The real historical character of God's, saving work recorded in

58 Evans, "New Christian Right", at 106 fn 132.

59 On the history of Evangelicalism see McGrath, *Evangelicalism*, ch 2.

60 George M Marsden, *Understanding Fundamentalism and Evangelicalism* (1991) at 4.

> Scripture, (3) Salvation to eternal life based on the redemptive work of Christ, (4) The importance of evangelism and missions, and (5) The importance of the spiritually transformed life.[61]

The list of another "insider", Professor Alister McGrath, is similar. He discerns six "fundamental convictions":

> (1) The supreme authority of Scripture as a source of the knowledge of God, and a guide to Christian living; (2) The majesty of Jesus Christ, both as incarnate God and Lord, and as the saviour of sinful humanity; (3) The lordship of the Holy Spirit; (4) The need for personal conversion: (5) The priority of evangelism for both individual Christians and the church as a whole; (6) The importance of the Christian community for spiritual nourishment, fellowship and growth.[62]

Harvey Cox points to Billy Graham as "the paradigmatic evangelical"[63]. Evangelicalism is seen by its proponents as nothing more than pure or true historic Christianity under a modern label.[64] James I Packer explains:

> It [Evangelicalism] is, we maintain, the oldest version of Christianity; theologically regarded, it is just apostolic Christianity itself. Ideally, the Evangelical would choose no title for himself but "Christian". He holds that he alone is entitled to call his faith "Christian" without qualification. If, however, he must use a further label to differentiate himself from other groups within the Church, he accepts "Evangelical" as being the historically established term for his position . . .[65]

Evangelicalism is the label preferred by most conservative Protestants today. They usually reject the term "fundamentalism" because of its odious connotations and because Evangelicalism is, according to Packer, broader and more thoughtful as well as older and more historically anchored.[66] Because of the widespread use of 'fundamentalism' it is necessary to examine this term closely.

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61 Ibid at 4-5.

62 McGrath, *Evangelicalism* at 51.

63 Harvey Cox, "The Warring Visions of the Religious Right" *Atlantic Monthly*, Nov 1995, 59 at 62.

64 "Evangelicalism is historic Christianity. Its beliefs correspond to the central doctrines of the Christian churches down the ages . . . evangelicalism has shown itself to have every right to claim to be a standard- bearer of historic orthodox Christianity in the modern period." McGrath, *Evangelicalism*, at 94. Likewise see John Stott in David L Edwards/ John Stott, *Essentials: A Liberal-Evangelical Dialogue* (1988) at 39: "[T]he Evangelical faith is historic, mainline, trinitarian Christianity, not an eccentric deviation from it. For we do not see ourselves as offering a new Christianity, but as recalling the Church to original Christianity."

65 Packer, *"Fundamentalism" and the Word of God*, at 38.

66 Packer, ibid at 30-38.

(e) Fundamentalism: a vilified sub-species

Despite the tendency to indiscriminately call all conservative Christians 'fundamentalists',[67] the temptation ought to be resisted. Scholars explain that fundamentalism is a "sub-species"[68] of Evangelicalism: "all fundamentalists are evangelicals but not all evangelicals are fundamentalists."[69] Most British[70] and New Zealand[71] evangelicals are quick to distinguish themselves from the fundamentalists for the reasons to be elaborated shortly.[72]

Defining this pilloried sub-group of evangelicalism has proved difficult. Fundamentalism is not coterminous with a particular church, sect or denomination but is better described as a religious mass movement.[73] The origins of the term are quite modern. The appearance of "fundamentalism" as a distinct label in the religious lexicon occurs at the early part of the twentieth century.[74] Conservative American Protestants were concerned at the rise of liberal theology at the latter part of the nineteenth century. These American evangelicals responded to the "liberal" or "modernist" challenge with a series of twelve booklets, the first of which was published in 1909. Around three million copies of *The Fundamentals: A Testimony to the Truth* were circulated, through the generosity of two wealthy lay Californians. In 1910 the General Assembly of the (American) Northern Presbyterian Church pronounced five items as "the fundamentals of faith and of evangelical

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67 Or else, "born again Christians", "evangelicals", "Pentecostals" or "Charismatics". On this journalistic tendency and the meaning of these often-conflated terms, see Cox, "Warring Visions," at 62.

68 The characterisation used by James Veitch, "Fundamentalism and the Presbyterian Experience" in Gilling (ed), *Be Ye Separate* 24 at 30 and Colin Brown, "Where have all the fundamentalists gone?" ibid, 142 at 143.

69 Lyman Kellstedt and Corwin Smidt, "Measuring Fundamentalism: An Analysis of Different Operational Strategies" (1991) 30 JSSR 259 at 260.

70 See eg Stott in Edwards/Stott, *Essentials*, at 89.

71 See eg the editor's insertion to Lineham's essay in Patrick (ed), *New Vision New Zealand* (1993) ch 7 at 119 fn 20.

72 Packer's important monograph, *'Fundamentalism' and the Word of God*, is a lengthy attempt to explain precisely how (British) evangelicalism differs from classic American fundamentalism. Fundamentalism is evangelicalism "at something less than its best" (at 31). Indeed, in a stronger vein, he criticises it as being "a somewhat starved and stunted kind [of evangelicalism]—shrivelled, coarsened and in part deformed under the strain of battle." (at 33)

73 Kellstedt and Smidt, "Measuring Fundamentalism", at 261. See also James Barr, "Fundamentalism—A Challenge to the Church" (1991) 11 Quarterly Review 30 at 34.

74 The following account is drawn from Packer, *Fundamentalism*, ch 2 ("What is 'Fundamentalism'"); Tom W Smith, "Classifying Protestant Denominations" (1990) 31 Rev Relig Res 225 at 226; McGrath, *Evangelicalism*, ch 1 at 18-27; Shepard, "'Fundamentalism'", at 356; Veitch, " Presbyterian

Christianity." The list, which varies slightly,[75] was: (1) the inspiration and infallibility of Scripture (also referred to as the inerrancy of Scripture), (2) the deity of Christ, (3) His virgin birth and miracles, (4) His penal death for our sins, and (5) His physical resurrection and personal return.[76] The actual term "fundamentalist" was coined in 1920 by Curtis Lee Laws, the editor of the Baptist *Watchman Examiner*. Then it carried no pejorative connotations but rather was a badge of pride denoting those who defended "the fundamentals of the faith."

Today, of course, the word fundamentalism has acquired an ineradicable negative connotation. It has become, as Packer puts it, "a term of ecclesiastical abuse, a theological swear-word; and the important thing about a swear-word, of course, is not what it means but the feelings it expresses."[77] It has become a by-word for mass extremist, rigid, unthinking, fanaticism of any kind, a generic put-down of not just fervent religious groups but fanatics of other persuasions too.[78] Shepard submits that whatever label the face of conservative and confrontational religion is given it will incur a pejorative flavour, since what it opposes (modernity) is typically what many in Western academic and journalistic circles hold dear.[79]

This extreme form of evangelicalism[80] highlights tendencies with CC generally. Moreover, fundamentalists are ones most likely of all CCs to clash with the state on personal/private matters and call into question the scope of religious liberty.

Experience," at 28-30.

75 See Shepard "'Fundamentalism' Christian and Islamic" at 356 and fn 5; Veitch, "Fundamentalism and the Presbyterian Experience" at 29.

76 Packer, *Fundamentalism*, at 28.

77 Packer, *Fundamentalism*, at 30. James Barr, a leading critic of fundamentalism observed: " . . . fundamentalism is a bad word . . . a hostile and opprobrious term, suggesting narrowness, bigotry, obscurantism and sectarianism." Barr, *Fundamentalism* (1977) at 2.

78 The term fundamentalist is of course applied to Muslims and other religious groups. There can be economic fundamentalism and even agricultural fundamentalism: see Shepard, "'Fundamentalism; Christian and Islamic" at 355.

79 "If 'fundamentalism' now has a pejorative connotation in Western Academic and journalistic circles, it is surely because most academics and journalists very deeply oppose this phenomenon. Given this fact, whatever label we might invent it would certainly acquire a pejorative connotation in these circles if it caught on in general usage." Shepard, ibid at 367.

80 Stott in *Essentials*, at 90-91 lists eight "tendencies" of the fundamentalist mind-set. These are, to summarise: (1) a general suspicion of scholarship and science, which sometimes degenerated into a thoroughgoing, anti-intellectualism; (2) a mechanical view or "dictation theory" of biblical inspiration; (3) a naive, almost superstitious, reverence for the Authorized (King James) Version of the Bible; (4) a literalistic interpretation of all Scripture, leading to an insufficient recognition of the place of poetry, metaphor and symbol; (5) a separatist ecclesiology together with a blanket repudiation of ecumenism; (6) a cultural imprisonment; (7) a denial of the social implications of the gospel,

One characteristic of fundamentalism (of the transformative kind) marking it out from evangelicalism generally is its militancy. "A fundamentalist is an evangelical who is angry about something" is an observation by George Marsden often quoted.[81] Bridget Carr in her study of a rural fundamentalist community in New Zealand found this very much in evidence.[82] This militancy is directed at an enemy that goes by various names, as we shall see shortly. To the fundamentalist an active confrontation response is needed. Fundamentalism associates modernism with multifarious social evils.[83] It is also typically restorationist in seeking to restore society to a golden age which existed (in fundamentalists' eyes) in the past.[84] There is, as with evangelicals, a high view of scripture but it is pushed to an extreme.[85] Scripture is infallible or "inerrant" (without error) in a sense which is unflinching. Evidence that would contradict biblical factual accounts or depictions of reality is simply wrong: "When the Word of God says one thing, and scholarship says another, scholarship can go to hell," as Billy Sunday, a fundamentalist preacher, once put it.[86] Fundamentalists customarily adopt the excessively literalistic style which is often attributed to evangelicals. For example, the seven days of creation in *Genesis* are just that, seven 24-hour days, so the earth can not be more than a few thousand years old.[87] The literalistic reading of scripture by creationists is something evangelicals have major trouble with. Packer claims evangelicals know symbolism when they see it.[88] Moreover, evangelicals vigorously draw a distinction between the infallibility or inerrancy of scripture versus the

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except for philanthropy and some extreme right-wing political concerns; (8) an insistence on premillennial eschatology including uncritical espousal of Zionism.

81 Marsden, *Understanding Fundamentalism*, at 1: "A more precise statement of the same point is that an American fundamentalist is an evangelical who is militant in opposition to liberal theology in the churches or to changes in cultural values or mores such as those associated with "secular humanism" . . . Fundamentalists are not just religious conservatives, they are conservatives who are willing to take a stand and to fight." (ibid)

82 Bridget Carr, "No Grey Areas: A Rural Fundamentalist Christian Perspective," MA thesis, Religious Studies, University of Canterbury, 1992, at 24.

83 Carr, "No Grey Areas," at 24 records: "The rural Fellowship central to this investigation is extremely fearful of the consequences of 'Modernism' seen in the cities. Materialism, corruption and degenerating morals, to them, are associated with a secular, sick society."

84 Barr, "Fundamentalism—A Challenge", at 33.

85 See Stott's list, *Essentials,* point number 4.

86 Quoted in John Stenhouse, "The Rev Dr James Copland and the Mind of New Zealand 'Fundamentalism'" (1993) 17 J Relig Hist 475 at 475 (citing Richard Hofstadter, *Anti-Intellectualism in American Life* (1966))

87 Marsden, *Understanding Fundamentalism*, ch 6 ("Why Creation Science?") at 154.

88 Packer, *Fundamentalism*, at 98-99.

often all-too-fallible interpretations of Scripture[89] by those who would invoke it in their anti-modernist agendas.

Another characteristic of fundamentalists is an excessive dogmatism and certainty about the truth. The truth is non-negotiable; it is not a matter for debate or discussion. The fundamentalist moreover knows the truth.[90] There are "no grey areas", as Carr entitled her New Zealand study of rural fundamentalists:

> There are no "ifs" or "buts", no "perhaps" or "maybes", instructions for life everlasting as one of God's children is explicit in its simplicity. This black and white, dualistic philosophy of good and evil, leaves nothing to chance.[91]

An anti-intellectualism or "obscurantism", which was not a mark of the early "classical" fundamentalists, became an unfortunate feature of later fundamentalism as it "withdrew more and more into its shell".[92] As we have already seen with the Billy Sunday quotation, sometimes the anti-intellectualism was perversely worn as a badge of orthodoxy. Evangelicals, by contrast, are at pains to emphasise that evangelicalism is not afraid of facts ("all truth is God's truth" is a favourite refrain[93]) and that "obscurantism in all its forms is wholly out of keeping with true Evangelicalism."[94]

Fundamentalism contains both separatist and transformatist strains. There is a broad correlation here with the particular eschatological position held. Premillennial fundamentalists see these as the "last days" prior to the second coming of Christ whereupon the divine millennium will commence.[95] Under this apocalyptic and pessimistic view, large-scale cultural involvement and transformation is pointless; rather one must do one's utmost to "rescue the perishing". Premillennialism was usually combined with "dispensationalism",

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89 Ibid at 96.: "Too often the infallibility which belongs to the Word of God has been claimed for interpretations of Scripture which are, to say the least, uncertain and which make Scripture pronounce on subjects about which it does not itself claim to teach anything."

90 Barr, "Fundamentalism—A Challenge," at 32-33.

91 Carr, "No Grey Areas", at 39. See likewise at 19: "There were no grey areas of doubt or searching for the Truth. Their overwhelming Truth had given them absolute authority in knowing that their interpretation of Christianity was the correct and only possible way of worshipping God."

92 Packer, *Fundamentalism*, at 32.

93 See eg Stott, *Essentials*, at 96; John Hitchen, "Involved in Politics . . . Why" in Patrick (ed), *The Vision New Zealand Congress 1997* (1997) ch 10 at 192.

94 Packer, *Fundamentalism*, at 34. See the sympathetic account of the Rev James Copland by Stenhouse and of J Gresham Machen by Marsden, *Understanding Fundamentalism*, ch 7.

95 McGrath, *Evangelicalism*, at 21; Stott, *Essentials*, at 91

a doctrine of seven great ages or "dispensations" in which God unfolded His plan of history.[96] Dispensationalists saw this as the penultimate sixth era, or church age, an era culminating in imminent catastrophe, perhaps through nuclear holocaust.[97] The disintegration of secular society and the decline of morals are evidence aplenty to the fundamentalist that their views are correct.

The transformative fundamentalists, a much smaller group, are postmillennialists. The Second Coming will follow after the millennium of God's rule through His Church. Christians have a large job ahead to transform or 'reconstruct' the world in accordance with God's law. This approach is most closely associated with the Christian Reconstructionists or Theonomists.[98]

The two strains of fundamentalism are mirrored in the political sphere. Some fundamentalism is quietist, content to live out its life in its own enclave away from the fallen and corrupt world of politics. Separatist fundamentalists, if they vote at all, most certainly they do not stand for public office nor support and lead political parties. The biblical motto: "Wherefore come out from among them and be ye separate saith the Lord"[99] applies quintessentially to politics. In contrast, the transformatist fundamentalists are activists politically. The Moral Majority had self-avowed fundamentalists such as the Rev Jerry Falwell at its helm.[100] In New Zealand, fundamentalists from the Reformed churches were at forefront of the establishment of the Christian Heritage Party.

(f) Other sub-species: Pentecostals and Charismatics

The fastest growing elements of modern Christianity are the Pentecostals and the Charismatics.

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96 Marsden, *Understanding Fundamentalism* at 39-41.

97 The best-selling book in America in the 1970's was a dispensationalist apocalyptic potboiler by Hal Lindsey, *The Late Great Planet Earth* (1970): see Marsden, ibid, at 159; Cox, "Warring Visions", at 66-66.

98 See Evans, "New Christian Right" at 101 fn 76; Cox, ibid, at 66-68 and Rodney Clapp, "Democracy as Heresy", *Christianity Today*, 20 February 1987, 17. The leading theonomists, all American, are Rousas John Rushdoony, Greg Bahnsen and Gary North.

99 2 *Corinthians* 6:17 (KJV). Paul quotes in turn from *Isaiah* 52:11. This group correlates with Niebuhr's "Christ Against Culture". See Niebuhr, *Christ and Culture*, at 40-41.

100 See generally Walter H Capps, *The New Religious Right* (1994) ch 2 for an in-depth profile of Falwell.

Pentecostals are a diverse group whose origins date from the 1890s to the 1920s.[101] Mainstream Protestant denominations rejected the supernatural outward manifestations of the Spirit experienced by certain believers. Pentecostalism "insisted that true heart religion be evidenced by unmistakable signs of the Spirit's radical transforming power, especially the Pentecostal signs of faith healing and speaking in tongues."[102] This dramatic outpouring of the Holy Spirit was scripturally referenced to the day of Pentecost in the book of *Acts*, hence the name. Pentecostal growth was sparked by revivals such as the Azuza Street revival in Los Angeles in 1906 and the Welsh revival. These vibrant groups marked by their exuberance and experience of the "full gospel" eventually crystallised into denominations such as the Assemblies of God, the Apostolic Church and the Elim Church. Theologically, Pentecostals are not fundamentalists and indeed were targets of the classical fundamentalists of the early twentieth century.[103] The latter were "secessionists" insisting that the 'charismata' or supernatural spiritual gifts (speaking in tongues, divine healing, prophecy) ceased with the passing of the first-century apostles.[104] However, while not fundamentalists *stricto sensu*, Pentecostals are "fundamentalistic"[105] in that they affirm the fundamentals (virgin birth, substitutory atonement, second coming of Christ etc). The trouble was they were fundamentalists 'plus'—they believed more and it was the supernatural additions which were the sticking point. Pentecostalism was to align itself with mainstream evangelicalism.[106] Russell Spittler's summary of the distinctions between classical fundamentalism and classical Pentecostalism is instructive:

> On balance, Pentecostals turn out to be more restorationist, less aware of the course of Christian tradition, less polemic, collectively less antimodernist, more oriented toward personal charismatic experience, less politically involved, as much or more socially involved (increasingly so in recent decades), more ecumenical and less separatist, considerably less rationalistic and more inclined toward

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101 Russell P Spittler, "Are Pentecostals and Charismatics Fundamentalists?" in Poewe (ed), *Charismatic Christianity as a Global Culture* (1994) ch 5 at 104-105. For an account of New Zealand Pentecostalism see Brett Knowles, "Some Aspects of the History of the New Life Churches".

102 Marsden, *Understanding Fundamentalism*, at 43.

103 Spittler, "Are Pentecostals . . . ?", at 108-110.

104 Spittler, ibid at 113.

105 Spittler, ibid at 114: "the Pentecostals, while not part of the classical fundamentalist protest of the 1920s and 1930s, nonetheless decidedly think and act like fundamentalists. Pentecostals are fundamentalistic, even if they are not classical fundamentalists".

106 Spittler, ibid at 112. Spittler refers to the "Pentecostalization of evangelicalism" since the 1970s.

> religious emotion, increasingly less dispensational, and perennially less theologically sophisticated.[107]

Pentecostalism had a marked effect upon evangelicalism, indeed upon Christianity generally in the twentieth century. This brings us to the Charismatic Movement or Charismatics. These are believers who adopt a Pentecostal style of worship but remain in their own Catholic or Protestant churches.[108] Spittler explains:

> The word charismatic . . . functions as an adjective describing mainline folk who have adopted Pentecostal beliefs, values and practices. Hence, charismatic Catholics, charismatic Presbyterians, charismatic Lutherans, and so on . . . The new charismatics stem chiefly from the 1960s with clearly visible roots in the 1950s . . . Charismatics, who could be described as Pentecostals in mainstream garb can be found today in virtually every sector of Christendom—including the Roman Catholic and Eastern Orthodox traditions.[109]

James Veitch observes that Charismatic Christianity in New Zealand has continued to grow and, transcending traditional barriers between Protestants and Catholics, "has become 'a new ecumenical movement'." He describes it as "a movement which values conviction and certainty, characterised by a conservative theology and an authoritarian if not always 'fundamentalist' attitude towards the Bible."[110]

(g) "Liberal" Christianity

Although my subject group is CC, liberal Christianity deserves brief examination. First, it gives a fuller picture of Christian attitudes and thought. Second, this interpretation of Christianity is the one which, I suspect, has the most influence upon public life and policy. This is because those who in the "knowledge sector" tend, where they do profess Christianity at all, to be of a liberal temper. Indeed, the more highly-educated and those within the upper sociocultural and economic strata of society tend to be the core of liberal Christianity. Finally, and relatedly, one sees an affinity or easiness of co-operation between "liberal" Christianity and liberal or modernist thought generally.

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107 Ibid at 113-114.

108 Cox, "Warring Visions", at 62.

109 Spittler, "Are Pentecostals . . . ?", at 105.

110 Veitch, "Christianity: Protestants Since the 1960s" in Donovan (ed), *Religion of New Zealanders* 2nd ed at (1996) ch 7 at 99.

The roots of liberal Christianity, especially liberal Protestantism, can be traced to the nineteenth century. The enemy again was modernity but, whereas conservatives sought to stiffen their resolve by a vigorous reaffirmation of traditional beliefs, liberal Christians determined the path of wisdom was not rejection but accommodation of the faith to what was perceived as a formidable, secular, scientific worldview.

Christianity needed to be refashioned to meet the Enlightenment challenge. In Protestant Christianity the term for this reworking was called "liberalism" and in Catholic Christianity it was called "modernism".[111] Whichever label one prefers, for they were used interchangeably, the sincere motive was to save Christianity.[112] At the forefront of the liberal defence of the faith were those who most keenly felt the onslaught—the well-educated, the intellectual, the sophisticated elite. If they were going to retain their integrity Christianity must either be abandoned or modified. The latter was the preferred course. In Niebuhr's *Christ and Culture* typology these are "The Christ of Culture" type. Their historical antecedents were the Gnostics who sought to interpret and accommodate Christ to the prevailing Hellenistic philosophy of their day.[113] Their apologetic strategy is primarily directed to powers-that-be.[114] A convenient theological distillation of liberal/modernist thought is provided by a leading New Zealand liberal Christian, Jim Veitch:

> In [liberalism/modernism], religion was considered a human phenomenon; the Bible, the record of the human experience of God's presence; Christianity the crown of all the searching for God and, therefore, not the only way to God, nor the only expression of the work of God; Jesus was a human in and through whom God was present; but he was not divine, not born of a virgin, nor did he have miraculous power; his death was a profound example of the love of God, and his resurrection was spiritual not physical. All humans are, nevertheless, precious in God's sight, and none is ever finally divorced for the love of God and acceptance by an all-compassionate God.[115]

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111 Veitch, "Presbyterian Experience", at 29. Marsden explains "liberalism" stressed freedom from tradition while "modernism" emphasised adjustment to the modern world: ibid at 33.

112 Marsden, at 32. See generally Packer, ch 7.

113 Niebuhr, *Christ and Culture*, at 85 et seq.

114 Niebuhr, ibid at 104 comments: "The cultural Christians tend to address themselves to the leading groups in a society; the speak to the cultured among the despisers of religion; they use the language of the more sophisticated circles, of those who are acquainted with the science, the philosophy, and the political and economic movements of their time. They are missionaries to the aristocracy and the middle class, or to the groups rising to power in a civilisation".

115 Veitch, "Presbyterian Experience", at 29.

Liberal Christians have, historically, been strong advocates of the so-called "Social Gospel". Under this approach (most associated with Walter Rauschenbusch, an American professor of church history at the turn of this century) the Kingdom of God is realisable on earth and, moreover, this social transformation can be brought about by *human* means.[116] The last aspect is telling for—and this drew the scorn of CCs—it implied that human beings could establish the Divine Kingdom by themselves.[117] Pursuant to this approach, liberal Christians have frequently been at odds with the state on a range of issues of socio-political and economic morality. For them, addressing "structural" injustice is the foremost religious concern. The New Zealand sociologist, Ivanica Vodanovich describes the situation this way: "Within the established churches, a small group of liberal clergy and parishioners arguing government policy should embody the social gospel had, throughout the seventies, become increasingly involved in secular humanitarian issues, such as race relations, anti-nuclear protests, poverty, Maori land rights and the Treaty of Waitangi."[118] Images of clergy at the front of many of the 1981 Springbok rugby tour protests are still vivid.

The liberal Christian approach has not gone without criticism: some CCs "see in them the seeds of apostasy."[119] This is not the place to traverse such conservative criticisms of liberal Christianity.[120] Suffice to note that the subjectivist and anti-supernaturalist tendencies of liberal Christianity are considered by the conservatives to have had tragically unproductive and frustratingly spoiling consequences for the entire Christian enterprise.[121]

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116 See eg W Rauschenbusch, *A Theology of the Social Gospel* (1917) at 145: "The Kingdom of God is the Christian transfiguration of the social order." For a brief discussion, see John Stott, *Issues Facing Christians Today*, 2nd ed (1990) ch 1 at 6-8.

117 Stott, ibid, at 7. As Stott adds: "But the Kingdom of God is not Christianized society. It is the divine rule in the lives of those who acknowledge Christ."

118 "Religion and Legitimation in New Zealand: Redefining the Relationship Between Church and State" (1990) 3 Brit Rev of NZ Stud 52 at 60.

119 Mitchell, at 123.

120 As Mitchell (at 90) observes: "It is a melancholy feature of church life, as any church periodical will show, that there is a greater bitterness against opponents on one's own side than there is against those who are on the other side altogether. This is not, however, altogether surprising . . . They [conservatives] expect the enemy to attack [the faith] and accept this as a regrettable fact of life. But they expect their allies to defend it, and it is hard not to feel resentment when they are seen to yield up salients which they ought to be defending with their lives." Packer for example refers to liberal Christianity as "having had the effect of a Fifth Column": '*Fundamentalism*', at 163.

121 See Packer, ibid, at 160-168. Packer casts Liberalism as an entirely sincere but thoroughly misguided apologetic strategy as does Carl F H Henry: see Henry, *Gods of This Age or God of The Ages?* (1994) ch 20 at 280. See J Gresham Machen, *Christianity and Liberalism* (1923) for the classic critique.

II THE WORLDVIEW OF CONSERVATIVE CHRISTIANS: DEFINING ATTITUDES, BELIEFS AND VALUES

1 The idea of a "worldview"

Conservative Christians have, I suggest, a distinctive "worldview". First, we must define what we mean by a "worldview" for it is a term seldom used in legal discourse and when it is, it is invariably not defined.[122] The term is a translation from the German word *Weltanschauung*[123] (hence I write '"worldview" instead of "world view" or "world-view"). Alternative expressions are "fundamental, unspoken assumptions"[124] and "underlying axiomatic unconsciously-assumed convictions."[125] I shall stay with "worldview" as it is a more commonly used expression. Giesler and Watkins provide a helpful definition:

> A world view is a way one views the whole world . . . A world view is a way of viewing or interpreting all of reality. It is an interpretive framework through which or by which one makes sense out of the data of life and the world . . . [it] is the structure with which one molds the stuff of experience. It is the mold into which the clay of reality is cast . . . A world view is like a plot that holds the play of life together. It is a pattern superimposed on the cloth of the world by which one knows where to cut the fabric of experience.[126]

Some characteristics of a worldview are as follows. First, it is comprehensive, a "*macro-model*", designed to explain all of reality not merely some aspect of it.[127] Scientific models by contrast generally aim at some particular aspect or relationship within the universe. Second, it is enduring, not a fickle, easily changeable thing. If worldviews are like a set of

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122 For cases where the term has been used, see eg *King-Ansell* v *Police* [1979] 2 NZLR 531 at 535 and 543 (CA) (quoting a lecturer in sociology who appeared as an expert witness); *Barton-Prescott* v *Director-General of Social Welfare* [1997] 3 NZLR 179 at 185 (HC) (submission regarding the appellant's Maori worldview); *Re SDG* [1997] NZFLR 375 at 377 (Mental Health Review Tribunal) and *M* v *H* [1999] NZFLR 439 at 446 (Fam Ct).

123 James H Olthuis, "On Worldviews" (1985) 14 Christian Scholar's Review 153 at 153 explains that the German *Weltanschauung*, or "worldview" in English, is traceable to Kant's *Kritik der Urteilskraft* (1790).

124 Hunter, *Culture Wars*, at 119.

125 Harold Turner, "The Three Levels of Mission in New Zealand" in Patrick (ed) *New Vision New Zealand* (1993) ch 4 at 67.

126 Norman L Giesler and William D Watkins, *Worlds Apart: A Handbook on Worldviews*, 2nd ed (1989) at 11 and 15. See also Olthuis, "On Worldviews," at 155; Ronald H Nash, "The missing link in Christian evangelism: the importance of worldviews" (1998) 6 Stimulus 41 at 41 and Charles Colson and Nancy Pearcey, *How Now Shall We Live?* (1999) ch 2 at 14.

127 Gielser and Waktins, ibid, at 14.

spectacles, they are spectacles worn continuously and seldom changed. A change in worldview is a major event which might be dubbed a "paradigm shift" (in science) or a "conversion" (in religion).[128] Third, worldviews inform and guide life; one lives by a worldview.[129] A worldview that did not guide life would not be a worldview at all.[130] Fourth, worldviews, while possessed by an individual, do not belong just to an individual: "Worldviews are always shared; they are communal."[131] Fifth, worldviews are, suggest Walsh and Middleton, "intensely spiritual [and] are a religious phenomenon."[132] Their argument is that "faith is an essential part of life. Humans are confessing, believing and trusting creatures."[133] If this is so, then where, or in whom, we place our faith determines the worldview which we adopt—"our ultimate faith commitment sets the contours of our worldview." [134] In this sense believing is seeing. What one believes in (or has faith in, given the impossibility of convincing empirical proof of many things believed in) shapes what our vision for life is (worldview) and thereafter what we value and how we act.[135] If worldviews do rest upon "faith commitments" then what are these? Walsh and Middleton argue faith commitments refer to the way we answer four basic questions:

> (1) *Who am I?* Or, what is the nature, task and purpose of human beings?
>
> (2) *Where am I?* Or, what is the nature of the world and universe I live in?
>
> (3) *What's wrong?* Or, what is the basic problem or obstacle that keeps me from attaining fulfilment? In other words, how do I understand evil?
>
> (4) *What is the remedy?* Or, how is it possible to overcome this hindrance to my fulfilment? In other words, how do I find salvation?[136]

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128 Ibid at 12.

129 Ibid. See also Nash, "Missing link", at 46.

130 Brian J Walsh and J Richard Middleton, *The Transforming Vision: Shaping a Christian World View* (1984) at 32.

131 Walsh and Middleton, ibid, at 32.

132 Ibid at 34.

133 Ibid at 35. See also Nash at 44.

134 Ibid.

135 See Olthuis, "On worldviews," at 156: "a worldview functions both descriptively and normatively . . . A worldview is both a sketch of and a blueprint for reality; it both describes what we see and stipulates what we should see."

136 Walsh and Middleton, *Transforming Vision*, at 35 (original emphasis).

The answers to these sorts of basic questions (formulations of the questions vary[137]) reveal our basic, foundation beliefs, in other words, faith commitments. It seems justifiable to call these faith commitments "religious" since they comprise "ultimate concerns" (or answers), which is at least one major attempt at defining religion.[138] Ronald Nash argues:

> Religion is an inescapable given in life. All humans have something that concerns them ultimately and whatever it is, that object of ultimate concern is that person's God. Whatever a person's *ultimate* may be, it will have an enormous influence on everything else the person does or believes, that, after all, is one of things *ultimate* concerns are like.[139]

Yet another term for the basic answers we give are "presuppositions."[140] People presuppose answers to the basic questions.[141] The presupposed answers or presuppositions often remain unconscious. They can be brought to consciousness and explicitly articulated but seldom are.[142] The basic answers, faith commitments, or presuppositions (brought to the surface or not, and whether one wishes to characterise them as "religious") set the contours of a person's worldview.

Sixth, and finally, just as basic beliefs or presuppositions can be held unconsciously, so too can a worldview. Middleton and Walsh argue:

> It is indeed paradoxical that worldviews best provide orientation to life when we are not aware of them. They best provide a secure world and home for human activity when they are so internalized that we simply assume that we experience reality the way it truly is, that we picture the world "the way things in sheer actuality are."[143]

A similar comment was once made about metaphysics and its relationship with the hard-headed, down-to-earth lawyer: "Judges and non-judges who denounce metaphysics do not thereby escape from metaphysics. Nor do they establish the truth of their own metaphysical

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137 See eg Nash, "Missing link", at 42-43 who poses five questions. Colson and Pearcy, *How Now Shall We Live?* list three questions

138 The allusion to "ultimate concerns" here is to Paul Tillich's much-discussed definition (Tillich *Systematic Theology* (1951) vol 1 at 11-55.) For a critique, see Roy A Clouser, *The Myth of Religious Neutrality* (1991) ch 2 at 12-13.

139 Nash, "Missing link", at 44 (emphasis in original).

140 See Clouser, *Religious Neutrality*, at 101-107. "Presuppositions . . . are beliefs which can exercise an influence over other beliefs, even when remaining unconscious . . . [E]ven when they are held unconsciously, they direct or regulate the way people think." (at 102).

141 Clouser, ibid, at 104; Walsh and Middleton, *Transforming Vision*, at 35.

142 Walsh and Middleton, ibid at 35.

143 J Richard Middleton and Brian J Walsh, *Truth is Stranger Than It Used to Be* (1995) at 36-37 (quoting

assumptions. All they establish is their unawareness of their own basic assumptions."[144]

2 *Some worldviews*

There are many worldviews but I will very briefly refer to two pertinent to this study.

(a) Maori

It is difficult to generalise and posit *a* Maori worldview for modern Maori may be Christian, Marxist, atheist and so on. I shall focus upon the traditional, pre-Western Maori view of reality. A convenient summary is that by the Waitangi Tribunal in its 1985 report on the Manukau claim:

> It might be considered that Western society, although espousing a religion, is predominantly secular and individualistic in its world-view. Although there is a religious premise for the presumption that human-kind has authority over nature, that view probably springs from the secular and rational characteristics of our society. Maori society on the other hand is predominantly spiritual and communal. The Maori world view emphasises the primacy of nature and the need for man to tread carefully when interfering with natural laws, and processes.[145]

Maori have their own "indigenous discourse"[146] or *teo reo Maori*—naturally, the Maori story of New Zealand would read differently from the European (Pakeha) one. Jamieson has helpfully explicated some "archetypal forms" of Maori thought and feeling pattern. I extract some of these dimensions of *Te Ao Maori* from his catalogue below:

> Te ao Maori is essentially all one. Common bonds running through the universe count for more than specific differences. This means that the three areas of action—physical, intellectual, and spiritual—are intimately related as one.
>
> The essential oneness of te ao Maori gives rise to a cosmic or whole-

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144 Clifford Gertz, *The Interpretation of Cultures* (1973) at 89). Felix Cohen, "Field theory and judicial logic" (1950) 59 Yale LJ 232 at 260. See also Phillip E Johnson, *Reason in the Balance* (1995) at 67: "Most people . . . go about day-to-day life without thinking about metaphysics, but their thinking is nonetheless influenced by metaphysical assumptions. In fact, metaphysical assumptions are most powerful when they are unconscious and do not come to the surface because everyone in the relevant community takes them for granted."

145 Waitangi Tribunal, *Report of the Waitangi Tribunal on the Manukau Claim*, 2nd ed (1989) at para 9.3.5. This passage is quoted again recently in *The Whanganui River Report* (1999) at para 3.3. Judicial quotation of this passage is found in *Huakina Development Trust* v *Waikato Valley Authority* [1987] 2 NZLR 188 at 222 per Chilwell J (HC).

146 J G A Pocock, "Law, Sovereignty and History in a Divided Culture: The Case of New Zealand and the Treaty of Waitangi" (1998) 43 McGill LJ 481 at 487.

> world view. The many are one. Reality is united and absolute, and only appearances are fragmented and relative.
>
> Because te ao Maori is essentially all one, then, as in gestalt psychology, the whole counts for more than the sum of its constituent parts. Although one is outnumbered by the many, the many are outweighed by the one.
>
> Te ao Maori seeks simplicity. If the world is one, then truth is simple.
>
> Te ao Maori is alive—tihe mauri ora! Even trees and stones have a spiritual life force. The world is vital and dynamic, being in a process of either growth or decay. The life sciences come first—physics tags along behind.
>
> The oneness of te ao Maori is spiritual. What happens on this world is explicable only in terms of what happens in the other world.[147]

In terms of the classical problem of the One and the Many (of explaining unity and diversity), the traditional Maori worldview says all is ultimately One and the diversity (Many) is only apparent or temporary.[148] This is Monism, in philosophy, or Pantheism, in religion. Harold Turner has utilised a simple metaphor for this, which he calls, "The Ocean View":

> [L]ife's phenomena and the relationships between them [are] ephemeral and of no permanent significance, like an ocean where each of us is but a passing wave, a temporary ripple on the surface, or a momentary jet of spray . . .
>
> The Ocean View says there is no problem about a One and a Many, since there is only the One; so no answer is needed.[149]

His illustration is reproduced as Figure 2 below:

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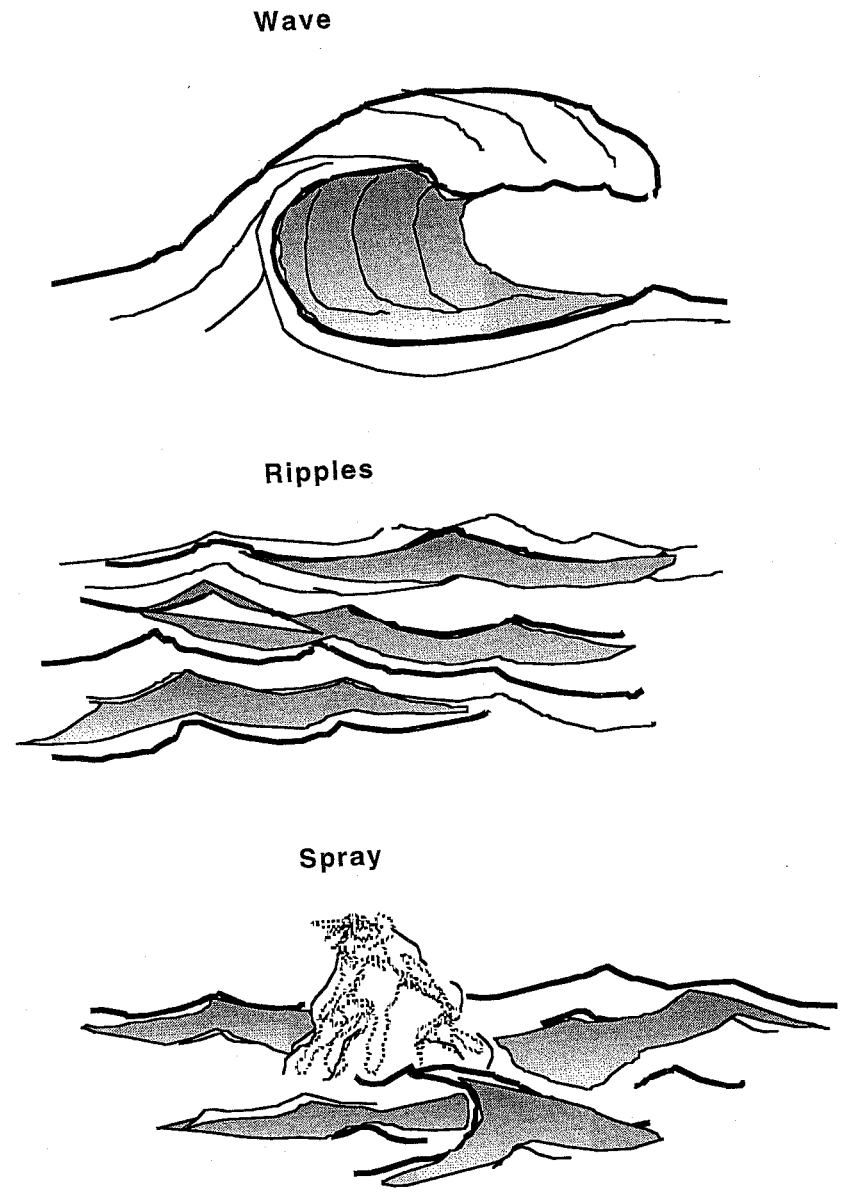
147 Nigel Jamieson, "The Maori Magna Carta" [1992] NZLJ 101 at 108-109. Jamieson's list contains 23 points of difference between *Te Ao Maori* and *Te Ao Pakeha*.

148 See generally Norman L Geisler and Paul D Feinberg, *Introduction to Philosophy: A Christian Perspective* (1980) ch 11.

149 Harold Turner, "Deep Mission to Deep Culture" in Flett (ed), *Collision Crossroads* (1998) ch 2 at 28-29.

Figure 2: The Ocean View



(c) Postmodern

The present Western era is increasingly described as a "postmodern" one. "Postmodernism" is difficult to define and reflects more an attitude than a coherent philosophy or "ism".[150] Stanley Grenz argues there is in fact no postmodern "worldview" as such:

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150 Michael McConnell observes: "Post-modernism is more a congeries of attitudes and ideologies than it is a single, coherent philosophical position": McConnell, "'God is Dead and We Have Killed Him!': Freedom of Religion in the Post-modern Age" [1993] Brigham Young ULR 163 at 181. See also

> Postmodernism defies definitive description . . . the postmodern era spells the end of the "universe"—the end of the all encompassing worldview. In a sense, postmoderns have no worldview. A denial of reality of a unified world as the object of our perception is at the heart of postmodernism. Postmoderns reject the possibility of constructing a single correct worldview and are content simply to speak of many views and, by extension, many worlds.[151]

Grand stories and narratives are eschewed: "I define postmodern as incredulity toward metanarratives", summarised Jean-François Lyotard, a leading postmodernist.[152]

At its simplest, postmodernity represents a profound disillusionment with modernity and all it stood for—the ideal of progress and the myth of mastery of nature by science and technology. Modernity's grand narrative, the so-called "Enlightenment project" ("the human intellectual quest to unlock the secrets of the universe in order to master nature for human benefit and create a better world"[153]) has run aground. The optimism and idealism of modernity is replaced with "a gnawing pessimism"[154] and a radical sense of anxiety. Middleton and Walsh call the latter, *anomie*, "the loss of a *nomos*—the loss of any secure sense of a meaningful order to the world."[155]

Postmodernism embraces the following interrelated cluster of concepts:

> (1) The self is not, and cannot be, an autonomous, self-generating entity; it is purely a social, cultural construct. (2) There are no foundational principles from which other assertions can be derived; hence, certainty as the result of either empirical verification or deductive reasoning is impossible. (3) There can be no such thing as knowledge of reality; what we think is knowledge is always belief and can apply only to the context within which it is asserted. (4) Because language is socially and culturally conditioned, it is inherently incapable of representing or corresponding to reality; hence all propositions and all interpretations, even texts, are themselves

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John D Vogelsang, "Doing the Right Thing in a Postmodern Society", *Quarterly Review*, Winter 1992, 3 at 4. "Unlike Modernism, Postmodernism does not offer a particular set of doctrines. At this juncture, its proponents are less intent upon fostering a Postmodern school of thought than they are upon challenging Modernism's basic premises."

151 Stanley J Grenz, *A Primer on Postmodernism* (1996) ch 33 at 40.

152 Lyotard, *The Postmodern Condition: A Report on Knowledge*, (trans by G Bennington and B Massumi) (1984) at xxiv. See Douglas E Litowitz, *Postmodern Philosophy and Law* (1997) ch 1 at 9-10.

153 Grenz, *Primer on Postmodernism*, at 3. Litowitz, ibid at 9, summarises it "broadly as the project of bringing reason and science to bear on social and political beliefs, thereby freeing humanity from superstition and slavish tradition."

154 Grenz, ibid at 7.

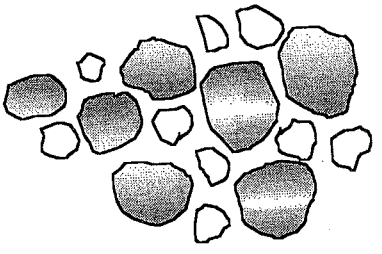
155 Middleton and Walsh, *Truth is Stranger*, at 36.

social constructions.[156]

Postmodernists are sceptical of Truth, capital "t", as a fixed notion[157]: "there is no absolute truth; rather, truth is relative to the community in which we participate."[158]

In terms of the problem of the One and the Many, postmodernism answers there is only the Many, the diversity. The notion of a One, the "uni"-verse is a chimera. Turner invokes the "pebbles" metaphor here. Reality here is "like a beach of pebbles jumbled accidentally together, but each separate and self-contained without any necessary connection with the others." Under this view, "there is nothing to hold the pebbles together, there is no universe; any one pebble might as well be anywhere. We must put up with the meaningless jumble."[159] His illustration is Figure 3 below:

Figure 3: The Pebbles View



2 *The conservative Christian worldview*

Harry Blamires once tried to explain the definitive characteristics of "the Christian mind."[160] His study was not with reference to a particular kind of Christian, viz., the "conservative" one, but most of the attributes he expounds fit nicely the model of CC I am endeavouring to elaborate. In describing the Christian mind, Blamires was throughout using

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156 Peter C Schanck, "Understanding Postmodern Thought and Its Implication for Statutory Interpretation" (1992) 65 S Cal L Rev 2505 at 2508-2509. For another itemisation and discussion of the principal beliefs of postmodernism, see Litowitz, *Postmodern Philosophy and Law*, at 10-17.

157 Litowitz, *Postmodern Philosophy and Law*, at 13.

158 Grenz, *Primer on Postmodernism*, at 8.

159 Turner, "Deep Mission to Deep Culture", at 28-29.

160 Harry Blamires, *The Christian Mind* (1963). Blamires' attempt is not of course the only one, although it has been highly influential. For another exposition see eg David Gill, *The Opening of the Christian Mind* (1989)(listing six characteristics).

the term "mind" to mean view of life (worldview).[161] He identified six features: (1) its supernatural orientation; (2) its awareness of evil; (3) its conception of truth; (4) its acceptance of authority; (5) its concern for the person, and; (6) its sacramental cast.

A "prime mark", said Blamires, of the Christian mind is its supernatural orientation: "it cultivates the eternal perspective . . . it looks beyond this life to another one."[162] This other-worldly mindset cannot for a moment escape a frame of reference which reaches out to the supernatural.[163] By a similar token, "the breaking-in of the greater supernatural order upon our more limited finite world"[164] is a given. Second, the Christian mind thinks in terms of the fact of Heaven and Hell. These are real places and the Christian is "conscious of the universe as a battleground between the forces of good and evil."[165] The CC is firmly located in this battleground. Other doctrines are relevant here—the doctrine of Original Sin explains mankind's tendency toward evil, while the Fall underscores man's fallen nature. (John Stott suggests the Christian mind is best viewed as one which has absorbed and now thinks in terms of the fourfold scheme of biblical history—the Creation, the Fall, the Redemption and the End (or Restoration)).[166] Third, the Christian mind has a distinct notion of the truth centred upon the divine revelation. Blamires observes:

> The marks of truth as Christianly conceived, then, are: that it is supernaturally grounded, not developed within nature; that it is objective and not subjective; that is a revelation not a construction; that it is discovered by inquiry and not elected by a majority vote; that it is authoritative and not a matter of choice.[167]

This describes the CC to a tee. Fourth, the Christian mind accepts and defers to authority. This was the first and primary characteristic of the CC noted earlier. Blamires argues the Christian mind has "an attitude to authority which modern secularism cannot even

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161 See Blamires at 44 and 67 where Blamires equates the Christian mind with the religious view of life which is its constant frame of reference.

162 Blamires at 67.

163 Ibid at 69.

164 Ibid at 68.

165 Ibid at 86.

166 John Stott, *Issues Facing Christians Today*, 2nd ed (1990) ch 2 at 34-35. Colson and Pearcy, *How Now Shall We Then Live?* at xiii and 14 identify Creation, Fall and Redemption as the three key stages.

167 Ibid at 107.

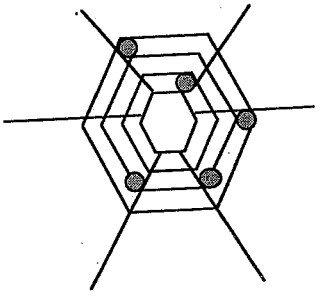
understand, let alone tolerate."[168] The CCs correspond to the those "who accept the revelation and the Church for what they are, the visible vehicles of God's action in the world."[169] Fifth, the Christian mind is concerned for the person ahead of the impersonal, mechanised contrivances which reduce man's life to a sub-human level.[170] Blamires' attribute is not one so far associated especially with the CC. However, to the extent Blamires emphasises the sacredness of the human person, made in the image of God, we find a resonance with the CC attitude to such issues as abortion and euthanasia.

Ontologically, and returning to the issue of the One and the Many, CCs believe it is a case of the One *and* the Many: "reality is structured in some intermediate way that ways both the One (the unity) and the Many (the plurality) are equally real and possess some permanent relationship."[171] Turner evokes the "web" or "network" metaphor here:

> The Web-Network View says both the problem and the answer are real, since there really is both a richness of diversity (the Many) and an order that governs this diversity systematically (the One). Reality consists of a system of interdependent, interrelated, levels of being, structuring everything that exists in a hierarchy which is itself part of the order or system. There is a universe and it has a system which can be investigated and understood, and a meaning we can appreciate.[172]

Turner's depiction of this "unitive, integrative plurality" is depicted below in Figure 4:[173]

Figure 4: The Web-Network View



168 Ibid at 132.
169 Ibid.
170 See ibid at 156 et seq.
171 Turner, "Deep Mission to Deep Culture", at 28.
172 Ibid at 30.

If we return to Walsh and Middleton's four basic worldview shaping questions and ask how the CC would answer them, the CC might respond with something like this:

(1) *Who am I?* I am a creature of God, special in that I am made in God's image (*imago Dei*). My purpose is to do God's will on earth by (a) living a holy separate life untainted by the world (the separatist response) or (b) living a holy life engaged with and transforming "culture"[174] (the transformatist response).

(2) *Where am I?* I am in a world created by God, a world that has a physical, visible, temporal aspect as well as a spiritual, unseen, eternal dimension. God sustains and "speaks" (intervenes) into this world today.

(3) *What is wrong?* The entire creation is fallen; mankind rebelled and sin is a present fact. Satan is a leader of this rebellion and evil is sin's fruit. The *zeitgeist* or spirit of this age is antagonistic to God; it denies His existence and His absolute unchanging moral and ethical standards.

(4) *What's the remedy?* The solution and salvation is found exclusively in the person of Jesus Christ who redeemed all creation and mankind. Restoration, however, is not yet complete, nor will it be completed until the Second Coming of Christ.

Whilst I have tried to crystallise the CC worldview and delineate its broad contours, it is again important to note that this is a generalisation. Conservative Christians (as much as other broad groupings such as Marxists or feminists) will not necessarily agree on *every* issue. Nash wisely reminds his readers:

> Any account of world-views that implied this would be gravely mistaken. Even Christians who share beliefs on all essential issues may disagree on other important points . . . They may disagree over how some revealed law of God applies to a twentieth-century situation. They may squabble publicly over complex issues like national defence, capital punishment, and the welfare state, to say nothing about the issues that divide the Church into different denominations.[175]

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173 Ibid at 32.

174 "Culture" is used here in its broadest theological sense. As Walsh and Middleton explain culture refers to what human beings have cultivated of our world. It does not refer to just intellectual and aesthetic pursuits (as in 'high culture' or a 'cultured' person) but "covers the whole range of human society." So not merely art, music and scholarship but also economics and politics, religion, education, technology, the media, marriage, family life, advertising and entertainment are culture. Walsh and Middleton, *Transforming Vision*, at 55. See also Lesslie Newbigin, *Foolishness to the Greeks* (1986) at 3: "By the word culture we have to understand the sum total of ways of living developed by a group of human beings and handed on from generation to generation."

175 Nash, "Missing link", at 43.

Despite the sharp differences in certain respects there are, I believe, sufficient "family resemblances"[176] shared between CCs to speak sensible of them as a group possessing a distinctive worldview.

III STANCE TOWARD THE STATE

Conservative Christians respect the state and consider it important to be exemplary law-abiding citizens.[177] The state is a necessary institution, ordained by God, to restrain the exercise of evil and sin, punish wrongdoers, and promote social peace and well being. Rulers "are sent by the him (the Lord) to punish those who do wrong and to commend those who do right."[178]

The precise role of the state and its limits differ within the various Christian traditions. The Reformed, Calvinist view of government's proper role is restricted: "The state has the practical, specific task of maintaining the law and upholding public justice . . . to go further and to seek the direct and control human action and motives is to go too far into totalitarian control."[179] Catholicism has a more positive view seeing it as "the role of the state to defend and promote the common good of civil society"[180] as well as the juridical function.

CCs of whatever persuasion see the state as a servant of God having only delegated authority.[181] All authority or sovereignty is ultimately grounded in God alone; all authorities exist at God's behest: "for there is no authority except that which God has established. The authorities that exist have been established by God."[182] The concept of a totalitarian state, or

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176 See Robert Song, *Christianity and Liberal Society* (1997) at 14 explaining the family resemblances shared by "liberals" and hence the justification for the label "liberalism".

177 See eg *Catechism of the Catholic Church* (1994) at para 2240, which reminds the reader that Christians' citizenship is in heaven as well as earth: "[Christians] reside in their own nations, but as resident aliens. They participate in all things as citizens and endure all things as foreigners . . . They obey the established laws and their way of life surpasses the laws . . . ".

178 1 *Peter* 2:14 (NIV). See generally Alan Storkey, *A Christian Social Perspective*, (1979) ch 12 ("A Christian View of the State") at 299.

179 Storkey, ibid, at 299-300. See also Gordon Spykman, "The Principled Pluralist Position" in Smith (ed), *God and Politics: Four Views on the Reformation of Civil Government* (1989) ch 5 at 86: "Principled pluralism teaches that the primary task of the state is to promote justice in society."

180 *Catechism*, at para 1927. "The common good" is defined in para 1906 to be "the sum total of social conditions which allow people, either as groups or as individuals, to reach their fulfilment more fully and more easily."

181 See *Catechism*, ibid, at para 1899 (quoting *Romans* 13:1-2).

182 *Romans* 13:1-2 (NIV).

even a state which intrudes into and pervades a large number of areas of life, is rejected. Whether described as "subsidiarity"[183] (in Roman Catholicism) or "sphere sovereignty"[184] (in neo-Calvinism), the state's proper sphere of operation is divinely limited. Other groups, institutions or communities—schools, families, churches, business corporations and so on—have their own integrity and sphere of activity before God and are not to be interfered with unnecessarily.[185] A state which tries to intrude into these communities or institutions by taking them over has gone too far.

The limits to the state are mostly clearly seen when the question of unjust or immoral law is raised. Civil disobedience is never a first resort but it remains a necessary route for the CC in certain circumstances. As Colson puts it: "where a state either demands what God prohibits or prohibits what God demands, the believer is to obey God and graciously accept the state's imposed consequences."[186] Catholics need turn no further than to Thomas Aquinas and his famous dictum *lex injusta non est lex* ("An unjust law is no law at all.")[187] Protestant CCs have any number of Reformation dissenters to draw from.[188] Francis Schaeffer, one of the most influential theologians for modern American Protestant CCs[189] (and whose influence is felt in New Zealand) re-echoed the duty of civil disobedience in his

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183 See *Catechism*, at para 1883: "Excessive intervention by the state can threaten personal freedom and initiative". The principle of *subsidiary* is defined (ibid) in terms that "a community of higher order should not interfere in the internal life of a community of a lower order, depriving the latter of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good."

184 "The concept of sphere sovereignty teaches that each sphere in society has its own independent authority; no one sphere should dominate or usurp the role of the others." A related concept is sphere universality which "refer to the cooperative relationship among the various social spheres; they should work together to promote wholesome community life.": Spkyman, "Principled Pluralist Position," at 79-80.

185 See Storkey, *A Christian Social Perspective*, at 309; Herman Dooyeweerd, *The Christian Idea of the State* (Transl J Kraay) (1968) at 28-29.

186 Charles W Colson, "Kingdoms in Conflict," *First Things*, Nov 1996, 34 at 35. See also Sir Norman Anderson, "Public law and legislation," in Kaye and Wenham (eds), *Law, Morality and the Bible*, pt 2, ch 6, at 233-234

187 See John Finnis, *Natural Law and Natural Rights* (1980) ch 12 for a discussion of this doctrine. The modern reaffirmation is found in the *Catechism*, at para 2242: "The citizen is obliged in conscience not to follow the directives of civil authorities when they are contrary to the demands of the moral order, to the fundamental rights of persons or the teachings of the Gospel. *Refusing obedience* to civil authorities, when their demands are contrary to those of an upright conscience, finds its justification in the distinction between serving God and serving the political community." (original emphasis)

188 The Scottish Covenantor, Samuel Rutherford, and his work *Lex Rex* (1644) is a favourite of some, especially Francis Schaeffer (*A Christian Manifesto* (1981) at 99) and John Whitehead, the American attorney who named his religious freedom advocacy organisation, The Rutherford Institute.

189 The pivotal seminal role Schaeffer has played among conservative Protestants is described in detail by

A Christian Manifesto:

> It was, is, and it always will be:
>
> GOD
>
> and
>
> CAESAR
>
> The civil government, as all of life, stands under the Law of God. In this fallen world God has given us certain offices to protect us from the chaos of that fallenness. But when *any office* commands that which is contrary to the Word of God, those who hold that office abrogate their authority and they are not to be obeyed. And that includes the State . . . God has ordained the State as a *delegated* authority; it is not autonomous. The State is to be an agent of justice, to restrain evil by punishing the wrongdoer, and to protect the good in society. When it does the reverse, *it has no proper authority* . . . The *bottom line* is that at a certain point there is not only the right, but the duty, to disobey the State.[190]

A Christian who is forced to choose God over Caesar must, as noted before, willingly accept the penalty. This is, "in reality expressing the very highest respect for law."[191]

The CC attitude to religious freedom is somewhat ambivalent. CCs claim religious liberty for themselves of course, but historically they have not always been magnanimous to non-Christian faiths.[192] The modern realisation that religious liberty must be extended to all religions has come belatedly (and perhaps due in part to a pragmatic recognition of their loss of cultural dominance) but is now reasonably well-established.[193] The now defunct Christian Coalition its Manifesto prepared for the 1996 New Zealand General Election listed "The right of all individuals to freedom of religion" as one of its "non negotiable policy principles."[194] The idea that groups such as Satanist and Wicca are entitled to religious freedom under the law does not, I suspect, sit easily with some CCs however.

IV "THE SPIRIT OF THE AGE"

Walter H Capps, *The New Religious Right* (1994) ch 3 ("The Theologian, The Teacher").

190 Francis A Schaeffer, *A Christian Manifesto* (1981) at 90-93 (original emphasis).

191 Martin Luther King Jr, *Letter from Birmingham City Jail* (1963): quoted in Colson, "Kingdoms in Conflict," at 38.

192 A point conceded by Carl F H Henry, *The Christian Mindset in a Secular Society* (1984) at 66-67.

193 See the multi-author statement, "Why Christians should be involved in politics," *Reality*, Oct-Nov 1996, 33 at 35, where they agree with Sir Normal Anderson's dictum that Christians "must accord to others the liberty of conscience which they claim for themselves." (quoting J N D Anderson, *Into the World: the Need and Limits of Christian Involvement* (1968) at 48).

One of the four distinctive characteristics of CC, noted at the beginning of the chapter, is its opposition to the prevailing ethos, values, or *zeitgeist*, "the spirit of the age". Many CCs see themselves as always in a deadly spiritual battle against the prevailing rebellious, God-denying spirits of the age. Paul's warning in *Ephesians* is taken seriously: "For our struggle is not against flesh and blood, but against the rulers, against the authorities, against the powers of this dark world and against the spiritual forces of evil in the heavenly realms."[195] Some CCs are not reluctant to invoke Biblical military metaphors. As the Rev Bruce Patrick of the Vision New Zealand Congress put it: "We face the challenge of arming and especially of organizing ourselves to be better engaged in the battle for our nation's spiritual and social future."[196]

Christians are increasingly reminded that they are "in the world" (and so engaged with and transforming the culture) but are "not of the world."[197] The latter admonition means not succumbing to and being conformed by its unregenerate, rebellious, fallen way of thinking. As Bishop Brian Carrell exhorts:

> Our calling as Christians is not to succumb to the spirit of the times and the outlook of a world that has come to ignore God, but in an attitude of gracious defiance to show that there is another way of looking, another way of living—a way found and focussed in the person of Jesus Christ.[198]

The CC sees a clear chasm between good and evil, not in terms of areas of creation being redeemed or unredeemed (dualism), but in terms of two opposing spiritual forces—either divine or satanic—which endeavour to shape and direct culture and claim

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194 "Agreement with New Zealand," Christian Coalition Manifesto 1996, at 5.

195 *Ephesians* 6: 12 (NIV). The *King James Version* uses the phrase "against principalities, against powers." See the Rev Arthur Gunn, "Victory over secular humanism," *CW*, 24 Oct 1986, 8 at 9: "We must understand that this battle [against secular humanism] is being fought not only on a human plane. It is a battle in the spiritual plane 'against the principalities and powers . . . '". See Lesslie Newbigin, *The Gospel in a Pluralist Society* (1989) ch 16 (entitled, "Principalities, Powers and People") at 207-208, where he comments: "The principalities and powers are real. They are invisible and we cannot locate them in space. They do not exist as disembodied entities floating above the world, or lurking within it. They meet us as embodied in visible and tangible realities—peoples, nations and institutions . . . The language is pictorial, mythological if you like, because we have no other language. But the things described are real and are contemporary."

196 Bruce Patrick, "After the 1997 Congress", in Patrick (ed), *The Vision Congress 1997*, ch 1 at 32. See also Viv Grigg, "Transforming the Soul of a Nation," ibid, ch 13 at 234.

197 *John* 17.

mankind's allegiance. Schaeffer put it this way: "It is not too strong to say that we are at war, and there are no neutral parties in the struggle. One either confesses that God is the final authority, or one confesses that Caesar is Lord."[199] C S Lewis similarly warned: "There is no neutral ground in the universe: every square inch, every split second, is claimed by God and counterclaimed by Satan."[200] Man's response is either obedience or disobedience to God. "Christian anthropology cannot avoid seeing the duality of obedience or rebellion as the basic conflict in human life."[201] Many CCs adhere to a binary, bipolar "either/or" approach in this regard. There is a pivotal and unavoidable "directional question"[202] to be answered by mankind. There is no middle ground, people must choose. "He who is not with me is against me,"[203] is the Scriptural warrant here. As the editor of *Challenge Weekly* reminded his readers recently, "You serve either God's Kingdom or Satan's Kingdom. *There is no neutral ground.*[204] Rather than call this "dualism" (where areas or spheres of life are God's and others are not), it is better to describe it as "duality", as Walsh and Middleton do:

> [T]here is a world of difference between *dualism* and *duality*. Christian discipleship forces us to recognize duality in life: *either* we serve the Lord *or* we follow idols. Dualism blurs the valid duality between obedience and disobedience because dualism identifies obedience, redemption and the kingdom of God with only *one* area of life. It sees the rest of life as either unrelated to redemption (or the sacred), or worse—under the power of disobedience, sin and the kingdom of darkness.[205]

Dualism is a distortion since it superimposes upon the structure of creation the "directional" question of obedience or disobedience. "Dualism . . . confuses structure and direction. Rather than seeing how the directional question runs through *all of life*, it identifies the

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198 Carrell, "Reaping the Whirlwind," at 35.

199 Schaffer, *Christian Manifesto*, at 116.

200 C S Lewis, "Peace Proposals for Brother Every and Mr Bethell" in *Christian Reflections* (1981) at 52: quoted in Walsh and Middleton, *Transforming Vision*, at 71.

201 Richard J Mouw and Sander Griffioen, *Pluralisms and Horizons* (1993) at 89.

202 Walsh and Middleton, *Transforming Vision,* at 96.

203 *Matthew* 12:30; *Luke* 11:23 (NIV).

204 Henk Kamsteeg (editorial), "Party's over—time to march", *CW*, 16 Feb 1999, at 2 (original emphasis).

205 Walsh and Middleton, *Transforming Vision*, at 95 (original emphasis). This criticism of dualism is echoed by Paul Windsor, Principal of Carey Baptist College, Auckland: see Windsor, "A Church Split Apart", *Reality*, Dec 1999/Jan 2000, 23.

direction with *particular parts* of the structure".[206] Creation is diverse and there are a plurality of structures which exist—schools, families, churches, teams, orchestras, governments, etc. This "associational" or "structural" pluralism is normative. The plurality of directional responses or "confessional" pluralism is, by contrast, not normative but antinormative. Confessional pluralism is a fact of a fallen rebellious world.[207]

1 *Naming "the enemy"*

CCs believe there has been a steady rise in, indeed a shift to, another supplanting worldview. There are various names for it among CCs.

Traditionally, it was called by the name historians prefer, "modernity". The roots of modernity lie in the Enlightenment (the Age of Reason).[208] "Modernism", the expression of the ideas and values of modernity (a period), is marked by a faith in reason, science and technology and the conception of man as an autonomous individual,[209] able to conquer nature and improve the human condition.[210] Following Kant, external authority, or "tutelage of others"[211] is rejected, the Church or God especially.[212] Emancipated from past superstitions and traditions, modernism is confident and optimistic: "the spirit of modernity is the spirit of progress."[213] "All the writers of the Enlightenment [were] united in their

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206 Walsh and Middleton at 96 (original emphasis).

207 See G S Smith (ed), *God and Politics*, at 75.

208 See Immanuel Kant, *An Answer to the Question: What is Enlightenment?:* "Enlightenment is man's emergence from his self-imposed minority. This minority is the inability to use one's own understanding without the guidance of another. It is self-imposed if its cause lies not in a lack of understanding, but in the lack of courage and determination to rely on one's own understanding and not another's guidance. Thus the motto of the Enlightenment is *'Sapere aude!* Have the courage to use one's own understanding!'". Quoted in Lucien Goldmann, *The Philosophy of the Enlightenment: The Christian Burgess and the Enlightenment* (1968) at 3.

209 Walsh and Middleton, *Transforming Vision*, at 119, believe this element, human autonomy, to be "the core of modern secularism. In the modern worldview, man becomes a law *(nomos)* unto himself *(autos)*." Thus they coin the phrase, *homo autonomus*.

210 See Vogelsang, "Doing the Right Thing in a Postmodern Society", at 3: "With its roots in the Enlightenment and its rise to prominence in the Industrial Revolution, Modernism is marked by a belief in the autonomous nature of the self or individual, faith in technology and reason as tools for progressively improving the human condition and trust in management and planning as the means to a good society."

211 Kant in Goldmann, *Philosophy of the Enlightenment* at 3.

212 To quote Kant again: "I see the central achievement of Enlightenment—that is, of man's emergence from his self imposed minority—above all in matters of religion . . . [T]his religious dependence is both the most damaging and the most humiliating of all." Goldmann at 4.

213 Middleton and Walsh, *Truth is Stranger Than It Used to Be*, at 15.

hostility to traditional Christianity and the Church", writes Lucien Goldmann.[214] Modernity is by nature antagonistic to religion which it sees as having an irrevocable "dark side".[215] CCs in turn treat modernity as the old foe, "a militant adversary of Christianity".[216]

Another term often used interchangeably with modernity,[217] is "secularism". This is derived from the Latin, *saeculum*, meaning "generation, age or world". Ruth Smithies, a leading New Zealand Catholic social commentator, explains:

> Secularism is that aspect of our post-Christian culture which denies the existence of a transcendent dimension to both human existence and the world or universe itself. We are self-reliant: God is superfluous and the pursuit of happiness is limited to this world and age.[218]

Secularism is not to be confused with "secularisation". The latter is a particular process of structural change in society, a "process by which religious thinking, practice and institutions lose social significance and become marginal to the operation of the social system."[219] Many social institutions have ceased to be under religious control. Nonetheless, there is an intimate symbiotic relationship between the two concepts, one reinforcing the other. Secularism (the internal, ideological) is reflected in secularisation (the external, sociological), and vice versa. Secularism may have promoted secularisation but equally (and perhaps more so) the secularity of modern society may be a consequence of structural changes pursuant to the secularisation process.[220] The process that creates the largely

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214 Goldmann, *Philosophy of the Enlightenment,* at 31-32.

215 See William P Marshall, "The Other Side of Religion" (1993) 44 Hastings LJ 843 at 854. Maimon Schwarzschild, "Religion and Public Debate in a Liberal Society: Always Oil and Water or Sometimes More Like Rum and Coca-Cola?" (1993) 30 San Diego L Rev 903 at 904 comments: "it is fair to say that the Enlightenment as a whole be held religion with something approaching horror."

216 Harold OJ Brown, "Unhelpful Antagonism", at 176.

217 See eg Wolfhart Pannenberg, "How to think about Secularism," *First Things*, June/July 1996, 27 at 28.

218 Ruth Smithies, "Gospel and Culture", in Patrick (ed), *The Vision New Zealand Congress 1997*, (1997) ch 6 at 99.

219 Ibid. See similarly Peter L Berger, *The Social Reality of Religion* (1969), at 107: "By secularization we mean the process by which sectors of society and culture are removed from the domination of religious institutions and symbols."

220 Bryan Wilson, "Secularisation': Religion in the Modern World" in Sutherland et at (eds), *The World's Religions* (1988) ch 58 at 954.

religion-free public environment generates a mindset that thinks typically of this-worldly things and not of God.[221]

In the last 30 years many American evangelicals and fundamentalists preferred to describe the enemy as "Secular Humanism". Francis Schaeffer was the one primarily responsible for the identification of humanism as this antithetical worldview usurping the Judeo-Christian one. For many years, Schaeffer occupied a seminal position in American Protestant CC as "the intellectual authority most often quoted, the one most trusted."[222] To him, humanism was pervasive and powerful:

> [T]he humanist worldview includes many thousands of adherents and today controls the consensus in society, much of the media, much of what is taught in the schools, and much of the arbitrary law being produced . . . The term humanism used in this wider more prevalent way means Man beginning from himself with no knowledge except what he can discover and no standards outside himself. In this view Man is the measure of all things as the Enlightenment expressed it.[223]

Timothy La Haye's influential book, *The Battle for the Mind,* (dedicated to Schaeffer) distilled and simplified Schaeffer's critique whilst reformulating it in popularised, inflammatory form:

> Most people today do not realize what humanism really is and how it is destroying our culture, families, country—and one day the entire world. Most of the evils in the world today can be traced to humanism, which has taken over our government, the UN, education, TV, and most of the other influential things of life. The church of Jesus Christ is the last obstacle for the humanists to conquer.[224]

Both Schaeffer and, to a lesser extent, La Haye were widely read by many CCs in New Zealand. Schaeffer drew directly from the largely obscure *Humanist Manifestos I* and *II* which contain the doctrinal tenets of Humanism.[225]

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221 American evangelical theologian, David Wells describes it thus: "Secularization and secularism are related to one another as the glove is to the hand or as the body is to the soul. The former is the public environment created by the modernizing process that produces a conscious counterpart that is its echo and in the sound of God and of the transcendent order are never heard; the latter is the psychological reflex to our reshaped society." David F Wells, *No Place For Truth or Whatever Happened to Evangelical Theology?* (1993) at 87.

222 Capps, *The New Religious Right,* at 58.

223 Schaeffer, *Christian Manifesto*, at 24.

224 T La Haye, *The Battle for the Mind* (1980) at 9.

225 The *Humanist Manifesto I* (1933) and the *Humanist Manifesto II* (1973). These are reproduced in the appendix to Corliss Lamont, *The Philosophy of Humanism*, 7th ed (1990).

Humanist Manifesto I (1933) was designed to be a comprehensive statement of *religious* humanism and outlined 15 theses regarding "the means and purposes" of religious humanism, a religion described as "a vital, fearless, and frank" one.[226] Thesis 6 noted that the time for theism had passed. Thesis 13 maintained that "all associations and institutions exist for the fulfilment of human life" and, somewhat ominously for some CCs, concluded: "Certainly religious institutions, their ritualistic forms, ecclesiastical methods, and communal activities must be *reconstituted* as rapidly as experience allows, in order to function effectively in the modern world."[227]

By the time of the publication of *Humanist Manifesto II* in 1973, humanism had moved away from being an avowedly religious belief system. *Manifesto II* explained that this form of humanism (religious humanism) was but a variety and emphasis within *naturalistic* humanism, the latter being, by implication, the principal expression of humanist thought now.[228] The opposition to traditional theism and the supernatural was reaffirmed, although it cautioned that views that merely rejected theism were not equivalent to humanism. Humanism constitutes in a positive sense "the belief in the possibilities of human progress and the values central to it." *Manifesto II* outlines 17 common principles which provide "a design for a secular society on a planetary scale." Principle 1 notes that religion "in the best sense" may inspire and foster human progress. Yet there is religion and religion:

> We believe, however, that traditional dogmatic or authoritarian religions that place revelation, God, ritual, or creed above human needs and experience do a disservice to the human species . . . As nontheists, we begin with humans not God, nature not deity . . . No deity can save us; we must save ourselves.[229]

Corliss Lamont, author of the leading text on the subject, describes Humanism thus:

> This philosophy can be more explicitly characterized as scientific Humanism, secular Humanism, naturalistic Humanism, or democratic Humanism, depending on the emphasis that to one wishes

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226 Lamont, ibid at 226.

227 Ibid at 288 (emphasis added).

228 Ibid at 291.

229 Ibid at 292-293. Reason and critical intelligence were reaffirmed as the most effective instruments for human progress (principle 4) as were: the belief in "maximum individual autonomy consonant with social responsibility" and increase in "individual freedom of choice" (principle 5); the commitment to democracy (principle 8); the separation of church and state (principle 9); and the principle of moral equality (principle 11).

> to give. Whatever it be called, Humanism is the viewpoint that men have but one live to lead and should make the most of it in terms of creative work and happiness; that human happiness is its own justification and requires no sanction or support from supernatural sources; that in any case the supernatural, usually conceived of in the form of heavenly gods or immortal heavens, does not exist; and that human beings, using their own intelligence and cooperating liberally with one another, can build enduring citadel of peace and beauty upon this earth.[230]

Schaeffer and his fellow American CCs objected to the founding anthropocentric premise of humanism[231]—"Man is the measure of all things" (as Protagoras, the fifth century BC Greek philosopher, put it[232]). To them this is pure idolatry, the deification of humankind. For these CCs: "Secular Humanism is a religion whose doctrine worships Man as the source of all knowledge and truth, whereas theism worships God as the source of all knowledge and truth."[233] There was, to be sure, a strain of humanism, Christian humanism,[234] which was not objectionable to these critics,[235] but that variety of humanism was decidedly not the ascendant one in the late twentieth century.

The attack upon secular humanism was strident and alarmist. Moreover, it fed the paranoid fears of some CCs ever alert for apocalyptic, Satanic-controlled, one-world government, conspiracies.[236] The leading New Zealand proponent of these conspiratorial global control theories is an itinerant Pentecostal evangelist, Barry R Smith, who consistently drew large audiences in the 1980s and 1990s.[237]

The secular humanist thesis has not gone without criticism from American evangelical scholars. David Wells, for example, identifies the loss of cultural hegemony with long-term

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230 Lamont, ibid at 14

231 John Swomley, *Religious Liberty and the Secular State* (1987), at 118 notes: "*Humanism* can be defined as putting human values ahead of material and institutional values. It can also be defended as making humans the measure and centre of everything instead of God."

232 Lamont, *Philosophy of Humanism* at 31.

233 John W Whitehead and John Conlan, "The Establishment of the Religion of Secular Humanism and its First Amendment Implications" (1978) 10 Texas Tech L Rev 1 at 30-31.

234 Lamont describes Catholic Humanism in his book (at 21-22) and traces in detail the religious roots of humanism at 48 et seq. The ethical teachings of a non-divine Jesus ("a great good man") are "an inspiration for the human race."(at 51)

235 See Schaeffer, *Christian Manifesto*, at 23 who endorses Christian humanism.

236 To quote La Haye again: "It is all very simple, if you face the fact that we are being controlled by a small but very influential cadre of committed humanists, who are determined to turn traditionally moral-minded America into an amoral, humanistic country. Oh, they don't call it humanist. They label it *democracy*, but they mean humanism, in all its atheistic, amoral depravity." La Haye, *Battle for the Mind*, at 142 (original emphasis).

structural processes (secularisation) as much as with the growth of secular humanism. He argues that while the perception of a secular humanist takeover is "not altogether beside the point", the causes of irreligion cannot be limited to ideas alone. The La Hayes of this world "overlook[ ] the whole social climate, brought about by our new social arrangements, that makes these ideas seem plausible and even inevitable to so many people. It is a social climate that . . . creates problems for belief that are quite as pernicious and difficult as the problems generated by those who consider themselves to be secular humanists."[238]

Sophisticated CC theorists invoke Peter Berger's concept of "plausibility structures".[239] Any religious (or other) worldview needs external, social reinforcement. The social structures that reinforce a particular worldview, that give it credibility, are "plausibility structures". Berger in his influential 1969 book spoke of "plausibility crisis" for religion generally: "Secularization has resulted in a widespread collapse of the plausibility of traditional religious definitions of reality."[240] Christianity is not immune from this problem.[241]

The American anti secular humanism critique was imported into New Zealand in the mid-1980s. Pastor Rob Wheeler of Auckland Christian Fellowship, a leading pentecostal pastor who stood unsuccessfully for the National Party, warned against the "satanic forces" which had "slowly eroded" the Christian foundation of the nation.[242] For Wheeler:

> a Satanic revival has touched New Zealand! Our nation has been converted to secular humanism which is anti-Bible and anti-Christian! Satan has been at work at all levels, right to the government. People have been actively converted through the media.[243]

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237 He has self-published a trilogy of books: *Warning* (1980); *Second Warning* (1985); and *Final Notice* (1987).

238 Wells, *No Place for Truth*, at 79.

239 See Berger, *Social Reality of Religion*, ch 6 ("Secularization and the Problem of Plausibility"). Christian scholars to drawn from Berger include Wells, ibid at 87 and Newbigin, *Foolishness to the Greeks*, at 10.

240 Ibid at 127

241 See ibid at 47: "The reality of the Christian world depends upon the presence of social structures within which this reality is taken for granted and within which successive generations of individuals are socialized in such a way that this world will be real to them. When this plausibility structure loses its intactness or conformity, the Christian world begins to totter and its reality ceases to impose itself as self-evident truth."

242 Brian Rudman, "For God and National", *NZ Listener*, 28 March 1987, 28 at 29.

243 Quoted in Knowles, "History of New Life Churches", at 310.

"It's time to stop the rot," gravely warned one visiting American CC in a 1987 front page issue of *Challenge Weekly* and he urged New Zealanders to "stand against the insidious spread of secular humanism" here.[244] While the Moral Majority's political agenda was viewed with some suspicion by some New Zealand CCs (there were "no direct linkages between the New Zealand and American movements and their constituencies were also significantly different"[245]), the identification of the bête noire as "secular humanism" was gratefully received by many: it served as a convenient shorthand label for the enemy and as a seemingly compelling socio-philosophical explanation of why permissiveness was increasing. As John Adsett Evans notes, New Zealand CCs in the 1980s were convinced that "more and more the very fabric of the nation was called into question. No longer was New Zealand a Christian nation. The concern was now with 'secular humanism' and the godlessness of the body politic."[246]

For example, in 1987 the Coalition of Concerned Citizens, in the *Coalition Courier,* published articles on "Humanism in the Media", "Humanism in the Classroom", "Declaring Victory over Secular Humanism" and "Humanism . . . a Global Plan".[247] This humanist exposé edition ran to 105,000 issues and was distributed throughout New Zealand.[248] The Christian Maori MP, Whetu Tirikatene-Sullivan echoed this concern. The substructure of Maori society, Christianity, was being undermined by destructive ideologies such as secular humanism.[249] Carr, in her study of rural fundamentalists, discovered the same concern: fundamentalist parents believed the New Zealand state school system (through such matters as evolution and permissive sex education) was promulgating a secular humanist philosophy, one which was quite at odds with Biblical morality they desired.[250]

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244 "It's time to stop the rot," an article by Dr John Stewart of Simon Greenleaf Law School, California: *CW*, 13 March 1987, at 1.

245 Knowles, "History of New Life Churches", at 303.

246 Evans, "New Christian Right", at 80-81. See the grim foreboding of John Massam, editor of *Challenge Weekly* in his editorial, "An alien spirit is abroad . . . ", *CW*, 9 Aug 1985, at 2. See also Massam, editorial, *CW*, 6 Sept 1985, at 2. The Rev Arthur Gunn consistently warned of the humanist danger: see Gunn, "Humanism—the unseen enemy," *CW*, 30 April 1986, at 18.

247 *Coalition Courier*, vol 3 no 2 March 1987 reproduced as a supplement in *CW*, 13 March 1987.

248 *Coalition Report*: reproduced as a supplement to *CW*, 17 April 1987.

249 "'Alien ideologies' prey on Maoris," *CW*, 24 July 1987, at 1.

250 Carr, "No Grey Areas", at 41.

In the late 1990s the humanist critique was less prominent, but still lives on. The Rev Brian Brandon, a CC minister, states in his Internet critique of humanism that "revival is imperative, and no more than in New Zealand where humanism has taken it toll perhaps more than anywhere"; humanism is a dominating Western worldview that "grips both church and society."[251]

2 *The postmodern worldview*

If we take postmodernism to be a period of transition in Western culture, one marked by "a growing sense that all knowledge is conditioned by a variety of human factors and that any pretension to objectivity and absoluteness in knowledge is misplaced"[252], then this worldview seems to bode ill for CCs as much as the confrontation of modernity did. Opinions amongst Christians differ.

In theory, postmodernism might be more tolerant of religion than modernity. It advocates pluralism so perhaps religious viewpoints will be more freely welcomed in public discourse. The Rev Rob Yule is one such New Zealand optimist:

> The 1990s is a pluralistic post-secular era, in which cultural diversity and religious belief are much more welcome than in the Secular age preceding it, which dated from the European Enlightenment. Religious conservatives, lamenting the loss of the privileges they enjoyed in the Christendom era, have not always recognised the significant opportunities that the new pluralistic situation provides.[253]

The openness of postmodernity, its receptivity to diverse stories of all stripes, might spell an opportunity for Christians to proffer their story with renewed vigour, suggests another commentator.[254]

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251 Brandon, "Freedom from Humanism", a six-part study series on the Internet website of St Martin's Presbyterian Church, Papatoetoe. Brandon remarks: "Over the last 30 years particularly in the area of moral issues, humanist ideas have been promoted strongly, and laws restricting divorce, abortion and homosexuality, have been put aside." The Chairman of the Auckland branch of the Humanist Society, George Pirie, wrote to *Challenge Weekly*, explaining Christians should be thankful of the infiltration and "humanising" influence of humanism upon their "sect": "Humanists actively infiltrate the Church claims chairman," *CW*, 2 July 1985, at 7.

252 Smithies, "Gospel and Culture" at 104 fn 3.

253 Rob Yule, "I've been thinking too—about MMP," *CW*, 9 Oct 1996, at 5. The Rev Yule will be Moderator of the New Zealand Presbyterian Church in 2000.

254 "In contrast to the modern, scientific perspective, postmodernity is open to the transcendent, to the mysterious, to spirituality and even to the Spirit." Jeff Fountain, "Postmodernity", *Reality*, April/May 1997, 13 at 14.

But some doubt postmodernity will benefit conservative religions. CCs believe in absolutes based on the known revealed Truth (capital "t"). If postmodernism does become the dominant worldview there may remain, as Robert Jenson calls it, an "asymmetry" between the way the "Abrahamic" religions (Christianity, Islam and Judaism) are treated and the manner other, less dogmatic, religions are. The Semitic faiths insist upon absolute values and standards for all[255] and reject the desirability of pluralism as a good in itself.[256] Arguably, postmodernism will reveal itself to be just another "secularist creed" with its own metanarrative of tolerance suppressing those with "intolerant" narratives at odds with its own.[257] Far from eschewing metanarratives, CCs insist "there *is* a single metanarative encompassing all peoples and all times."[258] This being so, they may well remain as unwelcome participants in the public arena as they were under modernity.[259]

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255 See Anderson, "Public law and legislation," at 235.

256 See Newbigin, *Gospel in a Pluralist Society*, at 244: "A Christian must welcome some measure of plurality but reject pluralism." Christians must "reject the invitation to live in a society where everything is subjective and relative, a society that has abandoned the belief that truth can be known."

257 Diogenes Allen, "Christianity and the Creed of Postmodernism" (1993) 23 Christian Scholar's Rev 117 at 124.

258 Grenz, *Primer on Postmodernism*, at 164 (emphasis in original).

259 Robert W Jenson, "The God-Wars" in Braaten and Jenson (eds), *Either/Or: The Gospel or Neopaganism* (1995) at 23-26.

Chapter 3

LIBERALISM AND THE "WELLINGTON WORLDVIEW"

Law is naturally influenced greatly by "the spirit of the age". New Zealand is commonly described as a liberal democracy.[1] In this chapter I will describe the salient characteristics of the philosophy undergirding the New Zealand legal system based on the premise that New Zealand law and government reflects liberal democratic beliefs, values and principles. I shall argue that: (1) liberal democracies in general reflect a distinctive philosophy or worldview, and that; (2) New Zealand law and government in particular evinces a similar worldview—what I shall call the "Wellington worldview".

I THE LIBERAL MODEL

Liberal democracies subscribe, in varying degrees, to liberalism. A preliminary cautionary comment is appropriate here. As Lovejoy has noted, doctrines ending in "ism" are best thought of as "compounds" or "complexes", not "simples":

> They stand as a rule not for one doctrine, but for several distinct and often conflicting doctrines held by different individuals or groups to whose way of thinking these appellations have been applied . . . and each of these doctrines, in turn, is likely to be resolvable into simpler elements, often very strangely combined and derivative from a variety of dissimilar motives and historical influences.[2]

I take liberalism to be the principal philosophical tradition that underlies the Western concept of a liberal democracy.[3] There are, to be sure, other philosophies of relevance,

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1 See eg Richard Mulgan, *Politics in New Zealand* (1994) at 17.

2 Arthur O Lovejoy, *The Great Chain of Being: A Study of the History of an Idea* (1936) at 5-6: quoted in Steven Lukes, *Individualism* (1973) at 43.

3 I share this strategy with Stephen Carter, *The Culture of Disbelief* (1993) at 55 where Carter remarks: "I use the term *liberalism* to denote the philosophical tradition that undergirds the Western ideal of political democracy and individual liberty— a tradition that such conservatives as Robert Bork claim to represent no less than many prominent liberal intellectuals." See also Scott Idelman, "The sacred, the profane and the instrumental: valuing religion in the culture of disbelief" (1994) 142 U Pa L Rev 1313 at 1363-1364 (contemporary liberalism is the "prevailing" philosophical approach to religious liberty in America) and Robert J Sharpe, "New Ways of Thinking— Liberalism" in McArdle (ed), *The Cambridge Lectures 1991* (1991) 265 at 297 : "For the past two hundred years, since the French and American revolutions,

especially the political philosophy and tradition of conservatism, and in New Zealand, socialism. I shall nevertheless concentrate upon liberalism on the premise it constitutes the *dominant* contemporary political philosophy. This view is not without support. For instance, Roy Perrett argues:

> The dominant Pakeha conception of justice is liberal and individualistic. This is not, of course, to say there are no differences between Pakeha liberals . . . But what egalitarian and libertarian liberals have in common is the assumption that we are all separate, individual persons with our own goals and values, and that the function of a system of justice is to promote a neutral framework of rights which will further our own individual interests to a degree maximally consistent with similar liberty for other individuals.[4]

Sir Ivor Richardson refers to rights being "at the heart of liberalism" and adds that for anyone "to question the prevailing philosophy, to put limits on rights and their protection through the Courts, is easily represented as an attack on liberal values."[5] Liberalism may be the ascendant ideology but it is leavened by conservative and socialist strains and echoes. I shall simply mention the differences between it (liberalism) and other "isms" where appropriate.

1 The characteristics of liberalism: general

> Liberalism has been the hope that, despite [the] tendency toward disagreement about matters of ultimate significance, we can find some way of living together that avoids the rule of force. It has been the conviction that we can agree on a core morality while continuing to disagree about what makes life worth living.[6]

Liberalism is, as the theorist John Gray puts it, "the political theory of modernity."[7] Notoriously, it comes in many different forms which makes it "foolish to attempt a univocal definition of such a historically and conceptually complex phenomenon"[8] and the task of isolating its core characteristics difficult. There is for example, classic liberalism and social

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[liberalism] has been the dominant political philosophy of western society." On the basic tenets of liberal democracy see Kent Greenawalt, *Religious Convictions and Political Choice* (1988) ch 2 at 16.

4 Roy W Perrett, " Individualism, Justice and the Maori View of the Self" in Oddie and Perrett (eds), *Justice, Ethics and New Zealand Society* (1992) 27 at 27.

5 Ivor Richardson, "Rights Jurisprudence—Justice for All?" in Joseph (ed), *Essays on the Constitution* (1995) 60 at 60.

6 Charles Larmore, "Political Liberalism" (1990) 18 Political Theory 339 at 357.

7 John Gray, *Liberalism*, 2nd ed (1995) at ix. See also Michael W McConnell, "'God is Dead and We have Killed Him!': Freedom of Religion in the Post-Modern Age" [1993] Brigham Young U L Rev 163 at 166.

or new liberalism.[9] John Rawls,[10] delineates three general types—liberalism based upon moral scepticism, one based upon pragmatic or prudential considerations or, thirdly, a moral conception of liberalism.[11] Rawls calls his "anti-perfectionist" version of liberalism "political liberalism" to distinguish it from "perfectionist" or "thick" versions—such as Immanuel Kant's and John Stuart Mill's—which presuppose some general and comprehensive philosophical or moral doctrine, some comprehensive view of the good life.[12] William Galston's *Liberal Purposes* is a recent example of this latter strain of liberal theory, the author putting forward a definite programme of liberal values and virtues, a liberalism "committed to a distinctive conception of the human good."[13] Rawls' liberalism, by contrast, (a "thin" form or "procedural liberalism"[14]) is something less, a "partially comprehensive view,"[15] albeit still a "moral" conception of justice in that it is "distinct from a consensus, inevitably fragile, founded solely on self- or group-interest."[16]

What are the principal characteristics or central premises of liberalism? Naturally, different scholars have different lists.[17] John Gray pinpoints four:

> Common to all variants of the liberal tradition is a definite conception, distinctly modern in character, of man and society. What are the several elements of this conception? It is [1] *individualist*, in that it asserts the moral primacy of the person against the claim of any social collectivity: [2] *egalitarian*, in as much as it confers on all men the same moral status and denies the relevance to legal or political order of differences in moral worth among human beings; [3] *universalist*, affirming the moral unity of the human species and according a secondary importance to specific historic associations and cultural forms; and [4] *meliorist* in its affirmation of the corrigibility and improvability of all social institutions and political arrangements. It is this conception of man and society which gives liberalism a definite

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8 Robert Song, *Christianity and Liberal Society* (1997) ch 1 at 9.

9 See Andrew Vincent, *Modern Political Ideologies* (1992) ch 2 at 27.

10 John Rawls, *Political Liberalism* (1993).

11 See Paul F Campos, "Secular Fundamentalism" (1994) 94 Colum L Rev 1814 at 1822-1824.

12 Rawls, "The Idea of an Overlapping Consensus" (1987) 7 OJLS 1 at 5-6.

13 William Galston, *Liberal Purposes: Goods, Virtues, and Diversity in the Liberal State* (1991) at 18.

14 See Charles Taylor, *Philosophical Arguments* (1995) ch 10 at 186 and Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54 U Toronto Fac L Rev 1 at 14.

15 Rawls, "Overlapping Consensus", at 16.

16 Ibid at 2.

17 See Song, *Christianity and Liberal Society*, at 40 et seq for a helpful discussion. Song comments: "[T]here is no common or unitary core of [liberal] doctrine . . . which anybody who wishes to qualify as a liberal must hold. It is better to think in terms of an overlapping range of beliefs, none of which individually a liberal must hold, but to some interpretation of which, when taken together, a liberal must subscribe." Song sets out five such beliefs.

identity which transcends its vast internal variety and complexity.[18]

Robert Sharpe identifies three central premises: in addition to individualism, he adds: [5] *freedom*—the state's role in "maximizing human dignity, self-fulfilment and autonomy, while minimizing interferences with individual moral choice"; and [6] *neutrality*—the belief that "the state and the law should be neutral as to particular conceptions of the good life."[19] To this growing list one could add liberalism is [7] *rationalistic*—favouring reason over affect, emotion etc.[20] Finally, and contentiously, it might be argued liberalism is [8] *humanistic*—concerned solely with human aspirations and interests divorced from theistic or other transcendent interests.

From this brief sketch I wish to focus upon certain characteristics in more detail.

2 *Individualism*

(a) Individual choice; autonomy

Liberalism overlaps with and draws upon the philosophy of individualism to a significant degree. Indeed liberals are, assert some, "formally committed to individualism."[21] Under individualism the individual human being is the central focus, the basic unit of society. As Bhikhu Parekh explains:

> Unlike the Greeks, and indeed all the premodern societies which took the community as their starting point and defined the individual in terms of it, liberalism takes the individual as the ultimate and irreducible unit of society and explains the latter in terms of it. Society "consists" or is "made up" of individuals and is at bottom nothing but the totality of its members and their relationships.[22]

Liberalism defines the individual in "austere and minimalistic terms," argues Parekh, by abstracting the person from all or his or her "contingent" and "external" relations with other people and nature.[23] For liberals, "the self is fundamentally detached from

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18 Gray, *Liberalism*, at xiii (italics in original). See also ibid at 86.

19 Robert J Sharpe, "New Ways of Thinking—Liberalism", at 265-266.

20 Nomi Maya Stolzenberg, "'He Drew a Circle that Shut Me Out': Assimilation, Indoctrination, and the Paradox of a Liberal Education" (1993) 106 Harv L Rev 581 at 612-613.

21 Vincent, *Modern Political Ideologies*, at 32.

22 Bhikhu Parekh, "The Cultural Particularity of Liberal Democracy" in Held (ed), *Prospects for Democracy* (1993) at 157.

23 Ibid at 158.

contingencies, being related to them (if at all) through choice or consent."[24] Michael Sandel has dubbed this conception of the person, "the unencumbered self." He argues:

> [R]ights-based liberalism begins with the claim we are separate, individual persons, each with our own aims, interests and conceptions of the good, and seeks a framework of rights that will able us to realise our capacity as free moral agents consistent with a similar liberty for others . . . The priority of the self over its ends means I am never defined by my aims and attachments, but always capable of standing back to survey and assess and possibly revise them. This is what it means to be a free and independent self, capable of choice.[25]

The freedom to control one's destiny, to retain self-direction or mastery, has been described by others as "autonomy."[26] The idea of the completely self-enclosed individual, always able to run his or her own life and make his or her own choices ("the individual as its own god", as one critic puts it[27]) is not the only conception of personhood on offer. Sandel, along with other communitarian critics of modern liberalism, points to a different conception:

> Following Aristotle, [the communitarian critics] argue that we cannot justify political arrangements without reference to common purposes and ends, and that we cannot conceive our personhood without reference to our role as citizens, and as participants in a common life . . .
>
> Communitarian critics of rights-based liberalism say we cannot conceive ourselves as independent in this way [where the self is prior to its ends], as bearers of selves wholly detached from our aims and attachments. They say that certain our roles are partly constitutive of the persons we are—as citizens of a country, or members of a movement, or partisans of a cause.[28]

So, instead of the unencumbered self, Sandel points to a different conception, the "situated self", the person whose life is always embedded or situated in those communities from which the individual draws his or her identity—whether family, tribe, party, religion or cause.[29]

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24 Song, *Christianity and Liberal Society*, at 40.

25 Michael J Sandel (ed), *Liberalism and its Critics* (1984) at 4-5.

26 Lukes, *Individualism*, ch 8.

27 Anthony E Cook, "God-Talk in a Secular World" (1994) 6 Yale J Law and Hum 435 at 442.

28 Sandel, *Liberalism and its Critics*, at 5-6.

29 Ibid at 6. Sandel's criticism echoes the view of human personhood to be found in British political Conservatism. That political philosophy posits a rival conception of the person where "human freedom and human personality are social artefacts, and the human person emerges already encumbered by obligations to those who have gone before.": Roger Scruton,"What is conservatism?" in Scruton (ed) *Conservative Texts: An Anthology* (1991) at 8

(b) A weak concept of community

If liberalism views society as simply an aggregation of individuals then *a fortiori* it would view groups or communities likewise. So, many argue, liberalism has a weak or under-developed concept of community.[30] Groups are of value only to the extent they represent the aggregation of individual choices and desires. They are a sort of collecting house or "matrix within which private preferences are formed."[31] The modern liberal state is content with a bilateral relationship between the state, on the one hand, and the individual, on the other. So-called "intermediate institutions" standing between the individual and the state, such as the family, the church, the voluntary society, are accorded little worth.[32]

The liberal themes of autonomy and voluntary choice have, some argue, a destabilising effect upon communities and communal life. The theologian Paul Marshall suggests that the liberal insistence upon the informed right to exit at any time can undercut any community's integrity and solidarity:

> [The religious community] must inform its members that they can quit at any time and thus it must inform its members that believing along with the rest of the community is not the most fundamental thing of all. Communities thus become half-minded and thus half-hearted . . . They become communities founded on prior respect for individual choice and thus become mirror images of the larger liberal society. In this liberal society, communities are not left free: rather they are constrained to become liberal associations.[33]

The liberal view of community can be contrasted with the conservative conception, a more "organic", communitarian one.[34] Conservatism has a "care for institutions", a concern to foster corporations, firms, schools, universities, theatres, clubs, teams, as well as the family and the church. Society—the term "civil society" is usually preferred—is made up of "the totality of these institutions."[35]

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30 See Parekh, "Cultural Particularity of Liberal Democracy" at 162.

31 Mark Tushnet, *Red White and Blue: A Critical Analysis of Constitutional Law* (1988) at 271.

32 Ibid.

33 Paul Marshall, "Liberalism, Pluralism and Christianity: A Reconceptualization" (1989) 21 Fides et Historia 3 at 9.

34 Vincent, *Modern Political Ideologies*, ch 3, at 74: "The communitarian and anti-individualist tendencies of conservatism derive, to some extent, from the organic analogy. The individual is part of an organic whole and cannot be understood except through the whole organism."

35 Scruton, "What is Conservatism?", at 11. As Scruton notes: "it is one of the tasks of the law to protect and uphold autonomous institutions". In doing so the state "shores up its own authority [since by] destroying autonomous institutions it leaves itself with no court of appeal wherein its own claim to obedience to might be defended." Ibid at 26-27.

3 Neutrality

(a) Neutrality explained

A central tenet of liberalism, perhaps the defining feature,[36] is its claim to be neutral concerning questions of the good life and ideas of the good. Ronald Dworkin's formulation is an off-cited one. A liberal theory of equality

> supposes that government must be neutral on what might be called the question of the good life . . . political decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life. Since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another, either because the officials believe that one is intrinsically superior, or because one is held by the more numerous or more powerful group.[37]

Sir Robert Stout said much the same thing in 1914 :

> To say that the State has a right to select one religion and teach its creed because it is the religion of the majority, is to declare it to be the duty of the State to propagate the religious experiences of only one section of the people. That would not be "the Government of the people for the people," but a Government for part of the people . . . Hitherto those who have been what are called liberals and progressivists have recognised that there are varieties of religious experiences, and that whatever the beliefs of citizens may be, all must have equal rights and equal privileges before the law. Make one class outcasts because of their race or religion, and you banish freedom and liberty from the State . . . If a State is to be fair and just to all and human liberty preserved, the State must be neutral to all phases of religious experience.[38]

The concept of neutrality is as Jeremy Waldron observes, "far from a straightforward concept,"[39] and John Rawls similarly refers to the term as "unfortunate."[40] Of the versions of neutrality on offer there seem to be two general types.[41]

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36 Peter Jones, "The ideal of the neutral state" in Goodwin and Reeve (eds), *Liberal Neutrality* (1989) ch 2 at 11: "Several of the advocates of neutralism regard it as the defining feature of liberalism: a liberal state *is* a state which imposes no conception of the good upon its citizens but which allows individuals to pursue their own good in their own way." (original emphasis)

37 Ronald Dworkin, "Liberalism" in Hampshire (ed), *Public and Private Morality* (1978) 113 at 127. See also the formulation by Bruce A Ackerman, *Social Justice in the Liberal State* (1980) at 11: "*Neutrality.* No reason is a good reason if it requires the power holder to assert: (a) that his conception of the good is better than that asserted by his fellow citizens, *or* (b) that, regardless of his conception of the good, he is intrinsically superior to one or more of is fellow citizens."

38 Robert Stout, "Religion and the State", A New Year's address delivered at the Unitarian Free Church, 4 January 1914, at 4-5 (on file with author).

39 Jeremy Waldron, "Legalisation and Moral Neutrality," in his *Liberal Rights* (1993) ch 7 at 145.

40 Rawls, *Political Liberalism*, at 191.

First, there is neutrality of aim or intention—the basic institutions of public policy must not aim to bring about a particular conception of the good. The policy must not be motivated by and designed to favour some particular comprehensive doctrine, religion and so on. Some dub this "procedural" neutrality.[42]

Second, there is neutrality of effects or consequences—the institutions of public policy must take care to ensure that the effects of the policies upon different conceptions of the good life are even-handed. On this view a policy ought not to increase the chance of one way of life flourishing and another diminishing, a position described by some as "unimpaired flourishing".[43] This second "substantive" version of neutrality is however unsustainable in many theorists' eyes.[44] Deborah Fitzmaurice argues, for example, that "whatever principles a state embodies, whether based on a particular conception of the good or not, it is an inescapable feature of a set of political institutions that it constrain the modes of life lived within it."[45] Similarly, Rawls comments: "it is surely impossible for the basic structure of a just constitutional regime not to have important effects and influences as to which comprehensive doctrines endure and gain adherents over time; and it is futile to counteract these effects and influences."[46]

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41 I draw here from Waldron, at 149-150; Galston, *Liberal Purposes*, at 100-101; Rawls, *Political Liberalism*, at 190-194 and Eric Mack, "Liberalism, Neutralism and Rights" in Pennock and Chapman (eds), *Religion, Morality and the Law: NOMOS XXX* (1988) ch 2 at 46-49.

42 But note that Rawls distinguishes between neutrality of aim and procedural neutrality: see *Political Liberalism*, at 191-192. Procedural neutrality he defines as a procedure that can be justified without appealing to any moral values at all, or only to neutral values such as impartiality, consistency of application and equal opportunity.

43 Christopher Eisgruber and Lawrence Sager, "The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct" (1994) 61 U Chicago L Rev 1245 at 1254.

44 See Rawls, *Political Liberalism*, at 194: "Neutrality of effect or influence political liberalism abandons as impracticable . . ." ; Larmore, "Political Liberalism," at 358 n 4: "Liberal neutrality . . . is thus a procedural idea. It also usually involves a 'neutrality of aim' in virtue of which political principles are not intended to favour any controversial view of the good life . . . But it does not include the additional requirement ('neutrality of effect') that political principles have an equal influence on all permissible ways of life, for this is likely to be impossible."; Christopher Eisgruber and Lawrence Sager, "Unthinking Religious Freedom" (1996) 74 Texas L Rev 577 at 606: "the government cannot be neutral in the sense of being equally hospitable to all belief systems."

45 Deborah Fitzmaurice, "Liberal Neutrality, Traditional Minorities and Education" in Horton (ed), *Liberalism, Multiculturalism and Toleration* (1993) at 53.

46 Rawls, *Political Liberalism*, at 53.

What is the justification for neutrality? Unless we have some idea of *why* neutrality is important, then our conception will, argues Waldron, be in danger of being incoherent.[47] Waldron suggests various possible arguments for neutrality: one based upon moral scepticism; a commitment to diversity; a faith in moral progress; the importance of autonomy and the evil of coercion; equal respect, or the danger of entrusting legislators with the moral authority perfectionism would involve. Galston proffers three explanations. Neutrality may be justified because:

> First, it may be argued there is in fact no rational basis for choosing among ways of life. Assertions about the good are personal and incorrigible. State neutrality is desirable because it is the only nonarbitrary response to this state of affairs. Second, it may be argued that even if knowledge about the good life is available, it is a breach of individual freedom—the highest value—for the state to impose this knowledge on its citizens. Of course, the best outcome occurs when individuals freely choose to pursue the good. But freely chosen error is preferable to the coerced pursuit of the good . . . Third, it may be argued the diversity is a basic fact of modern social life and that the practical costs of public efforts to constrain it would be unacceptably high.[48]

(b) Non-neutrality: concession and defence

Some liberal theorists have been prepared to abandon the claim to neutrality.[49] Galston, for example, concedes that liberalism "cannot, as many contemporary theorists suppose, be understood as broadly neutral concerning the human good. It is rather committed to a distinctive conception of the human good, a conception that undergirds the liberal conception of social justice."[50] If a liberal society is individualistic, rationalistic, one placing emphasis upon autonomy and so on, the liberal's response might be: "But so what?"[51]

However, the obvious implication is that conceptions of the good life which do not conform with the liberal model nor share its tenets are destined to struggle. At worst, these non-liberal ways of life or communities may disappear. Recall that neutrality of effects or

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47 This is a point Waldron strongly urges (and chides other theorists for neglecting), namely that "it will be the justification we favour which determines our interpretation of the concept, rather than the other way round . . . Justificatory argument in political theory and jurisprudence must precede conceptual analysis, not the other way round.": Waldron, "Legislation and moral neutrality," at 152-153.

48 Galston, *Liberal Purposes*, at 82.

49 See Stephen Macedo, "The Politics of Justification" (1990) 18 Political Theory 280 at 298: "The liberal must, in the end, defend his partisanship and not evade it."

50 Galston, *Liberal Purposes*, at 18.

outcome is ruled out by many liberals as an attainable state of affairs. Certain ways of life will inevitably suffer. Rawls concedes this:

> The principles of any reasonable political conception must impose restrictions on permissible comprehensive views, and the basic institutions those principles require inevitably encourage some ways of life and discourage others, or even exclude them altogether.[52]

The discouragement of certain ways of life might, says Rawls, occur for two reasons. The way of life might directly conflict with the principles of justice, for example, by advocating racial discrimination or even slavery. Second, the way of life may be admissible but simply fail to gain adherents under the liberal social order. Interestingly for present purposes, Rawls cites "certain forms of religion"[53] as examples of this second situation. He continues:

> Suppose that a particular religion, and the conception of the good belonging to it, can survive only if it controls the machinery of state and is able to practice effective intolerance. This religion will cease to exist in the well-ordered society of political liberalism.[54]

Is this unfair? Given a social world of limited space ("no society can include within itself all forms of life"[55]), if any ways of life must make way it would seem logical to expunge the illiberal ones:

> But if a comprehensive conception of the good is unable to endure in a society securing the familiar equal basic liberties and mutual toleration, there is no way to preserve it consistent with democratic values as expressed by the idea of society as a fair system of cooperation among citizens as free and equal. This raises but does not of course settle, the question of whether the corresponding way of life is viable under other historical conditions, and whether its passing is to be regretted.[56]

4 Privatisation

The well-recognised strategy of liberalism is to confine religion to the private realm.[57] As Basil Mitchell notes: "Religion, says the new liberalism, is a private matter. It belongs to

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51 I am quoting Waldron here: see his "Legislation and Moral Neutrality," at 166.
52 Rawls, *Political Liberalism*, at 195.
53 Ibid at 196.
54 Ibid at 196-197.
55 Ibid at 197.
56 Ibid at 198.
57 Lloyd Geering, speaking of New Zealand, observes: "It is one of the marks of religion in the Secular Age that religion becomes more and more privatized, while the state organs, through which the nation as a whole operates, become religiously neutral.": "New Zealand enters the Secular Age," in Nichol and Veitch (eds), *Religion in New Zealand* (1983) 161 at 170.

the realm of ideals, not to that of interests. It follows that religious considerations, as they affect morality, should have no place in law making."[58] Stanley Fish adds: "the liberal feels obliged to quarantine religious pronouncements, to confine them to contexts (the home, the Church) that present the least risk of infection."[59] As a New Zealand Christian commentator noted recently:

> Church is now generally regarded as something you do in private—like Rotary or stamp collecting—which shouldn't be allowed to have an impact on public or even professional life.[60]

The view of conservative political theory is markedly different. Religion is an indispensable device to foster public morality and preserve social order. Religion, or at least traditional, incumbent religious institutions, are important *public* institutions. Roger Scruton, for example, notes:

> If conservatism deserves our attention for nothing else, it is at least for having recognized these difficulties [concerning the interface of politics and religion], and for having refused to consign to the private realm (the realm of "consenting adults") a phenomenon that is manifestly public both in its content and in its effects. For the conservative, as for the socialist, the public and the private are far more intricately intertwined than the liberal tends to acknowledge.[61]

For some liberals privatisation is a benign strategy. Religion is consigned to the private realm out of respect for and solicitude towards it. Liberalism tends "to relegate that which is most important to the private sphere"[62] and religion is one of these cherished institutions. Under this view religion is being left alone and is protected from invasive public regulation.

Privatisation of religion is achieved through a careful drawing of the boundary between public and private life (obviously itself a contentious dichotomy). Frederick Gedicks' exposition is particularly lucid:

> [O]ne of the key tasks of contemporary liberal politics is to police the boundary between public and private life by distinguishing value from fact and desire from reason. Beliefs or values that reside in private life are suspect as a basis for government action unless they can be relocated in public life as facts or reasons. Only when

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58 B Mitchell, *Law, Morality, and Religion in a Secular Society* (1970) at 100.

59 Stanley Fish, "Liberalism Doesn't Exist" [1987] Duke LJ 997 at 999.

60 M McMillan, "A Bigger Ghetto or a Brighter Bride?", *Reality*, Oct/Nov 1998, 23 at 25.

61 Scruton, "What is conservatism?", at 28.

62 Theodore Y Blumoff, "The New Religionists' Newest Social Gospel: On the Rhetoric and Reality of Religions' 'Marginalization' in Public Life" (1996) 51 U Miami L Rev 1 at 5.

> confirmed by widely shared human experience, scientific investigation, or reasoning from premises that can be verified by experience or investigation does a belief qualify as knowledge upon which government legitimately can act.[63]

Having drawn a dichotomy whereby one category (public life) is reserved for scientific facts, empirical evidence and reason, and another category (private life) is set aside for values, beliefs and personal preferences, the fate of religion is sealed. Gedicks continues:

> As one of the purest contemporary expressions of subjective, impossible-to-confirm values, religious beliefs need not (and, indeed, cannot) be considered by those who act in public life. Liberal government thus treats religious beliefs neutrally—as a subjective value preference restricted to private life, rather than as objective knowledge proper to public life.[64]

Why is religion privatised? Liberalism gives at least three answers. First, the neutrality argument again. The liberal state cannot espouse any one particular controversial conception of the good, cannot "impose" beliefs, religious or otherwise, upon others.[65] (This position is however, as we have seen, under-cut by some liberal theorists' admission that liberalism does promote a substantive conception of the good.) Second, there is the epistemological objection. Religion is viewed as an inferior source of knowledge, being private, inaccessible, speculative and irrational. This argument, however, is susceptible to the charge that the liberal overlooks or exaggerates the rationality of science and underestimates the rationality or reasonableness of religion. Third, there is the recurrent fear that religion, when introduced into the public sphere, is simply too divisive.

The last reason requires further comment: the "contemporary liberal nightmare"[66] of religious and sectarian conflict is a powerful and persistent (and understandable) one. The

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63 F M Gedicks, "Public Life and Hostility to Religion" (1992) 78 Virg L Rev 617 at 678.

64 Ibid at 679.

65 Frederick M Gedicks and Roger Hendrix, "Democracy, Autonomy, and Values: Some Thoughts on Religion and Law in Modern America" (1987) 60 S Cal L Rev 1579 at 1597 observe: "The religious experience and its accompanying morality, it is argued, are matters of personal piety and unyielding convictions; bringing one's religious beliefs into the public arena as predicates for government action is, therefore, highly inappropriate, a public imposition of private and personal beliefs." See also Rawls, *Political Liberalism*, at 179-180: "The difficulty is that the government can no more act to maximise the fulfilment of citizens' rational preferences, or wants (as in utilitarianism), or to advance human excellence, or the values of perfection (as in perfectionism), than it can act to advance Catholicism or Protestantism, or any other religion. None of these views of the meaning, value and purpose, of human life, as specified by the corresponding comprehensive religious of philosophical doctrines, is affirmed by citizens generally, and so the pursuit of any one of them through basic institutions gives political society a sectarian character."

66 Gedicks, "Public Life," at 684.

sixteenth and seventeenth century wars of religion are "the relevant historical memory"[67] for liberal theorists, such as Rawls, when they consider the public role of religion today. Bosnia and Northern Ireland provide a contemporary reminder, if one was needed. Privatisation attempts to dampen religious fervour. William Marshall suggests:

> If religion is seen as private and not universal, there is less imperative to conquer the religious beliefs of others. Instead of viewing the religious beliefs of others as a challenge to an individual's belief structure, the individual who accepts privatization sees others' beliefs as routine and non-threatening. The only threat occurs when others violate the privatization norm by seeking to use the public square for their own religious purpose.[68]

The question remains, however, whether religious fervour compared to secular, ideological, ethnic or any other enthusiastic, mass promotion of a cause is *especially* dangerous and deserving of restraint. For those insisting on a strict separation of church and state and the exclusion of religion from public life, the Enlightenment nightmare of incessant religious conflict and division may well have "assumed the character of an unquestioned assumption of eternal validity."[69] But others see religion as no more a threat to modern social cohesion and political stability than rival ideologies or "isms" of various kinds.[70] Indeed, as Schwarzchild counters:

> Religion seems an odd choice as prime threat to liberalism at the end of a century that has been so greatly dominated by struggles over Communism, fascism, and extreme nationalism . . . For most of the twentieth century, at least outside the Islamic world, illiberal politics have overwhelmingly been Communist politics, or the politics of essentially secular forms of fascism, nationalism, or Third World socialism: the politics, one might say, of the Enlightenment's illegitimate heirs, liberalism's bastard siblings. These movements, in our time, loosed the demons that the Enlightenment was supposed to

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67 Bernard G Prusak, "Politics, Religion and the Common Good," *Commonweal*, 25 Sept 1998, 12 at 17 (quoting US Catholic political theorist, David Hollenbach).

68 William P Marshall, "The Other Side of Religion" (1993) 44 Hastings L J 843 at 861-862.

69 James Hitchcock, "Church, State and Moral Values: The Limits of American Pluralism" (1981) 44 Law and Contem Prob 3 at 8. Similarly, Gerard V Bradley, "Dogmatomachy—A 'Privatization' Theory of the Religion Clause Cases" (1986) 30 St Louis ULJ 275 at 303 argues: "The [Supreme] Court is clearly engaged in an entirely prophylactic effort, one that has constitutionalized the relationship of church to state without *any empirical* confirmation of the [divisiveness] 'evil' that assertedly justified it." (Original emphasis).

70 Douglas Laycock, "Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century" (1996) 80 Minn L Rev 1047 at 1094-1095: "It is not that 'religion' is 'inherently intolerant and persecutory'; rather, the risk of intolerance and persecution is a risk of any human movement organized for a common purpose. I see no reason to believe that religion presents a risk different in kind or degree from the risk of secular ideologies."

exorcise: dogma, intolerance, mass enthusiasm, and total war.[71]

5 *Rationality*

Liberalism is a child of the Enlightenment[72] and so it would be unsurprising if liberalism did not give primacy to reason.[73] The autonomous individual makes choices on rational grounds. Such persons, in the liberal conception, are "suspicious of and feel nervous in the presence of, feelings and emotions, especially those that are deep and powerful and not fully comprehensible to reason or easily brought under control."[74] The legacy of the Enlightenment and its antipathy to tradition, mystery, awe and superstition as ordering principles cannot be underestimated.

In superstition's place was put reason—everything has to answer, as Waldron puts it, at "the tribunal of reason."[75] At the bar of reason, religion is typically found wanting. Religion is usually associated by liberals with subjectivism and emotion, with superstition. Liberals are concerned with sterner stuff. Cook, a liberal critic, criticises the liberal attitude:

> Conceptually, liberalism—given its emphasis on the rational, empirical, and factual—sees questions of religions faith as a set of speculative assertions incapable of rational verification or disproof. Liberalism has, then, a structural bias against religious knowledge. The empirical orientation of the former has deemed the transempirical faith of the latter irrational from the start.[76]

Again, we might pause to contrast the liberal with the conservative political view. The latter is committed to defending tradition, the "tacit understanding of social forms".[77] There is what Scruton refers to as "the conservative defence of prejudice—of the instinctive moral sense whereby people come to act with understanding, even though they have no

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71 Maimon Schwarzschild, "Religion and Public Debate in a Liberal Society: Always Oil and Water or Sometimes More Like Rum and Coca-Cola?" (1993) 30 San Diego L Rev 903 at 911. See also Gedicks and Hendrix, "Democracy, Autonomy and Values," at 1591: "The most profoundly horrible atrocities of the 20th century have been committed by unambiguously secular regimes—Nazi Germany, Stalinist Russia, Maoist China, Khymer Rouge Cambodia."

72 And, some would argue, it is equally a child of the Protestant tradition especially Puritanism: Stephen Mott, *A Christian Perspective on Political Thought* (1993) ch 9 at 131.

73 Vincent, *Modern Political Ideologies*, at 25, notes: "The Enlightenment signalled the full and experimental use of reason in human affairs. Theology, economics, politics, law and philosophy were all profoundly affected. No longer was authority in religion or politics unquestioned."

74 Parekh, "Cultural Particularity", at 158.

75 Jeremy Waldron, "Theoretical Foundations of Liberalism" (1987) 37 Phil Q 127 at 134. See also Greenawalt, *Religious Convictions*, at 24: "in liberal theory, rationality may be contrasted with reliance on personal intuition, feeling, commitment, tradition, and authority as bases for judgment."

76 Cook, "God-Talk", at 436.

77 Scruton, "What is conservatism?" at 6.

understanding of why they act."[78] Prejudice is not blind or irrational behaviour but "is 'pre-judgment', a distillation of experience over generations."[79] Conservatism has a much more benign view of religion or at least traditional, institutional religion. Edmund Burke, for example, saw religion as "the basis of civil society and the source of all good and of all comfort."[80] Scruton submits:

> Conservatism has seen religion as a necessary bulwark to morality, and morality as a sine qua non of social order. Religion, however, when it breaks free from institutions, and elects the individual conscience as its sovereign, is as much a danger to the social order as a support to it. It can never be a matter of indifference when the institutions of religion decline, or impetuously discard to their inheritance. The conservative vision of a stable establishment has therefore always made room for churches, and sought to protect them with the legal privileges suited to their spiritual task . . . [r]ecognising that values are more easily destroyed than engendered, the conservative will naturally sympathise with the religious worldview.[81]

6 Progress

A core characteristic of liberalism is, as Gray posited earlier in this chapter, that it is *meliorist*, "in that it asserts the open-ended improvability, by the use of critical reason, of human life."[82] Many liberals thus have a doctrine of progress: "some notion of improvement in moral and political understanding and behaviour is fundamental to any form of liberalism."[83] Modernity's belief in progress is, suggest some, but a secularised substitute for the Christian eschatological hope: "The providence of God guiding the historical process toward eschatological fulfillment is replaced by a philosophy of progress guided by the predictive power of science and technology and promising a future of worldly happiness."[84]

II THE "WELLINGTON WORLDVIEW"

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78 Ibid at 3.
79 Vincent, *Modern Political Ideologies*, at 73.
80 T Mahoney (ed), *Reflections on the Revolution in France* (1790)(1955 ed) at 102. Quoted in Mott, *A Christian Perspective*, at 117.
81 Scruton, at 27-28
82 Gray, *Liberalism*, at 86.
83 Song, at 43.
84 Wolfhart Pannenberg, "How to Think about Secularism", *First Things*, June/July 1996, 27 at 29.

Most of the political and bureaucratic elite have never heard of John Rawls or Ronald Dworkin nor read abstruse books on liberal political theory. Very few, if any, of the governing elite subscribe to secular humanism per se (the bogey man of many conservative Christians, as we saw in the previous chapter) in the sense that they are "card-carrying" members, consciously adhering to humanism's tenets, advocating its goals, attending meetings and so on. Rather, it would be more accurate to say there subsists, among the powerful and influential, a prevailing, and largely unconscious, worldview.

Secular liberal thought and values operate by way of subconscious absorption or "osmosis."[85] For all practical purposes, for "getting things done" in public life, there is, as James Davison Hunter suggests (when speaking of the American scene), a "latent moral ideology" or a "tacit faith", held by the so-called "knowledge sector"—professors, journalists, media elites, lawyers and educators.[86] Secularism, he argues, has become "the dominant moral ideology of American public culture and now plays much the same role as the pan-Protestant ideology played in the nineteenth century."[87] Hunter summarises as follows:

> Secular humanism in American public life is neither an all-embracing and self-aggrandizing religion conspiring to control American institutions, nor is it a fiction manufactured by the religious right as a scapegoat for all the problems they see. Where secular humanism can be described accurately as a sectarian religion, it has almost no impact on American institutions. Yet where it does have an impact (as the latent moral ideology of the intellectual classes, of the media of mass communications and of public education, and the like) it does so as a relatively diffuse moral ethos rather than as a religion.[88]

In the United Kingdom, Ninian Smart similarly suggests: "The most influential world view in the ruling echelons of British life is scientific humanism, which lives unreflectively together with various forms of more or less liberal Christianity." [89]

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85 The absorption of culture and foundational values by "osmosis" is discussed by Ruth Smithies, "Gospel and Culture", in Patrick (ed), *The Vision New Zealand Congress 1997* (1997) ch 6 at 100. Smithies relates the familiar illustration of the frog, When dropped into a pot of boiling water it will immediately jump out. But placed in a pot of cold water with the vessel slowly heated until boiling point the frog remains in the pot with disastrous consequences.

86 James D Hunter, "Religious Freedom and the Challenge of Modern Pluralism" in Hunter and Guinness (eds), *Articles of Faith, Articles of Peace* (1990) ch 4 at 66-67.

87 Ibid at 57.

88 Ibid at 71.

89 Ninian Smart, "Church, Party, and State," in Badham (ed), *Religion, State and Society in Modern Britain* (1989) ch 20 at 386. Muslim scholar, Tariq Modood, "Establishment, Multiculturalism and British

In New Zealand it would be surprising if the prevailing "Wellington worldview"—the mindset of the vast majority of parliamentarians, bureaucrats, consultants, academics, business leaders, company directors, news media editors and journalists, medical specialists and doctors, judges and lawyers, and so on—were not a modernist or scientific humanist one. It is difficult, I concede, to substantiate this claim for, *ex hypothesis*, a worldview is the taken-for-granted way of conceiving reality, the "*un*articulated premises" (à la Oliver Wendell Holmes) which require no articulation.

To reiterate, few belong to humanist or rationalist societies—in New Zealand these are small, peripheral groups with low memberships. But the modernist worldview nonetheless remains the ascendant one, the "diffuse moral ethos and latent ideology" of those in positions of influence, especially regarding formulation of public policy. The prevailing "plausibility structure"[90] is one shaped by modernist ideals. Faith, the spiritual realm, God, these are matters for private taste. John Stenhouse, in an essay sympathetic to the efforts of several early New Zealand fundamentalists, observes:

> There are not many modern intellectuals whose basic intellectual outlook is not fundamentally antithetical to that of such fundamentalists. Nowadays the basic intellectual assumptions of most are shaped and informed by scientific naturalism with its implicit anti-supernaturalism and the pervasive agnosticism of post-Kantian philosophy . . . fundamentalists appear rather like beings from another planet, and invite caricature and dismissal rather than understanding.[91]

Trevor de Cleene, a former Minister of Revenue in the Lange Labour Government expressed (in a newspaper article on euthanasia) what is a common secularist view: "Frankly, it is my personal view that if a medical practitioner lets his or her view of religion come into a professional judgment, then such a person should not be practising medicine in the first

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Citizenship" (1994) 65 Political Q 53 at 60-61, likewise argues: "[S]ecularism in its various forms is *the* dominant ideology; and one which is more dominant in London than in the regions, more amongst 'the chattering classes' than outside it, more at the political and cultural centre then at the periphery. Indeed, it is no exaggeration to say that secularism is one of the principal '-isms' which define the political and cultural centre of this country."

90 See Peter Berger, *The Social Reality of Religion* (1969) ch 6 (Secularization and the Problem of Plausibility).

91 Stenhouse, "Fundamentalism and New Zealand Culture," in Gilling (ed), *"Be Ye Separate": Fundamentalism and the New Zealand Experience* (1992) 1 at 7.

place."[92] An incident in April 1997 illustrates this secularist attitude. A doctor was censured by the Heath and Disabilities Commissioner after he suggested prayer as a form of treatment to a patient. The patient declined this suggestion. The doctor, a Christian, nonetheless prayed for his patient and told him that all science pointed to religion and God as the truth. Following a complaint, Robyn Stent, the Commissioner, ruled that he must apologise to the patient, his actions having breached the latter's right to freedom from exploitation and coercion and his right to give informed consent to the treatment.[93]

To describe the prevailing New Zealand secular worldview of the Pakeha elite in terms of Walsh and Middleton's four worldview questions (Chapter 2) yields something along the following lines:

> *Who am I?* I am an autonomous individual *(homo autonomous)*, master of my own destiny.
>
> *Where am I?* I stand in a world of natural potential and my task is to utilise that potential for society's betterment.
>
> *What's wrong?* I am hindered by ignorance of nature and lack of tools for controlling it.
>
> *What's the remedy?* My hope rests in the good life of progress wherein nature yields its bounty for human benefit. Only then will people find happiness in a life of material affluence, with no needs nor dependence. There is no God to help me, no supernatural intervention can assist me. I must help myself through my own creative intelligence.[94]

Three characteristics of this mindset are worth brief elaboration.

Ontology

The Wellington worldview assumes a specific ontology—a particular picture of reality, or what is ultimately real. Phillip Johnson refers to the contemporary Western metaphysical or ontological position as *scientific naturalism* or simply *naturalism* for short.

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92 T De Cleene, "Thou shalt die with dignity and mercy", *NZ Herald*, 30 Oct 1992: quoted in McMillan, "A Bigger Ghetto," at 25.

93 "Praying doctor must apologise", *Otago Daily Times*, 5 Dec 1998, at 7. See Heath and Disability Commissioner, Report on Opinion—Case 97HDC7400 (3 April 1998). The Commissioner found a breach of Right 2 and Right 7(1) of the Code of Health and Disability Services Consumers' Rights. This report is available from the Health and Disability Commissioner website: www.hdc.org.nz.

94 I adapt this from Walsh and Middleton's description of the (unarticulated) worldview of typical North Americans. See their *Transforming Vision*, at 36.

This is "the doctrine that nature is 'all there is'."[95] Although many of the initial founders of liberalism (for example, Locke) were theists, the modern liberal accepts, usually implicitly, the naturalistic account of the world.[96] Johnson explains:

> Modernism's metaphysical foundation rests firmly on scientific naturalism, which is "the way things really are". Through science we now know that nature, of which are a recently evolved part, really *is* a closed system of material causes and effects, whether we like it or not. Any other system—particularly one based on the supposed commandments of a supernatural being—would therefore be founded on illusion rather than reality. God is a product of the human imagination, not the Creator of us all . . .
>
> Modernist naturalism is equivalent to rationality because it excludes consideration of miracles, defined as arbitrary breaks in the chain of material causes and effects . . . Most modernists' identification of naturalism with rationality is so complete that they do not think of naturalism as a distinct and controversial metaphysical doctrine but simply assume it as part of the definition of *reason*.[97]

Epistemology

Closely related to its ontology is its epistemology, what counts as knowledge. Knowledge is that which is empirical, factual, discoverable by reason—it is data which is, in principle, available to every citizen.[98] Again one is driven back to the Enlightenment. According to Waldron, for liberals:

> the social order must be one that can be justified to the people who have to live under it. We have seen that the Enlightenment impulse on which this is based is the demand of the individual mind for the intelligibility of the social world. Society should be a *transparent* order, in the sense that its workings and principles should be well-known and available for public apprehension and scrutiny.[99]

Under this view, religion and religious knowledge appears to be an "epistemologically inferior" system of belief or values from which to conduct public debate and make public

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95 Phillip E Johnson, *Reason in the Balance: The Case Against Naturalism in Science, Law and Education* (1995) at 7.

96 Ibid at 40.

97 Ibid at 46 (original emphasis).

98 Johnson, *Reason in the Balance*, at 47.

99 Waldron, "Theoretical Foundations," at 146 (original emphasis). See also Greenawalt, *Religious Convictions*, at 55 et seq: "[T]he thesis that political decisions should be made on naturalistic, nonreligious, publicly accessible grounds is a claim about the ethical import of liberal democracy . . . The common theme of the [liberal] writers is that the grounds of decision should have an interpersonal validity that extends to all, or almost all, members of society; decisions should be based either on commonly shared premises or on modes of reasoning that are accessible to everyone."

decisions.[100] An anecdotal illustration. In the parliamentary debate on a voluntary euthanasia measure, the Death with Dignity Bill 1995, Bill English, a National MP, noted that nonreligious arguments carried much more weight than theological ones: "As a Catholic politician I regret that a key part of defeating the bill was to show that the arguments against it were procedural, practical and political, not just moral. However the moral arguments are in the end the strongest."[101]

Decisions based upon faith and divine revelation appear inherently undemocratic, coming as they do from a source of knowledge not available or readily accessible to others.[102] Moreover, not only are religious grounds lacking in accessibility they also are dangerous: they have the potential to re-ignite old sectarian or religious passions long thought to be buried following the rise of the liberal secular state. [103] The epistemological attack upon religion is criticised in trenchant terms by Cook:

> The increasing secularism of the modern, founded on a faith in the capacity of human reason and rooted in empiricism, rejects systems of knowledge grounded in faith as superstitious nonsense on stilts, unreceptive to human verification or disproof. Liberalism marginalizes religious epistemologies, sequestering them within the narrow confines of private life in the hope that the havoc they might engender, if let loose in the public side of democratic demolition, will be prevented. [104]

To the liberal, the accusation that liberalism is biased or hostile to religion is to make a "category mistake."[105] Gedicks explains:

> The liberal argument is that because the claims of religion are not amenable to empirical or rational proof, they are fundamentally different from the claims of secular ideologies and disciplines and can be proven rationally or empirically and thus need not be dealt with in the same way. Secular enterprises yield knowledge, which the liberal state is bound to accept; religion only yields unprovable beliefs about

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[100] William Marshall, "The Other Side of Religion" at 845 notes: "The response to this attack [by religionists against exclusion from public decision making] has rested primarily on epistemological grounds. It has been contended that because religious principles are based on faith rather than reason, they are no commonly accessible to the polity and, therefore, cannot serve as a basis for political discretion making. According to this view, religion is an epistemologically inferior belief system from which to construct norms of public behaviour and morality."

[101] "Euthanasia debate: 'politics working well'," *The Tablet*, 10 Sept 1995, at 11. For a full discussion, see Ahdar, "Religious Parliamentarians and Euthanasia: A Window into Church and State in New Zealand" (1996) 38 JCS 569.

[102] Johnson, *Reason in the Balance*, at 47.

[103] Kathleen M Sullivan "Religious and Liberal Democracy" (1992) 59 U Chicago L Rev 195 at 197-198.

[104] Cook, "God-Talk", at 437-438.

[105] Gedicks, "Public Life and Hostility to Religion" at 693.

the good, as to which the liberal state must remain neutral.[106]

Once the dichotomy between "science, reason and knowledge" versus "religion, faith and belief" is accepted, the former is readily found to trump the latter.[107] In terms of the split between public and private life, it becomes immediately obvious that (to remain rational, ordered and accessible), public life must be secular, with religion confined to private life.[108]

Ethics

The prevailing worldview refuses to be tied to a timeless, absolute moral code such as that provided by some religions. Ethics are relativistic and anthropocentric. Ethical relativism "claims there is no way to justify a single morality as the *correct* one and others as *mistaken*."[109] As one MP put it in the debate on homosexual discrimination law, "one person's belief is another person's heresy."[110] Those who insist on a single version of morality are entitled to their opinion but cannot expect to have it imposed on others nor translated into law. Michael Cullen MP, during the same debate, tersely reminded the ethical absolutist lobbyists:

> I say to those people who have a moral abhorrence of homosexual acts that nothing in the Bill prevents them holding the view that they hold . . . that they are welcome to live according to the lights of their own morality. The legislation says their rights stop at the end of their nose, that they cannot impose their views on other people . . .[111]

The modernist worldview may be the ascendant one but it is not the exclusive one. Other worldviews compete for ascendancy. New Zealand is really in a period of transition. As I argued in Chapter 1, the Christian worldview, once dominant culturally, is waning and is being supplanted by a secularist liberal one. But the demise of the former is not total and the triumph of the latter is not complete. At least one major complicating factor is the acknowledgement in the last two decades in New Zealand of a traditional Maori worldview.

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106 Ibid at 693-694.

107 Johnson, *Reason in the Balance*, at 10.

108 Gedicks, "Public Life," at 695-696: "Liberalism politically privileges Secularism over religion by naming public life (the realm of secularism) rational and orderly and private life (the realm of religion) irrational and chaotic."

109 Victor Grassian, *Moral Reasoning* (1981) at 28 (emphasis in original).

110 Michael Laws MP in the third reading of the Human Rights Bill 1993: (1993) 537 NZPD 16976.

The renaissance in Maoridom in the last two decades is reflected in many ways. In public ceremonial occasions a prominent place is given to Maori. Peter Donovan argues:

> We in New Zealand do not have an established church, but we do have an increasingly accepted civil religion. With growing public recognition of biculturalism and Treaty partnership ideals, Maori ceremonial has come to take on much of the role of official public and community spirituality. It is Maori tradition, after all, that nowadays provides the means for appropriately laying to rest public figures, dealing with the shock and grief of tragedies, solemnising the opening of buildings, the commencement of conferences and cultural festivals, the launching of frigates, and so on.[112]

In law the Maori resurgence is abundantly documented, the prime example being the resurrection of the Treaty of Waitangi to a quasi founding-document status. Recognition of Maori cultural values, which inescapability includes spiritual concerns, is virtually de rigeur in recent social (and other) legislation. I will simply take two examples to illustrate the incursion of the Maori worldview.

The family law statute which most explicitly acknowledges Maori interests is the Children, Young Persons and Their Families Act 1989.[113] The Director-General of Social Welfare is required in all policies adopted and all services provided by the Department to "have particular regard for the values, culture, and beliefs of the Maori people".[114] The Act recognises and supports the role of the distinctive Maori forms of collective life, namely, the whanau, hapu and iwi. Policies ought to "avoid the alienation of children and young persons from their family, whanau, hapu, iwi and family group."[115] Similarly, numerous custody cases reveal Family Court judges are sensitive to the cultural and spiritual benefits a traditional Maori upbringing can give to a child.[116]

In environmental law the acknowledgement of a Maori worldview is perhaps clearest of all. A trilogy of sections in the Resource Management Act 1991 provide the mandate:

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111 (1993) 537 NZPD 16974.

112 P Donovan, "Civic Responsibilities of the Churches to People of Other Faiths" in Ahdar and Stenhouse (eds), *God and Government: The New Zealand Experience* (2000) ch 4 at 81-82.

113 See generally W Atkin and G Austin, "Cross-cultural Challenges to Family Law in Aotearoa/New Zealand" in Lowe and Douglas (eds), *Families Across Frontiers* (1996) ch 22 at 331 and Joan Metge and Donna Durie-Hall, "Kua Tutu Te Puehu, Kia Mau: Maori Aspirations and Family Law" in Henaghan and Atkin (eds), *Family Law Policy in New Zealand* (1992) ch 2 at 74 et seq.

114 Section 7(2)(c)(ii) of the Act.

115 Section 7(2)(c)(iii). See also s 13 and s 4(a)(i) and (c), as well as the Long Title.

116 See eg *Rikahana* v *Parson* (1986) 4 NZFLR 289; *Makiri* v *Roxburgh* (1988) 4 NZFLR 673; *Capes* v *Capes*, unrep, Family Court, Hastings, FP 020/202/88, 4 May 1990, Judge Inglis QC, at 5-6.

> **6. Matters of national importance**—In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall recognise and provide for the following matters of national importance . . .
>
> (e) The relationship of Maori and their culture and traditions with their ancestral lands, water, sites, waahi tapu, and other taonga.
>
> **7. Other matters**—In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall have particular regard to—
>
> (a) Kaitiakitanga: [and, pursuant to section 2] " 'Kaitiakitanga' means the exercise of guardianship by the tangata whenua of an area in accordance with tikanga Maori in relation to natural and physical resources; and includes the ethic of stewardship . . . ".
>
> **8. Treaty of Waitangi**—In achieving the purpose of this Act, all persons exercising functions and powers under it, in relation to managing the use, development, and protection of natural and physical resources, shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).

Expanding upon kaitiakitanga, one commentator explains that it "refers to the act of applying the celestial and terrestrial curricula to guard the mauri (life-force) of the resource and the wairua (ordained spirit) of the relationship of the people with resource as a creation from God."[117]

Quite how local authorities and the Environment Court practically take into account Maori spiritual values is an interesting question (and another thesis in itself).[118] Certainly, some commentators are irritated at the requirement to entertain such metaphysical concerns. As one mocked:

> If my Maori neighbour claims that I am polluting the stream which runs through both our properties with diary waste we can analyse the water before and after it flows through my property and present the evidence to a hearings committee or a Court. The evidence should carry the day. But if my Maori neighbour claims that my developments are upsetting the mauri or life force of the water then I can mount no evidence to refute the claim. Similarly I should have

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[117] W M Kairaitiana, "Core Values and Water Resources" [1999] NZLJ 337 at 340.

[118] For a helpful overview (by a non lawyer) see Mason H Durie, *Te Mana Te Kawanatanga: The Politics of Maori Self-Determination* (1998) ch 2.

> no power to insist that my neighbours plant their crops according to the signs of the zodiac . . .
>
> In reality all manner of races, groups and cultures have spiritual values and we should have learned to keep them out of the legislative arena as much as we can. By definition such values are subjective and yet strongly shape our perceptions. But a Court or hearing is a poor venue in which to debate competing perceptions. We do not live in a theocracy.[119]

It is difficult to generalise from the case law but there is some indication that while Maori spiritual values are taken into account they seldom have decisive weight. To take a recent example, in *Mahuta* v *Waikato Regional Council*, the Environment Court found no adverse effects on the physical environment from a proposal by Anchor Products to expand its dairy factor. The Waikato river would not be harmed. However, local Maori elders testified that the development would constitute "an assault on the spirit and mind" of their people, "an offence to their ancestors", and "desecrate the waters [and] . . . further damage the mana of Waikato-Tainui and their special relationship with the river."[120] Given, however, that there was no harm to the river—no physical, empirical, scientific adverse effects—and that the company had taken strenuous measures to accommodate Maori concerns, the requisite consent would be granted. The Court conceded that the only matter not fully provided for was the concern about spiritual pollution of the river,[121] but, regrettably, "perceptions which are not presented by tangible effects do not deserve such weight as to prevail over the proposal and defeat of it."[122] A summary by two lawyers seems fair: "alleged harm to Maori cultural and spiritual values based on matters of perception . . . appears likely to be preferred by the Court—unless supported by appropriately qualified expert opinion of tangible adverse effects."[123]

The Wellington worldview may in fact be a heterogeneous one comprising a fluid, plurality of worldviews. Anti-modernist counter examples can be pointed to. The Prime Minister, Jenny Shipley, for instance, ruffled secularist sensitivities in a March 1998 speech

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[119] Owen McShane, "Maori Issues and the RMA" [1999] NZLJ 346 at 346-347.

[120] *Mahuta* v *Waikato Regional Council*, Environment Court, Auckland, A 91/98, 29 July 1998, at paras 162-168.

[121] Ibid at para 265.

[122] Ibid at para 268.

criticising "political correctness". She referred to the pressure in education to "try and be so neutral to the point, that we have created almost an amoral environment" for children to learn in:

> We . . . know that where a child is spiritually nurtured, whether it's Christian faith, the Bhuddist [sic] faith or any other faith in the world . . . it gives that individual a greater level of confidence, to stand tall knowing who they are . . . Many people would argue that [secular education] was an important development when it was passed into law in New Zealand. Some would argue now that in fact it is an idea whose time has gone[;][t]hat with a modern education system where boards of trustees are in place, we should trust parents to decide what flavour and tone their school seeks to articulate in the charter and the law should be silent on this issue. I want to leave with you whether or not it is time to put our heads up in New Zealand and ask ourselves the question whether that neutrality has led us anywhere . . . When I hear people then argue that it is the fact that we are a secular society that is justification for us not to allow the traditions, whether they are cultural traditions or religious traditions to be practised in our learning institutions, again I can't help but wonder whether it's time we asked some of these fundamental questions.[124]

In a subsequent interview, the Prime Minister made it clear that a return to Christian schooling was not what she had in mind. In postmodernist pluralist language, she explained: "I want the visiting vicar, the visiting monk and the visiting Buddhist. I want children to be subjected to a wide range of spiritual experiences so that they can make a judgement of their own as to where their needs can be best met."[125] The Prime Minister's kite-flying initiative (apparently a personal speech,[126] and one yet to be implemented by the Government) drew predictable criticism. Mrs Shipley had simply "succoured the religious right"[127] wrote one journalist, while the editor of the *Sunday Star-Times* was dismayed. In its editorial, "Keep state out of spirituality", the paper remonstrated:

> Many New Zealanders have a more jaundiced view of the powers of religion [than the Prime Minister]. They can point to conflicts between Moslem and Jew, Christian and Christian, Christian and Jew, Hindu and Moslem, to illustrate what happens when that confidence of knowing who they are that Mrs Shipley speaks of, goes awry . . . This is an issue which will divide not enrich our

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123 Trevor Gould and Trevor Daya-Winterbottom, "Blood Sweat, and Fears" [1999] NZLJ 342 at 345.

124 Hon J Shipley, speech to the UNESCO "Values in Education" Summit, Wellington, 26 March 1998. A transcript of this speech can be found in the New Zealand Government web site.

125 Remarks made on the *Holmes* programme (a television current affairs programme), 26 March 1998 and reported in "Spiritual element 'needed'", *Otago Daily Times*, 27 March 1998, at 1.

126 Reportedly, she rejected her staff's prepared speech notes and composed it herself the night before while having her hair done: Ruth Laugesen, "Hail Captain courageous—This Prime Minister is willing to take risks", *Sunday Star-Times*, 29 March 1998, at C3.

127 Bruce Ansley, "That old-school religion", *NZ Listener*, 11 April 1998, 23 at 23.

lives. Mrs Shipley should back off now.[128]

Notwithstanding such counter-currents, my submission is that the New Zealand elite, while not without some who hold to conservative Christian and other worldviews, *by and large* is comprised of those who unconsciously adopt and practically operate upon secular liberal modernist premises.

III THE JUSTIFICATION FOR A SECULAR PUBLIC SPHERE

> Religious conviction is all very well when we come to private behaviour, what we might do behind closed doors, but it can have nothing to do with public policy because it has, by its very nature an inbuilt prejudice. For example, judge or teachers should not allow their personal beliefs to intrude into their professionalism. This view of life and politics has been accepted as normative in New Zealand for most of my lifetime.[129]

Judges and legislators (and lawyers) who are Christians must in practice operate upon modernist premises. Liberal democratic principle constrains them to do so. The basis for a judicial decision cannot be religious; the justification for why the defendant should be excused or why the law should prohibit *X* must not be a solely religious one. Stephen Carter characterises the notion that it is wrong for any government official to take conscious account of his or her religious understanding in performing their duties as a "liberal axiom":

> The liberal ideal is an objective judge . . . In order to fit the objective model, she must in effect promise that she will strive to put aside *all* of her prejudices and preconceptions. Her religious preconceptions are simply one part of this personal moral knowledge that she must promise to ignore. If her personal religious convictions should somehow leak into her reasoning process, she will have failed . . .[130]

Case law bears this out. Thus, for example, in *C* v *C*, an English custody case, Balcombe LJ observed:

> [I]n making a decision on welfare the judge should not be influenced by subjective considerations. To take an example: the issue may be whether the child is to be brought up in the faith of religion A or in that of religion B. The judge may be a member of religion A, and a firm believer in its tenets: nevertheless, he must try to ensure that his personal beliefs do not affect his judicial function in deciding where

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128 "Keep state out of spirituality", *Sunday Star-Times*, 29 March 1998, at A12.

129 Bruce Logan, "Public policy and religious conviction" (1995) 3 Stimulus 20 at 20 (italics omitted).

130 Stephen L Carter, "The Religiously Devout Judge" (1989) 64 Notre Dame L Rev 932 at 934 (original emphasis). See also Scott Idelman, "The Role of Religious Values in Judicial Decision Making" (1993) 68 Indiana LJ 433.

the child's welfare lies.[131]

The secular, liberal environment constrains public officials from invoking their religion directly. Religion must be "bracketed", to use the term favoured by some political and legal theorists.[132]

There is an unwitting or deliberate capitulation on the part of many Christians themselves. The charge of some Christian scholars is that Christians who do hold positions of influence too readily accept a secular framework of reference, a modernist worldview. Blamires, in *The Christian Mind*, lamented the fact that: "Except over a very narrow field of thinking, chiefly touching questions of strictly personal conduct, we Christians in the modern world accept for the purpose of mental activity a frame of reference constructed by the secular mind, and a set of criteria reflecting secular evaluations."[133] Phillip Johnson re-echoed this recently:

> The domination of naturalism over intellectual life is not affected by the fact that some religious believers and active churchgoers hold prestigious academic appointments. With very few exceptions, these believers maintain their academic respectability by tacitly accepting the naturalistic rules that define rationality in the universities. They explicitly or implicitly concede that their theism is a matter of "faith" and agree to leave the realm of "reason" to the agnostics.[134]

1 Why are religious reasons or justifications impermissible?

There is a voluminous and sophisticated debate among (mainly American) political philosophers on the propriety of religious argument and justification in public debate. The basic issue is not so much the fact of participation by religionists in public debate (this is conceded), but the reasons they give for their arguments and, to a lesser extent, the language they use.

Although the writing is often equivocal and opaque, few, if any, liberal theorists can be found who would bar religionists from the public arena. This would contradict liberalism's claims to neutrality and tolerance. Religionists can participate but they must have

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131 [1991] 1 FLR 223 at 230.

132 See eg Carter, *The Culture of Disbelief* (1993) at 56.

133 Blamires, *The Christian Mind*, at 4. This quotation distils the thesis of his first chapter, entitled "The Surrender to Secularism".

134 *Reason in the Balance* (1995) at 8.

a "secular", "public", "non-religious", "pragmatic" (terms vary) reason for the change they seek. Reliance upon religion *alone*, what the Bible or the Pope says, is insufficient and impermissible. This observation by Kent Greenawalt is typical:

> I assume that in a liberal democratic society neither officials nor citizens should seek legal prohibitions of actions simply because they are regarded as sins. Such prohibitions . . . lie too close to imposing religious views themselves on people to be proper. Thus, someone should not urge that consenting homosexual acts be penalised solely because she believes they are sins in the eyes of God or will bring bad consequences in an afterlife. The decision on prohibition should depend on harms and benefits that are comprehensible in nonreligious terms in this life.[135]

A religious reason can still be proffered but it must be accompanied by an adequate "secular"[136] or "public" reason for the advocacy. John Rawls has aptly dubbed this, "The Proviso." Clarifying his central concept of "public reason" recently, he submits:

> Reasonable comprehensive doctrines, religious or nonreligious, may be introduced in public political discussion at any time, *provided* that in due course proper political reasons—and not reasons given solely by comprehensive doctrines—are presented that are sufficient to support whatever the comprehensive doctrines introduced are said to support.[137]

When making important decisions, legislators and citizens, argues Rawls, cannot invoke reasons drawn from their comprehensive moral, religious or philosophical doctrines, but only from the concept of "public reason". This is "the reason of [a democracy's] citizens, of those sharing the status of equal citizenship." [138] Reliance upon one's particular religious faith or knowledge is impermissible. In Rawls' words:

> [O]n matters of constitutional essentials and basic justice, the basic structure and its public policies are to be justifiable to all citizens, as the principle of political legitimacy requires. We add to this that in making these justifications we are to appeal only 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 . . .
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> This means that in discussing constitutional essentials and matters of

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135 Kent Greenawalt, *Private Consciences and Public Reasons* (1995) ch 1 at 6.

136 Robert Audi dubs this "the principle of secular rationale": see his "The Place of Religious Argument in a Free and Democratic Society" (1993) 30 San Diego L Rev 677 at 691, and Robert Audi and Nicholas Wolterstorff, *Religion in the Public Square* (1997) at 25-28.

137 Rawls, "The Idea of Public Reason Revisited" (1997) 64 U Chicago L Rev 765 at 783-784 (italics supplied). Or, as he explains in plainer terms in an interview: "People can make arguments from the Bible if they want to. But I want them to see that they should also give arguments that all reasonable citizens might agree to": Prusak, "Politics, Religion and the Common Good," at 15.

138 Rawls, *Political Liberalism*, at 213.

> 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 . . . As far as possible, the knowledge and ways of reasoning that ground our affirming the principles of justice... are to rest on the plain truths now widely accepted, or available to citizens generally. Otherwise, the political conception would not provide a public basis of justification.[139]

It can be seen that "common sense", "science", the "accepted general beliefs" or "plain truths" are associated with secular knowledge and thinking, whereas the controversial and inaccessible are associated with religion. There is an initial and pivotal categorisation of knowledge and reasoning.[140]

Supporters of religion may explicitly, or implicitly, "load the dice" against religion by acceding to this crucial compartmentalisation whereby religion is deemed to be in the realm of faith (subjective, unprovable, speculative) *as opposed to* reason (empirical, objective, rational).[141] Carter unwittingly does this: "The effect of privileging rationality", he complains, "is to skew the public dialogue that liberalism demands, so that everyone has a voice except those whose epistemology rests on faith."[142] A brief example from the New Zealand euthanasia debate again: the Christian Democrat MP, Graeme Lee, began his attack upon the Death with Dignity Bill 1995 by emphasising the sanctity of life. However, a change of tack was called for: "But it is appropriate to continue to argue this Bill on a rational basis, the argument being that the Bill cannot be seen to be sustainable for any rational reason at all."[143]

For Rawls, "fundamentalists" (lumped in with "autocrats and dictators") are unable to make such public justifications.[144] Furthermore, they are excluded from his notion of an "overlapping consensus"[145] since their commitment to "the idea of public reason and

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139 Ibid at 224-225 (emphasis added).

140 As Michael McConnell points out: "Secular, 'objective' reasoning was the neutral stating point; any religious reasoning was 'controversial', 'subjective', and—in public matters—inappropriate." McConnell, " 'God is Dead and We Have Killed Him!'" at 174.

141 Larry Alexander, "Liberalism, Religion and the Unity of Epistemology" (1993) 30 San Diego L Rev 763 at 770 n 20 (emphasis in original).

142 Carter, "Religiously devout judge," at 939.

143 (1995) 549 NZPD 8421.

144 "Idea of Public Reason," at 805-806.

145 See Rawls, "The Idea of an Overlapping Consensus", at 14.

deliberative democracy" is purely contingent and pragmatic.[146] Those then who "assert that the religiously true . . . overrides the politically reasonable"[147] have reached the boundary of liberal, democratic tolerance.

Is liberal theory reflected in the New Zealand public square? This is again a difficult question to evaluate. It is hard, I submit, to find public policies or Acts of Parliament that are justified simply upon a religious basis today. Legislators do demand a secular rationale for their policies. In matters of obvious "moral" sensitivity—abortion, capital punishment, homosexual law reform, etc—a conscience vote usually applies. Understandably, freed from the dictates of the party whip, religious and theological arguments are frequently invoked in these occasions.[148] Even so, as I argued using the euthanasia debate as an example, secular "practical" "rational" arguments are still favoured by religiously-minded parliamentarians in convincing their colleagues.

IV THE LIMITS OF TOLERANCE

> Liberalism may be said to have originated in an effort to disentangle politics and religion. It has culminated in what I see as a characteristic liberal incapacity to understand religion. This incapacity has theoretical implications, for it prevents liberals from fully comprehending what is distinctive (and partisan) in their creed. Nor is it devoid of political consequences: Policies that liberals typically defend as neutral are experienced by many religious communities as hostile. Liberals see themselves as defenders of our constitutional faith, while many of the religiously faithful see themselves as victims of secularist aggression.[149]

1 The Problem of "Foreign Policy"

Liberal states are tolerant of religion. Indeed, religious liberty is "a defining feature of liberal democracy."[150] People appear relatively free to follow their religious aspirations—to pray, worship, spread their message and so on. It is a truism, however, in constitutional discourse that freedoms are seldom if ever unlimited: "rights are never absolute".[151]

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146 "Idea of Public Reason," at 806. He adds (ibid) "Unreasonable doctrines are a threat to democratic institutions since it is impossible for them to abide by a constitutional regime except as a *modus vivendi*."

147 Ibid.

148 See Ahdar, "Religious Parliamentarians", at 583-584.

149 William Galston, *Liberal Purposes* (1991) at 13.

150 Kent Greenawalt, *Religious Convictions and Political Choice,* at 18.

151 Richardson J in *R v Jefferies* (1993) 10 CRNZ 202 at 217 (CA).

Religious freedom is no exception. So, while liberal states grant religionists a large measure of freedom—indeed it should be acknowledged, greater freedom than in any other stage in recent world history and more freedom than that afforded religion in other "non-liberal" nations— there are still, necessarily, limits.

This illustrates the broader problem of "foreign policy" in political theory: any comprehensive philosophy or ideology must deal with those who oppose its basic tenets. Larry Alexander observes:

> Any comprehensive normative theory must deal with the problem of how to regard and deal with those who reject the theory itself ... Liberalism as a normative theory is not exempt from the problem of "foreign policy," the problem of how to treat nonliberal views and their proponents.[152]

Galston agrees: "A liberal democracy must have the capacity to articulate and defend its core principles, with coercive force if needed."[153] The legislative expression of this self-defence principle is contained in section 5 of the New Zealand Bill of Rights Act 1990, which denotes the broad basis upon which rights may be curtailed:

> **5. Justified limitations**— . . . the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

If liberalism is a distinctive, partisan ideology with particular bedrock tenets (an argument developed in Chapter 4), we would expect it to tolerate and accord favour to those belief systems, ideologies and religions which reflect liberal thinking and not otherwise. A "liberal" religion, a "religion that emphasizes rationality and individual discovery of truth and downgrades emotional commitment, scriptural revelation, and hierachical control"[154] would fit comfortably into a liberal framework. For example, in the debate on the abolition of the ban on shop trading at Easter, Katherine O'Regan MP commented:

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[152] Larry Alexander, "Liberalism, Religion, and the Unity of Epistemology", at 763-764. Another scholar observes: "That a political theory—*any* political theory—will create and retain for itself the means of its own survival . . . is a universal constant. That liberalism rejects conduct—and even speech—which undermines one of its basic tenets must be regarded as a given. Moreover, it is a constant with respect to all political theories. Thus, to expect that a liberal political regime would not embrace the power of self-defense is unreasonable.": Blumoff, "The New Religionists' Newest Social Gospel", at 24 (original emphasis).

[153] William Galston, "Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory" (1999) 40 Wm and Mary L Rev 869 at 904.

[154] Greenawalt, *Religious Convictions and Political Choice*, at 21.

> I will not go into the religious aspect today, although I must admit that the Mount Maunganui [retailers] brought to the select committee a minister of the church who supported the Bill. He hoped people would do both: he hoped they would go to church in the morning and go shopping in the afternoon. I thought he was a particularly enlightened vicar or minister.[155]

At its crudest, liberalism favours liberal religions and disfavours and suppresses illiberal ones. Edward Foley, for example, argues:

> [T]he political philosophy of liberalism necessarily divides religions into two categories: (1) liberal religions, which are those philosophically reasonable religions that accept the liberal position that the government must be impartial among all philosophically reasonable religions; and (2) illiberal religions, which are those that deny this liberal position and insist, instead, that the government endorse or favour their particular creed as the one true faith. While the government can maintain a position of neutrality among liberal religions, liberalism itself necessitates that the government must disfavour and discriminate against illiberal religions.[156]

In Rawlsian liberalism, for example, Rawls discusses the problem of those religions which insist that certain issues are so fundamental (in the sense that their or society's salvation depends upon it) that their right resolution justifies civil strife.[157] Rawls' reluctant answer to the foreign policy problem is suppression:

> In affirming a political conception of justice we may eventually have to assert at least certain aspects of our own comprehensive religious or philosophical doctrine (by no means necessarily fully comprehensive) . . . At this point [i.e. where religionists insist upon resolution of fundamental issues even up to the incurring of civil strife] we may have no alternative but to deny this, or to imply its denial and hence to maintain the kind of thing we hoped to avoid.[158]

There comes a certain point where liberalism, if is to remain intact as the governing ideology, must defend itself. Rawls explains that all religions respecting liberalism's conception of justice are welcomed (and liberalism is indifferent towards them) but, otherwise, beware:

> These opposing [religious, philosophical or moral] doctrines we assume to involve conflicting and indeed incommensurable comprehensive conceptions of the meaning, value and purpose of human life (or conceptions of the good). They are equally permissible provided they respect the limits imposed by the principles of political

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155 Hon Katherine O'Regan, Report back of the Commerce Committee on the Shop Trading Hours Act Repeal (Easter) Amendment Bill 1997: (1997) 562 NZPD 3470.

156 Edward B Foley, "Political Liberalism and Establishment Clause Jurisprudence" (1993) 43 Case Wes Res L Rev 963 at 973.

157 John Rawls, *Political Liberalism* (1993) at 152.

158 Rawls, *Political Liberalism*, at 152.

justice.[159]

Commenting upon this passage, Stephen Macedo explains: "Underline 'provided': All religions compatible with liberalism will be respected; those not compatible will be opposed. The liberal *must* in this way imply that religious convictions incompatible with liberalism are insupportable."[160]

2 *What is liberalism's limit?*

It might be thought that liberalism's tolerance for religion ceases at the point when religion advocates civil disorder or breach of the peace. Certainly, any religion promoting civil strife or violence would deserve close scrutiny and, if need be, direct curtailment. The liberal simply points to the standard Millian justification for restriction upon liberty, viz: "harm to others".

But liberalism is likely to be offended by less blunt, more intellectual challenges to its authority. "Tolerance is," according to one vocal liberal critic, "exercised in an inverse proportion to there being anything at stake."[161] Liberalism will defend itself when any of its fundamental premises are directly challenged. Religions that conform their beliefs and practices to liberal ways avoid trouble, but ones that do not court it. Jay Newman describes the liberal attitude in these terms:

> "We will tolerate your religious actions and beliefs only as long as they do not come into conflict with any of our major institutions; when they do, it is you people who will have to do the accommodating." . . . [E]ven in a liberal society, the member of a religious minority must "know his place" in order to survive, and he must be constantly mindful of the fact his liberal neighbours will only tolerate so much.[162]

Newman suggests that limit of tolerance is reached at the point of conflict with liberalism's "major institutions." One of these major institutions is the primacy of reason as the adjudicative criterion for public order. Stanley Fish sees religious conservatives' attack

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159 Rawls, "The Idea of an Overlapping Consensus", at 9.

160 Stephen Macedo, "The Politics of Justification" (1990) 18 Political Theory 280 at 289 (original emphasis).

161 Stanley Fish, "Almost Pragmatism: Richard Posner's Jurisprudence" (1990) 57 U Chicago L Rev 1447 at 1466.

162 Jay Newman, "The Idea of Religious Tolerance" (1978) 15 Am Phil Q 187 at 191.

upon reason—where (as liberals define it) reason is "a faculty that operates independently of any particular world view"[163]—as a central challenge:

> "Tolerance" may be what liberalism claims for itself in contradistinction to other, supposedly more authoritarian, views; but liberalism is tolerant only within the space demarcated by the operations of reason; any one who steps outside that space will not be tolerated, will not be regarded as a fully enfranchised participant in the marketplace (of ideas) over which reason presides.[164]

This would not be so devastating if reason was prepared to treat or accommodate religious knowledge as rational. But as we have seen, for liberalism, operating under naturalistic premises, such forms of knowledge have been ruled out in advance as subjective speculations suitable only for the private realm. As Phillip Johnson charges: "modernist tolerance stops at the point where the religious people start demanding that public institutions treat their subjective beliefs as if they might possibly be objectively true."[165] To acknowledge or accede to truth claims based upon divine knowledge is to risk destabilising the entire liberal edifice. Again, Fish explains this more eloquently than most:

> In this liberalism does not differ from fundamentalism or from any other system of thought; for any ideology—and an ideology is what liberalism is—must be founded on some basic conception of what the world is like (it is the creation of God; it is a collection of atoms), and while the conception may admit of differences within its boundaries (and thus be, relatively, tolerant) it cannot legitimize differences that would blur its boundaries, for that would be to delegitimize itself. A liberalism that did not "insist on reason as the only legitimate path to knowledge about the world" would not be liberalism; the principle of rationality that is above the partisan fray (and therefore can assure its "fairness") is not incidental to liberal thought; it *is* liberal thought . . .[166]

The problem is conservative religionists' "obdurate refusal to 'listen to reason'"[167](as that term is defined by secular liberals). They insist upon their concept of the good for all. They commit the cardinal liberal "sin" of "imposing one's beliefs upon others"[168], or at least trying to do so. Conservative Christians reject ideological or confessional pluralism. New Zealand today may be a pluralistic, multi-ethnic, multi-religious society, where "tolerance" is

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163 Stanley Fish, "Liberalism Doesn't Exist" [1987] Duke LJ 997 at 997.

164 Ibid at 1000.

165 Johnson, *Reason in the Balance,* at 48.

166 Fish, "Liberalism Doesn't Exist," at 1000 (the passage in quotation marks is from Stephen Carter).

167 Stanley Fish, "Mission Impossible: Settling the Just Bounds between Church and State" (1997) 97 Colum L Rev 2255 at 2283.

the ultimate virtue. Conservative Christians, however, stubbornly challenge the goodness of an ethical or moral pluralism and scorn the supposed worth of a diversity of views of the good life for its own sake.[169] There is *one* way revealed (through the Bible or the Church) for people to follow. A pluralism in fact is inescapable but a pluralism of beliefs is not. Conservative Christians, while they would (and did[170]) applaud the Prime Minister's 1998 attack upon a purely secular education, were decidedly uneasy at the prospect of other religionists having equal opportunity to propagate their faith in the nation's classrooms. Robert Jenson explains the root of the concern thus:

> The *ideology* of pluralism is, however, [for conservative Christians], quite another matter—though it too is old, as old as later antique civilisation. Pluralism as ideology is a rule for deciding what ideas or practices, besides pluralism itself, are to be approved. Tolerable ideas and practices are those that lead us unreservedly to applaud the fact of pluralism, and good ones are those that actively promote the proliferation of pluralism both factual and ideological.[171]

Conservative religionists decline to play along and refuse to take their place quietly in the pantheon. Truth has a public, universal character and must be proclaimed. Such views, when expressed, typically evoke a chorus of criticism. Advocates of this anti-pluralist thesis are typically called "fundamentalists", "intolerant", "bigoted", "fascist", "illiberal" and so on. Jenson believes an "asymmetry" is at work here. Whilst in theory all views are welcome, in reality, conservative religious ones are not. "This asymmetry", he suggests, "has a simple explanation: Judaism, Christianity, and Islam are in fact disruptive of the discourse shaped by pluralist ideology and so will naturally be ejected if possible."[172] In a telling passage, he comments:

> [W]hen we go on to ask *who* in fact is silenced and *when*, and what sorts of speech are offensive within the discourse of ideological

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168 Paul Marshall refers to "the common liberal piety that 'you can't impose your beliefs on others'": "Liberalism, Pluralism and Christianity: A Reconceptualization" (1989) 21 Fides et Historia 3 at 6.

169 See eg Daniel Taylor, "Deconstructing the gospel of tolerance" *Christianity Today*, 11 Jan 1999, 43. "I am inconsistent if I simultaneously assert both that what I believe is right and that I have no interest in having others agree with me or in seeing the whole society conform its practice to my views—unless, of course, I accept pluralism as a ruling value in itself and for its own sake, in which case I am not a church nor inspired by religion." Lisa Newton is not a CC herself but provides a good articulation of the mindset: "Divine Sanction and Legal Authority: Religion and the Infrastructure of the Law" in Pennock and Chapman (eds), *Religion, Morality and the Law: Nomos XXX* (1988) ch 9 at 188-189.

170 See eg Bruce Logan, "Religious roots essential to education", *Evening Post*, 6 April 1998.

171 Robert W Jenson, "The God-Wars." In Braaten and Jenson (eds), *Either/Or: The Gospel or Neopaganism* (1995) 23 at 25 (original emphasis)

172 Ibid at 26.

> pluralism . . . the silenced are almost always those who if they spoke would say something characteristically Jewish or Christian or Islamic. Try, for example, arguing that unrestricted permission to abort the unborn is a social and political evil at a party in Manhattan or a college town in Minnesota. Your arguments will not be rebutted: heads will merely be turned as from one who has audibly broken wind. If, on the other hand, you argue what is in fact the *conventional* opinion, you will be praised for courage and compassion.[173]

This is an American observation but many New Zealand conservative Christians would concur. Bruce Logan complains: "The religious view of life, and in our culture that means the Christian Faith, is by definition likely to turn people into bigots at worst or flat-earthers at best."[174] The Rev Bruce Patrick at the 1996 Vision New Zealand Conference likewise observed:

> This post-modern era is seen as a new age of tolerance where all views are equally valid and equally true. There is however one important proviso: tolerance is extended as long as views are accepted by a majority, or are so promoted by a vocal minority that they are seen to be politically correct. In the last ten or possibly twenty years it has become distinctly politically incorrect to represent Christianity or a Christian view in any sphere apart from the purely religious.[175]

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[173] Ibid at 25 (italics in original).

[174] Bruce Logan, "Eve, Red Liberal Apples and Human Rights." *Cutting Edge*, June/July 1996, 1 at 4.

[175] Patrick, "Introduction: Envisioning the Kiwi Church, " in Patrick (ed), *New Vision New Zealand Volume II* (1997) ch 1 at 22-23.

Chapter 4

A MODEL OF ENGAGEMENT

In this chapter I sketch a model of engagement. Having detailed the conservative Christian worldview (Chapter 2) followed by the prevailing Wellington worldview (Chapter 3) I am now concerned with how these two worlds (or rather the participants in them) interact.

Ira Lupu's legal model of church-state interaction is a useful one.[1] So far as the law is concerned there are, he argued, really only two basic models of church-state interaction to consider. The first is the model of *conflict*.[2] The believer and the state may clash over the application of secular law to religious conduct. The second relevant model is church-state *alignment*.[3] This in turn may take two forms, either (a) the state co-opting religion for its purposes (Erastianism) or, (b) religion co-opting the state for its purposes (theocracy).[4] Complete co-opting of one by the other is most unlikely to occur in the West today. Instead of an entire take-over of one institution by the other, there are a variety of intermediate positions that are likely to prevail. Religious communities and the state typically co-exist amicably and co-operate together in advancing societal goals.

I submit the pattern of interaction between conservative Christians (CCs) and the New Zealand State can be broadly divided into two. The first and predominant paradigm is peaceful co-existence. Although there are tensions, the two worlds by and large live together harmoniously, with mutual adjustment being the lubricant. Second, there is a model of conflict. Occasionally, the tensions between the two worlds spill over into open confrontation. I shall elaborate upon each model now.

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1 Ira C Lupu, "Models of Church-State Interaction and the Strategy of the Religion Clauses" (1992) 42 De Paul L Rev 223. Lupu's model is a reply to a revision of Niebuhr's Christ/culture typology by Michael W McConnell in "Christ, Culture, and Courts: A Niebuhrian Examination of First Amendment Jurisprudence" (1992) 42 De Paul L Rev 191.

2 Lupu, "Models", at 224.

3 Ibid at 225.

I PEACEFUL COEXISTENCE

Conservative Christians seldom experience repression or curtailment in a liberal democracy. Peaceful co-existence best describes the relationship between the *majority* of CCs and the state for the *majority* of the time. The reasons for this are undoubtedly many. There is a sensitivity by the state to the claims of religious conscience, certainly where the religionists concerned are numerous and politically powerful, as CCs are. The state does, for example, grant exemptions from legal duties for believers in certain circumstances.[5] Equally, I suggest there is willingness on the part of many CCs to accommodate themselves to the spirit of the times.

Conservative Christians have become accustomed to their privatised status to a large degree. When they do transgress the boundary between public and private realms and assert themselves in the public arena, they have learnt to use a new language.

1 The translation strategy

Conservative Christians internationally have come to the sober realisation that explicitly-religious arguments cut increasingly little ice in society. Appeals to authority, such as "the Bible says", or "the Church teaches", fail to convince secular citizens (and probably many Christians also). In a postmodern, relativist, post-Christian society, many CCs have recognised that the path of progress requires a different strategy. They ought still to "think Christianly" and let the Scriptures or Church guide them, but the eternal divine truths need to be translated[6] into "rational", "secular", "prudential" arguments palatable for *homo*

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4 On models of church-state relationship see eg Francis Lyall, *Of Presbyters and Kings* (1980) ch 1; Leo Pfeffer, *Church, State and Freedom*, rev ed (1967) ch 1.

5 See eg ss 28 and 39(1) of the Human Rights Act 1993 (discussed in Chapter 9), s 21 of the Education Act 1989 (which permits "home schooling") and two examples mentioned by Keith J in *Mendelssohn* v *Attorney-General* [1999] 2 NZLR 268 at 274: the right to refuse on the grounds of conscience to belong to district law societies and to refuse to answer questions about religious affiliation (s 24 of the Law Practitioners Act 1982 and s 43(3) of the Statistics Act 1975 respectively).

6 See eg John Coffey, "How Should Evangelicals Think about Politics? Roger Williams and the Case for Principled Pluralism" (1997) 69 Evangelical Q 39 at 59: "[A]though it is acceptable for believers to let their religion shape their political convictions, they cannot expect the state to pass a piece of legislation for purely religious reasons. Laws against divorce, adultery or homosexual acts, for example cannot be passed simply on the grounds that may Christians believe that God hates these things, publicly accessible reasons must be provided for every policy recommendation, and 'laws adopted by the

autonomous. Thus, although, as "a matter of principle", Christians are "not precluded from adducing religious considerations in advocating a political choice, it would in practice be useless for [them] to do so."[7] Hence, a translation process is wise (quite apart from being "good manners"[8]). As John Stott urged:

> In social action . . . we should neither try to impose Christian standards by force on an unwilling public, nor remain silent and inactive before the contemporary landslide nor rely exclusively on the dogmatic assertion of biblical values, but rather reason with people about the benefits of Christian morality, commanding God's law to them by rational arguments.[9]

Similarly, Charles Colson reminds American evangelicals that modern culture is a mission field in much of need of translation of the message as any other: "we must translate God's revelation into the language of the world."[10]

Non-Christians are able to understand and be persuaded by such suitably translated arguments. Humankind is made in the image of God and has an in-built conscience or "inkling"[11] of the Truth. Whether this in-built recognition is grounded in "natural law" (in the Catholic tradition) or "common grace" and "general revelation" (the Reformed), it is real.[12] We should not be surprised, argues the Christian, that Scriptural truth resonates with people's own sense of justice since "God has written his law in two places, on stone tablets and on the tablets of the human heart (*Romans* 2:14 f). The moral law is not alien to human beings, therefore."[13] Postmodernist confusion is "overstated", for "the claims of faith" (properly translated into contemporary language) "can be understood, assessed and debated publicly—including by those who do not share them. Indeed, this is what makes serious [political] theology possible and necessary."[14]

The 47 prominent evangelical New Zealand Christians who signed, "Why Christians

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government should rest on some secular objective.'" (quoting, in the final clause, Greenawalt, *Religious Convictions*, at 20).

7 Patrick Hannon, "On Using Religious Arguments in Public Policy Debates" in Treacy and Whyte (eds), *Religion, Morality and Public Policy* (1995) 68 at 70.

8 Phillip E Johnson, "Nihilism and the End of Law", *First Things*, June/July 1993, 19 at 25.

9 John Stott, *Issues Facing Christians Today*, 2nd ed (1990) at 52.

10 Colson and Pearcey, *How Now Shall We Live?* (1999) at 34.

11 Stott, *Issues Facing Christians*, at 52.

12 See eg Richard John Neuhaus, "Why We Can Get Along," *First Things*, Feb 1996, 27 at 30 et seq.

13 Stott, *Issues Facing Christians*, at 56.

14 Max L Stackhouse, "Theo-cons and neo-cons on theology and law," *Christian Century*, 27 Aug-3 Sept 1997, 758 at 760.

should be involved in politics", endorse this optimistic view. People's "inborn awareness of right and wrong" is accompanied by the eminent "reasonableness of God's principles for people." Thus, a "wide spectrum of thinking women and men endorse the Biblical values because they make common-sense."[15]

Is appealing to people's self-interest, extolling the benefits of God's law rather than the truth of it, an unworthy strategy? No, answer its defenders, for one has "to be realistic."[16] Prudential appeals to self-maximisation of welfare "may not save souls",[17] but they still contribute to a moral ecology containing laws which facilitate that prime directive. Part of the entire Gospel is "the cultural commission"[18] to redeem and transform, as far as humanly possible, the world. Christians, then, are instruments of God's common grace or providence, obedient to the divine command "to promote righteousness and hold back the forces of evil in society."[19] The law and the government ought not to be used to secure men's salvation, but there are still other important ends they may contribute to.

II CONFLICT

The differences in worldview between CCs and the political and bureaucratic elite may produce conflict. There are "pressure points" and, despite self-restraint by both sides, disputes sometimes occur. It is important to stress that the instances of conflict are few and tiny in relative terms compared to the examples of co-operation. Nonetheless, they do exist.

A source for the increasing tension recently has come from the realisation by many CCs that the tide has turned against them and that the state can no longer be assumed to be Christian. Christians have no *a priori* right to govern, nor to expect public policies to reflect their values. Two core tenets of liberalism are the target for CCs: privatisation and neutrality.

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15 "Why Christians should be involved in politics", *Reality*, Oct/Nov 1996, 33 at 35.

16 Stott, *Issues Facing Christians*, at 57. Stott quotes William Temple: "The art of government, in fact, is the art of so ordering life that self-interest prompts what justice demands." Continues Stott: "People need to be convinced that the laws which govern their lives are for their good, and that it is to their advantage to be law-abiding."

17 Charles Colson and Nancy Pearcey, "Quoting the Bible isn't enough", *Christianity Today*, 11 Aug 1997, at 72.

1 Privatisation challenged

Some CCs question liberal theory's dividing line—a secular rational public sphere must be quarantined from speculative passions such as religion. The private realm is the home for the latter. Criticism by CCs is twofold. Liberalism is unconvincing in (1) its claim that their religion is an epistemologically inferior source of knowledge and, relatedly, (2) in its claim that the Christian religion is irrational.

First, some critics of liberalism have endeavoured to show that both liberalism and religion operate on the same epistemological level. Both the sceptic and the believer know the world the same way—through a mixture of experience, testimony, evidence, reason and belief.[20] Christians' beliefs in the existence of God, miracles, the divinity of Christ and so on, are based on such a thing as the number of witnesses, their independently-tested reliability and the number of intelligent people who accept these things as true. A Christian's religious epistemology may be quite consonant with her epistemology in general and all of that person's beliefs, criteria of evidence and methods of reasoning may cohere. To adapt Larry Alexander's example,[21] Jane's religious beliefs are supported in exactly the same way that her beliefs that Abel Tasman "discovered" New Zealand, that Apia is the capital of Samoa, that cricketer Sir Richard Hadlee took 431 test wickets and that the speed of light is constant. She "does not believe any of these things based on first-hand observation, and the last item she finds counter-intuitive and impossible to conceptualize, though she believes it to be true, nonetheless."[22] Thus, continues Alexander:

> There are not two ways of "knowing", religious and secular/liberal; there are not both sectarian and secular/liberal "truths". As a consequence of epistemological unity, liberalism must establish its tenets by rejecting conflicting religious ones, not by the illusion of "neutrally" banishing them to the "private realm", where they can somehow remain "true" but impotent, by meeting them head on and showing them to be false or unjustified. Liberalism is, as many critics claim it to be, the "religion" of secularism . . . both liberalism and antiliberal religious views inhabit the same realm and make conflicting claims within it. Liberalism is not at a different level

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18 Colson and Pearcey, *How Now Shall We Live?*, at 33 et seq.
19 Colson and Pearcey, "Quoting the Bible", at 72.
20 Larry Alexander, "Liberalism, Religion and the Unity of Epistemology" (1993) 30 San Diego L Rev 763 at 768-770.
21 Ibid at 769.
22 Ibid.

. . .[23]

Others question the supposed inaccessibility of religious knowledge.[24] An American evangelical scholar David Smolin, for instance, argues that religious reasons are just as "publicly accessible", even "reasonable", as obstruse, philosophical, or scientific ones: "I would . . . deny the premise that Biblical Christianity is less understandable to the public than is, for example, the often obscure and pedantic language of modern secular moral philosophy. I doubt that the people of America understand the language of Kant better than the language of the Bible."[25]

Second, it might be that religious claims are rational and secular claims are irrational.[26] If a key premise of liberalism—the naturalistic view that "nature is all there is"—is wrong, then it would be decidedly irrational to ignore spiritual or other-worldly claims. Not all secular theories depend on reason, and not all religions eschew reason or rational proofs for the existence of God. Charles Curran notes, for example, that: "Epistemologically, Roman Catholicism has insisted that the word and work of God are mediated in and through reason and human nature. Reason and reason's ability to know the truth have been stressed in Catholicism."[27] Moreover, reason is susceptible to the same sort of epistemological attack that faith is. Reason might itself rest upon belief and liberalism might be seen as a kind of faith (in reason). The religious rejoinder is thus: "secularism itself is based on a nonrational faith [and] secularism must in the end, also rest on metaphysical and moral claims that cannot be proved."[28] The postmodern scholar Stanley Fish has developed this critique most eloquently:

> [L]iberalism is informed by a *faith* (a word deliberately chosen) in reason as a faculty that operates independently of any particular worldview . . . liberalism depends on not inquiring into the status of reason, depends, that is, on the assumption that reason's status is

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23 Ibid at 790.

24 See eg Patrick Neal, "Religion within the Limits of Liberalism Alone?" (1997) 39 JCS 697 at 717 -718.

23 David M Smolin, "Regulating Religious and Cultural Conflict in Postmodern America: A Response to Professor Perry" (1991) 76 Iowa L Rev 1067 at 1085. Smolin could garner sympathy here from Jeremy Waldron here. In "Religious Contributions in Public Deliberation" (1993) 30 San Diego L Rev 817 at 846, Waldron notes that "what is striking about foundational writing in modern secular liberal thought is its dryness and relative inarticulacy."

26 Frederick M Gedicks, "Public Life and Hostility to Religion" (1992) 78 Virg L Rev 671 at 694.

27 Curran, "Religious freedom and human rights in the World and the Church: a Christian perspective" in Swidler (ed), *Religious Liberty and Human Rights in Nations and in Religions* (1986) at 147.

28 Robert P George, "A Clash of Orthodoxies", *First Things*, Aug/Sept 1999, 33 at 34.

> obvious: it is that which enables us to assess the claims of competing perspectives and beliefs. Once this assumption is in place, it produces an opposition between reason and belief, and that opposition is already a hierarchy in which every belief is required to pass muster at the bar of reason. But what if reason or rationality itself rests on belief? Then it would be the case that the opposition between reason and belief is a false one, and that every situation of contest should be recharacterized as a quarrel between two sets of belief with no possibility or recourse to a mode of deliberation that was not itself an extension of belief.[29]

Fish's argument is that reasons do no hang in mid-air or come from nowhere, but rather come from "the realm of particular (angled, partisan, biased) assumptions and agendas."[30] As critics see it, the attempt by liberals to assign to reason some overarching transcendent status whereby reason can stand "above the fray" and adjudicate between belief systems but not be drawn into the fray and have to compete itself, is unconvincing. Reason is no Archimedean point for reason is immanent, this-worldly—if we want a lever to move the world, it must be a lever outside the world.[31] Invoking "reason" as a sort of "God term" or master concept does not dispense with the problem of providing particular reasons.[32] For some liberals, argues Campos, "*invoking* 'reason' becomes equivalent to *giving* reasons."[33] But this will not do. Cook explains:

> For liberalism, the arbiter of clashing desires is human reason rather than God's will. Human reasoning, however, only has instrumental capacity. That is, it is no more than a tool for elaborating our value commitments. It might permit us to explain the implications of certain values or conceptions of the Good, but it cannot determine what that Good should be.[34]

Rather, "what is and is not a reason will always be a matter of faith, that is, of the assumptions that are bedrock within a discursive system."[35] Reason then is just the vehicle

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29 Stanley Fish, "Liberalism Doesn't Exist" [1987] Duke L J 997 at 997-998. Fish has elaborated more fully upon this thesis in a lengthy essay: Fish, "Mission Impossible: Settling the Just Bounds Between Church and State" (1997) 97 Colum L Rev 2255.

30 Fish, "Liberalism", at 998.

31 See Fish, "Mission Impossible," at 2274; Charles Fried, "Perfect Freedom, Perfect Justice" (1998) 78 Boston UL Rev 717 at 719; John Warwick Montgomery, "Law and Christian Theology: Some Foundational Principles" in Cranfield, Kilgour and Montgomery (eds), *Christians in the Public Square* (1996) 117 at 127 (no Archimedean lever or fulcrum exists).

32 See Paul F Campos, "Secular Fundamentalism" (1994) 94 Colum L Rev 1814 at 1820-1821: "It seems that, for Rawls, 'reason' and 'reasonable' fill the lexical space that in many discourses would be filled by 'God', or 'the Scriptures', or 'moral insight'. The concept of the reasonable becomes for Rawls what Kenneth Burke calls a 'God term'; and the characteristics of this God remain, as perhaps befits its metaphysical status, somewhat mysterious".

33 Ibid at 1821 (emphasis in original).

34 Anthony E Cook, "God-Talk in a Secular World" (1994) 6 Yale J Law and Hum 435 at 443.

35 Fish, "Liberalism Doesn't Exist", at 998.

that leads liberals to the fundamental assumptions or values in their belief system of "faith", namely, the priority of the individual and the primacy of individual choice and autonomy.[36]

2 *Neutrality challenged*

A central tenet of liberalism, as we have seen, is its claim to be neutral concerning questions of the good life and ideas of the good. But is the state neutral?

CCs belatedly realise that there is always a "particular conception of the good life" or orthodoxy which is *de facto,* if not *de jure,* established. Lesslie Newbigin reminds: "No state can be completely secular in the sense that those who exercise power have no beliefs about what is true and no commitments to what they believe to be right."[37] Non-neutrality went unnoticed and uncriticised for a long period while the state favoured CC interests. Bias exercised in one's favour is usually invisible.

With their cultural establishment eroded, however, Christian theorists now question the alleged neutrality of the state. The privatisation of religion is now being experienced with full vigour. A cultural Christian establishment had shielded Christians from the full effects of privatisation. In this sense the thoroughgoing privatisation of religion was never achieved for the *de jure* disestablishment was offset by a continued *de facto* establishment of a cultural Christianity. This cultural hegemony has now gone leaving many CCs feeling bewildered and vulnerable. Their religion really is privatised now, in law and in fact. Liberal tolerance is now castigated by some as a fraud: liberalism is equated with secularism. Wilken charges:

> Secularism wants religious practice, especially Christian practice, banished to a private world of feelings and attitudes, at the same time it expands the realm of the public to include every aspect of life. The earlier secularist appearance of tolerance toward religion is now seen to have been a sham.[38]

Robert George likewise maintains that:

> [Conservative Christians and other conservative religionists] quite reasonably reject secularism's claim to constitute nothing more than a neutral playing field on which other worldviews may fairly and civilly compete for the allegiance of the people . . . secularism is

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[36] Cook, "God-Talk", at 443.
[37] Lesslie Newbigin, *The Foolishness of the Gospel* (1986) at 132.
[38] Robert Wilken, "Serving the One True God," in Braaten and Jenson (eds), *Either/Or: The Gospel or Neopaganism* (1995) 49 at 50.

> itself one of the competing worldviews. We should credit its claims to neutrality no more than we would accept the claims of a baseball pitcher who in the course of a game declares himself to be the umpire and begins calling his own balls and strikes . . . secularism is itself a sectarian doctrine with its own metaphysical and moral presuppositions and foundations, with its own myths, and, one might even argue, its own rituals. It is a pseudo-religion.[39]

Patrick Neal argues that even if liberalism were neutral with regard to conceptions of the good, it is not neutral in its *conceptualisation* of what it means for someone to have a conception of the good.[40] Rather, liberalism has a distinctive individualistic way it requires the good life to be conceived and pursued. This conceptualisation or "meta-theory", as Neal calls it, requires that individuals define for themselves, separately and individually, their own ends. So liberalism prevents the person from saying he or she cannot know and understand the good apart from others. The individual cannot say: "I can only know the good to the extent I share the good with others." Persons can share the ends with others but only once they have first separately worked out their own ends.[41] Individuals must be "the primary bearers of conceptions of the good."[42] In Neal's words:

> [L]iberal theory of neutrality regarding the good presupposes a meta-theory of the good which is not neutral. That meta-theory holds that conceptions of the good are properly understood as the individually defined and processed ends which separate selves pursue . . . This meta-theory is non-neutral because it necessarily rules out any alternative meta-theory which denies that a "conception of the good" can be properly understood as the ends which separate selves define and pursue. One such alternative is [the person] who maintains that "conceptions of the good" are properly understood as essentially, and not just contingently, shared relations which are primarily definitive of, and not primarily defined by, individual selves.[43]

I have quoted Stanley Fish already. CC theorists share a similar critique of liberal neutrality to that of many postmodernists. The credit for the "deconstruction" of liberalism and its supposed neutrality is often given to the latter,[44] but, as we noted earlier, some liberal

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39 George, "Clash of Orthodoxies," at 34-35.

40 Patrick Neal, "A Liberal Theory of the Good?" (1987) 17 Canadian J Phil 567.

41 Or, as Neal (ibid at 572) puts it: "Now these ends can be shared with other individuals, but only in a particular sense. They can be shared *contingently* and *aggregately* but not *essentially* and *collectively*" (original emphasis).

42 Ibid at 573.

43 Ibid at 578.

44 See Michael W McConnell, "'God is Dead and We have Killed Him!': Freedom of Religion in the Post-Modern Age" [1993] Brigham Young UL Rev 163 at 182: "[T]he central insight of post-modernism is the exposure of liberalism as just another ideology. What post-modernists have taught us is that the

theorists themselves concede that liberalism is not neutral. The postmodernist critique is, in essence, that liberalism is just another ideology reflecting a partisan belief system, moreover, one grounded upon a particular historical culture.[45] For instance, Fish observes:

> [L]iberalism doesn't have the content it believes it has. That is, it does not have at its centre an adjudicative mechanism that stands apart from any particular moral and political agenda. Rather it is a very particular moral agenda (privileging the individual over the community, the cognitive over the affective, the abstract over the particular) that has managed, by the very partisan means it claims to transcend, to grab the moral high ground, and to grab it from a discourse—the discourse of religion—that held it for centuries.[46]

Defenders of a secular liberal state explain that it is "not hostile to religion, [but] can be defined as a state that is uncommitted to any religious institution or institutions or to religious beliefs and practices."[47] The secular state is simply concerned with temporal matters leaving religion alone,[48] even, suggest some, out of respect for religion.[49] Moreover, it is said, there is a clear difference between "nonreligion" and "irreligion",[50] the secular state adopting the former position.

However, the notion of secular as purely nonreligious and not irreligious is rejected by many CCs. Any attempt at pure neutrality is transitory at best. The nonreligious can easily, and does eventually, degenerate into the irreligious state and into a kind of "practical atheism".[51] For example, if the state teaches that all religious references are to be excluded from public life and proceeds on the assumption that society can be ordered as if God did not exists this sends a negative anti-religious message to citizens. Some, in more strident

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supposed neutrality often claimed for liberalism is really only a mask for a system and a way of life that now seems to post-modernists to be based upon patriarchal, white, male, European, and bourgeois interest and values."

45 See eg Cook, "God Talk", at 443: "[D]espite its theoretical protestations, liberalism is not a relativist philosophy that accepts all conceptions of community as equally viable. It clearly values the autonomy of the individual and all that is thought to entail for the individual's political and civil liberties, as well as the resulting distributions of power and wealth in society."

46 Fish, "Liberalism Doesn't Exist," at 1000.

47 John Swomley, *Religious Liberty and the Secular State* (1987) at 7.

48 Muldoon J in *O'Sullivan* v *Canada* (1991) 84 DLR (4th) 124 at 134.

49 See James E Wood, "An Apologia for Religious Human Rights" in Witte and van der Vyver (eds), *Religious Human Rights in Global Perspective* (1996) 455 at 470: "The secular state is one in which government is limited to the *saeculum* or temporal realm; the state is independent of institutional religion or ecclesiastical control and in turn, institutional religion is independent of state or political control. It is a state that is without jurisdiction over religious affairs not because religious affairs are beneath the concerns of state, but rather because religious concerns are viewed as being too high and too holy to be subject to the prevailing fallible will of civil authorities or to popular sovereignty."

50 See Stanley Ingber, "Religion or Ideology: A Needed Clarification of the Religion Clauses" (1989) 41 Stan L Rev 233 at 310-312.

fashion, dub liberalism as little more than "secular fundamentalism."[52]

Pluralism is also challenged. Behind its façade of tolerance and openness there lurks intolerance.[53] An American evangelical theologian, Don Carson, argues:

> But if any religion claims that in some measure other religions are wrong, a line has been crossed and resentment is stirred up . . . Exclusiveness is the one religious idea that cannot be tolerated. Correspondingly, proselytism is a dirty word. One cannot fail to observe a crushing irony: the gospel of relativistic tolerance is perhaps the most "evangelistic" movement in Western culture at the moment, demanding assent and brooking no rivals.[54]

An English legal scholar, Ian Leigh, likewise refers to a form of "liberal fundamentalism" at work:

> Liberals view any attempt to practice or express religious belief outside the confines of subjective thought and experience with suspicion and hostility. Claims that religious truth is objective or universal are, paradoxically, the one type of religious expression which Liberals cannot tolerate.[55]

CCs concede there have existed, hybrid or synthesised belief systems or worldviews which mixed Christian and other values together. Christendom itself was never purely Christian—Hellenistic influences, for instance, remained; the wheat and the tares lived together.[56] Nonetheless, most CCs were sure the Christian worldview was the dominant partner in the synthesis that was Western Christendom. Following the Enlightenment the mixture changed: the dominant partner became reason not revelation. It has taken a long time (for Christendom had a great deal of momentum) but inexorably secularist corrosion did its work. The dominant partner in the Western worldview emerges finally in the late-twentieth century, one that is, for CCs, patently a secularist or humanist one.

The differences between the worldviews (which generate the potential "pressure points") are catalogued below in Table 2:

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51 Wilken, "Serving the One True God," at 50.
52 See Campos, "Secular Fundamentalism".
53 See also Peter Donovan, "The Intolerance of Religious Pluralism" (1993) 29 Rel Stud 217.
54 Don A Carson, *The Gagging of God: Christianity Confronts Pluralism* (1996) at 32-33.
55 Ian Leigh, "Towards a Christian Approach to Religious Liberty" in Beaumont (ed), *Christian Perspectives on Human Rights and Legal Philosophy* (1998) ch 2 at 35.
56 *Matthew* 13:24-30 and 36-43.

Table 2: Catalogue of worldview differences

Wellington worldview	CC worldview
the individual emphasised	the individual-in-community stressed
mankind is autonomous	mankind is heteronomous
naturalism is assumed	supernaturalism is assumed
truth is relative, contingent	truth is universal, transcendental
there are many paths	there is one path
ethical relativism	ethical absolutism
mankind has evolved	mankind was created
mankind is basically good	mankind is fallen
mankind is progressing	mankind is rebelling and faces judgment
heterosexuality is not uniquely normative	heterosexuality alone is normative
reason is final	revelation/tradition is final
religion is private	religion is also public
the state is neutral	the state is in practice non-neutral

III PREDICTIONS

I shall leave aside the peaceful co-existence model. The conflict model is of greater interest. One possibility is that CCs will simply lose out in cases of conflict between the Wellington and CC worldviews. The Reformed Churches of New Zealand in its submission to Parliament concerning the proposed Bill of Rights 1985, expressed this concern eloquently and a lengthy quotation is merited:

> The potential for abuse and judicial persecution and restriction upon Christianity is made all the more likely because of the religious climate of our day. Whether religious practices will be accepted[sic] to the courts will be determined by the prevailing religious values—in this case, secular humanism. The courts will be most likely to look with favour upon those religions which show some accord with humanism. Certain religions will be favoured. In particular, those religions which accept the ideal of a pluralistic society, which are not universal in their claims and principles; those religions which emphasize personal choice, the ultimacy of human rights, the tolerance of other views, proclaim a non-discriminating "love", promote social egalitarianism, have a libertine ethical system and do not discriminate ethically or sexually; those religions which propage [sic] against the traditional nuclear family with its "stereotyped sex roles" will be seen to be most consistent with the values of the secular state. On the other hand, those religions such as Christianity which implicitly deny the pluralistic society by declaring all other beliefs erroneous or false, which reject human

> self-determination in any ultimate sense, have an authoritative revelation to which they are subject, uphold an authoritative social structure in church, society, and family, and which will not tolerate or encourage evil ethical practices are almost certainly to be viewed as anti-democratic and contrary to the ultimate values of a democratic society. It has become increasingly common in the past ten years for officials of the State, whether they be psychologists or judges in family courts, or elected representatives, to portray Christianity and Christians, even when they have used the normal democratic channels and responsible and lawful means to advocate their positions, as being intolerant, bigoted, irrational, unthinking, socially destructive, harmful, and at times positively dangerous. It is only a small step to declare particular practices and beliefs intrinsic to such religions as not in the best interests of a "free" and "democratic" society.[57]

Another possibility is that where conflict occurs, CCs and the state will reach an accommodation. Compromise may go at least part of the way to assuage CC concerns. The ultimate form of the accommodation is hard to predict. In the next part I will consider several areas of engagement to see what has transpired in practice.

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[57] Submission 62 to the White Paper 1985, *A Bill of Rights for New Zealand* at 8 (para 4.2)(on file with author).

Part II

Chapter 5

HUMAN RIGHTS

In this chapter I examine the conservative Christian concerns with human rights laws. In general, conservative Christians (CCs) are disturbed at the individualistic and intolerant tendencies of modern human rights laws. For CCs the root cause is the humanistic foundation of these laws and I analyse this first. Next, I briefly outline the specific concerns CCs harbour regarding rights laws. Finally, the chapter chronicles several of the significant clashes CCs have had with rights proponents over the last two decades.

I AN AMBIVALENT ATTITUDE

CCs have, historically, maintained a lukewarm "cautious"[1] attitude to human rights. Contemporary Christian scholars admit this. A leading American evangelical theologian and founder of *Christianity Today* magazine, Carl F H Henry observed: "It is only fair to concede that evangelical Christians have not in the recent past been the active vanguard of human rights concerns, including religious liberty issues."[2] Likewise, Fr John Langan conceded:

> The [Catholic] Church, especially in France, experienced the proclamation of human rights in 1789 as a very cold and hostile wind, and it cannot claim for itself a significant place in either the theoretical or the practical struggle for human rights in the eighteenth and nineteenth centuries. Human-rights theory in an explicit and politically dynamic form confronted Catholicism as an alien force, and it has taken Catholicism a long time to appropriate it.[3]

Notwithstanding their apologetic tone, CCs still emphasise "a critical attitude towards dominant

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1 Christopher Marshall, "'A Little Lower than the Angels': Human Rights in the Biblical Tradition" in Atkin and Evans (eds), *Human Rights and the Common Good: Christian Perspectives* (1999) 14 at 15: "Historically Christian churches have been cautious if not overtly hostile to any assertion of 'natural rights' or 'the rights of man' fearing its non-theistic tone and its potential to weaken the traditional Christian emphasis on obligation."

2 Carl F H Henry, *The Christian Mindset in a Secular Society* (1984) at 67.

3 John Langan, "Human Rights in Roman Catholicism" in Swidler (ed), *Human Rights in Religious Traditions* (1982) ch 3 at 33.

ideologies on human rights"[4] is warranted. There are three inter-related reasons for this attitude.

1 The non-theistic foundation of human rights

CCs are ready and willing to defend human rights: "it is not intrinsically wrong for Christians to participate in the human rights movement as a means of service to others."[5] Christians are enjoined by Scripture to vindicate the rights of the poor, the weak, the fatherless, the alien, the disadvantaged. Such opposition as there is is not directed to human rights as such but to their foundation. The foundation of human rights is perceived by many CCs as being human-centred not God-centred, anthropocentric instead of theocentric. Such a grounding is, as they see it, unstable and is likely to lead to arbitrary and oppressive outcomes.

In ethics and in legal theory questions of right and wrong, of what one ought to do—for example, one should not steal or commit adultery—will have some ultimate basis or source. The curious, if not impertinent, will at some point, when presented with a rule or command, ask "the grand sez who?", as Arthur Leff once put it.[6] At rock bottom, there is someone or something which is "the unjudged judge, the unruled legislator, the premise maker who rests on no premises, the uncreated creator of values."[7] Leff continued, "Now, what would you call such a thing if it existed? You would call it Him."[8] The ultimate source of law is God or some God analogue. R J Rushdoony explained it in these terms:

> Law is in every culture *religious in origin*. Because law governs man and society, because it establishes and declares the meaning of justice and righteousness, law is inescapably religious in that it establishes in practical fashion the ultimate concerns of a culture . . .
>
> Second, it must be recognised that in any culture *the source of law is the god of that society*. If law has its source in man's reason, then reason is the god of that society. If the source is an oligarchy or in a court, senate, or ruler, then that is the god of that system . . . Modern humanism, the

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4 Matthijs de Blois, "The Foundation of Human Rights: A Christian Perspective" in Beaumont (ed), *Christian Perspectives on Human Rights and Legal Philosophy* (1998) ch 1 at 27.

5 David M Smolin, "Church, State and International Human Rights: A Theological Appraisal" (1998) 73 Notre Dame L Rev 1515 at 1538.

6 Arthur A Leff, "Unspeakable Ethics, Unnatural Law" [1979] Duke LJ 1229 at 1230.

7 Ibid at 1230.

8 Ibid.

> religion of the state, locates law in the state and thus makes the state, or the people, as they find expression in the state, the god of that system.[9]

The location of the ultimate source of authority in a legal system (the "god" of that system) would seem to be, at its simplest, either divine and transcendent, on the one hand, or temporal and earthly, on the other. The choice is between God (or gods) and humankind. Jesus was questioned by the chief priests and elders on one occasion about His authority ("by what authority are you doing these things?", "And who gave you this authority?"). The stark alternatives posited in Jesus' reply (in the form of a question) were: did John's and His own authority come "from heaven, or from men?"[10] Law is either "what God requires" or "what man wills."[11] Leff submits: "Put briefly, if the law is 'not a brooding omnipresence in the sky', then it can be only one place: in us."[12] The answer to the crucial question "sez who?" is humankind in the form of: each autonomous, rational individual; some outstandingly wise or noble individual or individuals (the King, the highest Court); or some abstract collective (the people, the State). Identifying the foundation of the legal system in an abstract principle—the principle of "utility" (Bentham), the "rule of recognition" (HLA Hart) or the "grundnorm" (Hans Kelsen), for example—simply begs the question as to *who* promulgated the principle.[13]

The choice between either God or humankind as the foundation of law reflects the dualist mindset of CCs explored in Chapter 2. To recap, CCs believe people must respond in either obedience or disobedience to God; "either we serve the Lord or we follow idols."[14] For the CC, the dominant worldview in contemporary Western societies such as New Zealand is a modernist, humanistic one. "Man is the measure of all things", including law and human rights. Under humanism there is no God to save us nor to promulgate fundamental norms or a "higher

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9 Rousas John Rushdoony, *The Institutes of Biblical Law* (1973) at 4-5 (original emphasis).

10 *Matthew* 21: 23-27.

11 Harold O J Brown, *The Sensate Culture: Western Civilization Between Chaos and Transformation* (1996) ch 5 at 79.

12 Leff, "Unspeakable Ethics," at 1233. The "brooding omnipresence in the sky" is the phrase coined by American Supreme Court Justice, Oliver Wendell Holmes. See Leff, ibid, at 1233 fn 5. See similarly Brown, *Sensate Culture*, at 88: "If there are no laws made in heaven, by what standards should human society organize itself? . . . There is only one answer: We must make them ourselves."

13 See further Phillip E Johnson, "Nihilism and the End of Law", *First Things*, March 1993, 19-25.

law". As the Humanist Manifesto II (1973) puts it: "Ethics is autonomous and situational, needing no theological or ideological sanction."[15] Humanists are strong supporters of human rights, such rights having their foundation in human experience, needs and interest. The "preciousness and dignity of the individual person is a central humanist value."[16]

CCs object to the purely human foundation of human rights. Dr Christopher Marshall, lecturer at the Bible College of New Zealand, observes in a recent important essay:

> Within the church, many conservative Christians look with great suspicion on any talk of rights, deeming it to be humanistic, egotistical and overly optimistic about human nature. Human beings are sinners; they have no rights before God, least of all absolute and inalienable rights. The fact that most human rights declarations make no mention of God, and that people appeal to rights to justify licentious lifestyles, simply confirms that rights have nothing to do with divine revelation. They are an expression of human rebellion against the law of God, a law which makes demands, not issues rights.[17]

This unease is most clearly and forcefully articulated by Reformed scholars. Van Egmond recounts:

> Since the notion of human rights arose in history (in the American and French Revolutions), the Reformed tradition, particularly Calvin's, dating back to the Reformation and ultimately rooted in Augustine, has distrusted any talk of human rights as allocated by humankind to itself on the basis of humanity and whatever philosophical or religious foundation is at hand.[18]

If human beings have rights they can only, given the sovereignty of God, be granted by God. Human rights are not innate but are bestowed by God. They are gifts from the Creator.[19] Everything in creation belongs to the Creator. Thus, "the idea that human beings, because of their own reason, might be able to establish rights for themselves, to decide these on the basis of their own authority and to ground these in their own humanity,"[20] is wholly repudiated. If

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14 Walsh and Middleton, *The Transforming Vision* (1984) at 95.

15 Third principle of the Manifesto. The Manifesto is reproduced in full in Corliss Lamont, *The Philosophy of Humanism*, 7th ed (1990) 290 at seq.

16 Fifth principle. See ibid, at 294.

17 Marshall, "Little Lower than the Angels", at 25.

18 Aad van Egmond, "Calvinist Thought and Human Rights" in An-Naim et al (eds), *Human Rights and Religious Values: An Uneasy Relationship?* (1995) ch 14 at 195.

19 Ibid at 194-195.

20 Ibid at 184.

people have dignity it is because God has graciously caused it to be so, having made humankind in His own image (*imago Dei*). While human rights *per se* are laudable, the idea or *theory* of human rights (as a purely human construct) is eschewed. To quote van Egmond again:

> The so-called Calvinistic rejection of "human rights" appears to be far from simple: it is due to their origin within a humanist frame of thought in which humankind itself sovereignly allocates these rights to itself. As far as rights themselves are concerned, as opposed to the question of their foundation, Calvinists have no objection. Rather, they oppose the idea of human rights for the sake of human rights.[21]

The human-centred character of rights theory is criticised by CCs for at least two reasons. First, being based upon "the will of changeable men" they are likely to be arbitrary.[22] A humanistic foundation is unstable, whereas God's commandments and ordinances are not. Second, to repose the power to formulate rights in sinful men is dangerous.[23] If the people or the state (simply a collective of sinners) acknowledge no other authority than itself, it may lead to absolutism and tyranny.[24] "Law comes to represent," warns Harold OJ Brown, "not the will of the creator but the will of the strongest creatures." Thus, "Oliver Wendell Holmes Jr, thought no differently in this respect from the great dictator, Adolf Hitler. Both of them believed that laws simply represent the will of the dominant majority."[25]

CCs differ on the wisdom of basing human rights on the inherent dignity of man, a difference reflecting the different strands of Christian theological thought.[26] Catholic scholars, in the natural law tradition, are readier than Protestants to ground human rights in this way. This is attributable in part to a desire for "a foundation for human rights which would be universally

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21 Ibid at 197.

22 Ibid at 196 (quoting Groen van Prinsterer, *Unbelief and Revolution* (1847)). See also Brown, *Sensate Culture*, at 82.

23 See van Egmond, "Calvinist Thought", at 195 where he observes: "Humans are not only creatures over against a sovereign God; they are also sinners in the presence of the holy God. This absolutely excludes any talk of human rights. The sinful creature has no rights to assert but is totally dependent on grace."

24 See ibid at 196. That is not to ignore the history of rulers claiming divine authority acting as despots also.

25 Brown, *Sensate Culture*, at 88.

26 As Marshall, "Little Lower than the Angels," at 28 explains: "There is no such thing as a single Christian perspective on human rights."

accessible"[27] not one simply amenable to Christians. Protestant scholars are more chary. The naturalistic and evolutionary premises of humanism seem to undercut humanist arguments for human rights based upon human dignity. Carl Henry, for example, argues:

> [H]umanism as a philosophy provides no metaphysical basis adequate to preserve [human] rights in distinction from other principles that humanism relegates to a sociocultural by-product of a particular period of history. Universal and permanent human rights are logically inconsistent with the humanist theses that personality is an accident in the universe and that human nature is evolving. We cannot empirically extrapolate unchanging values and final truths either from a world of impersonal processes or merely from the human situation.[28]

Several Christian scholars argue that secular theory is "most vulnerable"[29] at this key point of providing a justification for human dignity. It is here, they argue, that a theistic, biblical account of human dignity and rights is strongest.[30]

The belief that the foundation of rights must be in God rather than in humankind reflects fundamental CC notions about religion, law and the state. As we saw in Chapter 2, CCs are adamant that the state is the servant of God possessing delegated and limited authority. The state stands under God and God's law. The state cannot grant or bestow rights for two reasons.

First, only God can bestow rights. As Marshall observes: "Paradoxically it is their gift-character that guarantees them as rights. If they were of human origin, humans could unmake them. As grants from a faithful God, their inalienablity is secure."[31] Second, people *already* have God-endowed rights prior to society and the state. "Rights are prior to society and must be recognised by it."[32] The purpose of government then is to acknowledge and protect these

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27 Langan, "Human Rights in Roman Catholicism," at 26.

28 Henry, *Christian Mindset*, at 65.

29 Marshall, "Little Lower than the Angels," at 33. See also Stephen Layman, "God, Human Rights, and Justice" (1987) 17 Christian Scholar's Review 189; John W Montgomery, *Human Rights and Human Dignity* (1995); Michael J Perry, *The Idea of Human Rights: Four Inquiries* (1998) ch 1 at 11: "There is no intelligible (much less persuasive) secular version of the conviction that every human being is sacred; the only intelligible versions are religious."

30 Marshall, ibid; Montgomery, ibid.

31 Marshall, "Little Lower than the Angels," at 37.

32 *Catechism of the Catholic Church* (1994) at para 1930.

antecedent God-given rights.[33] There can be no question of the state subsequently entitling its citizens to exercise their human rights. This understanding of rights accords with the view of some CCs that "true law is never *made*, but *found*."[34] Harold OJ Brown observes:

> It is self-evident that we cannot make the laws of nature, the laws of physics and chemistry . . . But there is a specific kind of law that we *can* make—or at least we think we can make. We can pass resolutions, enact statutes, and write them in the law books. The great question remains: Can we make whatever laws we please, or are we bound to respect a higher order in human affairs as we must in physics and chemistry?. . .
>
> [T]he most dangerous revolution in history was when men discovered that they can *make* laws. The older term *legislation*—derived from the Latin, *lex, legis* (law), and *latus* (moved, as in "translate")—corresponds to the view that laws are "found", as it were in heaven, and "moved" into our human law codes and statute books.[35]

When governments in their arrogance purport to make law with disregard for the higher law (of God), CCs believe arbitrary and often repressive law is the outcome.

In the international sphere, the United Nations Universal Declaration of Human Rights (UDHR) is criticised for not clarifying its foundation. The UDHR, adopted by the United Nations (UN) in 1948,[36] has been described as the "spiritual parent of and inspiration for many human rights treaties."[37] If it is the spiritual parent its ancestry was left frustratingly opaque. Carl Henry cautions:

> A major weakness of the United Nations Universal Declaration of Human Rights adopted in 1948 was and is its failure to clarify the source and sanction of human rights . . . the UN Declaration does not

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33 See John W Whitehead, *The Stealing of America* (1983) at 32: "[R]ights were seen as an endowment from the Creator and, as a result, were absolute. Thus, rights were not products of the state. Government, then, could not legitimately take away what God gave and government had not given . . . [T]he purpose of the state was to protect the God-given rights of men."

34 Roy Clements, *Practising Faith in a Pagan World* (1997) at 120 (original emphasis). Clements adds: "its cogency rests not on the arbitrary dictates of a human legislator, but on the eternal and unchanging character of God." (ibid). "Positive law," he continues (at 137), "is fundamentally godless, and freedom can be sustained only as long as legislature and judiciary, and the people themselves, feel themselves accountable to a higher law, the law of God."

35 Brown, *Sensate Culture*, at 84 and 89 (original emphasis).

36 GA Res 217 A (III), UN Dec A/810 (1948). The UDHR was adopted without opposition by 48 votes to zero with 8 abstentions.

37 Henry J Steiner, "Political Participation as a Human Right" (1988) 1 Harvard Human Rights Year Book 77 at 79. Quoted in Mutua, "The ideology of Human Rights" infra, at 605.

> identify the transcendent source of rights. It leaves unstated whether or not a *super*state—perhaps the United Nations itself—might ultimately be viewed as the source and stipulator of human rights. Were Marxist or other totalitarian powers to dominate the United Nations, could they then manipulate the content of human rights on the premise that all particular nations are answerable to the catalogue of rights that the international or supranational body imposes?[38]

Christians were, in fact, intimately involved in the birth of the Declaration. René Cassin, one of its principal architects, viewed it as a worthy extension of the Ten Commandments.[39] The decision not to identify the philosophical or religious foundation of the UDHR was a deliberate, pragmatic one designed to "present the image of universality"[40] and thus ensure maximum acceptability to signatory nations. One result is that the philosophical foundations of human rights still remain contested today.[41]

2 *The individualistic bias of human rights*

Human rights laws strike CCs (or to be precise, CC theorists and commentators) as excessively individualistic documents. This is of course not a sentiment unique to CCs. Sir Ivor Richardson, for instance, promulgated a tripartite schema of individual, group and community rights and responsibilities, with a proper balance required between them being the goal.[42] The undeniable liberal tenor of human rights theory carries with it the concomitant liberal emphasis upon personal autonomy and individual freedom. CCs discern the ugly face of *homo autonomous*[43] in the background. Modernism, as we saw in Chapter 3, conceives of man as an autonomous individual, emancipated, as Kant put it, from the "tutelage of others", the Church

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38 Henry, *Christian Mindset*, at 67-68.

39 René Cassin, "From the Ten Commandments to the Rights of Man" in Shoham (ed), *Of Law and Man: Essays in Honor of Haim H Cohn* (1971) 13-25. See Marshall, "Little Lower than the Angels," at 44.

40 Makau wa Mutua, "The Ideology of Human Rights" (1996) 36 Virg J Int'l L 589 at 629; Karin Mickelson, "How Universal is the Universal Declaration?" (1998) 47 UNBLJ 19 at 22. See Montgomery, *Human Rights and Human Dignity*, at 275 n 23: "The Commission on Human Rights which drafted the declaration . . . and the Third Committee which revised it . . . avoided for political and pragmatic reasons the question of the ultimate origin of human rights—leaving each signatory and reader to supply the lacuna (hopefully with transcendence as Cassin and [Lebanese Christian, Charles] Malik surely did)."

41 See eg Michael Freeman, "The Philosophical Foundations of Human Rights" (1994) 16 Human Rights Q 491; Tom Campbell, "Human Rights: A Culture of Controversy" (1999) 26 J Law and Soc 6.

42 Ivor Richardson, "Rights Jurisprudence—Justice for All?" in Joseph (ed), *Essays on the Constitution* (1995) at 61-83.

and God included. Modernism's anthropological conception of man as answerable to no one but himself (*homo autonomous*) is deeply disturbing. CCs are reminded of the damning *leitmotif* in the book of *Judges*: "In those days there was no king in Israel: everyone did what was right in his own eyes."[44] Prominent New Zealand CC commentator, Bruce Logan, for instance, warns:

> Today the concept of human rights means the freedom to choose without having to worry about what anyone else thinks . . . The current idea of rights is about empowering the individual to maximise the opportunity to act on preferences and to expand the power of the idol of our time: choice.[45]

Mott likewise discerns a tension within many Christians who "see behind the use of rights a society of isolated, self-contained units. Each relates to others primarily for purposes of his or her own benefit. The community becomes fragmented and secondary."[46] Catholic voices echo this concern:

> [L]iberalism errs in giving too much room to individual freedom at the expense of the common good and the needs of the disadvantaged, that its doctrine of rights lends to a neglect of duties, that liberal societies have lapsed into a resentful and self-protective consumerism, and that liberalism involves both the denial of a normative structure of goods for human beings in society and serious errors in anthropology.[47]

Instead of the selfish assertion of rights by the unencumbered individual, CCs prefer to think in terms of the sacrificial non-assertion of one's rights, of doing one's duty and carrying out responsibilities to others.[48] Marshall reminds that freedom "can never mean absolute autonomy . . . [it] is not a lordless anarchy in which isolated individuals are free to do whatever their vanity dictates."[49] There is, rather, another classic Christian paradox at work here—true freedom comes with submission to rightful authority: "Freedom is not freedom from subjection

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43 Walsh and Middleton's term for modern secularism's concept of man. See Chapter 3.

44 *Judges* 21: 25.

45 Bruce Logan, "Human Rights—Do we have the right to choose?," *Reality*, Feb/Mar 1997, 7 at 7. See also Marshall, "Little Lower than the Angels," at 57.

46 Stephen Charles Mott, "Human Rights and Christian Thought," *Reformed Journal*, June 1989, 9 at 9.

47 Langan, "Human Rights in Roman Catholicism," at 35.

48 Mott, "Human Rights and Christian Thought," at 9 asks: "[I]n terms of Christ's teaching of self-sacrifice and turning the other cheek, can one validly assert one's rights? Should not our response be one of duty and responsibility for others, rather than of making claims for oneself?"

49 Marshall, "Little Lower than the Angels," at 57.

to all restrictions, but freedom in subjection to God's will."[50]

In the Reformed tradition, persons have particular "offices" or "callings" (mother, child, labourer, pastor, artist, Prime Minister) with responsibilities attached. Rights are necessary to fulfil one's office and discharge one's duties to God and man. Rights are never rights in the abstract or rights for rights' sake.[51] Rights in the CC lexicon are always duty-rights.[52] As Paul Marshall expounds: "Human beings have the right to do what God calls them to do. Their rights relate to their God-given human duties and responsibilities."[53]

3 *The intolerant, totalitarian dimension of human rights laws*

Some CCs perceive human rights theory as having coercive, even totalitarian tendencies. The human rights corpus is not as neutral or universalist as it pretends to be, but rather is based on a particular ideology. This observation is common fare among critics of human rights.[54] This ideological foundation is liberalism or liberal democracy. Liberalism is the political philosophy of modernism which, as Chapter 2 explored, is the "enemy", the supplanting worldview of this age. There is a clear link between human rights laws (especially the "International Bill of Rights"[55]) and Western liberal democratic theory.[56] Mutua argues:

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50 Ibid at 67.

51 Paul Marshall and Ed Vanderkloet, *Foundations of Human Rights* (1981) at 6-7.

52 This concept, "duty-right", is a theological one and does not approximate a neat equivalent in the Hohfeldian scheme of jural relations: see Wesley N Hohfield, *Fundamental Legal Conceptions* (1919) and R W M Dias, *Jurisprudence*, 5th ed (1985) ch 2. John Eekelaar ("What are Parental Rights?" (1973) 89 LQR 210 at 213) refers to "duty-rights" as existing in law "where Hohfield's conditions for a right are present, but where the claimant's freedom of choice has been replaced by a duty to perform the act." In the present context, a CC would say a believer's freedom of choice is voluntarily restricted by his or her obedience to God to perform the task.

53 Paul Marshall, *Human Rights Theories in Christian Perspective* (1983) at 20. Quoted by Christopher Marshall, "Little Lower," at 39.

54 See Mickelson, "How Universal?" at 26 et seq.

55 The International Bill of Rights consists of the UDHR, the ICCPR, the International Covenant on Economic, Social and Cultural Rights 1966, and the first Optional Protocol to the ICCPR 1966. See *Wellington District Legal Services Committee* v *Tangiora* [1998] 1 NZLR 129 at 133 per Keith J (CA). New Zealand became bound by the two Covenants in 1979 and, as Keith J (ibid) continued, by the Optional Protocol in 1989.

56 See eg Jack Donnelly and Rhoda Howard, "Human Dignity, Human Rights and Political Regimes" in Donnelly (ed), *Universal Human Rights in Theory and Practice* (1989) 66 at 71: "the near perfect fit between liberalism and the *Universal Declaration* reflects a deep and essential theoretical connection." See Mickelson "How Universal?" at 29.

> [H]uman rights and Western liberal democracy are virtually tautological . . . one is in fact the universalised version of the other; the human rights represent the attempted diffusion and further development at the international level of the liberal political tradition.[57]

The human rights corpus is simply "a proxy"[58] or "the moralised expression"[59] of a political ideology. Mutua continues:

> [I]t was presumptuous and shamelessly ethnocentric for the UDHR to refer to itself as the "common standard of achievement for all peoples and all nations." A closer examination of the rights listed in both the UDHR and the International Covenant of Civil and Political Rights (ICCPR) leaves no doubt that both documents—which are regarded as the two most important human rights instruments—are attempts to universalise civil and political rights accepted or aspired to in Western liberal democracies.[60]

The animating spirit behind human rights theory is the very one CCs discern to be the God-opposing *zeitgeist*. "Human rights" is but an expression or alter ego for modernism, secularism and humanism.

If law is fundamentally religious in origin (as Rushdoony postulated) then CCs' concerns are exacerbated when they hear human rights norms being referred to in quasi-religious terms. Human rights advocates characterise human rights standards as constituting "a large normative canon"[61] or a "set of secular ethics."[62] Mutua, in his recent critique of human rights, notes in passing how the UDHR has become "the 'gospel' of the human rights movement"[63] and the way many human rights advocates share an unequivocal "belief in the redemptive quality and power of human rights law."[64] Mary Ann Glendon too notes how, in its fiftieth year, the UDHR is "showing signs of having achieved the status of holy writ with the human rights

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57 Mutua, "Ideology of Human Rights," at 592.
58 Ibid at 607.
59 Ibid at 592.
60 Ibid at 605-606. The phrase in quotations is from the Preamble to the UDHR.
61 Thomas M Franck, "The Emerging Right to Democratic Governance" (1992) 86 Am J Int'l L 46 at 79.
62 Francesca Klug "A Bill of Rights as Secular Ethics" in Gordon and Wilmot-Smith (eds), *Human Rights in the United Kingdom* (1996) ch 5 at 53: "International human rights standards provide a set of secular ethics which, whilst drawing upon the moral teachings of all the major religions, attempt to express universal and timeless values."
63 Mutua, "Ideology of Human Rights," at 589 n 1.
64 Ibid at 595.

movement."[65] When human rights scholars refer to this being "the age of rights" and "human rights being the idea of our time"[66] they effectively elevate human rights (universal, omnipotent) "to a near-mythical, almost biblical plateau."[67]

For CCs there can be only one canon, one gospel, one set of ethics. "The good news of Jesus Christ is not to be found in the Universal Declaration of Human Rights."[68] Surrogate normative codes, even promulgated by the United Nations, are pale substitutes. The UDHR and its progeny, moreover, can, if one is not careful, become false idols, another ill-fated tower of Babel.[69]

People may worship abstract ideals of liberty, equality and tolerance instead of gold or bronze statutes but worship they must. Matthew de Blois sounds the alarm here:

> [There is] a tendency which disturbs me, namely that human rights have for many people almost the significance of a religious belief . . . Human rights seem to have become the basis of a new creed. Similarly, a Dutch humanist philosopher, Paul Cliteur, recently wrote that the human rights tradition has since the Second World War become the first real world religion, albeit without God, church or rituals.[70]

If human rights theory is but the universalised expression of a political ideology (liberalism), then we would expect it to be concerned with self-preservation. Liberalism will not tolerate challenges to its fundamental tenets. So, as we saw in Chapter 3, religion in the liberal democratic state is relegated to the private realm and "tolerated" to the extent it "knows its place". Its place is not to challenge essential liberal democratic tenets (expressed in human rights discourse) such as maximum individual choice, freedom of sexual expression, equality of the sexes, avoidance of exclusivist or dogmatic claims, and so on. Interestingly, with the

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65 Mary Ann Glendon, "Knowing the Universal Declaration of Human Rights" (1998) 73 Notre Dame L Rev 1153 at 1153.

66 Louis Henkin, *The Age of Rights* (1990) at ix: Quoted in Mutua "Ideology of Human Rights" at 627.

67 Mutua, ibid at 627. The same concern is expressed by Mickelson, "How Universal?" at 47.

68 Smolin, "Church, State and International Human Rights", at 1537.

69 See Smolin, ibid at 1528 and Glendon "Knowing the Universal Declaration" at 1154: "In its fiftieth year, the universal rights project can evoke, even in the minds of its friends, disquieting thoughts of another ambitious human undertaking: the ill-fated tower built by the men of the Valley of Shinar who wanted their very own staircase to heaven." Despite this chariness, Glendon counts herself as a supporter of the UDHR (see ibid at 1176).

70 De Blois, "Foundation of Human Rights," at 28-29.

privatisation and atomisation there comes statism. Christopher Marshall explains:

> [P]rivatism goes hand in hand with a kind of statism inasmuch as there is almost exclusive focus on State action to secure rights. Government is seen as the primary duty-bearer, responsible to remove as many impediments to personal freedom as possible. Individuals have rights; government has duties.[71]

David Smolin, an American evangelical legal scholar, puts the case against human rights in the strongest terms (perhaps to shock the reader): "Will International Human Rights be used as a Tool of Cultural Genocide?" is the provocative title of his essay.[72] (Incidentally, this article was commended to readers of one New Zealand CC publication.[73]) If totalitarianism comprises "an attempt to place all aspects of life of a people under the control of a centralized political authority"[74] then mediating groups and associations, such as families and religious organisations, pose a threat. They provide a different locus for citizens' affections, a different loyalty. Ironically, argues Smolin, human rights evolved out of efforts to curb the horrendous abuses of totalitarian governments, both left and right, but is itself in danger of falling into the same trap: "the modern human rights movement . . . mistook the establishment of human rights as an ultimate good, and thus yearned (however comically, given its impotence) to constitute a new form of totalism."[75] Smolin illustrates his thesis by exploring the potentially devastating effect the impact of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women[76] (CEDAW) would have upon a traditional religious community, such as Hasidic and Orthodox Jews if coercively implemented. Groups such as these perpetuate "stereotyped roles for men and women" (article 5) in violation of the

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71 Marshall, "Little Lower than the Angels," at 63.

72 David M Smolin, "Will International Human Rights be used as a Tool of Cultural Genocide? The Interaction of Human Rights Norms, Religion, Culture and Gender" (1996) 12 J L and Religion 143. See also his "Church, State and International Human Rights" at 1534 et seq.

73 *New Slant*, Nov 1998, at 3 (this publication is the newsletter of the DeepSight Trust, led by the Rev Dr Harold Turner).

74 Smolin, "Cultural Genocide?" at 143.

75 Ibid at 144.

76 GA Res 180, UN GAOR, 34th Session, Supp No 46, UN Doc A/34/46 (1979). CEDAW entered into force on 3 September 1981.

Convention's norm of sexual equality.[77] It is ironic, he argues, that nations that do not accept certain norms (eg feminist ones) as a matter of domestic law may be made to accept them as a matter of international law.[78] Smolin concludes:

> It is certainly too soon for the religious community to give up on international human rights law. At the same time, many religious communities have probably been far too sanguine, and even naive, about international human rights law. They have failed to perceive its potential totalism, or appreciate the way in which secular ideologies have come to color its goals, language, and processes . . . [P]ractioners of traditionalist religions, and all who endorse religious and familial liberty, cannot wholeheartedly support the strengthening of the enforcement of international human rights norms. Support for an expansion of enforcement of human rights law must be nuanced and selective, or risk creating a totalitarian force upon religious communities and families across the globe.[79]

Conservative Christian concern with human rights theory is, unsurprisingly, echoed by Muslim theorists. For example, in 1981 the Islamic Council for Europe promulgated its own "Islamic Declaration on Human Rights" (L'Islamic et les droits de l'homme).[80]

The clash of human rights theory with traditionalist religions again exposes the familiar paradox of liberalism—how to treat those who reject its theory (the "foreign policy" problem discussed in Chapter 3). There are limits to tolerance, even for liberalism.[81] Human rights theory, the alter ego of liberalism, confronts the same issue. Toleration, rights, cannot be extended to the intolerant. To the extent that CCs violate liberal axioms, intolerance can be expected. And in the modern era, governments will have the weight of international human rights treaties to press home the point. Malcolm Evans, in his recent comprehensive treatise on religious liberty and international law, argues that the UN's emphasis upon a "culture of tolerance" implies that:

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77 On New Zealand's compliance with this article, see *Status of Woman in New Zealand : The Combined Third and Fourth Reports on New Zealand's Progress on Implementing the Convention on the Elimination of All Forms of Discrimination Against Women* (Feb 1998) at 17-19.

78 Smolin, "Cultural Genocide?" at 169.

79 Ibid at 170-171.

80 See Michael King (ed), *God's Law versus State Law: The Construction of an Islamic Identity in Western Europe* (1995) at 3-5; Montgomery, *Human Rights and Human Dignity*, at 116.

81 In Rushdoony's words (*Institutes of Biblical Law*, at 5-6): "Every law-system must maintain its existence by hostility to every other law-system and to alien religious foundations, or else it commits suicide."

> freedom of religion does not include the right to adhere to a religion which is intolerant of the beliefs of others. On this view "Human Rights" has itself become a "religion or belief" which is itself as intolerant of other forms of value systems which may stand in opposition to its own central tenets as any of those it seeks to address . . . In seeking to assert itself in this fashion, the international community risks becoming the oppressor of the believer, rather than the protector of the persecuted . . . [There exists] the reluctance of the international community to accept that in the religious beliefs of others the dogmas of human rights are met with an equally powerful force which must be respected, not overcome.[82]

II SPECIFIC CONCERNS

Conservative Christian unease regarding human rights theory may be divided into two distinct areas. First, there is an internal, defensive posture: Is human rights law going to significantly affect the life of the believer and the faith community? Are traditional religious liberties under threat? Second, there is an external, societal focus: Do human rights laws restrict believers in witnessing to the truth in public life? Is the ability to influence public policy and retain (or reform) public institutions likely to be curtailed?

1 Internal and defensive

As we saw in Chapter 3, liberalism "privatises" religion, confining religion to the private realm where it can enjoy relatively unrestricted freedom. The concept of religious liberty preferred by the modern liberal state is what Sir Isaiah Berlin termed an example of "negative freedom" : "I am normally said to be free to the degree to which no man or body of men interferes with my activity. Political liberty in this sense is simply the area within which a man can act unobstructed by others."[83] The New Zealand Court of Appeal noted recently that most of the rights and freedoms under the New Zealand Bill of Rights Act 1990, including freedom of religion, are "negative freedoms, to use one part of Isaiah Berlin's famous categorisation."[84] They are primarily protections against state interference. Yet, this is not to say, the Court added,

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82 Malcolm D Evans, *Religious Liberty and International Law in Europe* (1997) at 260-261.

83 Isaiah Berlin, "Two Concepts of Liberty" in his *Four Essays on Liberty* (1969) at 122.

84 *Mendelssohn* v *Attorney-General* [1999] 2 NZLR 268 at 273 per Keith J.

that there are no circumstances in which the state may be required to take positive steps to ensure the effective enjoyment of negative freedoms.[85] A right to liberty points to the need for positive state interventions such as prohibitions against kidnapping; likewise an offence of disturbing congregations protects worship. As the Court of Appeal pointed out a week later, "the negative and positive labels may mislead. Negative freedoms require a supportive state environment with the establishment or recognition of positive rights . . . buttressed by available and effective policing and court process."[86]

To many CCs the area of non-interference from the state appears to be diminishing. Encroachment upon CCs' negative freedom is being felt in cherished spheres such as the family and the church. A retired judge, Arnold Turner, in a paper commissioned for the 1997 Vision New Zealand Congress, addressed these concerns. The Human Rights Act 1993 received only cautious approval:

> Christians should . . . support the general objective of the Act because it reminds all citizens of their duty to act fairly toward one another. However, Christians have concerns that some of the provisions of the Act go too far . . .
>
> The experiences which some Christians have had over the way the Act is working have caused them to ask: do some of the requirements of the Act mean that Christians must sometimes act in a manner which conflicts with conscience? Do some of those requirements conflict with the doctrines and practices of churches and Christian organisations?[87]

Bishop Brian Carrell summarised some of these "flashpoints" in his 1998 book:

> A car salesman is successfully prosecuted because he advertises for a Christian staff member . . . A Christian bookbinder is taken to court by an outspoken rationalist for declining to bind a set of papers denying the existence of God (even though the accused had offered to arrange an alternative bookbinder to do the work at no extra charge). A kindergarten diligently removes the pastry crosses from Easter buns so as not to offend any under-fives who may come from non-Christian homes, or who may perchance belong to another faith—while feeling no compunction about initiating the same little children in the mumbo-jumbo of Americanised Halloween with its "tricks or treats". Strangely,

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85 Ibid at 275.

86 *R* v *Song van Nguyen*, CA 26/99, 12 May 1999, at 6, per Keith J.

87 Arnold R Turner, "The Human Rights Act 1993" in Patrick (ed), *The Vision New Zealand Congress 1997* (1997) ch 22 at 366.

> in these and other cases like them, there is no sense of the law protecting the personal position and convictions of any Christians involved.[88]

The trouble frequently arises because, as the CC sees it, behaviour it would castigate as sinful has now become endorsed by the state as lawful and even worthy of protection as a human right. Some Christians may thus be required to act against conscience in the wake of recent state-enforced human rights norms. The "dark-side" of humanistic human rights theory is being revealed. Thus, for example, there is an anxiety among some CCs that their churches (after the prohibition of sexual orientation discrimination) might be required to: ordain gay ministers or pastors; hire gay staff such as secretaries or counsellors; conduct same-sex marriages and even stop preaching against homosexuality. Parachurch organisations such as Christian bookshops, camps, or Radio Rhema will be under similar strictures. With discrimination based on marital status being banned, churches and church schools may be required to employ persons living in *de facto* relationships.[89] Outside of churches and related entities, the CC businessperson or landlord may be forced to act against his or her conscience by hiring someone at odds with the spiritual ethos cultivated at the workplace, or be forced to let a flat to an unmarried or same-sex couple. Rather then analyse each and every instance, I shall take two important "pressure points"—parental rights and ordination of gay clergy—as case studies in later chapters.

2 *External and assertive*

As Chapter 2 noted, a mark of conservative Christianity is that it is restorationist. New Zealand can still be a Christian nation and the dire consequences if humanistic ideology is given further rein do not bear thinking about. The preferred strategy of the majority of CCs is social engagement and transformation. To recap, Christian morality and ethics are applicable for everyone not just Christians. God as Creator knows what is best for His creations, human beings. In utilitarian terms, God has already done the cost-benefit calculations and His perfect

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88 Brian Carrell, *Moving Between Times* (1998) at 46.

89 See Wayne Thompson, "Religious practices and beliefs: A case for their accommodation in the Human Rights Act 1993" [1996] NZLJ 106 at 110.

laws are the result.[90] Second, spurning God's requirements and commands renders believer and non-believer alike subject to judgment. Many CCs desire to express their transformative urge through democratic means—pressure-group lobbying, writing submissions to Parliament, forming political parties and so on.

The desire to direct or influence the character and path of society in the public sphere corresponds to Berlin's second concept of liberty, "positive freedom". For Berlin, this notion of freedom derived from the wish of a person to be his or her own master: "I wish my life and decisions to depend on myself, not on external forces of whatever kind."[91] For CCs purely negative religious freedoms—non-interference with faith-directed activity in the family, church, school and so on—are certainly important, but more is claimed. Christians are called to publicly proclaim the truth. Liberalism may want religion to stay privatised but Christianity (of this transformatist variety) will not oblige. Vatican II in its *Declaration on Religious Freedom* 1965 espouses this concept of positive religious freedom:

> [I]t comes within the meaning of religious freedom that religious bodies should not be prohibited from freely undertaking to show the special value of their doctrine in what concerns the organization of society and the inspiration of the whole of human activity.[92]

Fr John Courtney Murray's explanatory footnote to this passage is helpful:

> Implicitly rejected here is there outmoded notion that "religion is a purely private affair" or that "Church belongs in the sacristy." Religion is relevant to the life and action of society. Therefore religious freedom includes the right to point out this social relevance of religious belief.[93]

CCs wish to fully participate in the public square and influence public policy. CCs cannot be indifferent to what they regard as sinful, immoral behaviour in society, even where this takes place between consenting adults in private. "No man is an island" is their attitude. Millian

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90 See eg Oliver Barclay, "The nature of Christian morality," in Kaye and Wenham (eds), *Law, Morality and the Bible* (1978) ch 1 at 130-131: "The Christian contention is . . . that the observance of what is good is in the long run, and in the community as a whole for our own good . . . The utilitarian ideal, the 'greatest good of the greatest number', is, so long as it does not overlook the individual, a Christian concern also and Christian ethics . . . will serve that end in society as a whole."

91 Berlin, "Two concepts of liberty," at 131.

92 Chapter 1, section 4 of *Dignitatis Humanae Personae*, 7 December 1965, in Abbott (gen ed), *The Documents of Vatican II* (1966) at 683.

liberalism that would permit government interference with individual liberty only where it was necessary to prevent "harm to others"[94] is rejected, at least where harm is viewed in narrow, individualistic terms. There is, in the intricate web of relationships that comprise society (recall the Web-Network View, Figure 4 in Chapter 2), no such thing as "self-regarding" behaviour. "The consequences of human actions can rarely, if ever, be isolated to one person",[95] is a proposition most CCs would completely endorse. Sinful actions or institutions do have ramifications, sometimes invisible but always real, upon others. At a personal level, offence is caused and at a broader, societal level, the 'moral ecology' of the society is adversely affected. Everyone ultimately suffers and the raising of children in particular becomes most difficult. Grassian, taking the question of homosexual conduct as an illustration, nicely articulates the CC position:

> While Mill, no doubt, would have said that consenting adult homosexual behaviour does not "affect the interests" of disapproving heterosexuals, and consequently should not be the subject of legal sanction, the fact is that many disapproving heterosexuals do indeed "take an interest" in such behaviour—behaviour which many of them see as a "moral abomination", contrary to the will of God. For such individuals, the presence in their community of homosexuals may cause greater pain than a physical blow. Furthermore, they will certainly consider the possibly corrupting influence of homosexuals as affecting their own vital interest in their community and especially in the bringing up of their children.[96]

Many CCs are disturbed at the way the state is undermining institutions necessary for a healthy society. Again their list of specific concerns is a long one. There is trepidation at: the abolition of

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93 Footnote 11 of the *Declaration*: see ibid. Fr Murray was the principal architect of the *Declaration*.

94 John Stuart Mill in his essay *On Liberty* (1859) postulated this "one very simple principle" governing individual freedom in a liberal society: "That principle is, that 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. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right." Spitz (ed), *John Stuart Mill, On Liberty* (1975) at 10-11.

95 Victor Grassian, *Moral Reasoning: Ethical Theory and Some Contemporary Moral Problems* (1981) at 220.

96 Ibid at 221. I should note Grassian is not a CC; he simply aptly articulates the CC position. See also Berlin, "Two concepts," at 155: "Even Mill's strenuous efforts to mark the distinction between the spheres

Sunday observance; liberal censorship laws permitting pornography and other obscenity to proliferate; introduction of virtual abortion-on-demand; introduction of easy, no-fault divorce; increasing legal recognition of cohabitation outside of marriage (fornication to CCs); increasing recognition of homosexuality as a legitimate lifestyle. Again, rather than analyse each concern in depth, I shall select one contemporary contentious issue—legal recognition of same-sex marriages and its consequences—as a case study to assess to what extent CCs' positive religious freedom is restricted.

III THE LEGACY OF DISTRUST: CHRONOLOGY AND ANALYSIS

Conservative Christians have a legacy of distrust and antagonism towards human rights theory (and, in New Zealand, the Human Rights Commission) beginning two decades ago. Certain New Zealand CCs have found themselves at odds with rights proponents, whether law reformers or the Commission. Admittedly, not all rights controversies have gone against CCs—for instance, the Commission did not pursue the Rationalist Society complaint about the Auckland City Council funding of a nativity display in Aotea Square.[97] Nonetheless, many CCs have felt that, by and large, human rights law has not been on their side. In this section I shall chronicle and analyse several of the principal instances of conflict between CCs and rights proponents.

Before proceeding, a brief digression. One important recent development has not yet given rise to conflict. In 1994 the Human Rights Commission commenced a comprehensive project to assess the extent to which laws, regulations, as well as government policies or administrative practices, were in conflict with the anti-discrimination provisions of the Human Rights Act 1993, or their "spirit or intention". This massive audit was dubbed "Consistency 2000".[98]

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of private and social life breaks down under examination. Virtually all Mill's critics have pointed out that everything that I do may have results which will harm other human beings."

97 See "City approves manger display", *CW*, 27 Oct 1993, at 1; "Rationalists ready for battle", *CW*, 3 Nov 1993, at 1; "Nativity scene under guard", *Otago Daily Times*, 13 Dec 1994, at 1.

98 See generally Human Rights Commission, *Consistency 2000* (Report to the Minister of Justice pursuant to Section 5 (1)(k) of the Human Rights Act 1993) (31 Dec 1998); Paul Rishworth, "Applying the

Pursuant to s 5(1)(i) to (j) of the Act, the Commission was required to report to the Minister of Justice by 31 December 1998. On 16 June 1997 however, Cabinet decided to abort the project. Instead, specific areas of conflict would be assessed by chief executives of government departments in the natural course of events and exemptions for the government generated as need be.[99] A disappointed Commission still produced a truncated report.[100] Legislation was eventually passed on 8 September 1999 in favour of a much scaled-down approach.[101] Nonetheless, there is still a duty upon the Minister to report (half-yearly) to Parliament on progress made in remedying "significant inconsistencies" between existing legislation and the Act[102] and the Minister is obliged to consult with the Commission who have the opportunity to comment on the draft report.[103]

CCs have so far paid little attention to the Project,[104] but given that the Commission has expressed concern at, inter alia, laws that infringe the ban on sexual orientation discrimination[105] and the current (narrow) definition of the family,[106] the prospect of clashes may yet materialise.

1 The Eric Sides saga[107]

The first "flashpoint" remains perhaps the most significant. On 2 March 1979, Eric Sides, a Christchurch garage proprietor and devout Christian, placed advertisements for a service station attendant in the local newspapers. *The Press* advertisement read: "SERVICE STATION

Human Rights Legislation to Government: 'Consistency 2000' and the Human Rights Act 1993 (NZ)" (1998) 9 Pub L Rev 6.

99 The Cabinet decision and relevant press releases and background papers can be found in: Office of the Rt Hon Douglas Graham, "Consistency 2000 Update and the Proposed Amendments to the Human Rights Act 1993" (1998) 4 HRLP 123.

100 Human Rights Commission, *Consistency 2000 Report*, at 6: "This is the report the government did not want."

101 Human Rights Amendment Act 1999. An earlier effort, the Human Rights Amendment Bill 1998, introduced on 19 August 1998, lapsed through lack of support (this Bill is reproduced in Part D of the Human Rights Commission, *Consistency 2000 Report*).

102 Section 4 (1) of the Human Rights Amendment Act 1999.

103 Section 6.

104 But see Carolyn Moynihan, "Legal status for same-sex couples?", *Humanity*, Oct 1999, at 9, who places the same-sex marriage issue in the context of the consistency agenda.

105 See *Consistency 2000 Report* at para 9.10.

106 See ibid at para 9.5.

107 *Human Rights Commission* v *Eric Sides Motors Co Ltd* (1981) 2 NZAR 447.

ATTENDANT—We have a vacancy for a keen Christian person, 16-18, who is not afraid of work, to assist on our Forecourt, only permanents need apply." In deference to the Human Rights Commission Act 1977 (since replaced by the Human Rights Act 1993) both papers substituted "person" for "girl" but *The Star* also deleted the word "Christian" in a subsequent advertisement. Ian Robinson, an unemployed youth aged 16 saw *The Press* advertisement and telephoned Sides. Sides asked about Robinson's age and work history. Robinson had had some experience operating petrol pumps and had shortly before lost his job with another station. Sides then asked about Robinson's religion. Sides asked Robinson whether he was a Christian and was told by Robinson that he was. Sides probed further to inquire whether Robinson went to church on Sundays. Robinson said he did not. At that point Sides indicated there would be little chance of his being offered the post.[108] Robinson told his mother,[109] who was sufficiently upset to lodge a complaint about her son's treatment with the Human Rights Commission (HRC). Sides himself took umbrage with the Commission's taking up of the complaint. On 12 October 1979 he was quoted in a newspaper article as saying that he was willing to go to court to defend his right to advertise for committed Christian staff and he criticised the Chief Human Rights Commissioner for inconsistency.[110] In August of that year, the HRC had issued a public statement declaring that freezing works were lawfully entitled to specify Muslim slaughtermen as mutton slaughterers for Iranian-bound carcasses.[111] Halal killing was an essential requirement for this job and only Muslim slaughtermen were qualified to perform it. The matter had, by now, become one of considerable public interest. Efforts at conciliation between the parties (required under the legislation) proved fruitless leading the HRC to institute proceedings before the Equal Opportunities Tribunal. The plaintiff Commission sought declarations that the

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108 There are conflicting accounts of what was said. Robinson's version was that Sides told him that it was no use coming for an interview because he did not go to church on Sunday; Sides' account was that he said: "It does not sound like you are the person we are looking for." Ibid at 451.

109 The mother, ironically, stated to the Tribunal she herself was a born again or committed Christian. Ibid at 455.

110 The Chief Human Rights Commissioner of the time, Patrick Downey, is a Christian himself: see his essay, "What rights do individuals have and who cares: A Christian Perspective" in P J Downey, *Human Rights and New Zealand* (1983) at 53.

defendant, Eric Sides Motors, had breached section 15(1) of the Human Rights Commission Act 1977 (refusal to employ a person because of his or her religious or ethical belief) and section 32(1) (lodging for publication a discriminatory advertisement). The plaintiff also sought declarations against both newspapers for breach of section 32(1). Orders to restrain all defendants from repeating such breaches were also sought.

The Tribunal heard the case in December 1980 and delivered judgment on 15 April 1981. The declaration sought under section 15(1) was refused. The evidence fell short of the required standard of proof that the refusal by Sides to employ Robinson had been "by reason of [his] religious or ethical belief." The Tribunal could not rule out the likelihood that Sides may have been influenced to not employ Robinson because of secular, business reasons such as Robinson's poor work record.[112]

The Tribunal did, however, find there had been a violation of section 32(1). The defendants had advertised a position as being available only to Christians and had thereby indicated an intention to breach section 15(1) of the Act. An order was made restraining Eric Sides Motors from placing any similar advertisements and costs were awarded against the defendants.

The Tribunal's reasoning contains much of interest, especially as their opinion stands as one of the very few substantial judicial examinations of religious discrimination in New Zealand law. Indeed, *Eric Sides* stands as one of New Zealand's few modern religion and state cases.[113]

The Tribunal was fully aware of the significance of the case. It prefaced its opinion by noting that:

> [T]he questions [raised] are not trivial nor are the answers obvious. In

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111 (1981) 2 NZAR at 452.

112 The plaintiff could not discharge the burden of proving that "a substantial and operative factor" in Sides' decision not to employ Robinson was the latter's religious or ethical beliefs: ibid at 457. The defendant had in all probability formed as unfavourable view of Robinson's application prior to the questions on religion: ibid.

113 New Zealand judges, understandably, are reluctant to traverse church-state questions. See McGechan J's comment in a custody case involving parents of divergent Catholic persuasion, *K* v *K (No 1)* (1988) 5 NZFLR 257 at 279: "Ghostly conflicts between church and state of bygone centuries in other lands have no modern place in this country."

> fact the proceedings raise age-old questions of morality and enter areas where the law and the State have often found difficulty in drawing an appropriate line between individual freedom on the one hard and unfair discrimination on the other: in modern terminology, the issues concern the interface between freedom of religion and the right to employment.[114]

The opening paragraphs of the Tribunal's opinion are revealing and reflect a modernist worldview. The Tribunal begin by observing that: "In our view the questions raised are ones to which there are as a matter of morality no absolute answers. Rather it is a matter of where the line is to be drawn between competing rights."[115] Further, that line is one drawn by the state in the guise of the Act.[116] CCs are ethical absolutists who reject that notion that morality is what the state says it should be.

Next, the Tribunal cast Eric Sides, and his CC fellow-travellers, as hypocritical and intolerant. Much of the defence evidence expounded the rights of Christians yet it was the Tribunal's "understanding that the teachings of Christ require care and compassion for others."[117] Defence witnesses had little to say about employee's rights or the need to help the unemployed. Furthermore:

> When those who assert their rights are conscious of the needs of others, it is nearly always possible to reach a fair and balanced solution. When that consciousness is missing, it leads to the abuse of rights either unwittingly or wittingly (an extreme example of the latter being use of the device of advertising for "Christians only" in Nazi Germany as a means of excluding Jews).[118]

Despite its desire "not to become involved in moral and theological arguments"[119] the Tribunal continued to allude to the intolerant attitude of certain Christians. Holmes' maxim was invoked:

> Particularly in the field of human rights the life of the law is not logic but experience. History is replete with examples where the strict and apparently logical application of moral or religious views was led to great intolerance and injustice . . .

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114 *Eric Sides* (1981) 2 NZAR at 448.
115 Ibid at 449.
116 Ibid.
117 Ibid.
118 Ibid.
119 Ibid.

> Those who have little difficulty in saying that our law must ensure there is no discrimination on account of race, are averse to the view that the law should also ensure there is no discrimination on the ground of religious or ethical belief. This would be understandable if all those with strong beliefs, Christian or otherwise, were tolerant of the rights of others and minorities, as in many if not most cases their belief requires. Regrettably, this is not always so.[120]

The outcome was effectively decided once the Tribunal had obliquely characterised the defendant as lacking "consciousness of the rights of others", hypocritical and intolerant. It was clearly irritated by the intransigent and combative stance taken by Sides to the original complaint noting that the "position was eventually reached where the plaintiff [HRC] has little option but to take proceedings."[121] Certain intolerant religionists were mounting an open attack on human rights theory. They needed to be taught that all rights were qualified, all freedom was "governed by the law", in this case, "by the terms of the Act."[122]

The most interesting defence mounted by Sides was the claim that his case was on an equal footing with the Muslim slaughterman situation. Being a committed Christian, he argued, was a "qualification" for this work, in terms of section 15(1). Sides testified that his company "was set up as a totally Christian enterprise, the true purpose of the business being not the selling and repair of motorcars or the pumping of petrol but rather the serving of the Lord, with the business merely being a platform for giving witness to the Lord's work, and for the drawing of people together in Christian fellowship."[123] Sides was attempting to collapse the dualistic compartmentalisation of life into sacred and secular spheres. As we saw in Chapter 2, CCs, influenced by "Kingdom theology", argue all areas of life are under the Lordship of Christ and that there is no "secular" work that is not Christian work as well. A local minister gave evidence on behalf of Sides to this effect. The Tribunal commented:

> [W]e pay full regard to the passages in the evidence of the Reverend Yule in which he pointed out that the separation of life into sacred and

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120 Ibid.

121 Ibid at 450. See also ibid at 468: "Mr Sides . . . whilst indicating at one stage to the Chief Human Rights Commissioner that he was not seeking a Court case, virtually challenged the plaintiff to issue proceedings."

122 Ibid at 450.

123 Ibid at 461.

> secular, or spiritual and material, reflects a distinctly modern outlook lacking justification in Christian tradition and Christian morality.[124]

Nonetheless, the Tribunal found it impossible to accept that Christian belief could be "an essential qualification" for the job of a forecourt attendant.[125] Such a contention was "simply too extreme,"[126] for a number of reasons. First, it would mean that the employee's tenure would be tied to his or her continuance in the faith, so that if the employee lost his faith his services could be dispensed with. Second, "looked at in a reasonable and objective way"[127] it was plain a non-Christian forecourt attendant could do virtually all that was required. Third, the employer's ability to place such an idiosyncratic meaning upon "qualified" may lead to "very grave problems."[128] The Tribunal gave the unflattering analogy of an employer with a sincere belief in the supremacy of a certain racial group. Such a person could hardly be allowed to say membership of that race was an essential qualification for employment since he or she was running a business devoted to extolling the racial superiority of that group.[129] Finally, the Tribunal was sceptical that the whole purpose of Sides' operation was to serve God and propagate the faith. An examination of Sides' accounts revealed a normal family business:

> The business of The Eric Sides Motor Company Limited is . . . used to support Mr Sides and his family in the usual way, and we do not consider it can be said that the business or its assets are devoted solely or principally to the service of the Lord or the propagation of the Christian belief. Nor do we consider that the business of the Eric Sides Motor Company Limited is a charitable or religious organisation. It is in fact a commercial garage and service station.[130]

In the modernist understanding the operation was a simple secular business and no superimposition of spiritual motives could alter that. Sides' parallel submission—that he satisfied the exemption under section 15(7)(b) of the Act (permitting preferential treatment in employment based on religious belief where the sole or principal duties of the position were

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124 (1981) 2 NZAR at 461. The Rev Yule is quoted at the conclusion of Chapter 2.
125 Ibid.
126 Ibid at 462.
127 Ibid.
128 Ibid
129 Ibid.
130 Ibid.

substantially the same as those of a clergyman, pastor or priest)—was similarly rejected. A forecourt attendant could hardly be said to undertake duties akin to those of a clergyman.[131] Filling petrol tanks is very far from propagating the faith. The Tribunal was fortified by a (Christian) witness for the plaintiff who observed: "It is not imperative to pray before pouring petrol."[132] The witness believed Sides could still maintain the Christian character of his operation by beginning each day with a prayer for his employees; indeed, in her view, employing a non-Christian may itself be an evangelistic opportunity. Her closing remark raised the historic nightmare of liberalism: "If Mr Sides and all other employers were legally able to discriminate on the basis of religion, this could lead to sectarianism and strife."[133] The liberal state was of course created to defuse these very tensions. The Tribunal cautioned: "It is not difficult to foresee difficulties in New Zealand if there were such discrimination, for example in the case of a large employer who desired to employ only members of one religion or denomination."[134] The Tribunal were adamant that the Act did not place a Christian employer "in an impossible or devious situation" nor did it "cut[] across Christian principles or interfere[] with the ability of a Christian to devote his whole life to the service of Christ."[135] In its opinion there were still opportunities open to Sides to evangelise and serve God. The Tribunal refused to defer to Sides' own subjective assessment of what serving God meant and of how a Christian business ought to be run. The matter had to be looked at in "a reasonable and objective way."[136] Rationality is the modernist benchmark.

The Tribunal declined to comment on the apparent inconsistency of the present case and the Muslim slaughtermen one. In a public report, the Human Rights Commission did, however, defend its position. Sides' criticism was, it said, based on a misunderstanding. The difference between the two cases was explained this way:

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131 See ibid at 464.
132 Ibid at 463 (a Mrs Darroch giving evidence).
133 Ibid.
134 Ibid.
135 Ibid at 462-463.
136 Ibid at 462.

> [The Act] only applies to work that is available and for which the complainant is qualified. Since for most people in New Zealand the slaughter of animals for food is a religiously neutral act, there seems to be a presumption that this is, or should be true for everyone. But this is erroneous. For many Jews and for many Moslems the slaughter of God's creatures is a solemn and religious act. Thus the act of killing must be done in accordance with a particular religious ritual. In the case of Jews this is kosher killing, and in the case of the Moslems it is halal killing. Thus halal killing is not just slaughter of animals, but essentially a religious ritual that only believers in the Moslem Faith can perform . . .
>
> [N]o such religious significance attached to putting petrol into the tanks of motor cars.[137]

The distinction is highly questionable.[138] For certain religionists act *X* may be a religiously-charged phenomenon: for other religionists it may be neutral. If killing sheep is religiously-meaningful for Jews and Muslims it is hard to see why pumping petrol—an equally mundane task—cannot be religiously-important for certain Christians. Either both are religiously neutral activities (to the secular modernist mind) or both are sacred (to the particular religionists concerned). What the Commission, and (implicitly) the Tribunal, appeared to be saying was that the law would defer to what Muslims said about an everyday activity but not Christians. The explanation for this different treatment by the Commission arguably lies in the social ramifications of permitting subjective evaluations of religious freedom full rein. Logically, each and every activity in life can be invested with religious significance. For the law to defer to any behaviour cloaked with a religious veneer would raise the spectre of "every citizen becoming a law unto himself."[139] Instead of subjective determinations of religious liberty, the state must preserve for itself the right to draw the line between what is secular versus sacred, public versus private, impeachable or immune. As the Tribunal in *Eric Sides* put it: "the situation in New

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137 "Report relating to a complaint against Eric Sides Motors Limited, Christchurch", Human Rights Commission, 4 March 1980, at 4.

138 See John A Evans, "Church-State Relations in New Zealand 1940-1990", Ph D thesis, University of Otago, 1992, at 220-221.

139 The classic statement is that by the US Supreme Court in *Reynolds* v *United States*, 98 US 145, 166-167 (1879): "Can a man excuse his practices to the contrary [of the law] because of his religious beliefs? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." See also *Employment Division* v *Smith*, 494 US 872, 886 (1990).

Zealand is . . . that all freedom is governed by the law."[140] The state, under this view, grants religious freedom on *its* terms—it does not simply "find" or acknowledge antecedent rights.

The aftermath of the *Eric Sides* decision was interesting.[141] Public reaction to it was mostly unfavourable. The Prime Minister, Robert Muldoon, described the judgment as "a farce" and levelled the oft-heard cry "the law is an ass."[142] Sides claimed to have a large "fighting fund" to pursue the matter further but ultimately decided otherwise.[143] *Challenge Weekly* predictably portrayed the decision as religious persecution.[144] Secular newspapers joined the chorus of criticism[145] (and even in 1999 the decision still rankled[146]). The grassroots of the National Party were disturbed at what they saw as bureaucratic meddling with private enterprise and the small businessman.[147] A bill was introduced to amend the Human Rights Commission Act. However, support for the bill was decidedly lukewarm. The majority of the 45 submissions to the Select Committee supported the HRC's actions and the retention of the Act without any amendment.[148] The New Zealand Jewish Council opposed the amendment, as did certain church

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140 *Eric Sides*, at 450.

141 Events following the Tribunal decision are examined in detail in Mark Jones, "Questions of ethical and religious belief: Human Rights Commission v Eric Sides Motor Company Ltd and Others" (1983) 13 VUWLR 299 at 308-320.

142 See ibid at 309.

143 Ibid. See *CW*, 1 May 1981 (Editorial), at 2.

144 See *CW*, 24 April 1981, feature article and editorial.

145 *The Christchurch Star*, one of the defendant newspapers, ran a critical story under the headline "Common sense abandoned in Rights Act": *The Star*, 20 May 1981, at 4. Quoted in Jones, "Questions of ethical and religious belief" at 310. The *NZ Truth* decried the waste of taxpayers' money adding those who died in World War II did not so do to have this kind of legislation: *NZ Truth*, 26 August 1981, Editorial. Quoted in Jones, at 310.

146 Gavin McDonald, "Iron-shod rights," *The Star* [Dunedin], 14 July 1999, at 2: "Eric Sides wanted a 'keen Christian person' as an attendant. He did not get him. What he did get was the iron-shod heel of a powerful state machine. It squashed him like a bug."

147 A National Party remit calling for the repeal of the Act altogether was defeated: see the reference by F O'Flynn (Labour MP) in the Second Reading of the Human Rights Commission Amendment Bill (1981) 442 NZPD 4265. Jones notes, "Questions of ethical and religious belief" at 312, that the Ponanga Branch of the National Party (Pahiatua) described the Act, in their submission to the Select Committee, as a "waste of time."

148 Jones, "Questions of ethical and religious belief", at 312. The Select Committee chairman reported that "slightly more than half to the submissions received . . . were opposed to the proposed amendment, expressing concern that it might be the thin edge of the wedge in breaking down the framework of the [Act]." (1981) 442 NZPD 4193.

leaders. The latter emphasised the teachings of Christ called for tolerance.[149] Nonetheless, the bill was passed and a new section 15(7A) was inserted into the 1977 Act to accommodate the Eric Sides problem.[150] The somewhat clumsy solution read:

> **15(7A)** Nothing in this section shall apply to preferential treatment based on religious or ethical belief where —
> (a) That treatment is accorded by an adherent of a particular belief to another adherent of that belief; and
> (b) Having regard to the special circumstances that —
> (i) Govern the manner in which the duties of the position are required to be carried out; and
> (ii) Make it reasonable to require those duties to be carried out in that manner,—
> it is reasonable to accord that treatment to a person of the same belief.

The solution alluded to by the Tribunal in *Eric Sides*[151]—a statutory exemption for small firms (of say, less than six employees)—was not adopted. The victory[152] for CCs was to be one of the few however.

A 1990s sequel to *Eric Sides* attracted no public controversy. In *Proceedings Commissioner* v *Boakes*[153] the Complaints Review Tribunal found a similar case of religious discrimination had been made out. Neville Boakes, a member of the Exclusive Brethren Fellowship in Dargaville, purchased an auto-electrical business. With this purchase came a Mrs Mary McLean, the sole-charge office administrator. Mrs McLean was a fine worker but in the ensuing years Boakes began to have serious reservations about her continued employment. He admitted in evidence that he said words to the effect: "it's been worrying my conscience for three

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149 See Jones, ibid at 314, who cites the submission by the Joint Methodist-Presbyterian Public Questions Committee. The chairman of the Select Committee, Barry Brill, reported the concern of Jewish organisations that the Bill might open the doors to religious bigotry in the workplace: (1981) 442 NZPD 4193.

150 Section 2 of the Human Rights Commission Amendment Act 1981.

151 *Eric Sides* (1981) 2 NZAR at 463.

152 A pyrrhic one in the view of many. It is arguable that Eric Sides would still have contravened the Act despite the ad hoc amendment in his favour. See Geoffrey Palmer's criticism to this effect in the report back of the bill: (1981) 442 NZPD 4197 ("I can confidently say that if a similar case were brought before the commission and the tribunal, Mr Sides would still lose; so one wonders what will actually be accomplished by the amendment . . ."). See also Jones' extended analysis, "Questions of ethical and religious belief," at 314-318.

153 *Proceedings Commissioner* v *Boakes*, unrep, Complaints Review Tribunal, Whangarei, EOT 14/92, 13 April 1994.

years —we don't believe married women should work. My wife stopped working as soon as she got married."[154] He referred with approval to remarks made by the Catholic Archbishop of Melbourne that married women in the workplace was a major reason for the decline of moral standards since World War II. Boakes testified that "while he did not say that his church did not believe that married women should work, he did say that it was his belief before God that they should not."[155] Following her dismissal, an upset Mrs McLean lodged a complaint with the Human Rights Commission. Ruling upon it, the Complaints Review Tribunal held that the defendant had committed a breach of section 15(1)(c) of the Human Rights Commission Act 1977. Boakes had dismissed his employee by reason of her sex and marital status. The remedies awarded were extensive. Aside from a declaration that the Act had been breached, Boakes was enjoined from committing further similar breaches. Damages for pecuniary loss in the form of wages lost ($4,685) and for humiliation ($6,000) were awarded. Furthermore, it issued an order pursuant to section 38(6)(g), requiring the defendant to supply the complainant with a written apology within a fortnight. In the eyes of some commentators, this last order seemed unnecessarily heavy-handed.[156]

2 Criticism of the proposed Bill of Rights

The present New Zealand Bill of Rights Act 1990 is a diluted version of an entrenched, supreme-law, Bill of Rights proposed in 1985. The Fourth Labour Government in its "White Paper" outlined an entrenched Bill of Rights, one substantially modelled on the Canadian Charter of Rights and Freedoms 1982 and the ICCPR 1966.[157] The White Paper proposal attracted much criticism from a diverse range of groups. Many CCs joined the chorus of disapproval.

On 22-23 November 1985, 200 people attended a conference at Willow Park Convention

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154 Ibid at 3.

155 Ibid at 4.

156 A view shared by Thompson, "Religious practices and beliefs," at 113 and Paul Rishworth, "Religious Belief section 21(c)]" in *Human Rights Act 1993 Seminar Proceedings* (18 June 1994) 12 at 15-16.

157 *A Bill of Rights for New Zealand: A White Paper*, AJHR 1985, A6.

Centre, Auckland, to analyse the proposed Bill of Rights. It was organised by the Coalition of Concerned Citizens (the newly-formed political voice of CCs following the homosexual law reform debate) at the suggestion of *Challenge Weekly*.[158] Speakers included the Rev David Stewart, principal of the New Zealand Bible College, John Massam, editor of *Challenge Weekly*, Bruce Logan and Eric Sides.[159] The tone was set prior to the meeting after a visiting Canadian minister had warned of the devastating effect on churches that the Canadian Charter had had in that nation (the international seamless web at work here again).[160] The Willow Park delegates expressed "grave concern" with the White Paper.[161] While opponents of the Bill were many and varied (including, for instance, the New Zealand Law Society[162]), Sir Geoffrey Palmer, the architect of the White Paper, recently singled out CCs for special mention. Reflecting upon the events of the time he observed that "[e]xtensive submissions from fundamentalist Christian groups did not help" the cause.[163] In the Parliamentary debates some Government members pilloried CCs as "the looney Right".[164]

Many CC concerns coincided with those raised by others lodging submissions upon the Bill. They also harboured, however, some distinctive reservations. Eight can be identified (with some overlap between them).

(a) Transfer of power to the judiciary

The principal reason for opposition to the Bill of Rights proposal from the entirety of the

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158 "Seminar provides good chance for careful deliberation", *CW*, 15 Nov 1985, at 9.

159 Lawyers involved included Auckland solicitor David Burt and barrister Paul Cavanagh.

160 "Canadian Bill", *CW*, 15 Nov 1985, at 9 (quoting the Rev Bob Dobson).

161 "Doubts expressed over Bill", *CW*, 13 Dec 1985, at 3.

162 White Paper ("WP") Submission 140.

163 G Palmer and M Palmer, *Bridled Power: New Zealand Government under MMP* (1997) ch 15 at 268. See also G Palmer, *New Zealand's Constitution in Crisis* (1992) at 54.

164 See eg, the Hon Bill Jeffries, Minister of Justice: "Much of the opposition to the Bill was led by the looney Right; it does not have any merit" (1989) 502 NZPD 13044; Richard Northey believed that the Opposition members had misperceived that most of the community were against the Bill: "Why do they think that? They think it because a small group of their fundamentalist supporters—the looney Right—have bombarded the House with submissions opposing the Bill . . ." (1990) 510 NZPD 3461.

submissions was the transfer of power from the elected representatives to the judiciary.[165] (Widespread concern at the incorporation of the Treaty of Waitangi into the Bill was another major concern.[166]) The grant of wide-ranging power to determine social and political matters in a select few (namely judges) and the resultant politicisation of the judiciary were concerns for CCs too.[167] There was a special danger for CCs here however. Some CCs were pessimistic that judges would be appointed that held or were sympathetic to the CC worldview. The Reformed Churches of New Zealand, in a comprehensive submission on the Bill, argued:

> It is clear that the Bill of Rights will involve the courts in determining matters of social policy . . . If we may posit for the moment that there is a liberal humanist world-and-life-view, and a traditional-conservative world-and-life-view it is reasonable to expect that the Cabinet and Parliament, insofar as it has jurisdiction, will appoint judges that reflect the dominant social consensus of the Government of the Day. This is exactly the situation in the United States.[168]

In post-Christian, pluralist New Zealand there was little doubt in many CC's minds that candidates for the bench with liberal, humanist beliefs would be preferred over those espousing traditional, conservative views.

(b) Unnecessary

Some CCs resented the idea that the government could somehow belatedly bestow rights which New Zealanders already possessed. John Allen, on behalf of the Coalition of Concerned Citizens, remonstrated:

> This pernicious Bill is a thinly disguised attempt by the State to define and therefore to delimit [common law] rights enjoyed by an individual; it seeks to arrogate to itself the right to bestow upon New Zealanders those things which we, at present, already legitimately have . . . The late Sir Robert Menzies once said that when a government was given the power to confer rights upon the people, the implied power was also

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165 See *Interim Report of the Justice and Law Reform Select Committee: Inquiry into the White Paper — A Bill of Rights for New Zealand*, 9 July 1987, AJHR 1987, 1.8A, at 8-9. The Prime Minister, Geoffrey Palmer, acknowledged this in his Introduction speech to the New Zealand Bill of Rights Bill: (1989) 502 NZPD 13038.

166 See Palmer and Palmer, *Bridled Power*, at 268 and Phillip Joseph, "The New Zealand Bill of Rights" (1996) 7 Pub L Rev 162 at 164.

167 See eg, "Doubts expressed over Bill."

168 WP Submission 62 at 4.

given for the government or its successors to remove those rights.[169]

Sir Geoffrey Palmer conceded that the rights in the Bill were, generally speaking, already part of New Zealand law, their ancestry tracing back to the Magna Carta 1215 and the Bill of Rights 1689.[170] The original proposal (and the eventual Act) recognises this, for its Long Title states that it is an Act "to *affirm* . . . human rights and fundamental freedoms in New Zealand."

(c) Foreign intrusion and loss of sovereignty[171]

The unsuccessful campaign against CEDAW (to be discussed in Chapter 6) was still fresh in many CC's minds. Their antipathy to the UN aroused, these CCs could take no comfort from the fact that one of the reasons for the Bill of Rights was a desire to ensure New Zealand more closely complied with its international obligations.[172] Although the Government had ratified the ICCPR in 1978, reference to the International Covenant in the Preamble of the Bill (and paraphrased or refined versions of its articles in its main body) helped demonstrate to the UN Human Rights Committee that the New Zealand Government was well and truly meeting its obligations.

For many CCs, however, the imprimatur of the UN carried all the wrong connotations. That global organisation had been tainted by input from too many totalitarian, "godless" regimes. Secular humanism had infiltrated the UN. Some CCs even drew links here between the feared one-world, anti-Christ government spoken of in the book of *Revelation* and the global structures of the UN. Concerned Citizens, in their submission, considered that "many of [the Bill's] provisions [had] been made in high-sounding but rubbery language which [was] so common in Communist countries."[173] John Allen, writing for the Coalition of Concerned

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169 John Allen, "Rights Bill not needed", *Coalition Courier*, vol 4, no 1, June 1988, at 1: reproduced as a supplement in *CW*, 24 June 1988.

170 Introduction speech (1989) 502 NZPD 13040. See also White Paper, at para 3.2.

171 See *Interim Report* at 12. See Paul Rishworth, "The Birth and Rebirth of the Bill of Rights" in Huscroft and Rishworth (eds), *Rights and Freedoms* (1995) ch 1 at 18: "While not centred on any particular provision, there was a sentiment, especially amongst some conservative churches, that the Bill of Rights was part of a conspiracy to foist a dangerous internationalist ideology upon New Zealanders."

172 White Paper, at paras 4.21-4.22. See also Palmer (1989) 502 NZPD 13040.

173 WP Submission 175W at 9.

Citizens, railed:

> This Bill of Rights is a thinly-disguised attempt to superimpose an alien system of government upon our democratic freedom. Its origin is the United Nations Covenant of Civil and Political Rights [sic]—a document cynically used and incorporated into the constitutions of atheistic dictatorships such as the Soviet Union and its satellites.[174]

(d) Secular humanistic foundation

Many CCs were dismayed that there was no explicit acknowledgement of God as the source of rights. Some 25 submissions on the White Paper believed such an acknowledgement was needed.[175] For them, New Zealand still was a Christian nation; they sought to thwart any further erosion of the *de facto* Christian establishment (as I have called it). The Concerned Citizens' submission was typical:

> For the last 2000 years . . . the law has been based on the Bible and, being founded on God's law, has had far more authority than would a set of rules arbitrarily thought up by a government in power . . . Since the Queen is titled a Christian monarch, is head of the Church of England, and over 70% of New Zealanders consider themselves Christian, it is clear that the presuppositions for a Bill of Rights must be Christian rather than secular humanist ones.[176]

Instead, the New Zealand public had been presented with a humanist document. "The preamble to the Bill of rights," explained the Mount Maunganui Baptist Church, "sets up as a supreme standard, not the God based values on which our society is founded but those of a 'democratic society' (i.e. humanist) based on the rule of law and on principles of freedom, equality and the dignity and worth of the human person."[177] Once more the Reformed Churches' submission provided the fullest theological critique:

> [W]e believe that the Bill fails because it does not acknowledge Almighty God as the Source and Bestower of human rights. We believe that as soon as fundamental rights are decreed from an immanent source, immanent in creation, the work of interpretation, administering, applying, or defining those laws must be given to some institution or body which will hold awesome powers . . .This means that any

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174 Allen, "Rights Bill not needed".
175 Interim Report, at 23.
176 WP Submission 175W, at 2.
177 WP Submission 266W, at 1.

> fundamental law to protect freedoms and rights, which is grounded in the creation, will inevitably remove freedoms and take away rights, for it will concentrate infallible power in one or some governmental institutions. They will function as the supreme authority, and will have absolutist prerogatives over the community.[178]

This was "a true irony"[179] given that one of the avowed aims of the Bill of Rights was to restrain governmental power.[180] The only real check upon tyranny was the divine one: "Only by acknowledging Almighty God, to whom all human courts are subject, can effective limits be placed upon courts and parliaments."[181] Instead, the architects of the White Paper had grounded rights in an immanent, temporal, man-made source. The Bill of Rights would witness "the establishment of a particular religion, which we may call *secular humanism.*"[182] An historical analogy was drawn:

> [T]he Bill of Rights actually makes the political expression of secular humanism—Statism—the established religion, and supreme value of our nation. In doing so the Bill reincarnates the principles of religion that operated in the Roman Empire. What is not often understood is that the Empire was perfectly ready to tolerate all religions and beliefs, provided each acknowledged the Supremacy of Caesar and the State. The Bill of Rights is a secularized form of the same principle. Christianity would have been tolerated in the Empire if the church had burnt incense to the Emperors from time to time. Under the Bill of Rights, Christianity will be tolerated in our society only if it conforms to the mores of the ultimate and established religion—the values of the democratic state.[183]

Ensuring the right grounding for rights was a paramount concern for CCs and explains the many submissions they made concerning the wording of the preamble to the Bill of Rights. To reiterate, 25 submissions sought the inclusion of an express acknowledgement of God as the foundation of rights. Typical was the submission by Matthew J Jenkinson: "The government needs to realise there is a higher authority than its own, and that civil law should be an extension

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178 WP Submission 62, at 5.
179 Ibid.
180 See White Paper at 5 and para 4.19.
181 WP Submission 62 at 5.
182 Ibid at 7 (emphasis in original).
183 Ibid at 8. Presumably the writer is referring to the Roman Empire prior to Emperor Constantine's conversion.

of that law revealed in the Holy Scriptures."[184] Submissions by some CCs noted that there was a conspicuous absence in the New Zealand Bill of the theistic acknowledgement found in the Canadian Charter, the model for the Bill. (The Charter Preamble begins: "Whereas Canada is founded upon principles that recognise the supremacy of God and the Rule of Law"). The non-reference to the Deity in the White Paper was in stark contrast to such a reference in the ill-fated New Zealand Bill of Rights 1963 introduced by Ralph Hanan, the National Government's Minister of Justice, a generation earlier.[185] This point underscores the changed environment CCs now felt themselves to be in—the *de facto* Christian establishment (see Chapter 1) had crumbled.

The Select Committee's response to the Preamble issue was to say that theistic or Christian reference would be unfair to non-Christians: "In our view it would be inconsistent with Articles 6 and 8 [to eventually become sections 13 and 15 respectively of the 1990 Act] to acknowledge the supremacy of God. These two articles would protect the beliefs and practices of those who reject the Christian God."[186] To the Committee, exclusion of reference to God was neutral; to CCs it was a rejection of a theocentric foundation and its substitution with a humanist one.

(e) A downgrading of Christianity

The corollary of a failure to give God His due in the Bill of Rights was the relegation of Christianity to mere equality with all other religions. The Mount Maunganui Baptist Church, for example, decried the fact that "not only does the Bill ignore Christian values but gives equal pre-eminence to values which may be totally foreign to our society. To be extreme, the values of a

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184 WP Submissions: Quoted in Palmer and Palmer, *Bridled Power*, at 268-269.

185 The Preamble began, "Whereas the people of New Zealand uphold principles that acknowledge the supremacy of God . . ." The 1963 Bill is reproduced in Tim McBride, *New Zealand Civil Rights Handbook* (1980) at 593-599. For discussion see McBride, ibid at ch 21; Joseph, "New Zealand Bill of Rights," at 163 and Geoffrey Palmer, "A Bill of Rights for New Zealand?" in Keith (ed), *Essays on Human Rights* (1968) at 106 et seq.

186 *Interim Report* at 24.

Satanic cult or mindbending group are given equal status to those of a Christian group."[187] Concerned Christians believed the religious freedom article (article 8) would lead to "pluralistic excess" and even "moral anarchy." [188] Under the guise of manifestation of religious or ethic belief, a litany of immoral and unethical practices ("pornography, obscenity, immorality, idolatry, the use of drugs, prostitution, homosexuality . . .") might be forced upon the public. It was "preposterous to put unethical views on the same level as ethical ones."[189] Society ought not to allow persons espousing immoral or ethical views "equal privileges in the public arena." The Christian majority, in their view, needed protection from "aggressive and disruptive minorities."[190]

Not only would Christianity be placed on an even par with other religions, some submissions argued that certain religions—conservative or traditional ones especially—would not even receive that. Religions challenging the supreme values inherent in the Bill of Rights would fare poorly. Again, liberal democracy would draw the line at religions perceived to be illiberal and intolerant, that challenged its fundamental precepts.

(f) Disestablishment ramifications

The Coalition of Concerned Citizens was concerned the religious freedom provisions of the proposed Bill of Rights might be given an anti-establishment reading.[191] This might seem odd for the Bill contained no express anti-establishment provision—such as the opening clause in the First Amendment of the US Constitution (which stipulates that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"). The decision not to include an anti-establishment provision in the Bill was a deliberate one. The White Paper pointed out that Article 8 of the draft Bill of Rights (to become section 15 of the Act) was different from the First Amendment in its omission of a prohibition on establishment of

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187 WP Submission 266W, at 2. See similarly the Otumoetai Baptist Church submission: WP Submission 192W, at 4.

188 WP Submission 175W, at 3.

189 Ibid at 5.

190 Ibid.

religion. It continued:

> That provision [the First Amendment] was designed to prevent the creation of a state or official religion. That does not appear to be a real question to address in New Zealand. The American provision moreover has been used to deny state aid to religious schools—a practice long followed in New Zealand—and even voluntary prayers or bible readings in schools. The Covenant [International Covenant on Civil and Political Rights 1966] and the Canadian Charter contain no such provision. Accordingly it has not been included in the above text.[192]

Some White Paper submissions were highly critical of the absence of a non-establishment clause. Two academic lawyers, Elkind and Shaw, argued that, while the question of a state religion was not a question at the present time, it might become one in the future and was it "not the very purpose of the Bill of Rights to attempt to foresee and prevent future abuses?" They suggested the insertion of an explicit unambiguous provision worded: "There shall be no official State religion in New Zealand." Without such a provision they considered religious freedom was not really protected.[193] The Auckland Ethnic Council, New Zealand Jewish Council, Society for the Protection of Public Education and the New Zealand Rationalist Association shared this view.[194]

In its Interim Report two years later, the Select Committee reaffirmed the view expressed in the White Paper that the establishment of a State religion did not loom as a "real question" adding, somewhat curtly, that inclusion of an anti-establishment provision would be "inappropriate." Further, there was no need either for an express recognition that freedom from religion was protected since the Bill did "not give any greater protection to persons holding a religious belief than it gives to those who do not."[195]

Interestingly, the submission of the subcommittee of the Auckland District Law Society predicted that the breadth of the language of the religious liberty provisions in the draft Bill

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191 WP Submission 189 at 24-25.

192 White Paper, at 81, para 10.60.

193 Their submission was published in book form: see Jerome B Elkind and Anthony Shaw, *A Standard for Justice: A Critical Commentary on the Proposed Bill of Rights for New Zealand* (1986) at 51-52. See the *Interim Report* at 143.

194 *Interim Report*, ibid at 143 and 45.

195 Ibid at 45-46.

meant that "an establishment of religion type approach was quite probable" and that the courts "would be entertaining cases such as *Rich* v *Christchurch Girls' High School.*"[196]

The *Rich* case[197] concerned a protest by two girls against participation in a religious observance at a state secondary school. The two had walked out of a morning assembly at which hymns were sung and short prayers said. (Any girl not wishing to attend the religious segment of the assembly could get a note from her parent excusing her.) The next morning the two girls handed our leaflets protesting the religious observances, leading to about 30 girls walking out. The two were initially suspended and eventually expelled, not (said the school) for refusing to take part in religious practices, but for opening defying the authority of the principal and the school. The Court of Appeal upheld the school's actions. McCarthy J commented: "It is patent that the girls were not expelled for walking out of assembly but for their action in organising opposition to school authority." [198]

The judgment of the Canadian Supreme Court in *R* v *Big M Drug Mart Ltd*[199] (published soon after the release of the White Paper) was cited by the subcommittee as an example of the "havoc" that could be wreaked to New Zealand's trading hours legislation were an anti-establishment reading to be given the religious liberty provisions. Concerns about possible challenges (on the same basis) to the tax deductibility of contributions to churches and religious charities were also expressed.[200]

Brief mention of the Canadian experience is useful here. Case law on the religious freedom provision in the Charter (section 2(a))—which is worded solely in terms of free exercise and contains no express anti-establishment prohibition—has interpreted that provision to proscribe governmental establishment of religion as well as restrictions upon the expression of religion. In short, freedom *of* religion includes freedom *from* religion. In *Big M Drug Mart*, the Supreme Court observed:

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196 Ibid at 152.
197 [1974] 1 NZLR 1.
198 Ibid at 7.
199 (1985) 18 DLR (4th) 321.

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination. But the concept means more than that. Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the State or the will of another to a course of action or inaction he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free . . . Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.[201]

The passage gives an expansive notion to coercion, a concept that, in the Supreme Court's view, embraced subtle, indirect efforts to determine religious and other behaviour. In *Big M Drug Mart*, the Court held that a law prohibiting Sunday trading worked "a form of coercion inimical to the spirit of the Charter and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the [Lord's Day] Act creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians."[202] Non-Christians—whether Jews, agnostics, atheists or Muslims—were not required or compelled to observe the Christian Sabbath in the sense that they were compelled to attend Church or pray that day. But they were required to "remember the Lord's day of the Christians and keep it holy" insofar as they were "prohibited for religious reasons from carrying out activities which are otherwise lawful, moral and normal."[203] If one is precluded from doing an everyday activity (working, shopping, playing sport) to preserve the religious sensibilities of others, a form of coercion is arguably occurring. One is being indirectly forced to observe a religious practice, a practice which is not of one's choosing and one which may directly offend one's own conscience. The "arm of the

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200 *Interim Report* at 152.
201 (1985) 18 DLR (4th) 321 at 353-354 per Dickson J.
202 Ibid at 354.
203 Ibid.

State"[204] ought not to do this.

Inevitably, the argument was advanced that the non-inclusion of an establishment clause in the Canadian Charter meant that the protection of freedom of conscience and religion extended only to the free exercise of religion (as that concept is understood in America). The Sunday observance legislation in the United States had been held to be a potential violation of the anti-establishment principle only. Thus, it was argued, the absence of such a prohibition on the Charter should mean that the Sunday closing laws did not infringe the guarantee in section 2(a). The Court's response was that resort to American jurisprudence was "not particularly helpful" in this context. Moreover, the two clauses frequently overlapped and should not be seen as "totally separate and distinct categories."[205] Dickson J stated: "the applicability of the Charter guarantee of freedom of conscience and religion does not depend on the presence or absence of an 'anti-establishment principle' in the Canadian Constitution, a principle which can only obfuscate an already difficult area of law."[206] The extent to which the Charter permitted state financial support for, or preferential treatment of, particular religions or religious activities was an issue for another day and one "to be determined on a case by case basis."[207]

There was then some basis to the Coalition's anxiety that an anti-establishment interpretation might be given to the Bill's religious liberty provisions.

The Reformed Churches predicted that "almost certain[ly] all references to the Lord, and to the institutionalising of Christianity in our national life would be removed."[208] The National Anthem, Speaker's Prayer and other instances of ceremonial deism would be eradicated. Perhaps, "it could even get down to local Governments being forbidden to take part in Christmas festivities or put up nativity scenes, as has happened in the United States."[209]

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204 Ibid.
205 ibid at 356.
206 Ibid at 357.
207 Ibid.
208 WP Submission 62 at 10.
209 Ibid at 10.

(g) Threats to the family and parental authority

With the primacy accorded individual rights, many CCs feared this would have serious adverse repercussions for family life and parental rights.[210] The individual rights of the child would have to be accorded due weight and the state would feel itself obliged to vindicate the child's rights in any parental-child conflict. Parental religious upbringing especially would be threatened. The validity of this concern will be discussed in detail in Chapter 7. Children would now have "the right to refuse parental discipline, instruction, standards in the home, religious teaching and so forth."[211] Even more troubling was the prospect of cultic groups being able to entice children away from their homes despite their parents' objections.[212] "The enormity of the suffering that this Bill could bring to Christian parents weighs on my mind," was the lament of one CC commentator.[213] In response, some CC submissions advocated the inclusion of "family rights" in the Bill.[214] Concerned Christians, for example, contended:

> We note that some family rights have been included in the International Covenant on Political and Civil Rights, Article 23. The State should recognise the particular rights, authority and dignity of the family as a divine institution, pre-dating the State and indeed the very foundation of it . . . Parental authority should also be reaffirmed in that no contraceptive or sex education or similar manipulation of values be taught without parental consent.[215]

(h) Insufficient protection for the unborn child

Anti-abortion activists were convinced that the "right to life" guarantee (in Article 14 of the proposed Bill of Rights) would do little or nothing to stem the rising abortion rate in New Zealand. *Humanity,* the newspaper for the Society for the Protection of the Unborn Child, ran the headline "Bill is unsafe for unborn," quoting leader Marilyn Pryor as saying the Bill would

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210 See eg, the Rev Richard Flinn, "Give unto Caesar what is his," *CW*, 1 April 1986, at 8.

211 Reformed Churches WP submission at 9.

212 Ibid.

213 Laury Morrison, "Bill of Rights threatens family life," (the Issacharian Report), Supplement to *CW*, 23 Jan 1987.

214 See eg, Trevor Morrison, WP Submission 83 at 2; Murray Darroch, WP Submission 50 at 4; Nyalle Paris, WP Submission 307W at 3.

215 WP Submission 175 at 8. Graeme Lee, a CC MP, complained at the absence of family rights in the diluted 1990 Bill: (1990) 510 NZPD 3471.

leave unborn children "about as safe as a grass hut in a hurricane."[216] The Select Committee noted that some 168 submissions considered that Article 14 should expressly protect the foetus.[217] Some 84 of the 431 submissions on the Bill were "single issue" submissions opposing only the right to life guarantee and making no or little additional comment.[218] Typical of the CC concern was the submission by the Chairman of the Public Questions Committee of the Mt Maunganui Baptist Church:

> My concern is that the legislature is reneging in its duties by remaining silent on the right of the unborn child. It appals me to think that the drafters of the Bill are prepared to show such apparent concern for the rights of the individuals against the powers of the State but ignore those persons, who have no voice to speak—the unborn. Does this not constitute the ultimate in hypocrisy.[219]

CC anxiety was exacerbated by the reference in the White Paper to Canadian authority which had held that the corresponding guarantee in the Charter did not extend to giving rights to the foetus.[220]

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Following the widespread opposition to the original Bill of Rights, its architect, Geoffrey Palmer, by now Prime Minister, was forced to set his sights lower. An entrenched Bill having the force of supreme law had been decisively rejected.[221] As Sir Geoffrey (as he now is) noted in his introductory speech in Parliament: "the select committee concluded New Zealand was not ready for a fully-fledged Bill of Rights. However, it did consider that there was considerable merit in a Bill of Rights of some kind."[222] An interpretative Bill of Rights, having the status of

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216 *Humanity*, December 1985. Quoted in "Unborn child 'unsafe'," *CW*, 13 Dec 1985, at 3.

217 *Interim Report* at 52.

218 Ibid at 8. These 84 submissions were not included in the total of 243 submissions opposing the Bill. See ibid.

219 WP Submission 266W at 5. Some CC submissions also expressed concern at the prospect of euthanasia being introduced and Article 14 being unable to thwart this: see eg, Concerned Christians, WP Submission 175W at 6-7.

220 White Paper at para 10.85.

221 See Ivor Richardson, "Rights Jurisprudence," at 69.

222 (1989) 502 NZPD 13038.

an ordinary statute, was the result.[223] Judges would be required to interpret the law so as to protect citizens' rights and freedoms but there would be no power to strike down contravening legislation.

With the notion of a supreme law abandoned, most CCs lost interest. The fears of an unsympathetic judicial elite instigating humanistic social engineering had dissipated. Few Christian individuals or organisations issued submissions on the diluted Bill that was now proposed.[224] There were still some concerns from pro-life advocates.[225] The Seventh-Day Adventist Church alluded in its submission to the danger of the Bill being easily altered to become entrenched by later Parliaments.[226] In parliamentary debate, Graeme Lee emphasised this point: "It will just be a matter of time until the Bill will move from being ordinary law—albeit *de facto* supreme law—to being the bench-mark for all New Zealand law: the original objective."[227] The submission of the Social Responsibility Commission of the Anglican Church of New Zealand opposed the revised Bill for its undue emphasis upon individual as opposed to group rights and for its failure to acknowledge the Treaty of Waitangi. It supported many CCs in its concern at the prospect of sinister cults having a right to religious liberty. It even suggested an exclusion be drafted to ensure "religions or beliefs which [were] fraudulent and not bona fide or which involve devil worship, voodoo, black magic or bondage . . ."[228] not receive legal protection. On the other hand, it did not support any "tightening up" of the right to life provision and most CCs would not have agreed with its recommendation to add sexual orientation discrimination to the other grounds of prohibited discrimination. This last issue is examined in a Chapter 9.

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223 Opposition members referred to this in pejorative terms as a "Claytons Bill of Rights": see eg, Douglas Graham (1989) 502 NZPD 13041. "Claytons" was "a drink when you were not having a drink" — a non-alcoholic beverage which still tasted like alcohol.

224 There were no submissions for example from the Coalition of Concerned Citizens, Concerned Christians, or the recently-formed Christian Heritage Party.

225 See eg, Submission 46 (Women for Life); John O'Neill (Dunedin solicitor and prominent pro-life lobbyist).

226 Seventh-Day Adventist Church, submission 5W.

227 (1990) 510 NZPD 3471. Richard Northey, in the third reading debate, dismissed this "Trojan horse" thesis: (1990) 510 NZPD 3763.

3 *The Christian bookbinder complaint*

In 1995 a Christian bookbinder complained publicly about his treatment at the hands of the Human Rights Commission.[229] The bookbinder was asked by a customer to bind a book containing material which was, in the bookbinder's opinion, blasphemous. He completed the job for the customer, a rationalist, but asked him not to bring any similar books in to be bound. It made no difference to the customer that the bookbinder had offered to supply another binder with matching binding material so that the customer could get the job done elsewhere. The customer complained to the HRC. The complaint went through the initial stages of consideration prescribed by the Human Rights Act 1993: the complainant, the bookbinder and Commission staff attended a compulsory conciliation meeting. The complainant ultimately decided to withdraw his complaint and the matter did not proceed to a hearing. The bookbinder was, however, warned by the Commission by letter, not to refuse any subsequent orders of this kind. The letter concluded: "It should be made clear that the reason for closing the matter is because the complaint was withdrawn. The Complaints Division has asked me to remind you that discriminating against people because of their religious beliefs (or lack of them) is unlawful under the Human Rights Act 1993."[230] Arguably the Commission was incorrect in that the bookbinder was not discriminating against the customer or his beliefs but against the particular offensive material being provided[231] (the bookbinder, it appears, did not refuse to bind other material for the customer). No matter, the bookbinder (whose identity and particular religious affiliation were kept private by him) took issue with his treatment by the Commission. He complained in a *Sunday Star-Times* article that it was unsupportable for the law to force him to handle material he found offensive: "This is something that is really against mankind. Christianity governs the way we (Christians) live, but the law says it can be overridden."[232]

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228 Social Responsibility Commission of the Anglican Church of New Zealand, Submission 42W.

229 See Jane Clifton, "Christian offended by ruling on rights," *Sunday Star-Times*, 12 Nov 1995, at A3.

230 This portion of the letter is quoted in Paul Rishworth, "Coming Conflicts over Freedom of Religion" in Huscroft and Rishworth (eds), *Rights and Freedoms* (1995) ch 6 at 249.

231 Points made by Rishworth, ibid and Arnold Turner, "Human Rights Act 1993" at 381.

232 Clifton, "Christians offended,"

Legal commentary questioned whether there ought not to be some form of accommodation or exemption for this type of religiously-motivated discrimination, since without such an accommodation sincere religious persons might be hindered from operating in a commercial marketplace.[233] Some CCs took up the issue and launched a petition to amend the Act to allow an exemption on the grounds of religious conscience for businesspeople such as the bookbinder.[234] They could gain succour from the secular media on this occasion. The *Dominion,* in an editorial entitled, "Rights druids need sacking", attacked the HRC as a bureaucratic, meddling entity which needed scrapping. The bookbinder ruling was one of its examples of why this was needed. It scolded:

> The implications [of the bookbinding ruling] are outrageous. The commission is saying, in effect, that people's religious convictions must not influence their business decisions. Presumably a doctor who opposes abortion on religious grounds may not decline to perform them; a Christian builder must not refuse to build a house for satanists. It is apparently of no consequence that other bookbinders, doctors and builders are readily available, so that no customer is deprived of the desired service.
>
> It is bizarre that the very institution set up to protect and promote human rights should be prepared to violate an individual's conscience in this way. The Christian bookbinder might have wished for the same consideration which the Commission showed a Muslim boy when it told his school it must set aside its uniform rules and let him wear long trousers on religious grounds.[235]

No CC could have put the case more pungently.

4 Human Rights Commission criticism of the Christian Coalition

On 20 August 1996, prior to the General Election, the Chief Commissioner for the Human Rights Commission, Pamela Jefferies sent an open letter to Graeme Lee, co-leader of the

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233 See Rishworth, "Coming Conflicts," at 249-250 and Thompson, "Religious practices and beliefs," at 111-112. Thompson commented: "The religious bookbinder is precluded from living out his Christian life in his business activities by being required to be involved in certain activities (that is binding blasphemous material) contrary to his religious beliefs and practices."

234 See Clifton, "Christian offended."

235 "Rights druids need sacking," (editorial), *Dominion*, 17 Nov 1995, at 8. The complaint alluded to is *K* v *M*, 17 Aug 1994, C149/94. The HRC found a breach of s 65 of the Human Rights Act 1993 in the school's refusal to accede to the Muslim boy's request to wear long trousers. The school did not establish

Christian Coalition. (The Coalition was formed by the Christian Heritage Party and the Christian Democrats to contest the 1996 election). The Commission was "particularly concerned" with certain aspects of the Coalition's policies. The latter's family policy was viewed by the HRC as being inconsistent with the Human Rights Act 1993. The Coalition had floated a new "home carers allowance" designed to give additional welfare assistance to married, but not unmarried, couples with dependent children.[236] To assist only those families of a particular marital status was "inconsistent . . . with concepts of equity, fairness and tolerance" and sat uneasily with section 74 of the Act.[237] The Coalition responded by press release condemning the Commission letter as "laughable."[238]

The media largely ignored the exchange but this graphic and unusual intervention by a governmental agency into electoral politics disturbed at least one legal commentator. Grant Huscroft, an Auckland University law lecturer, criticised the action in a guest editorial for the *New Zealand Law Journal*. He expressed disquiet that the Commission's interference with the election campaign had passed without comment. The reason, he surmised, was that the Christian Coalition was an "easy target"—a small, struggling party advocating unfashionable policies well outside mainstream opinion. Even though few, he continued, "will be upset at criticism of its policies, but that is beside the point. The Chief Commissioner's letter was wrong not because of the position she took, but simply because she took a position."[239] The HRC responded in a subsequent issue. Mrs Jefferies pointed out that section 5(1)(c) allowed the Commission "to make public statements in relation to any matter affecting human rights" and there was nothing to suggest this power did not apply during election periods.[240]

The incident was yet another example of the antagonism that had developed over the years

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the "good reason" defence (s 65) either. See Adzoxornu, *Brooker's Human Rights Law* (1996) ch 4, at 26 (summary no 0010).

236 See "Agreement with New Zealand," Christian Coalition Manifesto 1996, at 8.

237 An opinion (dated 28 Aug 1996) by a Wellington barrister, Peter McKenzie, prepared for the Coalition, advised them there was no breach of any provision of the Act in the Coalition's family policy.

238 "Human Rights Opinion 'laughable': Commissioner should resign", news release, 19 August 1996.

239 Grant Huscroft, "Human Rights and Electoral Politics" [1996] NZLJ 321.

240 Pamela Jefferies, "The Human Rights Commission" [1996] NZLJ 399.

between CCs and successive Commissions.

5 *The Hero Parade advertisement*

A final illustration of the conflict between CCs and the HRC is the *New Zealand Herald* advertisement on 10 February 1999. A group calling itself "Stop Promoting Homosexuality International (NZ)" placed a full-page advertisement pointing out that real heroes affirmed lifelong marriage and the family and demonstrated public modesty avoiding indecent displays. Depicted in support were Mother Teresa, Dame Whina Cooper, Mahatma Ghandi and Martin Luther King Jr. The advertisement was a pre-emptive attack upon the "Hero Parade", the annual Auckland celebration of the homosexual and lesbian way of life. A spokesman for the group, the Rev Bruce Patrick of the Auckland Baptist Tabernacle (and, it will be recalled from Chapter 1, an organiser of the Vision New Zealand Congresses) explained the need for the notice given the media's "politically correct" silencing of the "silent majority" opposed to the promotion of homosexuality.[241] The following day, the Chief Human Rights Commissioner, Pamela Jefferies, criticised it as a destructive attempt "to stir up ill-feeling" against such groups, one "inconsistent with the spirit of a tolerant and inclusive society."[242]

The response was another advertisement a week later from "The Campaign for Human Rights" entitled, "It takes real heroes to stand up to hate." It castigated the Stop Promoting group for "spreading bigotry", "breeding intolerance" and "homophobia". Significantly, the long list of names of those who "proudly supported" the latter advertisement included "Chris Lawrence, Proceedings Commissioner, Human Rights Commission."[243] A complaint that the Human Rights Commission had compromised itself because of this was rejected by the Chief Commissioner.[244] Bruce Logan was one of several CCs who are displeased:

> How can the public have confidence in the HRC when it considers complaints on the ground of sexual orientation when its own

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241 Quoted in Chris Daniels, "Anti-hero parade ad stirs protest", *NZ Herald*, 11 Feb 1999, at A3.
242 Quoted in Daniels, ibid.
243 "It takes real heroes to stand up to hate," *NZ Herald,* 20 Feb 1999, at B9.
244 Letter by Pamela Jefferies to Arnold R Turner, 9 March 1999 (on file with author).

> Proceedings Commissioner subscribes to intemperate and even inflammatory language in a newspaper advertisement.[245]

The Chief Human Rights Commissioner's accusation that the original advertisement was an attempt to stir up ill-feeling "looked "very much like intimidation". But, continued Logan, a "tolerant and inclusive society allows all of us to state, without fear, what we believe to be right and wrong."[246] CCs would not be cowered.

IV CONCLUSION

Conservative Christians have, historically, been somewhat wary of human rights. While CCs believe in vindicating the rights of the weak and powerless, the ideology of human rights is viewed with some suspicion. The humanistic foundation of human rights is, as CCs see it, unstable. It can lead to oppressive outcomes for persons (such as CCs) who are perceived as "intolerant" or "bigoted". Human rights theory is but the alter ego of liberal modernism and so groups which test the limits of liberal tolerance can expect to be rebuffed. The secular supplanting "spirit of the age" is behind human rights laws for many CCs. Whether, to take one key objection, the recognition of God as the source of rights would make as significant a difference as CCs believe is debatable. Mere lip service might be paid to theistic preambles in Bills of Rights in a social and legal environment where deference to divine or higher law is not prevalent.

Many CCs are uneasy at the prospect of contemporary human rights law working against them. Specifically, their negative religious freedoms (religious exercise in the private realm) and positive religious liberty (capacity to influence society and public policy) may be restricted.

To better understand this anxiety I traced several of the significant "flashpoints" between CCs and rights proponents over the last two decades. The prosecution of a Christchurch

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245 Bruce Logan, "Human Rights," *Cutting Edge*, March/April 1999, 16 at 16.

Brethren garage proprietor, Eric Sides, by the Human Rights Commission in the early 1980s set the tone for frosty relations ever since. Spats between the two have recurred during the 1990s. At one level, the continued antipathy of CCs to human rights law is puzzling—there have been only a few cases where their conduct has been impugned. Are not CCs unnecessarily alarmist and given to over-reaction? This, I suggest, is to fail to see the importance of these cases at the socio-cultural and symbolic level. They are "surface culture" indicators of "deep culture" movements. In the "culture war", the struggle for the control of the "narrative" of New Zealand, public rebukes from the Human Rights Commission or Parliamentary select committees remind CC activists that their concept of the good, of what counts as a "right", is no longer dominant. Rights reversals underscore the cultural disestablishment of CCs and elicit from them an immediate, powerful and sometimes strident counter-reaction.

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246 Ibid.

Chapter 6

THE FAMILY, THE CHALLENGE OF CHILDREN'S RIGHTS AND THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

In this chapter I outline the conservative Christian understanding of the family, the internal relationships therein, the role of parents and attitudes to childrearing. I contrast this then with a liberal, modernist conception of the family and the upbringing of children. Under the conservative Christian (CC) view, the state has an important yet secondary role. CCs believe the state should give the family a large degree of autonomy; likewise parents should be deferred to when it comes to knowing what is best for children. There is no question of children having a direct relationship with the state. The liberal conception of the family is increasingly a reductionist one where the family is seen as an aggregation of self-interested individuals bearing rights. Children no less than parents have rights which may require vindication by the state.

Finally, I background the rise of the children's rights movement and New Zealand's adoption of the United Nations Convention on the Rights of the Child 1989. That Convention has been a prime cause for concern for many CCs in New Zealand and overseas.[1] For those CCs the Convention is seen as something that is likely to further erode parental authority, itself an attenuated commodity in contemporary Western society. Insofar as children have rights they are, for CCs, bestowed by God not the state. Whereas CCs acknowledge protective rights for children are laudatory, there is little to be gained and much to be lost by state recognition of "autonomy" rights for children.

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[1] American CC antagonism to the Convention has been a principal reason why the United States is one of the few nations yet to ratify it: see the regret expressed by Susan Kilbourne, "Placing the Convention in an American Context" (1999) 26 Human Rights 27 at 28.

I THE CONSERVATIVE CHRISTIAN CONCEPT OF THE FAMILY

1 Centrality of the family

The centrality of the family for CCs can never be underestimated.[2] "A man who fails at home fails at life" is an old saying summing up this attitude. An American evangelical John Whitehead re-echoes this old aphorism:

> Christians can evangelise the world, but if they are neglecting their family in the process then, at least personally, their work is for nought . . . The family should be the center of Christian life. No other institution (including the Church) or activity should get in the way of family life.[3]

Within the different Christian traditions, the family's foundational status is expressed somewhat differently.[4] "Catholics would see the family as a microcosm of the church", suggests Atkin, "evangelicals as a protection against permissiveness."[5] In Catholic teaching, the Christian family is characterised as a "domestic church."[6] It is a God-initiated community of faith, hope and charity assuming "singular importance in the Church."[7] Its foundational role in society is also emphasised: "the family is the original cell of social life" and thus civil authority has a duty to honour and safeguard it.[8] In Evangelicalism, the family is similarly revered as a small-scale image of the Kingdom of God.[9] It is also a source of strength against the world. As Barton puts it, the family in Evangelicalism "is a divinely-ordained guard against the ambiguities, individualism and experimentation of a modern world which has lost its way morally and religiously."[10]

2 Autonomous character

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2 On the evangelical concept of the family, see James Davison Hunter, *Evangelicalism: The Coming Generation* (1987) ch 4 and James Davison Hunter, *Culture Wars* (1991) ch 7.

3 John W Whitehead, *The Stealing of America* (1983) at 116.

4 See generally Phyllis D Airhart and Margaret Lamberts Bendroth (eds), *Faith Traditions and the Family* (1996).

5 W R Atkin, "The Family in Society—A New Zealand Christian Perspective" in Nichol and Veitch (eds), *Religion in New Zealand—Christians in Public Planning* (1981) at 40.

6 *Catechism of the Catholic Church (Libreria Editrice Vaticana)* The Catechism was published in Latin on 11 October 1992. I quote from the English translation published by CEPAC (1994) at para 2204. For discussion, see Norbett Mette, "The Family in the Teaching of the Magisterium" in Cahill and Mieth (eds), *The Family* [*Concilium*, 1995/4] (1995) at 74-84.

7 *Catholic Catechism*, at para 2204.

8 Ibid at paras 2207 and 2210.

9 Larry Christenson, *The Christian Family* (1970) at 10-11.

10 Stephen C Barton, "Towards a Theology of the Family" in Thatcher and Stuart (eds), *Christian*

The family is "a community of love under the authority of the parents."[11] This loving community does not exist for the state. Likewise, a child is not (to quote the American Supreme Court) "the mere creature of the State."[12] The family, rather, has its own integrity, destiny, purposes and responsibilities before God.

The "radical"[13] critique which argues there is no such thing as an antecedent, pre-political distinct entity as the family, that it is a purely political and legal construct (created, defined and regulated thoroughly by the state), is firmly rejected by CCs. "The personal is political"[14] may be the motto for some critical theorists, but not for them. Rather, "the family is prior to any recognition by public authority, which has an obligation to recognize it."[15]

The principle that one institution, such as the family, ought not to be dominated by other, such as the state, is referred to in Christian social and political theory as "sphere sovereignty" (in neo-Calvinism)[16] or "subsidiarity" (in Catholic social thought).[17] Families are an important type of "intermediate" institution or "mediating structure" between the powerful state and the individual. "Mediating structures", a term coined by Peter Berger and Richard John Neuhaus, are "institutions standing between the individual in his private life and the large institutions of public life."[18] They help the individual to mediate between the two spheres of public and private. Such structures consist of relatively small communities (neighbourhood, family, church, voluntary association and so on) which socialise individuals, enabling them to see that their self interest is connected with the interests of

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Perspectives on Sexuality and Gender (1996) 451 at 458.

11 Alan Storkey, *A Christian Social Perspective* (1979) at 234.

12 *Pierce* v *Society of Sisters*, 268 US 510, 535 (1925).

13 See Laurence D Houlgate, "What is Legal Intervention in the Family? Family Law and Family Privacy" (1998) 17 Law and Philosophy 141 at 143 (summarising the writings of Andrea Dworkin, Catherine MacKinnon, Martha Minow and others). See also Emily Jackson, "Fractured values: law, ideology and the family" (1997) 17 Studies in Law, Politics and Society 99.

14 The motto means in this context "that the family itself is political, that is, law and social policy together determine which groups of persons count as a family and which do not, and what rights and duties people have within family groups. It follows that the notion of a private sphere of family life that is immune from state intervention is 'incoherent'". Houlgate, ibid.

15 *Catholic Catechism* at para 2202.

16 See L Kalsbeek, *Contours of a Christian Philosophy* (1975) ch 28.

17 *Catholic Catechism*, at para 1883.

18 Michael Novak (ed), Peter L Berger and Richard John Neuhaus, *To Empower People: From State to Civil Society* 2nd ed, (1996) at 158. The original essay was published in 1977 and the Novak collection reproduces that seminal pamphlet, together with 11 essays exploring the original argument.

others, that their actions have consequences.[19] Such institutions may function as a counterweight to potential totalitarian tendencies of the modern, powerful state.[20]

3 *Definition*

How do CCs define the family? Larry Christenson defines a Christian family as "a family that lives together with Jesus Christ."[21] This much is incontestable but what sort of family is it? CCs typically have the traditional nuclear family in mind when they extol the family.[22]

Apart from the core meaning of family (a monogamous married couple living with their children) CCs will often add the rider that the husband be the provider, with the wife at home as a full-time housewife and mother.[23] While this concept of family has a strong currency among CCs—and is probably still the dominant one—there is also a wider conception of the family increasingly held by a smaller body of CCs. Indeed, CCs are by no means a monolithic group on the merits of the traditional "patriarchal" family structure.[24] Some CCs are alert to critics who argue that the traditional nuclear family is neither as traditional nor Biblical as most CCs believe.[25] It is pointed out that the nuclear family is

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19 "Mediating structures teach we cannot simply have things our own way . . . In voluntary associations, individuals learn to compromise, persuade, and sublimate narrow self-interest for the greater good of the group . . . mediating institutions teach that one's welfare is tied to the welfare of one's community. Without such training, the impetus will be for individuals to pursue self-interest with regard to others." Timothy Fort, "The First Man and The Company Man: The Common Good, Transcendence and Mediating Institutions" (1999) 36 Am Bus L J 391 at 428.

20 This thesis is developed by Stephen Carter, *The Culture of Disbelief* (1993) ch 2.

21 Christenson, *Christian Family*, at 14.

22 Catholic teaching, for instance, states: "A man and a woman united in marriage, together with their children, form a family . . . It should be considered the normal reference point by which the different forms of family relationship are to be evaluated." *Catechism*, at para 2202.

23 See eg Whitehead, *Stealing of America*, ch 6; David Popenoe, "How to Restore the Nuclear Family in Modern Societies", *Cutting Edge*, June/July 1997, at 8.

24 One US sociologist reports "a remarkable degree of heterogeneity" (at 400) among American conservative Protestants on the right distribution of power and decision-making in families. Traditionalist evangelicals are opposed by "a coterie of biblical feminists and more equality-minded evangelicals" who challenge "the hegemonic endorsement of the patriarchal family." John P Bartkowski, "Debating Patriarchy: Discursive Disputes over Spousal Authority among Evangelical Family Commentators" (1997) 36 JSSR 393 at 406.

25 See eg Carolyn Osiek, "The New Testament and the Family" in Cahill and Mieth (eds), *The Family* (1995) at 1-9. A searching critique is provided by Rosemary Radford Reuther, "An Unrealized Revolution: Searching Scripture for a Model of the Family" in Thatcher and Stuart (eds), *Christian Perspectives on Sexuality and Gender* at 442-450. At 442 she mocks: "Conservative American Christians are very concerned about the need to restore what they say is the biblical view of the family: a male-dominated nuclear family consisting of a working husband, a nonworking wife who is a full-time mother, and several dependent children. It is as if the Bible endorses a version of the late Victorian, Anglo-Saxon patriarchal family as the model of family life proposed in the Scriptures. It is taken for

"primarily a modern, urban development of the industrial revolution, whereas the Biblical tradition has to do with tribes, clans and extended families (including slaves) in ancient agrarian civilisations."[26] Sensitive to such criticisms, a small minority of CCs adopt a wider, more relaxed, notion of family which, while it is still based upon monogamous marriage and dependent children, embraces other blood relatives (and possibly close friends). Furthermore, the rigid "traditional" view of sex roles (working husband, housewife mother) is frequently relinquished in favour of a working couple model, albeit one where the wife's employment is secondary and sufficiently flexible to accommodate the children's needs.

4 *Internal structure and relationships*

The internal order and pattern of relationships within the CC family is distinctive. First, CCs are at pains to emphasise sexual equality.[27] From the beginning, citing *Genesis* 1, God made "man" both male and female. Each equally bears the image of God and both sexes were equally called to rule the earth. Likewise, in Christ, there is "neither male nor female", in the sense of one having superior or privileged status. Rather, "men and women are absolutely equal in worth before God—equally created by God like God, equally justified by grace through faith, equally regenerated by the outpoured spirit."[28] Having emphasised this, CCs then stress that "equality of worth is not identity of role."[29] Men and women are made equal but also made different. *Genesis* 2 is taken to illustrate the complementary roles of men and women.[30] Opinions differ among CCs on precisely what these respective roles entail. One view would confine women to motherhood as the near-

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granted that this Victorian ideal of the patriarchal nuclear family was created in the Garden of Eden and remained static until a recent, and unhappy, period in the 20th Century when it began to be 'undermined' by feminists, gay people, and delinquent children."

26 Barton, "Towards a theology of the family," at 455.

27 The following account draws heavily from John Stott, *Issues Facing Christians Today*, 2nd ed (1990) ch 13 and Storkey, *A Christian Social Perspective,* ch 8.

28 Stott, ibid at 261-262.

29 John Howard Yoder, *The Politics of Jesus* (1972) at 177 fn 23: Quoted in Stott, ibid at 262.

30 See Stott, ibid at 263: "Because men and women are equal (by creation and in Christ) there can be no question of the inferiority of either to their other. But because they are complementary, there can be no question of the identity of one with the other. Further this double truth throws light on male-female relationships and roles. Because they have been created by God with *equal* dignity, men and women must respect, love, serve, and not despise one another. Because they have been created *complementary* to each other, men and women must recognise their differences and not try to eliminate them or usurp one

exclusive vocation. Another CC stance sees a rigid division of labour as non-Scriptural. Women generally can pursue their own careers, as can married women, while husbands and men generally are not excluded from domestic chores and childrearing.[31]

The equality and complementarity of the sexes is a necessary prologue to the doctrine of "headship" or authority within the Christian family. St Paul's doctrine of masculine headship in *Ephesians* 5 is one of the most controversial texts in modern Christianity: "Wives submit to your husbands as to the Lord. For the husband is the head of the wife as Christ is the head of his body of which he is the Saviour. Now as the church submits to Christ, so also wives should submit to their husbands in everything."[32] To many CCs, this depicts a clear-cut domestic structure. Adding Paul's later exhortation for children to obey their parents in everything[33] reveals God's order for the family. American Lutheran pastor, Larry Christenson, depicts this diagrammatically in the opening part of his best-selling book, *The Christian Family*.[34] This book was, according to a prominent New Zealand Pentecostal pastor, "very, very well received . . . It came out at the right time [and struck] a chord in the hearts of the people. The people felt [that] we must work towards preserving the nuclear family."[35] Christenson's shema is reproduced below:

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another's distinctives." (Emphasis in original.)

31 Ibid at 262.

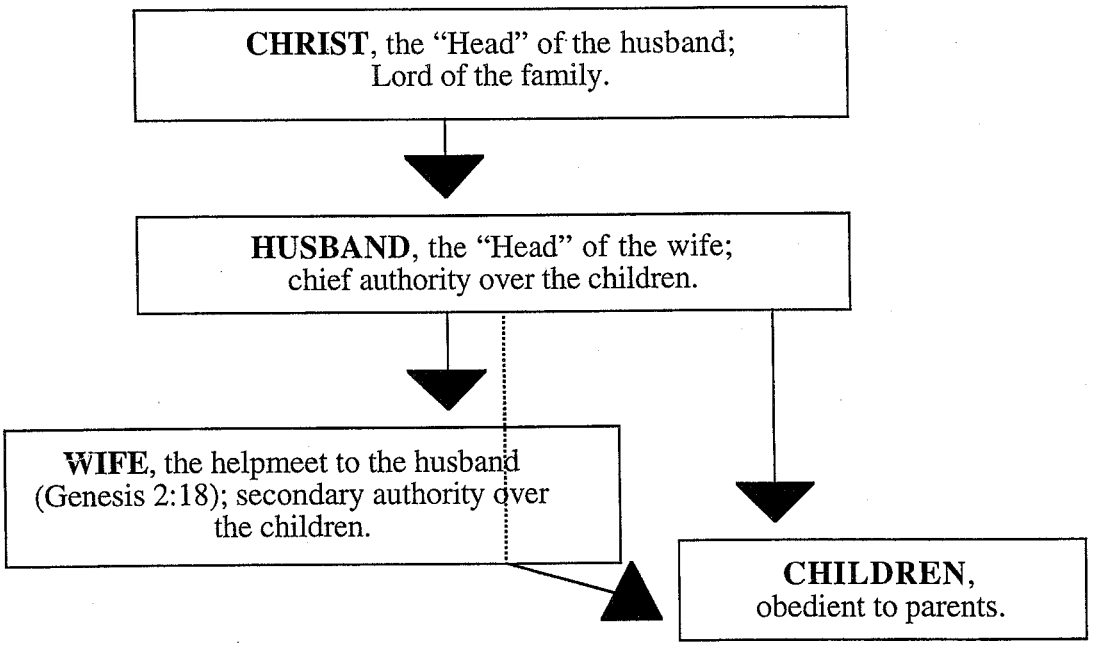
32 *Ephesians* 5:22-24. See also *Colossians* 3:18; 1 *Corinthians* 11:3.

33 *Ephesians* 6:1; *Colossians* 3:20.

34 Christenson, *Christian Family*, at 17.

35 Brett Knowles, "Some Aspects of the History of the New life Churches of New Zealand 1960-1990," Ph D thesis, University of Otago, at 176-177 (Pastor Rasik Ranchord being quoted). Ivanica Vodanovich noted that Christenson's text was regarded within charismatic and Pentecostal Christian circles in New Zealand as an authority on family matters: "Woman's Place in God's World" (1985) 2 NZ Women's Studies J 68 at 78 fn 8. See the Rev Arthur Gunn, "Family Pattern", *Challenge Weekly* (*CW*), 26 October 1994, at 24, for an identical Pauline depiction of the Christian family structure.

Figure 5: The Family Structure according to Christenson



A family structured this way reflects the divine order, "an order of authority and responsibility."[36] Headship here tends to be equated with lordship, the authority of the husband is contrasted with the submission and subordinate position of the wife. She is very much the "helpmeet" of *Genesis* 2 and her "primary responsibility is to give all of herself her time, and her energy to her husband and children, and home."[37] All this is not to in any way demean the wife and Christenson is at pains to add submissiveness is not servility. Nonetheless, it is still a subordination of wife to her husband.[38]

This authoritarian interpretation is greatly downplayed by other CCs who search for a less abrasive interpretation. John Stott, a leading British evangelical, is a good example. We cannot, he argues, jettison the Pauline teaching on masculine headship: "It remains stubbornly there and is rooted in divine revelation, not human opinion, and in divine creation, not human culture."[39] The reconciliation is to be found in expressing the concept of headship not so much in terms of "authority" (which has all the wrong connotations of domination), but in terms of "responsibility." For Stott, "the husband's headship of his wife

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36 Christenson, *Christian Family,* at 17.
37 Ibid at 47.
38 Ibid at 42 and 44.

. . . is a headship more of care than of control, more of responsibility than of authority . . . His concern is not to crush her, but to liberate her."[40] The headship of the husband also has a protective function. Women are, in Stott's view, the weaker sex and the husband shields his partner from attacks enabling her to flourish and blossom.[41] The CC portrayal of the family by overseas writers such as Christenson and Stott is reflected in the attitudes of CC couples in New Zealand.[42]

5 *Parenting and children's upbringing*

Children are expected to obey their parents.[43] Obedience is mandated even when the parents are in the wrong.[44] Parents, under the CC view, are to raise children in "the way they should go"[45] and thus have a God-given mandate and responsibility to provide an intellectual and moral framework for the development of their children. *Pace* critics such as Barbara Woodhouse,[46] parents do not "own" their children and children are not chattels. Rather, parents are "stewards" entrusted with children by God; they hold the office of parenthood. Rights or authority are necessary to fulfil one's office and discharge one's duties. Rights, as we saw in Chapter 5, are always duty-rights.

Parents cannot of course be despots. Conservative Christians recognise that the State has a legitimate role in checking abuses of parental office.

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39 Stott, *Issues Facing Christians*, at 229-230.

40 Ibid at 272.

41 Ibid at 272-273; Christenson, *Christian Family*, at 34-38. A poetic explanation of this headship doctrine was depicted by Matthew Henry, an English Biblical scholar, three centuries ago and is sometimes still cited. The wife was "not made out of his [Adam's] head to top him, nor out of his feet to be trampled upon by him, but out of his side to be equal with him, under his arm to be protected, and near his heart to be loved." Quoted in Stott, ibid, at 263. See also Vodanovich, "Women's Place," at 74.

42 See the extensive interview with six CC couples by Jeff Hayward, "Back to Fundamentals", *More,* Dec 1987, at 208 et seq.

43 See Christenson, *Christian Family*, ch 3 ("God's Order for Children"); Gunn, "Family Pattern". Scriptural references regularly invoked are the Fifth Commandment ("Honour thy father and thy mother"), *Exodus* 20:12; *Ephesians* 6:1 and *Colossians* 3:20.

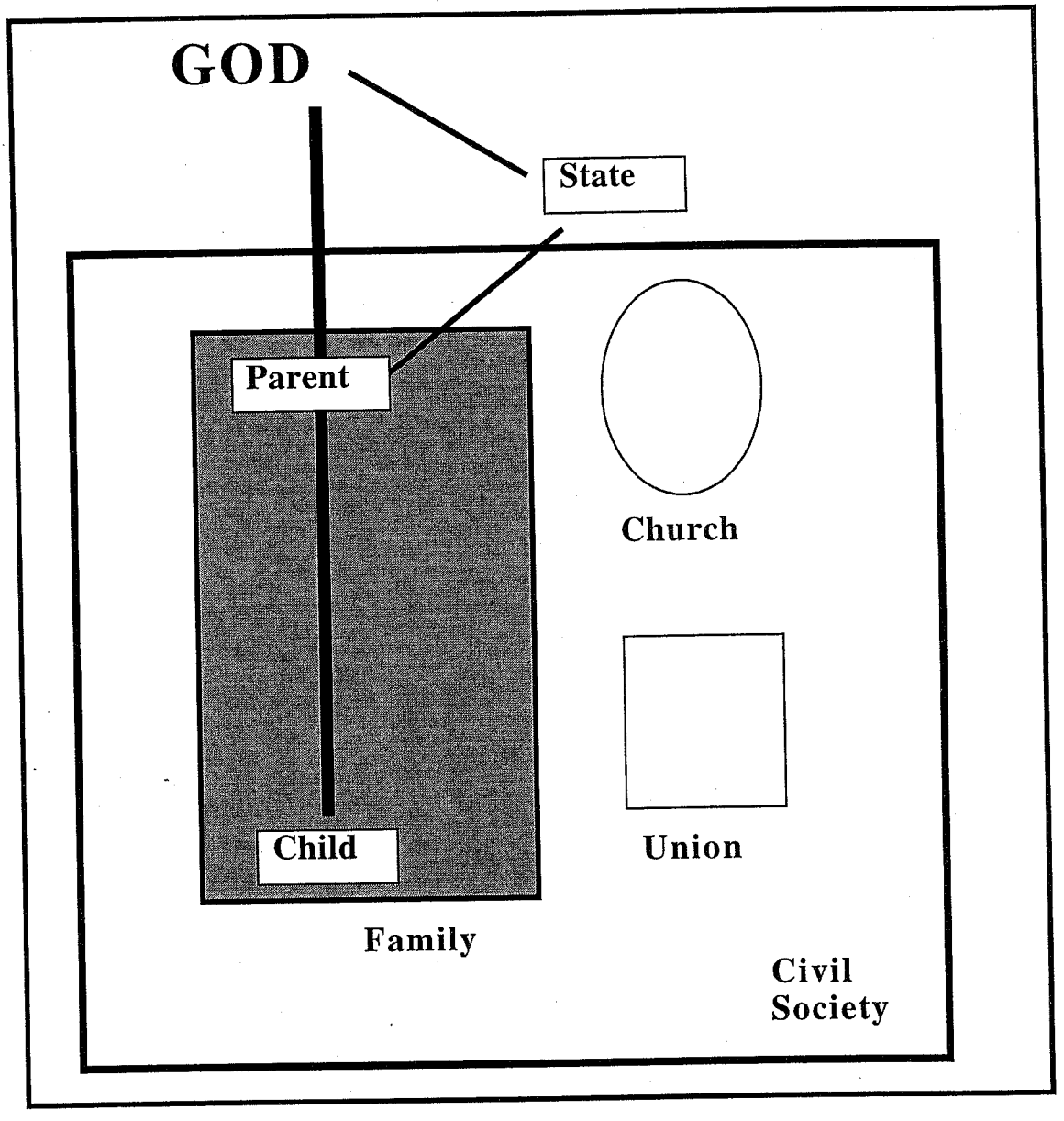
44 Christenson, ibid at 57.

45 Christenson, ibid at 61. The scriptural allusion is to *Proverbs* 22:6 ("Train up a child in the way he should go: and when he is old, he will not depart from it.")(KJV). Ellison explains that "religious conservatives grant that this [healthy psychosocial development—the cultivation of positive self-confidence, and social skills] is a worthy object, they stress the need to socialize moral values and to train children in submission to human and divine authority as the preeminent goals of successful parenting." C G Ellison, "Conservative Protestantism and the Corporal Punishment of Children: Clarifying the Issues" (1996) 35 JSSR 1 at 6.

46 Barbara Bennett Woodhouse, "'Who owns the child?': *Meyer* and *Pierce* and the child as property" (1992) 33 Wm and Mary L Rev at 995. See also Jonathan Montgomery, "Children as Property?" (1988) 51 MLR 323.

Figure 6 endeavours to capture the Conservative Christian conception:

Figure 6: The state and the family



At its broadest, the scope of the parental duty, one for which the CC is aware he or she is accountable to God,[47] is to "lead children into life".[48] Christenson breaks the duty down into three: to love, discipline and teach.[49]

Love needs no amplification, after all, to love one's own flesh and blood is only natural.[50] In loving one's children "excessive materialism"[51] is to be avoided; a "child-centred parenthood"[52] whereby children are heavily indulged and spoilt is an anathema.

Discipline is an important issue for CCs. They reject the "Rousseauist belief in the goodness of children."[53] Sin is pervasive, tainting child as much as adult[54]; as the Scriptures declare: "Foolishness is bound in the heart of a child; but the rod of correction shall drive it far from him."[55] Corrective discipline thus includes 'the rod' or corporal punishment. I shall return to this topic in a subsequent chapter.

The third strand of parental duty is to teach one's children. According to Scripture, the primary responsibility for education rests with parents. And it is education in the widest sense—moral values and virtues, indeed a "total world and life view."[56] Historically, Christian parents have delegated (or abdicated) much of this responsibility to the churches. Nonetheless, the duty and ultimate accountability remain with the parents. On certain issues many CCs are suspicious of the secular public schools' abilities to teach their children in a manner which will not undermine the children's faith. Sex education is an example. Principally, this is a matter for parents, but if it is covered at school, CCs expect moral restraint and sexual abstinence to be taught alongside the technical and hygienic aspects of

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47 Christenson, *Christian Family*, at 112, warns parents: "Consider. One day we must stand before the judgment seat of Christ (2 *Corinthians* 5:10), and answer for the way in which we have raised our children."

48 Storkey, *Christian Social Perspective*, at 224.

49 Christenson, *Christian Family,* at 63. Christenson's text here is *Ephesians* 6:4: "Fathers do not exasperate your children; instead, bring them up in the training and instruction of the Lord" (NIV).

50 Christenson, ibid, at 102.

51 James Dobson, *Dare to Discipline,* British ed (1971) at 40-41. Also Christenson, *Christian Family*, at 124.

52 Storkey, *Christian Social Perspective*, at 231.

53 Ibid at 232. See also Christenson, *Christian Family*, at 95.

54 See Christenson at 98: "The Bible does not look upon a child as basically good! 'Behold, I was brought forth in iniquity, and in sin did my mother conceive me.' (*Psalm* 51:5). The Bible does not view a child as one who essentially wants to do the wise and right thing."

55 *Proverbs* 22:15 (KJV).

56 Storkey, *Christian Social Perspective*, at 243.

sexuality.[57] Evolution is also a sensitive issue for some (but not all) CCs. Concerns about "permissive" sex instruction, the presentation of Darwinian evolution as if it were solid fact, and the general relativising of moral absolutes, has led an increasing number of CCs to withdraw their children from state schools.[58] Thus, recent developments have been the creation of the Independent Christian Schools[59] and the Home Schooling[60] movements. Both are anti-modernist reactions by Protestant CCs to the emergence of a more thoroughgoing secular state school curriculum.[61] The diffuse Protestant flavour of the public schools of yesteryear is gone leaving many CCs searching for alternatives. For Catholics, their minority status in New Zealand meant that a Catholic-oriented education could never be assured through the state system. The separate Catholic school system reflected a fundamental distrust of the supposed neutrality of a liberal, secular education,[62] an awareness Protestant CCs were to experience belatedly when their cultural hegemony was eroded and the tide began to turn against them. Formation of organisations such as the Concerned Parents' Association in 1974[63], and many others since[64], are illustrations of the

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57 See Dobson, *Dare to Discipline*, at 157-160. Government-funded sex education literature such as the booklet, *Sisters,* which espouse "liberal" views on the issue—for instance, presenting lesbianism as an acceptable sexual lifestyle and endorsing condoms for "safe sex"—draw flack from CCs. See eg Phillipa Peck, "Condoms Champion the Child Sex Industry", *Cutting Edge*, Oct/Nov 1997, at 16.

58 See John Adsett Evans, "The New Christian Right in New Zealand" in Gilling (ed), *"Be Ye Separate": Fundamentalism and the New Zealand Experience* (1992), at 82 and Bruce Logan, "Is Education Neutral?", *CW*, 18 June 1997, at 4.

59 See Alaine Coleman, "Christian Education in New Zealand" in Gilling (ed), *Godly Schools? Some Approaches to Christian Education in New Zealand* (1993) at 119. A helpful essay on one such leading independent Christian school is by E A Dunlop, "Middleton Grange School: the Endeavour to Establish an Interdenominational Christian School" in Gilling (ed), ibid, at 60.

60 See Christina Baldwin, "Christian Home Schooling in New Zealand" in Gilling (ed), *Godly Schools?* at 142.

61 See eg "More parents shy of state schools", *CW*, 16 Feb 1994, at 12. Craig Smith, Director of Christian Homeschoolers NZ, explains the rise in home schooling is driven principally for religious reasons, viz children need to be taught to honour God, something which doesn't happen in the state system. He estimated some 90 per cent of homeschoolers taught children at home for religious reasons.

62 See Christopher van der Krogt, "Good Catholics and Good Citizens" in Gilling (ed), *Godly Schools?* at 17-39. He notes (at 20): "While lamenting that public education failed to inculcate a religiously grounded morality, however, Catholics also charged that it was, in practice, sectarian and even anti-Catholic. According to Clearly [Bishop Henry Cleary] there could be no religiously neutral education, for by denying in practice the fundamental importance of religion in education, state primary schools were both secularist and sectarian."

63 The CPA, formed primarily with sex education in mind, as more "broadly concerned with the entire "liberal progressive education". To the CPA the supposed "value free" education approach in the state schools undermined Christian morality and parent authority: John Adsett Evans, "New Christian Right," at 82. See eg CPA Newsletter, "Health Education Fraud" reproduced as a supplement in *CW*, 24 Jan 1986. The Newsletter decries the proposed Department of Education health and peace syllabuses as an attempt to "establish humanism... as the state religion in New Zealand."

64 See eg the *New Zealand Education Development Foundation,* headed by Bruce Logan and based at Middleton Grange School, Christchurch and the *New Zealand Foundation for Values in Education*, based

CC reaction to the perceived corrosion of traditional Christian values in state education.

CCs reject a certain doctrinaire liberal, "neutral" view[65] that would suspend all religious training in the early years, waiting until the child was sufficiently mature to choose for herself. For one thing, there is always a message or religious impression being transmitted by the parents[66] (whether Christian or non-Christian) within the child's "primary culture"[67], and by the wider institutions of society—school, neighbourhoods, and especially the popular media. Religion, as indeed with many important things, is "caught" by the child as much as it is taught. Avoidance of all mention of religion by a child's principal role models, her parents, simply sends the message to the child that religion is unimportant to the people she is most intimately connected with.

Furthermore, prevailing Western culture—with its "predominance of attitudes and views indifferent or hostile to religious perspectives, and a relentless manipulation of human appetites, predilections and wants in such a way that it is very difficult for the child to arrive at a position of genuine 'open-mindedness' enabling balanced judgments about religion to be achieved"[68]—militates against devout parents' best efforts at a religious upbringing. The "playing field" is hardly "level" these days. (It probably never was, nor will be, but the comfort for CCs was that it seemed to tilted in *their* favour in former days). As an American critic, Shelley Burtt observes:

> When it comes to providing the next generation of American citizens with a sense of the different ways in which one can be a good human being, it seems to me that the message of the dominant secular culture is not in danger of being drowned out by the strictures of marginal sectarians. (Even Waco's Branch Davidians

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in Invercargill. The latter designed a Christian-inspired core values curriculum for use in state schools in New Zealand.

65 To be sure, not all liberals would take this view. For example, Kenneth Henley articulates another liberal view: "In the early years of the child's socialization, he will be surrounded by the religious life of his parents; since the parents have a right to live such religious lives, and on the assumption that children will normally be raised by their parents, parental influence on the child's religious life is both legitimate and unavoidable. But at such an early stage it can hardly be said that coercion is involved; the child simply lives in the midst of a religious way of life and comes to share in it. But surely the assertion that the child is born with religious liberty must entail that parents are under at least moral constraints not to force their religious beliefs upon the child once he is capable of forming his own views . . .": "The Authority to Educate" in O'Neill and Ruddick (eds.), *Having Children: Philosophical and Legal Reflections upon Parenthood* (1978) 255 at 260-261.

66 "Parents cannot avoid revealing their vision of life, their faith, even though this may well be unconscious at times." Kalsbeek, *Contours of a Christian Philosophy,* at 209.

67 Ackerman's felicitous phrase: Bruce A Ackerman, *Social Justice in the Liberal State* (1980) ch 5 at 159.

68 T H McLaughlin, "Religion, Upbringing and Liberal Values: A Rejoinder" (1985) 19 J Phil Educ 119 at 126.

> watched television.) Precisely because of the robust pluralism of our culture, then, we would do better to encourage parental efforts to create a moral environment filled with consistent, not conflicting, messages.[69]

To CCs, Christian teaching urges them not to be passive in matters of faith but to positively foster and encourage Christian virtue. The spiritual pilgrimage commences at infancy. Thus the *Catechism of the Catholic Church* states:

> Through the grace of the sacrament of marriage, parents receive the responsibility and privilege of evangelizing their children. Parents should initiate their children at an early age into the mysteries of the faith of which they are the 'first heralds' for their children. They should associate them from their tenderest years with the life of the Church. A wholesome family life can foster interior dispositions that are a genuine preparation for a living faith and remain a support for it throughout one's life. Education in the faith by the parents should begin in the child's earliest years . . . Parents have the mission of teaching their children to pray and to discover their vocation as children of God.[70]

Similarly, for evangelicals, Dr James Dobson urges them to eschew the notion that children should be allowed to decide for themselves in matters of religion. There is a crucial period in a child's life when, as he puts it, "imprinting" or attachment occurs. This opportunity must be seized when it is available. The venerable Catholic maxim, "Give me child until he is seven . . .", rings true. Failure to seize the opportunity for fear of "forcing religion down the children's throats" is regrettable, if not disastrous:

> The absence or misapplication of instruction throughout the prime-time period may place a severe limitation on the depth of a child's later devotion to God. When parents withhold instruction from their small children, allowing them to "decide for themselves", the adults are almost certainly guaranteeing their youngsters will "decide" in the negative. If parents want their children to have a meaningful faith, they must give up any misguided attempts at objectivity.[71]

In the adolescent rebellious phase, children may well resent heavy-handed instruction, yet, advises Dobson, "if the early exposure has been properly conducted, they should have an anchor to steady them."[72]

While devout parents have the duty to guide and direct children in the faith, the regeneration and conversion of their children is not something parents can achieve by their

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69 Shelley Burtt, "In Defense of *Yoder*: Parental Authority and the Public Schools" in Shapiro and Hardin (eds), *Political Order: NOMOS XXXVIII* (1996) ch 15 at 427.

70 *Catholic Catechism* at paras 2225-2226.

71 James Dobson, *Solid Answers* (1997) at 216.

own sincere and strenuous efforts. God alone saves.[73] Nonetheless, CC parents believe that they have a vital and foundational role in facilitating the (hoped-for) salvation of their offspring.

Here we encounter a difficulty, for it is the aim of some devout parents to so imbue the faith in their children that they will later, as adults, never depart from it. Unfortunately, as many parents lament, the proverbial advice ("Train up a child in the way he should go and when he is older he will not depart from it") is no cast-iron guarantee.[74] Children do (sometimes) forgo the faith of their youth. An attempt at religious indoctrination which will carry a child through to his adult years is thus likely to be unavailing. Where it does "succeed", the question remains whether this coerced participation is of any great merit to the church or to God. As an adult's response to God must be free, so also must a child's.[75] Christians are not, or at least ought not to be, afraid of children questioning their faith or "the exercise of critical rationality."[76] Criticism and reflection however ought, argue CCs, to be undertaken from a base of faith first. T H McLaughlin admirably articulates the aspiration of devout parents this way:

> Their long-term, or ultimate, aim is to place their children in a position where they can autonomously choose to accept or reject their religious faith—or religious faith in general. Since, however, these parents have decided to approach the development of their child's autonomy in religion through exposing their own particular religious faith, their short-term aim is the development of faith; albeit a faith which is not closed off from future revision or rejection. So a coherent way of characterising the intention of the parents is that they are aiming at *autonomy via faith.*[77]

6 *Threats to the family*

Most CCs are adamant the traditional nuclear family is under heavy attack and for

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72 Dobson, ibid at 217.

73 Regeneration or "new birth" is an act of God not man: see *John* 1:12-13 ("Yet to all who received him, to those who believed in his name, he gave the right to become children of God—children born not of natural descent, nor of human decision nor a husband's will, but born of God."). Eric Lane, *Special Children? A Theology of Childhood* (1996) at 101 comments: "Faith cannot be transmitted from parent to child in such a way as to bring them to regeneration. According to Jesus only God can do this work."

74 James Dobson, *Solid Answers*, at 217-219, consoles disappointed evangelical Christian parents on this point.

75 See eg Declaration on Religious Freedom *(Dignitatis Humanae Personae)* in Abbott (Gen ed), *The Documents of Vatican II* (1966). The Declaration, at para 10, states: "It is one of the major tenets of Catholic doctrine that man's response to God in faith must be free."

76 See the views of Arneson and Shapiro and others discussed later in this Chapter.

77 TH McLaughlin, "Parental Rights and the Upbringing of Children" (1984) 18 J Phil Educ 75 at 79 (emphasis in original).

them the threats to the family are legion.[78] The future of the Christian faith itself is inextricably bound up with the fate of the family.[79] It is no coincidence that the preservation and fostering of the family has become the rallying cry of conservative Christian political activists both in the United States and here. The rise of the "Moral Right" in New Zealand, as some dub it, first appeared under the banner "For God, Country, and Family". The traditional family became "a successful articulating principle" to galvanise the Moral Right, noted one critic.[80] The Christian Democrats (now renamed "Future New Zealand"), for instance, adopted the motto "Families First" as their touchstone and the promotion of "family values" remains their central policy plank. Likewise, the Christian Heritage Party is "committed to the biblical concept of the family" and "believes in promoting family values".[81]

The Rev Arthur Gunn articulates the CC unease:

> Moral absolutes are no longer applicable. Marriage is a thing of the past. Sex should be indulged in freely by all. Good people should be lampooned as being stupid; as being Victorian puritanical bags of misery. Above all, the Christian family must be destroyed . . . Today, the family is in terrible danger. To destroy religion, the family must be destroyed. Therefore, humanistic education, especially Marxist education, is extremely hostile to the Christian family. Our answer to all these things, if we are married, is to establish a Christian family which will be a witness to all who observe it that here is the only true bulwark of a true society.[82]

The locus of much CC resentment here is often simply "the state". It is frequently cast as the principal underminer of parental rights (in contrast to the media or the economy). As one *Challenge Weekly* correspondent put it:

> [T]he authority of parents to make decisions regarding the training of their children . . . has been stolen from parents in New Zealand. Scripture makes it clear that God-given authority belongs to parents, not the state, no matter how benevolent it purports to be.[83]

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78 In Pope John Paul II's words we are at "a moment of history in which the family is the object of numerous forces that seek to destroy it or in some way to deform it . . ." *Familiaris Consortio* [The Role of the Christian Family in the Modern World] (1982) at 12.

79 See Barton, "Toward a Theology," at 451 and Whitehead, *Stealing of America,* at 115.

80 Allanah Ryan," "For God, Country and Family": Populist Moralism and the New Zealand Moral Right" (1986) 1 NZ Sociology 104 at 111.

81 Christian Heritage Party 1999 Manifesto at 5-6. The motto of the CHP is "For Family, Values and Principles".

82 AG Gunn, "Family Life's under constant threat," *CW,* 18 Oct 1995, at 11.

83 Carolyn Killick, "Parents" authority upheld," (letter), *CW,* 13 April 1994, at 2.

Some CCs[84] also view the rise of certain social movements and ideologies as profoundly corrosive of strong family life, for example, feminism,[85] homosexual rights, and the children's rights movement.[86]

II A LIBERAL CONCEPTION OF THE FAMILY

1 Atomistic tendency

It is dangerous to generalise, especially (as we saw in Chapter 3) regarding such a compendious term as "liberalism". Nonetheless, and at the risk of caricature, it is possible to identify a liberal concept of the family and of childrearing. Over-emphasising the individualism inherent in liberal theory, the family is increasingly seen not as a separate entity, but rather as simply the sum of its component parts. There is a tendency today to view the family "as a collection of individuals united temporarily for their mutual convenience and armed with rights against one another."[87] American legal scholar, Carl Schnieder comments:

> [O]nce a court sees a problem as a question of constitutional right, it is easily driven toward psychologic man's view of human relations—driven that is, to treat the problem as one involving individuals not families, to project an atomistic image of the family, and to regard family problems as matters to be settled between the law and a single member of the family . . . Indeed, the very appeal to law—to an external set of standards enforced by might—is atomistic in that it circumvents the (no doubt idealized) standards of family decision: private persuasion and eventual accommodation based on solicitude for the person with whom one disagrees.[88]

2 Upbringing

As for what constitutes a proper childrearing with respect to religion in a liberal

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84 See again eg Stott, *Issues Facing Christians*, for a more cautious and decidedly less strident critique of such movements as feminism and gay rights. On feminism, for example, Stott cautions it would be "a mistake" to reject feminism as "a largely un-Christian movement" and cites Elaine Storkey's book, *What's Right with Feminism* (1985) as a valuable Christian analysis of feminism.

85 Madeline McGilvray, "Family unit reels under determined attack", *CW*, 31 July 1986, at 7. For a similar link between family erosion and feminist ideology, see Bruce Logan, "The Frog Prince Syndrome," *Cutting Edge*, June/July 1997, 1 at 3.

86 See eg Whitehead, *Stealing of America*, ch 6.

87 Carl E Schneider, "Moral Discourse and the Transformation of American Family Law" (1985) 83 Mich L Rev 1803 at 1858.

society, the debate is still ongoing.[89] Some liberals equate any attempt at religious training with indoctrination. John White, for instance, argues:

> [I]f the parent has an obligation to bring up his child as a morally autonomous person, he cannot at the same time have the right to indoctrinate him with any beliefs whatsoever, since some beliefs may contradict those on which his educational endeavour should be based. It is hard to see, for instance, how a desire for one's child's moral autonomy is compatible with the attempt to make him into a good Christian, Muslim or orthodox Jew . . . The unavoidable implication seems to be that parents should not be left with this freedom to indoctrinate.[90]

What then is an acceptable liberal concept of education? For Bruce Ackerman, liberal education "provides children with a sense of the very different lives that could be theirs—so that, as they approach maturity, they have the cultural materials available to build lives equal to their evolving conceptions of the good."[91] Similarly, the goal of a liberal upbringing is, according to Arneson and Shapiro,

> to prepare children for lives of rational autonomy once they become adults. A "rationally autonomous" life is one that is self-chosen in a reasonable way. Education for rational autonomy thus encompasses two requirements: (1) Upon onset of adulthood individuals should be enabled to choose from the widest possible varieties of life and conceptions of the good and (2) individuals should be trained into habits and skills of critical reflection.[92]

Parents must co-operate with the state to develop in their offspring "critical reasoning skills that will enable their children to stand back from the values they have been taught and to subject these values to informed critical scrutiny." [93] For liberals, it appears one should (to paraphrase the Biblical exhortation): "Train up a child in the way he should go so when

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88 Ibid at 1857-1858.

89 The *Journal of Philosophy of Education* has had a lively exchange in recent years. See, for instance, T H McLaughlin, "Parental Rights and the Religious Upbringing of Children" (1984) 18 J Phil Educ 75; Eamonn Callan, "McLaughlin on Parental Rights" (1985) 19 J Phil Educ 111; T H McLaughlin, "Religion, Upbringing and Liberal Values: a rejoinder to Eamonn Callan" (1985) 19 J Phil Educ 119; Peter Gardner, "Religious Upbringing and the Liberal Ideal of Religious Autonomy" (1988) 22 J Phil Educ 89; Eamonn Callan, "Faith, Worship and Reason in Religious Upbringing" (1988) 22 J Phil Educ 183; T H McLaughlin, "Peter Gardner on Religious Upbringing and the Liberal Ideal of Religious Autonomy" (1990) 24 J Phil Educ 107; Peter Gardner, "Personal Autonomy and Religious Upbringing: the 'problem'" (1991) 25 J Phil Educ 69; Eamonn Callan, "The Great Sphere: Education against Servility" (1997) 31 J Phil Educ 221; Michael Leahy and Ronald S Laura, "Religious 'Doctrines' and the Closure of Minds" (1997) 31 J Phil Educ 329.

90 J P White, *The Aims of Education Re-stated* (1982) at 166-167.

91 Ackerman, *Social Justice in the Liberal State*, at 139. See similarly, Amy Gutmann, "Children, Paternalism and Education: A Liberal Argument" (1980) 9 Philosophy and Public Affairs 338 at 350.

92 Richard J Arneson and Ian Shapiro, "Democratic Autonomy and Religious Freedom: A Critique of *Wisconsin* v *Yoder*" in Shapiro and Hardin (eds), *Political Order* (1996) ch 14 at 388.

93 Ibid at 403.

he is old he may—utilising his critical reasoning—depart from it."

Joel Feinberg, in a classic essay, characterised a child's right to religious freedom as a sub-species of a child's "right to an open future".[94] Children, he argued, have "rights-in-trust" or "anticipatory autonomy rights". These are rights that are preserved for the child until she is of age, but which can be violated "in advance" before the child is in a position to exercise them. The child's right of religious freedom is a particular "right-in-trust" which can be violated by adult conduct (by parents, teachers, the State) which effectively forecloses the child's future religious options. It would, seemingly, consist of religious indoctrination (or "brainwashing", to use a colloquial term) of such severity so as to ensure the child has little or no chance of leaving that religion for another. In the same way an infant's right to walk down the street would be violated, before it could be exercised, by cutting off his legs (Feinberg's graphic analogy), so a child's right to seek the truth and discover God wherever, or in whomever, he finds it, can be violated now by overbearing, systematic indoctrination. Figure 7 captures a liberal view:

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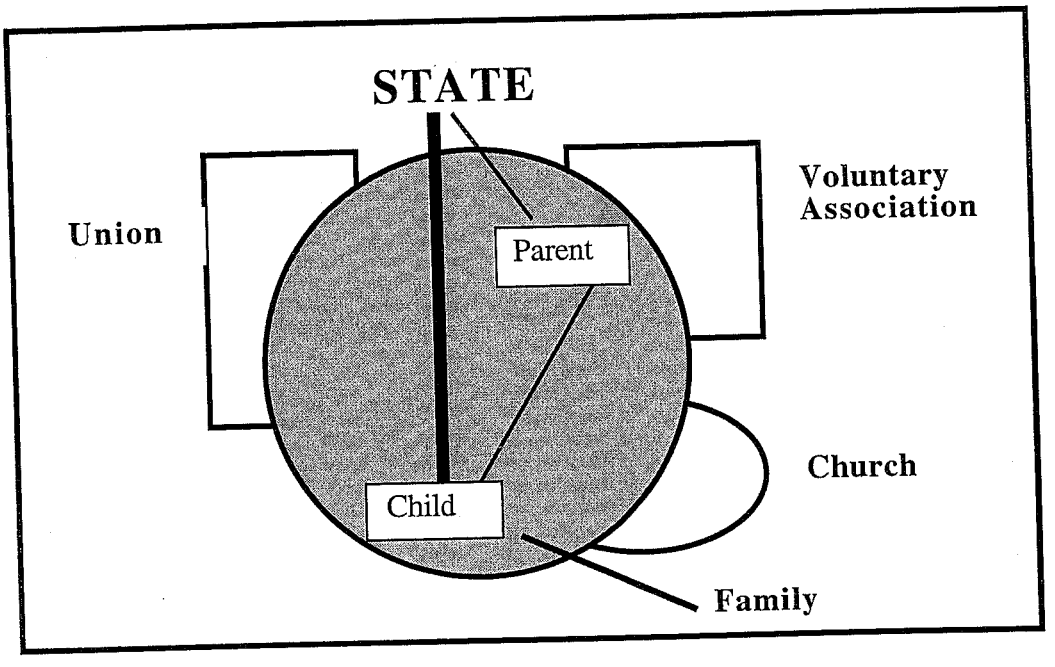
[94] Joel Feinberg, "The Child's Right to an Open Future" in Aiken and LaFollette (eds), *Whose Child? Children's Rights, Parental Authority and State Power* (1980) at 124-153.

FIGURE 7: A Liberal Conception of the Family



The liberal citizen must always be able to exit, her commitment to *any* cause or way of life must be contingent—bridges ought never to be burned. As we saw in Chapter 3, Sandel has dubbed this conception of the person, "the unencumbered self."

3 Legal reinforcement

New Zealand family law scholars confirm a growing "constitutionalisation" of family law whereby individual family members are treated as rights-bearers entitled to human rights protections.[95] The root of this trend is laid at the feet of modernity by Atkin and Austin. In describing modern New Zealand family law, they argue:

> The aptness of the phrase "'modern' family law" is immediately apparent when one foregrounds its modernist aspirations . . . Much of what characterises family law in the latter part of this century is the result of a long process of debunking and rejection of principles which derive ultimately from decidedly *pre*-modern, Judaeo-Christian traditions . . . The rules, judicial statements and procedures of modern New Zealand family law indicate, on the surface at least, just how much of a departure from these principles there has been.[96]

(Again, of course, one has to interpolate and emphasise that liberal individualist processes

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[95] See eg William Atkin and Graeme Austin, "Family Law in Aotearoa/New Zealand: Facing Ideologies" in Eekelaar and Nhlapo (eds), *The Changing Family* (1998) at 312-313.

are, in New Zealand, countermanded (to a degree) by the recognition of pre-modern, communal-oriented, Maori influences. Maori interests and family structures are, as we noted in Chapter 3, explicitly taken into account in family legislation and the family courts.[97]) The constitutionalisation of modern family law may initially seem odd. Most constitutional documents have a solely "vertical" focus—they are there to protect the private citizen (or group) against excesses of governmental power.[98] The New Zealand Bill of Rights Act 1990 is no exception, for section 3 states that the Act only applies to acts done by the various branches (legislative, executive or judicial) of the government and to persons performing public functions. However, the trend, or at least desire, internationally is to give such rights instruments a "horizontal" application.[99] The state, it is argued, ought to recognise and enforce human rights norms when private individuals (or groups) clash with other private persons. Where rights legislation is invoked in private disputes between, for example, family members, the liberal, modernist model is well and truly in evidence. The courts may be—and, as we shall see in the next chapter, have been—called upon to balance one family member's rights and freedoms against another's. This exercise, dubbed "definitional balancing" in North American constitutional jurisprudence is, as we shall see, not free from difficulty.

There is also the well-recognised phenomenon of "the waning of parental rights" over the course of this century. More than a quarter of a century ago, J C Hall explained:

> Fifty years ago the rights of a parent were held in high regard by English law. Since then there has taken place a fairly steady erosion of those rights so that the picture presented today differs quite markedly from that of the early 1920s. The principal reason for this decline in strength of parental rights is not far to seek: it lies in the ever-increasing concern of society for the well-being of its youngest members.[100]

Solicitude for the most vulnerable family member, the child, grew to the point where the welfare of the child became, in law, the paramount concern. Hall concluded by noting

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96 Atkin and Austin, ibid at 306 (emphasis in original).

97 See eg ibid and Atkin and Austin, "Cross-cultural Challenges to Family Law in Aotearoa/New Zealand" in Lowe and Douglas (eds), *Families Across Frontiers* (1996) ch 22.

98 On "horizontal" and "vertical" effects, see eg, Murray Hunt, "The 'Horizontal' Effect of the Human Rights Act" [1998] Public Law 423 and Ian Leigh, "Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth?" (1999) 48 ICLQ 57.

99 See ibid.

the child-centred approach was "surely a development which must command respect; for it was in its almost brutal indifference to the child's fate that the former English law of domestic relations was so woefully defective."[101] The ascendancy of the welfare of the child in any conflict between parents and children was, of course, to be codified in statute.[102] In 1998 Lord Oliver could confidently affirm:

> Whatever the position of the parent may be as a matter of law—and it matters not whether he or she is described as having a "right" in law or a "claim" by the law of nature or as a matter of common sense—it is perfectly clear that any "right" vested in him or her must yield to the dictates of the welfare of the child.[103]

The position in New Zealand is no different. The paramountcy of the welfare of the child is expressed in all relevant child legislation.[104] Judicial acknowledgement that this is so is common place. For example, in an important religious upbringing case where devout Seventh Day Adventist parents had badly neglected their children's education, Judge Inglis emphasised:

> The intervention [under the Children, Young Persons and Their Families Act] is made necessary to protect the children's rights, important rights fundamental to the child's own development and future welfare, which the parents themselves have either ignored or preferred not to recognise. On any competition for priority between the parents' rights and the rights of the children, there can be only one possible outcome . . . the lodestone is s 6 which makes it completely clear that in the last analysis the welfare of the children must be the deciding factor . . . The parents must realise that their right to their own opinions is secondary to the welfare of each of their children.[105]

With the rise of children's interests and the concomitant diminution in parents' some legislatures have seen fit to change the terminology also. Thus, for example, the English Children Act 1989 refers to "parental responsibility"[106] as does the Australian Family Law Act 1975 (Cth).[107] Other statutes retain parental rights alongside the parental responsibilities,

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100 J C Hall, "The Waning of Parental Rights" (1972) 31 Camb LJ 248 at 249.

101 Ibid at 265.

102 The first legislative recognition was s 1 of the Guardianship of Infants Act 1925 (Eng). In New Zealand this was quickly followed: see s 2 of the Guardianship of Infants Act 1926 (NZ).

103 *In re KD (A Minor)* [1998] 1 AC 806 at 827.

104 See eg s 23(1) of the Guardianship Act 1968; s 6 of the Children, Young Persons and Their Families Act 1989.

105 *In the Matter of the Seven P Children*, unrep, Family Court, Levin, CYPF 031/122-8/91, 15 July 1994, Judge Inglis QC, at 10.

106 Section 3 (1) of the Children's Act 1989 (Eng).

107 Section 61B of the Family Law Act 1975 (Cth).

the Children (Scotland) Act 1995 being an example.[108] The United Nations Convention on the Rights of the Child 1989 refers to both parental rights and responsibilities (and duties).[109] In New Zealand, the elimination of the phrase "parental rights" and its substitution with "parental responsibilities" has not occurred, despite the urging of some family law commentators.[110]

III THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

Parental authority is perceived by many CCs as being constantly undermined by the state. International treaties ratified by the New Zealand government are seen as principal culprits. In particular, the United Nations Convention of the Rights of the Child 1989 has been viewed as a threat. I select it therefore as a useful case study of the clash between CC and liberal, modernist worldviews and their respective concepts of the family.

1 The children's rights movement and the history of the CRC

(a) The children's rights movement

Before considering the United Nations Convention on the Rights of the Child 1989 (CRC), it is helpful to briefly recount the history of the children's rights movement. This is, of course, a large subject with many excellent accounts written.[111]

The recognition that children have rights is a decidedly modern phenomenon. History is marred with systematic abuse and exploitation of children as mere chattels suffered, if at all, until they could be usefully put to work.[112] In the Western tradition, for example, the

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108 See s 1(1) of that Act which sets out the parent's responsibilities to his child, while s 2(1) enumerates the parents' rights.

109 For example art 18(1) refers to the parents' responsibilities. Other articles refer to rights *and* duties in one breath: see eg arts 5 and 14.

110 See eg Judge P van Dadelszen, "The case for change: 'parental responsibility' not 'custody' and 'access'" (1995) 1 BFLJ 263.

111 The account in the text draws from MDA Freeman, *The Rights and The Wrongs of Children* (1983) chs 1 and 2; Freeman, "Whither Children: Protection, Participation, Autonomy?" (1994) 22 Manitoba LJ 307; Freeman, "The Limits of Children's Rights" in Freeman and Veerman (eds), *The Ideologies of Children's Rights* (1992) ch 3; Andrew Bainham and Stephen Cretney, *Children: The Modern Law* (1993) ch 3.

112 See generally Douglas Hodgson, "The Historical Development and 'Internationalisation' of the Children's Rights Movement" (1992) 6 Aust J Fam Law 252 and Cynthia Price Cohen, "The Relevance

Roman civil law doctrine of *patria potestas* (paternal power) taught that fathers exercised virtually complete control over their children, even encompassing their right to inflict death under certain circumstances.[113] Historians have argued the very concept of childhood is a modern invention, largely invented in Europe in the seventeenth century.[114]

Compressing the children's rights literature greatly, there are broadly three main groups. They are, in chronological order, the child protectionists, the child liberationists ("kiddie libbers", as some have dubbed them) and the liberal paternalists.

The first group, the children protectionists (or "child-savers") originate in the nineteenth century. Children needed to be protected from abuse and neglect, to be saved from the brutal excesses of the Industrial Revolution. Orphanages were established, as were schools for handicapped children and special juvenile justice procedures appear. "Society's concern for the child is to be seen very much in terms of the child's usefulness to society," argues Michael Freeman. He adds: "The picture emerges of children as objects of intervention rather than as legal subjects."[115] This child-saving approach, with its salvation motif, was the predominant one until the 1970s.

In 1971, the term "child liberation" makes its appearance.[116] Certain child advocates began to push well beyond a desire to simply protect children, towards giving children liberation in the form of full adult privileges and the right to self-determination. Here we see the liberal atomising of relationships and the constitutionalisation phenomenon in full flourish. Richard Farson captures the thrust of this agenda:

> Asking what is good for children is beside the point. We will grant children rights for the same reason we grant rights to adults, not because we are sure that children will then become better people, but for more ideological reasons, because we believe that expanding freedom as a way of life is worthwhile in itself. And freedom, we have found, is a difficult burden for adults as well as children.[117]

The shift from protectionism to liberation was characterised by some scholars as one from

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of Theories of Natural Law and Legal Positivism," in Freeman and Verman (eds), *The Ideologies of Children's Rights* (1992) ch 5 at 57-59.

113 Hodgson, ibid at 254.

114 See the account by Freeman, *Rights and Wrongs*, ch 1. Freeman, ibid at 8, draws upon the seminar work by Phillipe Ariès, *Centuries of Childhood* (1962).

115 Freeman, *Rights and Wrongs*, at 18.

116 See Freeman, "Whither Children?", at 312. To be precise the term is "liberation of the child", the subtitle to Adams (ed), *Children's Rights: Toward the Liberation of the Child* (1971).

protecting children to protecting their rights[118], or from "nurturence" to "self determination".[119] For CCs, however, self-determination sounds like a euphemism for the desire for self-mastery by *homo autonomous*.

A third and most recent wave of child's rights theorists is uncomfortable with both approaches. Freeman argues: "Too much of the literature on children's rights has dichotomised. There have been the child salvationists and the child liberationists".[120] This sort of dichotomy "oversimplifies the problem."[121] Rather, submits Freeman, "To take children's rights seriously requires us to take seriously both protection of children and recognition of their autonomy."[122] "We must," he insists, "recognise the integrity of the child, and his or her decision-making capacities, but at the same time note the dangers of complete liberation."[123] Freeman defends a version of liberal paternalism which draws upon Rawls' theory of justice.[124] Children ought to be granted sufficient autonomy to determine their own future except where their actions are adjudged to be "irrational", in that they would "lead to a severe and permanent weakening of [the child's] capacity to achieve his own ends."[125] Paternalistic intervention entails a hypothetical enquiry by adult decision makers into what children would, ideally, want for themselves.[126] Reformulating his liberal paternalist test, Freeman posits the question as "can the restrictions be justified in terms that the child would eventually come to appreciate?" The test, he concedes, "is not an easy test to

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117 *Birthrights* (1974) at 9: quoted by Freeman, "Whither Children?", at 313.

118 Farson, *Birthrights*, at 9.

119 CM Rogers and LS Wrightman, "Attitudes Toward Children's Rights: Nurturence or Self-Determination?" (1978) 34 J Social Issues 59 at 61. See Freeman, *Rights and Wrongs*, at 19.

120 Freeman, *Rights and Wrongs*, at 19.

121 Freeman, "Whither Children?", at 321-322.

122 Freeman, "Limits of Children's Rights," at 39.

123 Freeman, "Whither Children?", at 324.

124 John Rawls, *A Theory of Justice* (1971). Freeman, *Rights and Wrongs*, at 55 et seq summarises Rawls thus: "The principles of justice which Rawls believes we would choose in the 'original position' behind a 'veil of ignorance' are equal liberty and opportunity and an arrangement of social and economic inequalities so that they are both to the greatest benefit of at least advantaged and attached to offices and positions open to all under conditions of fair equality of opportunity." Freeman believes children can fit into Rawls' framework: ibid at 56.

125 Freeman, ibid at 57.

126 Bainham and Cretney, *Children*, at 93. Translating Rawls' hypothetical social contract into the children's situation generates the following test: The question we should ask ourselves is: what sort of action or conduct would we wish, as children, to be shielded against on the assumption that we would want to mature to a rationally autonomous adulthood and be capable of deciding on our own system of ends as free and rational beings? We would choose principles that would enable children to mature to independent adulthood.

apply."[127] John Eekelaar propounds a similar hypothetical adult judgment test.[128] However, it is hard not to agree with those who argue that a more realistic reflection of what really occurs in practice is that "adult decision-making reflects the value judgments of the decision-maker about what is good for children and not the decision-maker's projection of what children would want for themselves."[129] CCs worry that this adult decision-maker will be a state official and not the parent.

Child rights theorists of the liberal paternist variety appear to espouse the "interest theory" of rights as opposed to the "will theory."[130] Under the former, children have vital interests which require the imposition of duties upon others—parents, the State, and so on. Under a will theory, children would have rights to the extent they can exercise their will with respect to a certain subject matter. Applying a will theory to children encounters at least two problems: One, infants clearly lack the capacity to rationally exercise their will and, two, it would be dangerous for children, in many instances, to allow them to waive the duties imposed on others for their own benefit.[131] Accordingly, most children's rights theorists prefer some variant of the interest theory of rights.[132]

The children's rights movement has spread to New Zealand although some lament there is not yet in this country a sufficiently developed "children's rights consciousness."[133]

The typical CC reaction to the children's rights movement is predominantly a mixture of scepticism and hostility. More rights for children necessarily signals a diminution in parental rights and greater state intrusion into the family.[134] It is a zero-sum game. As one

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127 Freeman, "Whither Children?", at 326.

128 John Eekelaar, "The Importance of Thinking that Children have Rights" (1992) 6 IJLPF 221 at 229-230. Eekelaar propounds a hypothetical judgment which "stipulates a process which requires serious attention to be given to what the child in question . . . is likely to have wanted if fully informed and mature." (italics omitted).

129 Bainham and Cretney, *Children: The Modern Law* at 93-94 (citing Ruth Alder, *Taking Juvenile Justice Seriously* (1985)).

130 For a good discussion see Bainham and Cretney at 82 et seq.

131 A robust argument in favour of the interest theory of children's rights and criticism of the will theory is that by Neil MacCormick, "Children's Rights: A Test-Case for Theories of Right" in his *Legal Rights and Social Democracy* (1982) ch 8.

132 See eg, John Eekelaar, "The Emergence of Children's Rights" (1986) 6 OJLS 161.

133 GW Austin, "Children's Rights in New Zealand Law and Society" (1995) 25 VUWLR 249 at 250. The Office for the Commissioner of Children and the Youth Law Project are doing their utmost to raise this consciousness. Article 42 of the CRC obliges state parties to make that Convention's principles and provisions "widely known".

134 See eg Whitehead, *The Stealing of America,* at 80: "With the rise of the child rights movement, the integrity of the family is threatened."

New Zealand CC warned: "You don't have to be brilliant to know that you cannot give a child rights without taking away the corresponding 'rights' from parents."[135] In CC's minds, talk of liberating children from their parents leads simply to greater state involvement in the family.

(b) The United Nations Convention

Following World War II and the birth of the United Nations, agitation for a special comprehensive charter for children grew. The five basic principles for child welfare and protection in the first Declaration of the Rights of the Child (1924) formed the basis of the Declaration of the Rights of the Child 1959.[136] The General Assembly adopted this Declaration by unanimous vote on 20 November 1959. The 1924 and 1959 Declarations both emphasised children's protection and not children's autonomy. Freeman, commenting upon the 1959 Declaration, regretted that "although the preamble to the declaration refers to rights and freedoms, the ten principles set out in it do not embrace children's liberties (or freedoms) at all."[137]

The United Nations Convention on the Rights of the Child 1989 far exceeded most child rights advocates' expectations. As the instigation of Poland and buoyed by the decision of the United Nations (UN) to declare 1979 the "International Year of the Child," a conference on the "Legal Protection of the Rights of the Child" was held in Warsaw in January 1979.[138] This led to UN Commission on Human Rights drafting a Convention on the Rights of the Child. The Commission rejected an early Polish draft (which had essentially replicated the 1959 Declaration) in favour of something much more comprehensive. The CRC was adopted unanimously by the General Assembly of the United Nations without vote on 20 November 1989. It entered into force on 20 September 1990.

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135 Madeline McGilvray, "Political pressure on parents," *CW*, 18 Oct 1985, at 12.

136 For discussion as well as a list of the 10 principles see Freeman, "Whither children?" at 310-312. Freeman, at 311-312 comments: "The coverage [in the 1959 Declaration] is broader, though there is still a distinct overlap with the Geneva declaration. The emphasis is still firmly on protection and welfare and on what has been called the 'investment motive'."

137 Freeman, *Rights and Wrongs*, at 19.

138 See Hodgson, "Historical development," at 276 et seq for a detailed chronology of the CRC's evolution.

The CRC has received widespread acceptance with 195 nations having ratified it.[139]

Of the CRC's 54 articles, 38 deal with substantive personal rights for children. (Others deal with definitions and monitoring and implementation of the Convention). Classifications of the substantive rights vary[140], but one convenient taxonomy is subdivision into the "three Ps": protection, provision and participation.[141] As one would expect, given its antecedents, the CRC contains extensive provisions on the *protection* of children from discrimination, cruelty, exploitation and neglect. The Preamble to the CRC re-echoes the 1959 Declaration's approach here.[142]

There are, secondly, articles which provide for the *provision* of a child's basic needs: food, water, health care, education and so on. It is the third cluster of rights, the *participation* rights, which are most significant. Cynthia Price Cohen explains:

> Of the thirty-eight articles . . . devoted to substantive rights, at least ten of these have never been recognized for children in any other international instrument. They are all rights of "individual personality", and include such civil and political rights as the right to leave and return, to privacy, to freedom of expression, assembly, association and religion, among others.[143]

Cohen was puzzled by the inclusion of these autonomy articles since they were not seriously debated in earlier drafts let alone mentioned in earlier Declarations. She noted:

> It is difficult to account for this peculiarity in human rights treaty-drafting . . . the Convention on the Rights of the Child is an anomaly among human rights treaties in that an important segment of the positive law of the Convention was not preceded by rights claims based on natural law nor does it faithfully replicate the content of its related declaration.[144]

It is the advancement of these new "autonomy" rights for children which is the occasion for praise, from children's rights theorists[145], and dismay, from many CCs.[146]

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139 At the end of 1999 only two states (Somalia and the United States) had not ratified it: see the Free the Children International website: www.freethechildren.org.

140 See eg Freeman, "Whither children?", at 317-318 (a fivefold classification).

141 Thomas Hammarberg, "The UN Convention on the Rights of the Child — and How To Make It Work" (1990) 12 Human Rights Q 97 at 100.

142 See the Preamble: *"Bearing in mind* that, as indicated in the Declaration of Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection . . .".

143 Cohen, "Theories of Natural Law," at 61.

144 Ibid at 61 and 54.

145 See eg Freeman, "Whither children?", at 318: "It is the first convention to state that children have a right to 'have a say' in processes affecting their lives."

2 *New Zealand's adoption and the reception by the courts*

New Zealand signed the CRC in 1989 and it was ratified by the Government on 13 March 1993. New Zealand attached three reservations to the Convention. These relate to illegal immigrant children (article 28), youth employment (article 32) and criminal custody to children (article 37(c)). The Government reviewed these reservations in light of the UN Committee's prompting but considered each of them to be consistent with the objects and underlying principles of the CRC.[147]

The year the Convention was ratified it was considered by the Court of Appeal. *Tavita* v *Minister of Immigration*[148] concerned the proposed deportation of the appellant, Viliamu Tavita, back to Western Samoa. The appellant's visitor's permit had long since expired and he had become an overstayer. He had had a daughter whilst in New Zealand and shortly thereafter he married her mother. The Minister rejected an application to cancel Tavita's removal warrant.

Tavita's case was he would not be able to support his family in Samoa and they would not come with him. If he was deported he could not return for five years by which time he would be a stranger to his daughter. Evidence by a consultant paediatrician pointed out that the appellant was the primary caretaker of the three-year-old daughter and that his deportation now would "certainly have a detrimental effect on the child's emotional well-being and development." Judicial review proceedings were brought to set aside the removal order and require a reconsideration of Tavita's appeal. McGechan J made an interim order for a stay of Tavita's removal pending appeal. The Associate Minister of Immigration admitted that he had not taken international rights instruments (the International Covenant on Civil and Political Rights 1966 and the CRC) into account.

Cooke P, delivering the Court of Appeal's opinion, took a dim view of this. The

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146 See Bruce C Hafen and Jonathan O Hafen, "Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child" (1996) 37 Harv Int L J 449 at 451: "While there is much to praise in the CRC's approach to child *protection* . . . the CRC's vision of children's *autonomy* is misguided." (original emphasis).

147 Ministry of Youth Affairs, *Convention on the Rights of the Child: Presentation of the Initial Report of the Government of New Zealand*, (May 1997) at 11.

148 [1994] 2 NZLR 257.

appellant invoked two articles from the Covenant as well as two from the CRC. Article 9(1) of the latter provides that "States Parties shall ensure a child shall not be separated from his or her parents against their will, except when . . . such separation is necessary for the best interests of the child." Sir Robin Cooke, of his own initiative, also turned to article 8 of the European Convention for the Protection of the Human Rights and Fundamental Freedoms. Article 8(1) states: "Everyone has the right to respect for his private and family life . . .". Article 8(2) restricts government interference with this right except where it is in accordance with the law and is necessary in a democratic society.

To the Minister's argument that the Department was entitled to ignore the international instruments, the President's rejoinder was blunt: "This is an unattractive argument, apparently implying New Zealand's adherence to the international instruments has been at least partly window-dressing."[149] Cooke P noted with approval the Balliol Statement of 1992 (cited by counsel for the appellant) which referred to the duty of the judiciary to interpret and apply national constitutions, ordinary statutes and the common law in light of "the universality of human rights." The New Zealand Court of Appeal did not want to be a pariah in this regard. Far from it, as Sir Robin Cooke left open the possibility that, in an appropriate future case, New Zealanders may have a direct right of recourse to the UN Human Rights Commission, a body which was "in a sense part of this country's judicial structure."[150] He continued:

> A failure to give practical effect to international instruments to which New Zealand is a party may attract criticism. Legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention human rights, norms or obligations, the executive is necessarily free to ignore them. This emerges as a case of possibly far-reaching implications.[151]

Tavita as is landmark in establishing the relevance of international rights norms for ordinary domestic jurisprudence in New Zealand. The *Tavita* appeal was adjourned sine die,

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149 Ibid at 266.

150 Ibid. But note the Court of Appeal's rejection of the Committee as a "judicial authority" for the purposes of legal aid under the Legal Services Act 1991 in *Wellington District Legal Services Committee* v *Tangiora* [1998] 1 NZLR 129. The Judicial Committee of the Privy Council dismissed an appeal by Tangiora, the applicant for aid: *Tangiora* v *Wellington District Legal Services Committee* [2000] 1 NZLR 17. On recourse by New Zealand individuals to the Human Rights Committee see Don MacKay, "UN Covenants and the Human Rights Committee" (1999) 5 HRLP 76.

and the stay remained in force to enable the appellant to lodge a further application and for the recalcitrant Minister to take advantage of the "the opportunity of reviewing the case in light of an up-to-date investigation and assessment."[152]

The CRC has been taken into account many times in other courts.[153] Just three months after its ratification, the High Court in a custody dispute, *H* v *F*,[154] was referred to the Convention. Fraser J remarked obiter that there were several respects in which Exclusive Brethren beliefs were incompatible with the CRC's principles. Their "extreme doctrine of separatism" which meant a way of life for families of "sheltered but blinkered contentment"[155] contravened the Convention at several points, "for example, freedom to seek and receive information and ideas about all kinds (art 13), freedom of association (art 15), the accessibility of higher education to all on the basis of capacity (art 28), and education being directed to the preparation of the child for responsible life in a free society in the spirit of . . . tolerance and friendship among all peoples and . . . religious groups (art 29)."[156] The CRC was easily absorbed in New Zealand family law jurisprudence, indeed, Fraser J ventured: "In my view, the terms to the United Nations Convention reflect the generally accepted standards of society in this country."[157]

The Family Court has invoked the CRC on a number of occasions when interpreting the Children, Young Persons, and Their Families Act 1989 (CYPFA). Judge Inglis QC found assistance from the CRC in interpreting section 5, 6, and 13 of the CYPFA, observing "that the terms of such a convention [the CRC] can assist with the interpretation of ambiguous domestic statutory provisions or to fill lacuna."[158] He went on to find a number of similarities between the thrust of the Convention and the thrust of the Act. Similarly, for

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151 Ibid (emphasis added).

152 Ibid.

153 See Pauline Tapp, "Use of the United Nations Convention on the Rights of the Child in the Family Court" in *New Zealand Law Society Family Law Conference 1998* (1998) at 267-295 and Gabrielle Maxwell, "Children's rights: how well are they protected by legislation?" in Pipe and Seymour (eds), *Psychology and Family Law: A New Zealand Perspective* (1998) ch 8 at 133-135.

154 (1993) 10 FRNZ 486.

155 Ibid at 493.

156 Ibid at 499.

157 Ibid.

158 *In the Matter of the S Children* [1994] NZFLR 971 at 977. See also *Re S*, unrep, Family Court Auckland, CYPF 004/128-129/94, 11 February 1997, Judge Aubin, at 24.

Judge von Dadelszen the Convention was a "useful touchstone"[159] and he found that the principles in the Act were "consistent with the statements contained in arts 3.1, 7.1, 8.1, 9.1, 9.3, and 18.2 of the UN Convention."[160] In that case, *DGSW* v *G*, he deliberately buttressed each of his conclusions on the application of the Act with statements that the particular decision was in sympathy with a specific article of the Convention.[161] The similarities between the CYPFA and the CRC flow from the common recognition in both that, while the family is "the ideal structure within which the child should be nurtured"[162], the welfare of the child (or "best interests" as the CRC prefers) is paramount in any conflict between parents' (or others') interests and the child's interests. Both the Act and the Convention are essential child-centred rather than family-centred.[163]

The CRC continues to be regularly invoked in other contexts such as the scope of parental corporal punishment[164] and the issue of the writ of habeas corpus[165], although the majority of decisions referring to the CRC concern immigration appeals.[166]

3 *Conservative Christian antipathy to international conventions generally*

Many government reforms and law changes in the domestic arena are prompted by New Zealand's international commitments under United Nations treaties. This does nothing, as we saw in Chapter 5, to console many CCs. Conforming New Zealand domestic law to the dictates of the UN is felt by some CCs as "an intrusion on national sovereignty."[167]

The CC opposition to the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is a good example. A broad coalition of CCs wrote letters, held marches, and organised a 47,800 signature petition against CEDAW

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159 *Re the W Children* (1994) 12 FRNZ 548 at 558.
160 *DGSW* v *G* (1995) 14 FRNZ 23 at 31.
161 See ibid at 39 and 41. See also *M* v *H* [1999] NZFLR 439 at 445 where the Family Court buttressed its conclusion on access with the comment that it was supported by art 9(3) of the CRC.
162 *In the Matter of the S Children* [1994] NZFLR at 982 per Judge Inglis QC.
163 Ibid.
164 See *Ausage* v *Ausage* [1997] NZFLR 72.
165 See *Jayamohan* v *Jayamohan* (1997) 15 FRNZ 486.
166 See eg *Nath* v *Minister of Immigration* [1997] NZAR 303; *Ali* v *Deportation Review Tribunal* [1997] NZAR 208; *Mohamud* v *Minister of Immigration* [1997] NZAR 223.
167 Mark Toomer, "'Corporal punishment, abuse link groundless'", *CW*, 19 Feb 1997, at 3 (quoting Bruce Logan, director of the NZ Education Development Foundation).

which they saw as reflecting Marxist-feminist and humanistic ideals antithetical to the Christian family.[168] Although their efforts were to no avail, the petition and related protests were a "valuable exercise in politicising Christians . . . to oppose the advance of humanist policies."[169] CC groups such as Women For Life vowed to monitor any future government moves to destabilise traditional morality and family structures.[170] Examples in the 1990s of CC disdain for UN directives are the resistance by some CC mothers to the UN International Year of the Child "Smack-Free Week" in August 1994[171] and the negative reaction to the UN Fourth Women's Conference in Beijing in 1995. Ametta Moran, Director of Family Life International (and also one-time family spokesperson for the Christian Democrats) reported that the Conference's declaration was "strongly anti-family" with "quite serious implications for parents' rights in New Zealand."[172]

4 *Is the CRC a threat to parental rights? Pro-family, pro-parent aspects*

As we shall see next, many CCs perceive the CRC to be anti-family and a distinct threat to parental authority. The Christian Heritage Party in their 1999 Manifesto, for instance, promised that (if elected) it would "protect parental rights by placing reservations against those aspects of the United Nations Convention on the Rights of the Child which undermine a parent's lawful authority."[173] There are, however, aspects of the Convention that are supportive of the family and parental guidance.[174] Fair-minded critics of the Convention concede that "in many respects the CRC is surely constructive."[175] What are

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168 See "Call to pray against detrimental laws," *CW*, 22 Feb 1985, at 5 and "Convention complaint goes to UN Chief," ibid; Barbara Linton, "Forums showed NZ women object to radical left," *CW*, 25 Jan 1985, at 10 and 17.

169 "Petition arrives after the event," *CW*, 8 March 1985, at 5 (quoting the co-ordinator of "The Council for a Free New Zealand," which promoted the petition).

170 "Anti-conventionists to monitor Govt moves on morality," *CW*, 25 Jan 1985, at 3 (quoting Annetta Moran, Women For Life president).

171 See "Mothers call for action," *CW*, 31 Aug 1994, at 1 (Gisborne mother, Mrs Debbie Boswell, initiating action to retain the parental right to corporal punishment).

172 Mark Toomer, "Serious implications in document, says observer," *CW*, 18 Oct 1995, at 5.

173 *Christian Heritage Party Manifesto 1999*, at 6.

174 A point made by several commentators eg Austin, "Children's Rights in New Zealand," at 263. For a robust defence of the CRC directed at Australian CC attacks see Margaret Otlowski and B Martin Tsamenyi, "Parental Authority and the United Nations Convention on the Rights of the Child: Are the Fears Justified?" (1992) 6 Aust J Fam Law 137 at 143.

175 Hafen and Hafen, "Abandoning Children to their Autonomy," at 457.

these "constructive" elements?

The Preamble to the Convention begins by, inter alia, repeating the theme of earlier UN instruments that the family is of special importance.[176] It states that the States Parties to the CRC are:

> Convinced that the family, as the fundamental group of society and the natural environment for the growth and the well-being of all its members and particularly children, should be afforded the necessary protection in assistance so that it can fully assume its responsibilities within the community.

The Preamble adds that "the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding." The family is viewed as both an essential and a benign institution. Furthermore, parental rights are expressly recognised in article 5, which reads:

> States Parties shall respect the responsibilities, rights and duties of parents or where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Apart from this general parental right of guidance, the CRC contains various articles emphasising the importance of family life. Article 7(1), for instance, stipulates that the child shall have the right "as far as possible" to know and be cared for by his or her parents. Article 9(1) declares children ought not be separated from their parents against the latter's will unless such separation is needed for the best interests of the child. Children who do become separated from one or both parents have the right to "maintain personal relations and direct contact with both parents on a regular basis."[177] Other articles emphasise the desirability of "family reunification"[178] or speak of the need for special assistance where a child is "deprived of his or her family environment."[179]

Article 18(1) leaves the reader in no doubt that the Convention considers both parents to be the best persons to raise their children:

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176 See art 16(3) of the UN Declaration on Human Rights 1948 and art 23(1) of the ICCPR 1966 ("the family is the fundamental group unit of society and is entitled to protection by society and the State."

177 Article 9(3).

178 Article 10(1).

179 Article 20(1).

> State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

Article 18(2) supplements this by requiring States Parties to "render appropriate assistance" to parents to facilitate the performance of their child-rearing responsibilities.

The Convention does not ignore the spiritual dimension of life either. Article 14 addresses a child's right to freedom of conscience and religion. Article 27(1) states: "State Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, *spiritual,* moral and social development." Again, it is the parents who have the primary responsibility to secure the conditions of living necessary for the child's development.[180] Placement of the child temporarily or permanently deprived of his or her family in any foster, adoption or similar placement is to be undertaken with due regard for, inter alia, the child's religious background.[181]

Finally, the Convention's Preamble provides a glimmer of hope for those CCs concerned at rising abortion levels. It states "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth."[182] Pro-life supporters in New Zealand have recently noticed this and used it in argument for tighter abortion controls.[183]

5 *Conservative Christian concerns with the Convention*

CC misgivings about an international convention on children's rights go back to the mid-1980s. Madeline McGilvray, for example, writing for *Challenge Weekly* in 1985, warned readers that the proposed Convention on the Rights of the Child spelt disaster: "If you thought you didn't have much control over your children now, just wait until this

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180 Article 27(2).

181 Article 20(3). The child's ethnic, cultural and linguistic background are also to be given due regard.

182 The New Zealand Family Court has recognised the protective mechanisms in the CYPFA 1979 may extend to an unborn child. See *In the matter of Baby P* [1995] NZFLR 577.

183 See eg, Dennis Walker, "Convention on the Child" (letter), *Humanity*, Oct 1998, at 4. A petition was launched in 1998 by "Christians for Life" calling for legal recognition and protection of the unborn child. See ibid.

convention is ratified."[184]

The concerns of such CCs with the CRC are numerous. Whilst the family is accorded importance, the Convention is unclear on precisely what kind of family is preferred. The traditional, nuclear, patriarchal family is not assumed. The CRC mentions "extended families", for one thing.[185] The real concern for some CCs, however, is that non-Christian forms of family might be recognised as normative.

(a) Greater state intervention under the welfare test?

Parent's rights are recognised but in a diluted form. As we saw earlier, article 5 refers to the rights and responsibilities parents to provide appropriate "direction and guidance", not the right to command obedience. Moreover, parental direction is limited to that which is "consistent with the evolving capacities of the child", implying a diminishing degree of control as the child approaches adolescence. Furthermore, under the CRC the parental direction is direction in the exercise by the child of *its* rights, not the parents' rights. As American lawyers Hafen and Hafen speculate: "The question remains whether the parental rights and duties recognized by article 5 extend only to the parental role in enforcing rights granted to children by the CRC."[186] Defending the CRC against Australian CC attacks, Otlowski and Tsamenyi's explanation would simply confirm the Hafens' fears:

> [A]lthough the right of parents to provide guidance and direction to their children in the exercise of their rights is unequivocally recognised under the Convention, it is clearly a qualified right which is subject to external scrutiny, and which may be overridden in circumstances where, for example, the parents are not acting in the best interests of the child, or where the parents are unreasonably attempting to impose their views upon mature minors who have the capacity to make their own decisions.[187]

If Otlowski and Tsamenyi are correct and that some, perhaps most, parent-child conflicts will now be resolved by external scrutiny (read the state) operating under the vague "best interests" standard (or even under a test of whether parental direction is

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184 McGilvray, "Political Pressure on Parents," at 12. See also her article in *Challenge Weekly* a year later, "Family unit reels," at 7: "This convention [ie the CRC] will be the final death blow to the family in the legal sense . . .".

185 See eg article 5.

186 Hafen and Hafen, "Abandoning Children to Their Autonomy," at 458.

187 Otlowski and Tsamenyi, "Parental Authority," at 144.

"unreasonable"), then CCs would appear to have some cause for alarm.

Some CCs apprehend that the CRC will result in greater state intrusion into family life by tilting the balance of rights in the parent-child relationship in favour of the child.[188] One New Zealand CC writing to *Challenge Weekly* typifies this concern. Mies Omen asserted: "The UN Convention on the Rights of the Child undermines God-given parental authority."[189] And who assumes this authority? "The Government (not the parents) shall have the final say as to what is 'in the best interests of the child' (Article 2)[sic]."[190]

Is there substance to this concern? Article 3(1) does affirm that "the best interests of the child shall be a primary consideration" in all actions concerning children under the CRC. Article 18(1) declares the best interests of the child shall be the parents' "basic concern." Article 9(1) provides that a child may be separated from his or her parents but only exceptionally, namely when "such separation is necessary for the best interests of the child." Do these articles imply that if parental childrearing falls below some assessment of the child's best interests, then state intervention is warranted? Could a child invoke the state's assistance against her parents if, in the child's view, her best interests are being unreasonably addressed?

The answer to this depends upon whether the best interests test applies only as a *secondary* criterion once the family is already subject to state scrutiny, or whether the best interests test applies as a *primary* jurisdictional test.[191] The traditional approach in common law jurisdictions is the former: the welfare of the child test is only applied as a standard once the custody (or access) of the child is in dispute, or when serious neglect or abuse is established and placement is now in contemplation. Otlowski and Tsamenyi, however, suggest that the CRC may have ushered in "a new family and lower threshold for state intervention in intact families,"[192] viz, state intervention where the child's best interests (as determined by the child and the state, not the parents) is being thwarted. The CRC is ambiguous here. Article 9 does provide that separation from parents in the child's best

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188 See ibid at 144-145.
189 Letter (untitled), *CW*, 7 Sept 1994, at 7.
190 Ibid. Omen refers incorrectly to article 2 instead of article 3.
191 Hafen and Hafen, "Abandoning Children to Their Autonomy," at 464.
192 Hafen and Hafen's tentative opinion, ibid.

interests "may be necessary" in the case of abuse or neglect or where the parents are separated and thus a custody direction is required. This supports the view that the best interests standard still remains a secondary one only. But the instances given are simply illustrative not exhaustive, and so the possibility remains open that the best interests standard may be used as primary triggering test. Otlowski and Tsamenyi argue that the CRC is primarily directed at state parties' obligations towards children rather than attempting to interfere with the parent-child relationship.[193] While that may be the aim and while reminding states of their basic duties towards children is *a* primary objective, it is not the sole one. Neither does it rule out the familiar possibility of legal instruments having unintended consequences.

In New Zealand, the legislature has consistently acknowledged parents as the best judges of their own children's welfare and where the welfare of the child test is applied, it has traditionally been invoked as a secondary criterion. Section 6(1) of the Guardianship Act, 1968 declares that the father and mother of a child are each a "guardian" of the child. "Guardianship" is defined in section 3 of that Act to mean the custody of the child which includes "the right of control over the upbringing of a child." The concept "upbringing" includes, under section 2(1), "education and religion." In a 1994 decision, Judge Inglis observed:

> [U]nless and until ss 3 and 6 of the Guardianship Act are rewritten the fact remains that the guardians of a child have the sole legal responsibility for the child's care and upbringing.[194]

Section 13(b) of the Children Young Persons and Their Families Act 1989 underscores this by requiring courts involved in child protection proceedings to be guided, inter alia, by:

> The principle that the primary role in caring for and protecting a child or young person lies with the child's or young person's family, whanau, hapu, iwi and family group, and that accordingly
> (i) A child's or young person's family . . . should be supported, assisted and protected as much as possible; and
> (ii) Intervention into family life should be the minimum necessary to ensure a child's or young person's safety and protection.

Parental autonomy is not absolute and the presumption that parents will generally act

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193 Otlowski and Tsamenyi, "Parental Authority," at 145, 146 and 157.
194 *In the Matter of the S Children* [1994] NZFLR 971 at 977.

in the children's best interests is just that. The presumption can be rebutted—courts have always retained their *parens patriae* jurisdiction. However, state intervention to protect or care for children is not lightly exercised. The threshold for state intervention has, historically, always been demanding. The parents' childrearing conduct must fall below a socially-acceptable threshold which, out of respect for family autonomy, is set at a high level. In New Zealand, the legislature has codified the traditional abuse or neglect threshold. State intervention into family life should be the "minimum necessary" for the child's safety and protection.[195] Section 14(1) of the CYPFA goes on to set out nine grounds for intervention. The first two are most apposite here. A child is in need of care or protection if:

> (a) The child or young person is being, or is likely to be, harmed (whether physically or emotionally or sexually), ill-treated, abused, or seriously deprived; or
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> (b) The child's or young person's development or physical or mental or emotional wellbeing is being, or is likely to be, impaired or neglected, and the impairment or neglect is, or is likely to be, serious and avoidable.

Serious harm or neglect is the benchmark, with New Zealand courts being mindful that a certain degree of latitude, to accommodate the unconventional, is permissible.[196] So, in one care and protection case involving a family living in a small religious community adhering to "fundamentalist Christian beliefs", the court reminded itself that it:

> must always be wary of imposing standards and values which are unreasonably high and which fail to recognise the width of parental style and the individuality of people and the rights of individuals to have and to nurture their children in their own religious and personal beliefs.[197]

Judge Strettell in that same case quoted with approval these words from a pre-CYPFA case, *E* v *DSW*, where Anderson J cautioned:

> State intervention is not justified by the prospect of improving a child's care but by inadequate care which, having regard to the diversity of our New Zealand culture and its broad range of parenting abilities, is clearly unacceptable. The principle imports a

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195 Section 13(b)(ii) of CYPFA 1989.

196 See eg *DGSW* v *B*, unrep, Family Court, Auckland, CYP 004/110/92, 6 September 1993, Judge MacCormick, at 10: "That a person is somewhat unusual does not exclude them from being a good citizen or a good parent. Acceptance of diversity is important in any community; and unconventional and nonconformist approaches frequently have community value."

197 *DGSW* v *T*, unrep, District Court, Christchurch, CYPF 009/25-6/93, 15 July 1994, Judge Strettell, at 2-3.

> consideration of minimum community standards of parental competence such that the State should not intervene unless parental care has been proven to be unacceptably incompetent.[198]

The welfare of the child test is only a secondary criterion which applies once the family is already subject to state scrutiny in care and protection proceedings (or custody and access proceedings). The primary jurisdiction test for intervention in an intact or united family remains serious abuse of neglect and only when that is proven do the parents' actions fall for scrutiny under the welfare of the child standard. Judge Inglis QC in *In the Matter of the S Children* makes this point: "this first and paramount principle, stated in s 23(1), [the welfare of the child], can be applied only if there are proceedings 'where any matter relating to the custody or guardianship of or access to a child . . . is in question'."[199]

(b) Other concerns: "choice" rights and beyond

The real heart of CC concern is the novel introduction of "choice"[200] rights for children. CCs have no objection to the protection or provision rights. The extension of adult participation rights to children (in articles 13 to 16) may, fear some CCs, see the virtual extinction of parental rights.

Article 13(1) grants children "the right to freedom of expression" which includes "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers . . . through any . . . media of the child's choice." This broad right is subject only to restrictions provided by law necessary for respect of the rights and reputation of others or to protect national security, public order, health or morals.[201] One New Zealand CC took article 13 to mean:

> Parents are NOT ALLOWED to place any restrictions on what a child sees, reads, hears is taught in school or experiences in any way.[202]

Critics of the CRC fear the breadth of article 13(1) will open the door to children being

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198 *E* v *DSW* (1989) 5 FRNZ 332 at 334: quoted in *DGSW* v *T*, ibid, at 3.
199 [1994] NZFLR 971 at 977.
200 Hafen and Hafen's characterisation: see "Abandoning Children to Their Autonomy," at 450.
201 Article 13(2).
202 Omen, Letter to *CW*, 7 Sept 1994, at 7 (capitals in original).

exposed to obscenity, pornography and violence without parental restriction.[203] Of the more extreme assertions is one suggesting that the article gives a teenage child the right to acquire information about devil worship, black magic or homosexuality and pass on such information to other teenagers.[204] The scope of article 13(1) is untested. Whether restrictions upon a child's freedom of expression would be permitted under the proviso in article 13(2) (which justifies curtailment if public health or morals so require) is an open question. Given, however, that article 34 requires states to "protect the child from all forms of sexual exploitation and sexual abuse" and to take all measures to prevent "the exploitative use of children in pornographic performances and materials", an unrestricted right to (for example) pornography for children would appear highly unlikely.[205] Otlowski and Tsamenyi speculate that article 13 might be interpreted to include a right of an adolescent minor to seek and obtain contraceptive advice and treatment without parental consent.[206] If this is so, article 13 buttresses the *Gillick* mature minor principle to be discussed in the next chapter.

Article 14(1) of the CRC recognises the state's duty to "respect the right of the child to freedom of thought conscience and religion." This is immediately qualified by article 14(2) which requires states to respect the rights and duties of parents "to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child." The potential impact of this important article is discussed at length in the next chapter.

Next, article 15(1) requires state parties to "recognize the rights of the child to freedom of association and to freedom of peaceful assembly." Again, there is the proviso, in article 15(2), allowing restrictions to be imposed where these are necessary in a democratic society so as to protect public order, safety etc or the rights and freedoms of others. Once more the CC verdict is pessimistic: "Parents are NOT ALLOWED to influence or restrict in any way a

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203 See Hafen and Hafen, "Abandoning Children to Their Autonomy", at 469; Otlowski and Tsamenyi, "Parental Authority", at 155.

204 Otlowski and Tsamenyi, ibid, at 155 (quoting from a paper on the CRC submitted to the Human Rights Commission by Australian CCs in 1990).

205 On the question of censorship of child pornography the High Court noted, obiter, the positive obligation upon New Zealand pursuant to art 19 of the CRC to protect children from exploitation: see *Moonen* v *Film and Literature Board of Review* [1999] NZAR 324 at 334-355.

206 Ibid at 155 fn 103.

child's choice of associates"[207] and "Parents cannot stop their children from associating with friends of their choice."[208] Whether this article goes this far—preventing parents from mixing with others whom the parents deem undesirable—again, remains untested.

Article 16(1) provides: "no child shall be subjected to arbitrary or unlawful interference with his or her privacy family home or correspondence." Concerns of CCs here turn upon the uncertain scope of the child's right to "privacy". American case law illustrates privacy has a wide meaning extending to a person's control over their sexual development and procreative capacities. Thus, speculate Hafen and Hafen, "a major risk of the CRC's vague reference to privacy rights for children is that its language can be construed to support sexual freedom for children."[209] CCs have fought many battles on this front in recent times attempting, usually unsuccessfully, to stem state recognition of adolescents' rights to contraceptive advice, abortion and sex education literature. Article 16(1) also refers to protecting the child from "unlawful attacks on his or her honour and reputation." Quite what is contemplated here is unclear. A parent who imposed a night-time curfew or insisted upon certain jewellery (such as nose-studs) being removed might lower her child's reputation amongst her peers. Article 16(2) provides that a child has "the right to the protection of the law against such interference or attacks" upon, inter alia, the child's "honour and reputation." The article may well be primarily directed at the state interference with privacy and reputation but the possibility exists, given the ambiguity of the wording, that this participation right will run against the parents.[210]

Finally, CCs fear that one of the protective articles in the Convention will be interpreted to eliminate one of their cherished parental rights, the right of corporal punishment. Chapter 8 will consider this in detail.

IV CONCLUSION

Conservative Christian and liberal notions of the family differ, as do their respective understandings of the desirable pattern of internal relationships within the family and the

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207 Omen, Letter to *CW*, 7 Sept 1994, at 7 (capitals in original).
208 Goss, "Parents choices, children's rights," at 8.
209 Hafen and Hafen, "Abandoning Children to Their Autonomy" at 474.

upbringing of children. The CC interpretation of the family—with its concepts of headship, submission and obedience—must appear to secular liberals as antiquated, authoritarian, hierarchical and sexist. CCs are especially sensitive to public policy concerning the family and the raising of children. For them, the family is critical to the survival of the faith; attacks upon the family, and CC parental prerogatives, elicit a typically hostile reaction.

I noted liberalism's tendency toward atomisation of communities. Its emphasis upon individual autonomy has led to a growing "constitutionalisation" of family law. The individual rights of family members are increasingly recognised by the state. While hardly a negative thing per se, such constitutionalisation carries with it dangers for the integrity and effective working of families. This, at least, is the CC belief. One facet of this incursion of "rights culture" into family law is the children's rights movement.

While early international instruments regarding children stressed the paternalistic protection of children, the United Nations Convention on the Rights of the Child 1989 broke new ground by recognising certain participation or autonomy rights for children. The children's rights phenomenon has provoked the same wariness from many CCs that human rights theory has. Perhaps it has received even greater suspicion and criticism since it impacts upon one of CC's most cherished institutions, the family.

CCs are not opposed to protective and provision rights for children but many feel alarm at the potential operation of participation rights for their children. In recent decades, their parental authority has been undermined by myriad non-legal social and cultural factors. So a potential legal undermining of their authority is hardly welcome. CC fears are exacerbated by their awareness that the "spirit of the times" is against them. Government and legal authorities, acting in accordance with the "Wellington worldview", are not, surmise CCs, likely to be sympathetic to them. The CC approach to family and childrearing is, they suspect, likely to be viewed as intolerant, illiberal and outdated by policy-makers and the courts. Courts in New Zealand have, however, shown more sensitivity and latitude toward "unconventional" parenting approaches than most CCs give them credit. Furthermore, many CCs have failed to discern the positive pro-family and pro-parent

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[210] Ibid at 472.

elements of the Convention. As for the concern that the CRC will see greater state intrusion into the intact family under the guise of the broad welfare standard, there are indications from the early New Zealand case law invoking the Convention that this will not transpire. The welfare test will continue to be applied as a secondary criterion once the state has established its jurisdiction in the customary way (for example, once serious parental abuse and neglect is proven). The traditional common law deference to parental decisionmaking and the state's respect for family autonomy is unlikely to change. The strident and exaggerated concerns of some CCs appear to me to be misplaced. On the other hand, it would be unwise to totally dismiss their concerns, given that many of the CRC's participation articles are yet to be tested.

Chapter 7

THE PARENTAL RIGHT OF RELIGIOUS UPBRINGING AND THE UNITED NATIONS CONVENTION

This chapter examines a key conservative Christian (CC) concern with the United Nations Convention on the Rights of the Child 1989 (CRC). Some CC parents believe that they will now be hindered in their crucial obligation to teach and transmit the faith. Perhaps the foremost parental right cherished by CCs is the right to control their children's religious upbringing. Most CCs would, I suspect, heartily agree with Dr James Dobson:

> There is nothing more important to most Christian parents than the salvation of their children. Every other goal and achievement in life is anemic and insignificant compared to this transmission of faith to their offspring. This is the only way the two generations can be together throughout eternity. . . [1]

Does, for example, the CRC usher in a novel right of a child, in accordance with its maturity, to determine his or her own religion independently of its parents? Some New Zealand CCs fear the worst here:

> Parents have the right to provide direction "consistent with the evolving capacities of the child", but cannot coerce a child to attend church or stop them attending a church they disagree with.[2]

> Parents are NOT ALLOWED to influence or restrict in any way a child's views on morality or religion.[3]

CC critics of the CRC are concerned that it could be interpreted to create difficulties for parents in both reinforcing religious practices within the family and discouraging a child's initiative to pursue other religions or no religion.

I begin by examining the present state of the law governing parental control over the religious upbringing of children in the intact and united family. By "intact" I mean the situation where the parents are married and living together; a "united" family is one where

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1 James Dobson, *Solid Answers* (1997) at 221.
2 Arlene Goss, "Parents' choices, children's rights," *Challenge Weekly* ('*CW*'), 8 Feb 1995, 8 at 8.
3 Omen, Letter to *CW*, 7 Sept 1994, at 7 (capitals in original).

the parents (if not the children) are of one accord on how the children should be raised.[4] The traditional limitation upon parents' control of their children's religious upbringing is risk of harm to the children. In part III, I turn to the CRC, especially Article 14, which deals with a child's right to religious liberty. I consider whether the Convention will give impetus to an independent right of religious freedom for a child. Part IV examines religious upbringing in the fractured family. Finally, I draw some brief conclusions about the impact of the CRC.

I PARENTAL CONTROL OVER CHILDREN'S RELIGIOUS UPBRINGING: THE INTACT FAMILY

1 Historical development: from paternal supremacy to joint parental control

There was a period in English legal history when the state restricted the authority of parents to rear children in the religion they deemed fit.[5] The sixteenth and seventeenth centuries witnessed various statutes circumscribing Roman Catholic parents in England from inculcating that faith in their children.[6] The eighteenth century saw a gradual relaxation of these anti-Catholic measures explicable, it seems, because Protestantism felt itself sufficiently secure by then.[7] By Lord Eldon's time, the English courts were prepared to look with equal favour on all religions.[8]

(a) *Religio sequitur patrem*

During the nineteenth century the English common law embraced the doctrine of paternal supremacy in matters of religious upbringing. Control of the children's religion was

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4 My usage accords with that by Lord Scarman in *Gillick* v *West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112 at 176.

5 See Lee M Friedman, "The Parental Right to Control the Religious Education of a Child" (1916) 28 Harvard L Rev 485 at 485-487 for a brief account.

6 For example in 1590, the Elizabethans enacted a statute requiring schoolmasters to adhere to the Established Church and in 1594 it was made a crime for a Roman Catholic parent to send his child abroad for a Catholic education. See Friedman, ibid.

7 Ibid at 487.

8 See *Lyons* v *Blenkin*, Jac. 245, 37 ER 842 (1821). But the courts were not prepared to look with favour upon atheism: see the very next case in that volume of the English Reports, *Shelley* v *Westbrooke*, Jac 266; 37 ER 850 (1817) and also *In re Besant* (1879) 11 Ch D 508.

for the father; thus the maxim, *religio sequitur patrem.*[9] Of the many authorities to this effect, the most-cited are the *Agar-Ellis* cases in the late 1800s.[10] In the first *Agar-Ellis* decision Malins VC propounded the law clearly:

> The principles of this Court are the principles of common sense and the principles of propriety, that the children must be brought up in the religion of the father. The father is the head of his house, he must have the control of his family, he must say how and by whom they are to be educated, and where they are to be educated, and this Court never does interfere between a father and his children unless there be an abandonment of the paternal duty, and that may be considered to take place when the father brings them up irreligiously. . . . ; where there is immoral conduct . . . .; or where the Court is of the opinion that the father has been guilty of abandonment of the parental duty. Then and then only will the Court interfere.[11]

The Court of Appeal endorsed this summary fully. There was a strong theological flavour to the *religio sequitur patrem* doctrine, with the *Agar-Ellis* judges constantly referring to the father's right of control within the family as "one of the most sacred of rights"[12] and required as much by "the laws of Christianity"[13] as by the laws of England. In the second *Agar-Ellis* case, Lord Brett MR observed: "It seems to be that in the word 'sacred' the Vice Chancellor has summed up all that I have endeavoured to express . . . The rights of a father are sacred rights because his duties are sacred duties."[14] Coupled with the deference to a father's divinely-ordained duty and a reluctance to "interfere with the natural order and course of family life,"[15] was a pragmatic acknowledgement of judicial incompetence in this area. Bowen LJ explained why, palpable unfitness aside, it was better to trust parental (or more accurately as it then was, paternal) judgment:

> It is far better that people should be left free, and I do not believe that a Court of Law can bring up a child as successfully as a father, even if the father was exercising his discretion as regards the child in a way which critics might condemn . . . the natural law . . . points out that the father knows far better as a rule what is good for his

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9 But note Friedman's criticism (at 488) of this maxim: "Like many maxims, this is a glittering half truth that advances the discussion little. How far does it follow? In what was is it to follow? Indeed experience shows that in many instances it follows only by coming out in quite the opposite direction."

10 *In re Agar-Ellis* (1878) 10 Ch D 49 (*Agar-Ellis (No 1)*) ; *In re Agar-Ellis* (1883) 24 Ch D 317 (*Agar-Ellis (No 2)*).

11 *Agar-Ellis (No 1)* at 56-57.

12 *Agar-Ellis (No 1)* at 72 per James LJ (delivering the judgment of the Court of Appeal).

13 Malins VC, ibid at 55.

14 *Agar-Ellis (No 2)* (1883) 24 Ch D 317 at 329 (CA). The reference to the Vice Chancellor is to Bacon VC in *Re Plomley*, 47 LT (NS) 284.

15 Bowen LJ in *Agar-Ellis (No 2)* at 335.

> children than a Court of Justice can . . . [I]t is not mere disagreement with the view taken by the father of his rights and the interests of his infant that can justify the Court in interfering. If that were not so we might be interfering all day and with every family.[16]

Although the father's rights were paramount they were not impregnable. The courts would interfere where the father had been demonstrated to be gravely unfit. The cases speak of a father being deprived of his rights where he "forfeited, abandoned or waived" his rights.[17] Immoral conduct would also disbar him. As to what precisely constituted an abandonment or waiving of parental rights, the courts frequently differed.[18] Certainly, an ante-nuptial agreement between father and mother directing that the children be raised in a particular faith (or more to the point, a faith other than the father's) was not binding.[19] A father could always change his mind. There were, even so, limits. As we shall see later, if a child was of such an age and of such stage in his religious development and education that a change in his religion would be "dangerous and improper"[20] the court might preclude interference with the child's settled religious identity.

The *Agar-Ellis* cases were the apotheosis of paternal power. The outworking of the *religio sequitur patrem* principle could sometimes lead to draconian results. In *Agar-Ellis* itself, the Protestant father succeeded in effectively severing links between his daughter, aged nearly seventeen, and her Catholic mother. Upset at the mother's efforts at a Catholic upbringing, the father removed his daughter from her care, allowing her to visit her mother only once a month, whilst requiring all correspondence between the mother and the girl to be first vetted by him. Such a severe approach, reflecting a callous disregard for his daughter's best interests, could hardly be commended. Two of their Lordships in the landmark 1986 *Gillick* judgment, to which I shall return later, vilified the Victorian judges' vindication of the father's rights in that case. *Gillick* is important having been cited by New Zealand courts

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16 *Agar-Ellis (No 2)* at 335 and 338-339.

17 See Malins VC in *Agar-Ellis (No 1)*.

18 Friedman, "Parental Right to Control Religious Education," at 492, suggested: "Indeed there is perhaps no situation which has betrayed the judiciary to yield to its own religious prejudices so subtly as the issue of parental abandonment in the face of rival religious claims between parents and relatives over some poor child who had been made the object of religious zeal."

19 See *Agar-Ellis (No 1)* at 60; *In re Browne*, 2 Ir Ch Rep 151 (1852).

20 *Stourton* v *Stourton*, 8 De GM and G 760 at 767 (1857) per Knight Bruce LJ.

with approval on numerous occasions.[21]

(b) Joint parental authority

The father's supremacy remained intact under the common law until abrogated by statute in the 1920s. Beginning that decade, courts involved in child custody or upbringing matters were instructed to have regard first and foremost to the best interests of the child; any claim of paternal superiority was rejected. Section 2 of the New Zealand Guardianship of Infants Act 1926 read:

> the Court in deciding that [child custody or upbringing] question, shall regard the welfare of the infant as the first and paramount consideration whether from any other point of view the claim of the father, or any right at common law possessed by the father . . . is superior to that of the mother, or the claim of the mother is superior to that of the father.

Hence, both parents of the children share an equal right to control the religious upbringing of the children.[22] Moreover, from 1926 to the present day in New Zealand, all religious upbringing questions in court proceedings are to be judged against the paramount test of the child's welfare.

However, the *religio sequitur patrem* doctrine had a certain degree of momentum which carried through well after the mid 1920s legislative change. There was a tendency, in some cases, for courts to assume that the best interests of the child were fostered by following the father's wishes in matters of religion.

In New Zealand the leading case on religious upbringing, in the first half of the twentieth century, was *In re McSweeney*, a 1943 Court of Appeal decision.[23] Myers CJ endeavoured to follow the common law approach of father's superiority but his was a lone dissenting voice. The three judges in the majority firmly rejected the *religio sequitur patrem* approach and emphasised that the welfare of the child must be paramount in resolving disputes over religious upbringing and custody.

The case involved two children, a boy of thirteen, and his sister, aged eight. Both had

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21 See eg *Re J (An Infant): B and B* v *DGSW* [1996] 2 NZLR 134 at 145 (CA); *Re the P Children (No 2)* (1992) 9 FRNZ 93 at 107 (Fam Ct); *Ausage* v *Ausage* [1997] NZFLR 72 at 81 (Fam Ct).

22 See Leo Pfeffer, "Religion in the Upbringing of Children" (1955) 35 Boston UL Rev 333 to 356; Comment, "Adjudicating what *Yoder* left unresolved: Religious rights for minor children after *Danforth* and *Carey*" (1978) 126 U Pa L Rev 1135 at 1141 (hereafter "*Yoder* Comment").

been baptised as Roman Catholics but had, with the father's full knowledge and acquiescence, been brought up as Protestants. They had attended Sunday school under the direction of their Protestant mother and there was no evidence they had ever been inside a Catholic church or been pupils at a Catholic school. By the time of trial both parents were deceased and the children were happily living with a Mrs Prouting, a Protestant friend of the mother. She had continued to bring them up as Protestants and taken good care of them with the approval of the father while he was alive. (The father had died two years after the mother). The present action was brought by the testamentary guardian appointed under the father's will, a Father Fogarty. The priest, pursuant to the will, sought the custody of the children to comply with the father's wishes that they be brought up as Catholics. Father Fogarty had been rebuffed in his attempts to give religious instruction to the children at the rural state primary school they were attending. His proposal was for the children now to be cared for by a Catholic institution, the Home of the Sisters of Nazareth in Christchurch. The majority of the Court of Appeal were content to quote from *Ward* v *Laverty*,[24] where the House of Lords noted the distinct change in emphasis from a father's right to the child's welfare. *Ward* had been subsequently reinforced by the New Zealand Guardianship of Infants Act 1926. This all meant that, as Smith J explained:

> The same deference is not paid today to the views of the father apart from his merits. By law, the father has now no claim which is superior to that of the mother when the custody of a child is in issue before the Court and the value of the independent personality of the child is implicit in the statutory declaration that in all questions of the custody, the Court shall regard the welfare of the child as the first and paramount consideration.[25]

To the majority it would be "sheer caprice and a great hardship" for the children to now be uprooted from persons whom they regarded as their father and mother and for the "whole current of their lives" to be reversed simply to satisfy the testamentary wishes of the father.[26] During his lifetime the father had shown himself indifferent to their religious education and his wishes now ought to be given very little weight.[27] The children's best interests strongly

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23 *In re McSweeney and Another (Infants): Fogarty* v *Prouting* [1943] GLR 239.
24 *Ward* v *Laverty* [1925] AC 101 at 108 (Lords Finlay, Atkinson and Sumner concurring).
25 *In re McSweeney* [1943] GLR at 246.
26 Fair J, ibid, at 254.
27 Fair J, ibid at 253; Smith J ibid at 248; Blair J at 244.

indicated the status quo should pertain.

(c) Current recognition under domestic and international law

The parental right to religious upbringing is recognised by statute in New Zealand. Section 3 of the Guardianship Act 1968 defines "guardianship" to include "the right of control over the upbringing of a child" and "upbringing" is in turn defined (in section 2(1)) to include "education and religion." The parental right of religious child rearing is reinforced by the free exercise of religion provision in the New Zealand Bill of Rights Act 1990. Section 15 declares that: "Every person has the right to manifest that persons' religion or belief in worship, observance, practice or teaching either individually or in community with others and either in public or in private." In an important case, *Re J*, the Court of Appeal affirmed that the parental right to religious upbringing fell within section 15 (and section 13). Gault J stated:

> The right of parents to manifest religion extends to bringing up and educating children in that religion until such time as their children are able to exercise their own freedom of religion (see art 18(4) of the International Covenant [on Civil and Political Rights 1966]).[28]

Parental control over religious upbringing is also supplemented by certain provisions in the education legislation. For example, section 79 of the Education Act 1964 authorises parents to withdraw their children from any religious instruction engaged in by a state primary school. Section 21 of the Education Act 1989 permits parents to conduct their own course of education for their children at their home, subject to certain curriculum guidelines. In other words, section 21 allows "home schooling", which is a form of education undertaken by parents the vast majority of whom are religiously devout.[29]

The domestic statutory provisions for parental religious childrearing are further underscored by similar rights given to parents in this area by international conventions. The International Convenant on Civil and Political Rights 1966, [30] was quoted by the Court of Appeal in *Re J* to buttress the domestic provisions on parental religious childrearing. Article

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[28] *Re J (An Infant): B and B* v *DGSW* [1996] 2 NZLR 134 at 145.

[29] See further Patrick Lynch, "Religious Education: A Right and a Growing Societal Imperative" in Ahdar and Stenhouse (eds), *God and Government : The New Zealand Experience* (2000) ch 5.

18(4) reads:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Finally, article 5 of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981 sets out a detailed interlocking system of rights and duties to religious freedom within the family. This United Nations Declaration, while not of the same status as a Convention, nonetheless has been taken into account in the New Zealand courts.[31] Article 5(1) mirrors the language of article 18(4) of the ICCPR in giving parents "the right to organize the life within the family in accordance with their religion or belief." Article 5(2) provides that children have a right to receive religious education in accordance with their parents' wishes and ought not to be compelled to receive any such teaching which conflicts with that desired by the parents. Children not under the care of their parents are entitled, under Article 5(4), to have their parents' expressed wishes on religion taken into account in their upbringing and nature. Once more, the ubiquitous best interests of the child is the "guiding principle" for articles 5(2) and 5(3).

2 *The limit of the parental religious childrearing right: endangerment*

> Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety order health or morals or the fundamental rights and freedoms of others.

Article 18(3) of the ICCPR quoted above embodies the standard limitation on civil rights and freedoms found in United Nations (UN) international instruments.[32] The Court of Appeal in *Re J* quotes it when cautioning that "the right to manifest one's religion and belief in practice cannot be absolute." [33] Drawing from Lord Scarman's speech in *Gillick*,[34] the Court of

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30 Signed by New Zealand on 12 November 1968 (999 UNTS 272); ratified on 28 December 1978 (1120 UNTS 489) and entered into force on 28 March 1979.

31 See eg the High Court in *Huakina Development Trust* v *Waikato Valley Authority* [1987] 2 NZLR 188 at 217 per Chilwell J.

32 See also art 14(3) of the CRC and art 1(3) of the Declaration on the Elimination of All Forms of Intolerance which repeat art 18(3) of the ICCPR.

33 *Re J* [1996] 2 NZLR 134 at 145.

Appeal affirmed what has now become (in the last decade or so) the received wisdom on parental rights in family law. Gault J explained that "the scope of parental rights is reflective of parental duties towards children."[35] The prime duty is, of course, to care for and nurture children until adulthood. The scope of the parental right of religious upbringing is limited in two broad ways.

First, affirmed the Court of Appeal, there is the traditional limitation: parental upbringing practices cannot place at risk the child's life, health or welfare, what I shall call the "endangerment" limitation for shorthand purposes:

> The parents' right to practice their religion cannot extend to imperil the life and health of the child. Before it would become necessary to embark upon a s 5 examination it would be necessary to define the scope of the right to practise religion as extending (notwithstanding the right of a child to life) to the right to refuse medical treatment for the child on religious grounds even in circumstances where it is evident death will ensue without that treatment. We are not able to do that. . .
>
> We define the scope of the parental right under s 15 of the Bill of Rights Act to manifest their religion in practice so as to exclude doing or omitting anything likely to place at risk the life, health or welfare of their children.[36]

The courts have, as noted, always retained their inherent *parens patriae* (literally "parent of the country"[37]) jurisdiction to care and protect children in need of such protection. The classic articulation of the boundary of the parental religious childrearing right is that of the American Supreme Court in *Prince* v *Massachusetts*:

> Parents may be free to become martyrs themselves. But it does not follow that they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.[38]

The UN Declaration on the Elimination of Intolerance 1981 echoes this concern. Article 5(5) states: "Practices of a religion or beliefs in which a child is brought up must not be injurious to his physical or mental health or to his full development . . ."

Second, and more controversially, the right to bring up and educate children in the

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34 *Gillick* [1986] AC 112 at 184-185.
35 *Re J* [1996] 2 NZLR at 145.
36 Ibid at 146.
37 *Black's Law Dictionary*, 6th ed (1990) at 1114.
38 *Prince* v *Massachusetts*, 321 US 158, 170 (1944) per Justice Rutledge.

religion of the parents' choosing extends "until such time as their children are able to exercise their own freedom of religion."[39] I shall examine this intriguing limitation in detail in part III of this chapter.

(a) Life-threatening situations

Where a child's life is at stake, parental wishes grounded in religious beliefs are to no avail. Courts in New Zealand, as elsewhere,[40] have authorised the medical treatment and overridden the parents' refusal of consent. Parents simply are not permitted to hold the power of life and death over their children and cannot elect to deny urgent life-preserving medical treatment for their children.[41] The state's role as *parens patriae* is given full reign here ensuring it takes care of those who cannot protect themselves. While "the child is not the mere creature of the State"[42] the child is still a citizen. The state then has a duty to protect children.

The courts will always intervene by placing the child under the temporary guardianship of the court whilst authorising suitable medical personnel to give consent on its behalf to the necessary medical procedure. The High Court draws its authority to do so from its inherent *parens patriae* jurisdiction[43] or from its statutory power under section 9 of the Guardianship Act 1968. The Family Court, and in limited circumstances the District Court, can make orders enabling the Director-General of Social Welfare to give consent under the Guardianship Act.[44]

Re J is itself a good illustration of the courts' approach in life-threatening situations. It is one of the many Jehovah's Witnesses blood transfusion cases where parental refusal to

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39 *Re J* [1996] 2 NZLR at 145.

40 For overseas examples see *B(R)* v *Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315 (Canada); *Re S (A Minor)(Medical Treatment)* [1993] 1 FLR 376 (England); *Jehovah's Witnesses in Washington* v *King County Hospital*, 278 F Supp 488 (1967), aff'd, 390 US 598 (1968).

41 See Jane E Probst, "The Conflict Between Child's Medical Needs and Parents' Religious Beliefs" (1990) 4 Am J Fam Law 175 at 178.

42 *Pierce* v *Society of Sisters*, 268 US 510 at 535 (1925).

43 The inherent *parens patriae* jurisdiction is discussed by Cooke J in *Pallin* v *DSW* [1983] NZLR 266 at 272 (CA) (jurisdiction still exist albeit to be sparingly exercised). Note also s 33(3) of the Guardianship Act 1968 which declares the High Court shall continue to have all such powers concerning children as it had prior to the commencement of that Act.

44 Section 8 of the Guardianship Act 1968 enables the Family Court to appoint an extra guardian such as the Director-General. The District Court's jurisdiction to do likewise derives from s 15 of the Family

consent to such medical treatment comes under legal scrutiny.[45]

A three-year-old boy, J, had suffered a life-threatening nose bleed. His parents, Jehovah's Witnesses, declined consent to the child being given a blood transfusion, a procedure deemed necessary and urgent by the medical staff at the local hospital. At the request of the attendant doctor, hospital, police and Social Welfare personnel, sought and obtained the relevant court order without informing the parents. The Director-General of Social Welfare was appointed guardian of the child for the purpose of authorising the transfusion. J received the blood transfusion. Evidence from the attendant practitioner was that if J had not have received the first blood transfusion he would have died. A second transfusion was also undertaken as a necessary part of J's ongoing care due to the boy's dangerously-low haemoglobin level. Subsequently, the Director-General applied to the High Court under section 9 of the Guardianship Act 1968 for J to be placed under the guardianship of the Court, an application which was duly approved. The High Court[46] appointed a doctor as an agent of the Court for the purposes of consenting to medial treatment whilst the parents were appointed as general agents of the Court in all other respects. J recovered and required no further blood transfusions. J's parents through all this were "deeply upset."[47] J had unfortunately contracted ARDS (Adult Respiratory Distress Syndrome), itself a life-threatening condition as a result, it seemed, of the blood transfusions. The Director-General attempted to have the guardianship order made by the High Court discharged but that was opposed by J's parents so as to preserve their right of appeal.

The parents argued that the order was in breach of their fundamental rights as parents guaranteed under the New Zealand Bill of Rights Act 1990. They submitted that, pursuant to sections 13 and 15 of the Act, they were guaranteed the right to bring up children according to their (the parents') beliefs and to make decisions as to their medical treatment according to those beliefs. The Court of Appeal was in agreement thus far: "The upbringing of children

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Courts Act 1980. See *Re J (An Infant): Director-General of Social Welfare* v *B and B* [1995] 3 NZLR 73 at 78-79.

45 See eg *Re P* [1992] NZFLR 94; *Re V* [1993] NZFLR 369; *Re CL* [1994] NZFLR 352.

46 The High Court judgment of Ellis J is reported at [1995] 3 NZLR 73.

47 *Re J* [1996] 2 NZLR at 137.

extends to making decisions as to health and medical treatment. That is a right long recognised under the common law in any event . . . though, as [*Gillick*] makes clear, it was never absolute."[48]

Counsel submitted that those parental rights could only be limited to the extent justified in a free and democratic society (section 5 of the Act). The burden, it was argued, rested upon that state to prove that the consequent limitation upon the rights was justified and the least intrusive means necessary in the circumstances. In terms of the particular medical procedure here, it was submitted that the state ought to have established (to "a high degree of probability") that the blood transfusion was necessary, that it was not ineffective or controversial, that it would not cause substantial harm to the patient and that there was no alternative medical management acceptable to guardians available.[49] (Jehovah's Witnesses have long maintained that blood transfusions are a high risk and dangerous medical procedure and have pointed to alternative procedures to accomplish the same ends[50]). Counsel for the parents acknowledged there was a paramount right of J to life under section 8 of the Bill of Rights Act. However, his concern was the rights of the parents.

The approach sought by J's parents was rejected. It was not a matter of deciding whether the state had justifiably restricted the parents' rights. Rather, it was a question of what was the parents' right to begin with. Taking a child-centred approach, the Court of Appeal believed that certain fundamental rights and interests *of the child* inherently circumscribed the rights of the parent. One did not need to balance the interests of the state with those of the parents since parents' rights were inherently limited anyway, in this case by the rights of the children. The Jehovah's Witness parents' religious freedom was intrinsically limited by their three-year-old son's right to life.

The Court of Appeal's approach is one which has been dubbed in North American

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48 Ibid at 145.

49 See ibid at 143-144.

50 See the literature referred to in the article by leading New Zealand Jehovah's Witness spokespeople, Stephen Papps and Warren Cathcart, "Ex parte orders for medical intervention on Jehovah's Witnesses: the risk of injustice" (1994) 1 BFLJ 136.

constitutional jurisprudence "definitional balancing."[51] No freedoms or rights are absolute. All are limited. The question is: how are they limited? Are rights such as religious freedom intrinsically limited such that their scope is restricted by reference to other rights and freedoms? Freedom of religion, under this view, can by its very nature never extend beyond the point at which it infringes other person's fundamental rights and freedoms. There is no religious liberty to sacrifice children since, by definition, religious liberty only extends to religious practices that do not harm others. Or, are rights widely-defined and only limited when the state succeeds, in the particular instance, in justifying the restriction as necessary?

The "definitional" versus "ad hoc" balancing debate is, arguably, simply the "horizontal/vertical effect" debate from another angle. This is a large subject which cannot be pursued here[52] but I find myself firmly in the vertical camp. It is better, I believe, to see the issue in terms of the state's interests conflicting with the citizen's. Constitutional protections are traditionally designed to safeguard the individual's or group's fundamental rights and freedoms against government interference. The proper approach is to first define the right broadly. Having done so, it may be discovered that some state law has the purpose or effect of substantially impeding the free exercise of the right. The next stage is to weigh the state interest in restricting the right against the individual's interest in exercising it. This final balancing is an "ad hoc balancing", viz, is the state's interest on *this* occasion sufficiently weighty in a free and democratic society to justify *this* particular restriction upon the right? The onus lies upon the state to justify the limitation, which may or may not be an easy task.[53]

The majority in a 1995 Canadian Supreme Court case involving Jehovah's Witnesses children and blood transfusions, *B(R)* v *Children's Aid Society of Metropolitan Toronto*,[54]

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51 See Sidney R Peck, "An Analytical Framework for the Application of the Canadian Charter of Rights and Freedoms" (1987) 25 Osgoode Hall L J 1 at 21-31; Peter W Hogg, *Constitutional Law of Canada*, 3rd ed (1992) at 813, fn 89.

52 For a helpful recent discussion see Hunt, "The 'Horizontal Effect' of the Human Rights Act" [1998] Pub Law 423. Hunt exposes the beguiling simplicity of the notion of two exclusive polar alternatives by outlining various intermediate possibilities.

53 As Hafen observes: "the placing of the constitutional presumption essentially determines the outcome" in many cases: Bruce C Hafen, "Individualism and Autonomy in Family Law: The Waning of Belonging" [1991] Brigham Young L Rev 1 at 17.

54 [1995] 1 SCR 315.

were strongly in favour of ad hoc not definitional balancing.[55] (This case was strongly relied upon by the parents in *Re J*). La Forest J pointed out that the Supreme Court had "consistently refrained from formulating internal limits to the scope of freedom of religion where the constitutionality of a legislative scheme was raised; it rather opted to balance the competing rights under section 1 of the Charter."[56] In the majority's opinion it was much sounder to leave to the state the burden of justifying the restrictions it had chosen.[57] Section 1 of the Charter was specifically designed for balancing rights. That provision, like section 5 of the New Zealand Bill of Rights Act 1990, permits fundamental freedoms to be limited when such limits are demonstrably justified in a free and democratic society. Applying the ad hoc balancing methodology, it found that parental religious freedom had been infringed by the Ontario Child Welfare Act's wardship procedure, a procedure which here had overriden the parents' right to choose medical treatment according to their religious beliefs. Although the Act's procedure constituted a "serious infringement"[58] on the parents' religious liberty, the restrictions were held to be "amply justified"[59] under section 1 of the Charter. The majority was in no doubt that the Ontario Child Welfare Act gave effect to the state interest in protecting children at risk, something which was "a pressing and substantial objective."[60] In balancing the state's interest with the parents' interest the statute had restricted parental freedom no more than was necessary. The wardship procedure was carefully examined—something which is not required under the more abstract definitional balancing approach—and found to be acceptable in terms of accommodating parental religious convictions[61] whilst still protecting the children.

In *Re J*, the High Court had emphasised the need for a clear procedure in these parental refusal of consent to medical treatment cases. Ellis J had outlined a desirable protocol which had several built-in procedural features designed to assuage the concerns of

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55 For commentary critical of definitional balancing, see Peck, "An Analytical Framework," at 25 and 31; Janet November, "Defining and Balancing Conflicting Rights" (1996) 4 Bill of Rights Bull 56; and Julian Rivers, "A Bill of Rights for the United Kingdom?" in Beaumont (ed), *Christian Perspectives on Law Reform* (1998) ch 2 at 35.

56 *B (R)* [1995] 1 SCR at 383-384.

57 Ibid at 384.

58 Ibid at 385.

59 Ibid at 386.

60 Ibid at 385.

devout parents temporarily displaced as guardians under a wardship order.[62] By placing the burden of justifying restrictions of parental rights upon the state, the majority in *B(R)* ensured that the wardship procedure would remain no more invasive of parental rights than was necessary. The Court of Appeal's approach, however, obviates the need for such careful scrutiny.

(b) Non life-threatening situations: health

Barring one case to be discussed shortly, the position in New Zealand when the child's life is not threatened is unclear. Even the American case law on this point is unhelpful, with decisions being fairly evenly split on whether to intervene and override parental wishes.[63] Although each case must be dealt with on its own merits, obvious factors would seem to be[64]: (1) the severity of the condition; (2) its curability or reversibility; and (3) the invasiveness of the proposed treatment and its prospects of success. Certainly it would be undesirable to circumscribe the *parens patriae* jurisdiction to situations where the child is at "death's door"[65] but, on the other hand, judicial intervention to override parental religious rights where (say) a minor cosmetic improvement is at issue would seem unwarranted.

The only New Zealand case in point appears to be *Liu*. A twelve-year-old Taiwanese boy had a detached retina in his right eye and was completely blind in his left eye. Expert medical opinion was that Joseph would totally lose his sight in his right eye within a few weeks if surgery did not take place. Joseph's parents opposed this. First, they disagreed

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61 It made provision for notice to be given the parents, evidence to be called and for time limits on the wardship to be imposed.

62 See *Re J* [1995] 3 NZLR 73 at 88 for the High Court's protocol. Ellis J concluded that wardship orders in these kind of cases should: wherever possible be made on an inter partes basis to enable parents to state their views; be made only where the child's life or well-being is in serious jeopardy and there is no other reasonable medical treatment available; be made on terms that least interfere with parents' rights and so they can be kept fully and promptly informed and; should facility speedy reviews and eventual discharge of the order. The overall attitude of the Court should be one where it is "most reluctant to deprive parents of their function as guardians except to the extent necessary to provide treatment." (ibid)

63 See Laura M Plastine, "'In God We Trust': When Parents Refuse Medical Treatment for their Children Based upon their Sincere Religious Beliefs" (1993) 3 Seton Hall Cons LJ 123 at 145-147. Maureen D Manion, "Parental Religious Freedom, the Rights of Children, and the Role of the State" (1992) 34 JCS 77 at 83; Jane E Probst, "The Conflict Between Child's Medical Needs and Parents' Religious Beliefs" (1990) 4 Am J Fam Law 175 at 188.

64 See Probst at 178-182 for her suggestions and Morag McDowell, "Supervening parental rights: religion and the refusal of consent to a child's medical treatment" (1998) BFLJ 233 at 240.

with the medical diagnosis and its gloomy prediction. Second, they believed God would heal their son and indeed "that the miracle ha[d] already begun."[66] The parents were committed Baptists and had emigrated on the basis that God had spoken to them and promised to heal Joseph if they left their homeland (Taiwan) and went to New Zealand. The parents testified that Joseph had no sight in his right eye but that recently his vision had improved (an assessment not concurred with by the attending doctor). They believed that "what is best for Joseph is that he not have this operation. If he does, they [the parents] believe he will be subjected to terrible pain and suffering."[67] As for Joseph, he deposed in a short affidavit:

> I do not to want to have the operation on my right eye because I believe that God is curing my right eye. I believe that this miracle has already begun. Since I was examined by Doctor Hadden on 4 July 1996, the vision in my right eye has improved . . . I have had explained to me that the doctors say I will go blind if I do not have the operation. I understand this but believe God will cure me.[68]

Despite the sincere beliefs of the parents and Joseph, Tompkins J preferred to accept the prognosis of the two consultant ophthalmic surgeons, viz, without intervention blindness in the right eye within a matter of weeks, and thus complete blindness given the blindness already in Joseph's left eye. In light of the Court of Appeal's holding in *Re J*, his Honour found that declining the operation would "place at risk Joseph's health and welfare." Against this were a number of considerations: the chances of success of the operation (between 70 to 80 percent); detachment of retina again, even if the procedure was carried out; the view of parents and child, and; the emotional trauma to the family from the judicial intervention. Tompkins J was aware this was a case in the "grey area":

> [M]ost of the other cases that have come before the courts have been blood transfusion cases which at least in most of them, involve a clear cut choice between life and death. In this case, the choice is not clear cut because success of the operation cannot be guaranteed and it is a choice between total blindness and still significantly limited vision.[69]

Weighing up all these considerations in what was "not an easy" decision, "the proper course

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65 Pennsylvania Superior Court in *In re Cabrera*, 552 A 2d 1114 at 1120 (Pa Super Ct 1989).
66 *Auckland Healthcare Services Ltd* v *Liu*, unrep, High Court, Auckland, M 812/96, 11 July 1996, Tompkins J at 5.
67 Ibid at 6.
68 Ibid.
69 Ibid at 8.

of the court to take [was] to authorise the operation to be carried out."[70] The parents were at all times to be kept fully informed of the relevant medical management and legal processes concerning Joseph.

Given the courts' strong adherence to the principle of paramountcy of the welfare of the child, it may be that the majority of decisions in the grey area (of non-life threatening yet curable afflictions) will be resolved in favour of intervention. If the court believes that parental religious scruples are standing in the way of treatment that would reasonably improve the child's health and well-being, it is hard to see it not intervening to promote the child's best interests. American examples where the state did intervene to override parental objections to treatment include: surgery to correct a facial deformity[71]; a blood transfusion to save a child's right arm[72] and; treatment for a boy's arthritic knee condition.[73] In these situations it is likely that a New Zealand court would also intervene.

Most of the cases in the present context involve infants and pre-schoolers but some involve adolescents of reasonable maturity. Section 11 of the Bill of Rights Act 1990 provides that "Everyone has the right to refuse to undergo any medical treatment".[74] In *Liu*, Tompkins J noted:

> If Joseph were an adult, s 11 would give him the right to refuse to undergo this operation. But at the age of 12, he lacks the capacity to exercise his right under that section . . . Whilst of course full weight should be given to Joseph's views, I do not consider that s 11 of the Bill of Rights Act can be determinative.[75]

In *Liu*, as we have seen, the boy's eloquent views, whilst weighed in the balance, did not prove determinative. In *Auckland Healthcare Services* v *T*, a twelve-year-old suffering from malignant lymphoma, A, was described by Paterson J as "both mature and positive in her present situation."[76] Despite the medical prognosis that without chemotherapy A would die, her parents "because of genuine and sincere religious beliefs"[77] would not consent to such

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70 Ibid.
71 *In re Sampson*, 317 NYS 2d 641 (NY Fam Ct 1970), aff'd, 323 NYS 2d 253 (NY App Div 1971), aff'd, 278 NE 2d 918 (NY 1972).
72 *OG* v *Baum*, 790 SW 2d 839 (Tex Ct App 1990).
73 *Mitchell* v *Davis*, 205 SW 2d 812 (Tex Civ App 1947).
74 See Graeme Austin, "Righting a Child's Right to Refuse Medical Treatment" (1992) 7 Otago LR 578.
75 *Liu*, at 7.
76 [1996] NZFLR 670 at 671.
77 Ibid.

treatment. A herself expressed similar views but, as her counsel indicated, she was "somewhat confused."[78] The High Court in a succinct judgment followed *Re J* and held that A ought to be placed under the guardianship of the Court and the treatment administered. His Honour also referred to article 6 of the CRC which recognises that children have an inherent right to life and which requires state parties to "ensure to the maximum extent possible the survival and development of the child." In this life-threatening situation the state's interest in the preservation of the child's life was uppermost.

(c) Non life-threatening situations: education

Where parental religious convictions result in their children being seriously deprived of education, the line has been crossed. The state in its *parens patriae* capacity will intervene to protect children and ensure they are given the educational opportunities which is their due.

In the American Supreme Court case, *Wisconsin* v *Yoder*,[79] the Court held that a compulsory school attendance law which required parents to send their children to school until the age of sixteen violated Old Order Amish parents' religious freedom and infringed their constitutional right to direct the religious upbringing of their children. Crucially, the Court found that accommodating the sincere religious convictions of the Amish by foregoing one, or at the most two, addition years of compulsory secondary education would not impair the physical or mental health of the children nor "result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship . . ."[80]. The children had, in the first eight years of schooling, acquired enough formal education "to participate efficiently and intelligently in American democratic process."[81] However, as Justice White observed in a concurring opinion, it would be "a very different case"[82] if the Amish parents had forbade their children from attending any school at any time and from complying in any way with state educational standards. It was only because the Amish children had, in the first eight

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78 Ibid.
79 *Wisconsin* v *Yoder*, 406 US 205 (1972).
80 Ibid at 234 per Burger CJ (expressing the views of six members of the Court).
81 Ibid at 225 per Burger CJ.
82 Ibid at 238 (Brennan and Stewart JJ joining his opinion).

years, already acquired "the basic tools of literacy to survive in modern society",[83] together with the fact that the further year or two's compulsory education would add little to this, that the parents' claims prevailed.

In New Zealand the kind of religiously-motivated educational deprivation alluded to by Justice White in *Yoder*, calling for state intervention, is well-illustrated in *Re The Seven P Children.*[84]

The Ps and their seven children, aged from one to sixteen, lived in "spartan and primitive conditions"[85] in an isolated mountainous rural area near Levin. Their house had no mains electricity, no telephone, partly-lined interiors and unglazed windows covered with plastic. The parents were staunch Seventh Day Adventists. They were examples of separatist fundamentalists (see Chapter 2). The problem was that the parents' isolated, world-denying, lifestyle[86] had disastrous consequences of the children. Since 1982—nine years previous to the court proceedings—none of the children had received any more than minimal formal education.[87] Moreover, the evidence showed the parents had become "expert at passive resistance"[88] to any outside attempt to provide formal education for the children—whether by attending school, Correspondence School lessons, private tutoring or otherwise. For instance, the eldest boy, R (aged sixteen), was found to have a reading age nearly five years behind the level expected of someone his age. The pattern repeated itself for the other children also. Summarising the psychologists' findings, the Family Court concluded: "There cannot be any doubt at all that the elder children have been educationally crippled and that the younger children are in danger of being educationally crippled as well."[89]

The Department of Social Welfare in 1991 applied to the Family Court for a declaration that the children were in need of care and protection in terms of section 14 of the

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83 Ibid.

84 *Re The Seven P Children*, unrep, Family Court, Levin, CYPF 031/122-8/91, 8 October 1991, Judge Inglis QC (hereafter *P Children No (1)*).

85 Judge Inglis' characterisation in the second decision, *Re the P Children (No 2)* (1992) 9 FRNZ 93 at 95.

86 In Judge Inglis's words (ibid): "it is clear that their preference is to live in isolation from the influences of the outside world and that they do not wish any of their children to be contaminated by what they [the parents] see as the undesirable moral values of modern society."

87 The only formal education being "a few weeks attending a school in 1984" *P Children (No 1)* at 2.

88 *P Children (No 2)* at 95.

89 *P Children (No 1)* at 4.

Children, Young Persons and Their Families Act 1989 (CYPA 1989).

Judge Inglis QC noted that the Ps were excellent, caring parents: "no-one ha[d] found anything to criticise in the children's behaviour or their attitude." "Obviously," he continued, "the children have been well brought up and well nurtured."[90] The achilles heel of the parents' childrearing, however, was the almost total neglect of the children's formal education. Judge Inglis was aware that the issues raised were ones of "great constitutional importance."[91] The Ps ("by all accounts harmless and good people"[92]) had sincerely chosen, on religious grounds, a separatist lifestyle and had, to their credit, brought up children who were "polite, courteous and enthusiastic."[93] To what extent then was the state entitled to intervene in a mode of upbringing which had "many exemplary qualities" and was "based on sound moral values"[94] but which seriously and unacceptably neglected the children's educational development? Judge Inglis identified two legal limitations upon the parents' upbringing in this case. First, education legislation imposed obligations upon parents to ensure their children received formal education. Second, the Department of Social Welfare was under the legal duty to intervene where there were grounds for believing a child needed care and protection. Here, the Department relied upon section 14(1)(b) of the CYPFA which states a minor is "in need of care or protection" if the "child's or young person's development or physical or mental or emotional wellbeing is being or is likely to be, impaired or neglected, and that impairment or neglect is, or is likely to be, serious and avoidable." Judge Inglis quoted with approval a passage from Jeffries J:

> The normal duty and care owed by a parent is to nurture a child to a state where it is independent of the parent. The nurturing process has some clearly identifiable characteristics which are shared by most humans. The provision of shelter, clothing, food, together with love and affection. In preparation for independence, education in its broadest sense.[95]

The parents' right of religious upbringing had "come into conflict with the right of each of the children to be educated, both academically and socially, to equip them for independence

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90 Ibid at 5.
91 Ibid at 6.
92 Ibid.
93 Ibid at 5 (the educational psychologists description of them).
94 Ibid.

in a modern world."[96] He concluded:

> In law and in fact I am completely satisfied that each of the children is in need of care and protection according to the criteria in s 14(1)(b). While Mr and Mrs P may have acted with the best intentions and motives, it is no use hiding from the fact that even on the most charitable view the elder children have for many years been seriously deprived of their rights to education and social contact, and there is a clear risk that the younger children will be similarly deprived. The children have been left with no choice: their deprivation has imposed upon them, wasting and frustrating their inherent talents and intelligence, and, perhaps of equal importance, isolating them from the experience and knowledge which they require in order to make their own informed choices as adults.[97]

The Court reminded the parents that the "lodestone" under the CYPFA was the welfare of the children, and thus: "On any competition for priority between the parents' rights and the rights of the children, there can be only one possible outcome."[98] An order was made under section 101 vesting custody of the children in the Department. The children would remain in their parents' home; school-age children would be enrolled in the Correspondence School and a registered teacher and social worker would monitor the children's progress. The children could no longer be allowed to "drift aimlessly."[99] Judge Inglis concluded his judgment with another bouquet regarding the parents' loving and caring efforts to raise their large family. Their neglect of education was thus "tragic":

> [T]he parents may not have appreciated that a loving, caring and united home with strong moral values is only one part of a child's upbringing. Each of the children is a person in his and her own right. Each of the children has a right to reach his and her full potential, educationally and socially. The parents would not deny them food when they are hungry. They must not deny them education and knowledge when they are thirsting for it.[100]

The Judge's language here resonates with Feinberg's child's "right to an open future", discussed in the previous chapter. The State has a legitimate interest in ensuring children's right to future opportunities are not irrevocably foreclosed by present parental upbringing practices, whether religiously-grounded or not. The Amish children in *Yoder* and the Seventh Day Adventist children in *Seven P Children* may wish to continue living an

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95 The passage is in *E* v *M*, unrep, High Court, Wellington, M 361/79, 13 Sept 1979. As Judge Inglis noted, it has been "frequently relied upon by the Family Court": *P Children (No 1)* at 7.

96 *P Children (No 1)* at 8.

97 Ibid at 9.

98 Ibid at 10.

99 Ibid at 11.

isolationist rural life but they may also desire to become "nuclear physicists, ballet dancers, computer programmers or historians."[101] The State then has an interest in, to use Judge Inglis' words, ensuring that "each [child] has a right to reach his or her full potential, educationally and socially."

Returning to the *Seven P Children*, unfortunately there was an aftermath. Six months later the case reappeared before Judge Inglis in the Levin Family Court.[102] The parents, resentful of the original Department intervention, had refused to co-operate with the educational salvage plan so carefully instituted by the Court. The original plan had proved unworkable: Mr and Mrs P were showing "great reluctance" to assist the children in their Correspondence School assignments and the visiting teacher was treated by the parents as "an intruder in the home."[103] In December 1991 a revised plan was implemented whereby the two eldest boys were placed with relatives in Hamilton so as to enable them to attend a secondary school, whilst the three remaining school-age children were placed in a country school not far outside Levin. (The Ps' counter-proposal to place all their children in Seventh Day Adventist schools was rejected since those schools lacked facilities to cope with the children's severe educational and social deprivation). By now the parents were convinced they were being "persecuted" for their lifestyle and religious beliefs and that Department of Social Welfare intervention was at the behest of a "conspiracy" by their Hamilton families to destroy their family.[104] Judge Inglis observed that the Ps, although sincere people, were "utterly committed to a viewpoint which is impervious to any reasoned argument or suggestion."[105] Religious conviction impervious to reason is beyond the limit of the liberal state's tolerance. The Court was blunt in its denunciation of the parents' continued placing of their religious convictions ahead of their children's education. Since their children's educational shortcomings had been brought home to them they had "not demonstrated any firm commitment to ensure that the children make up for lost time."[106] Their conduct

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100 Ibid at 12 (emphasis added).
101 White J in *Yoder* at 240.
102 *P Children (No 2)* (1992) 9 FRNZ 93.
103 Ibid at 97.
104 Ibid at 102.
105 Ibid.
106 Ibid at 106.

betrayed "an underlying attitude that an ordinary 'secular' education to the children requires no more than a token effort, that it is of far less importance than other aspects of their lifestyle, and that in any event they have the right to bring up the children in their own way."[107]

The welfare of the children demanded decisive and urgent action lest, in the wake of parental non co-operation, the situation continue to drift. The two older boys (aged fifteen and nearly seventeen) expressed a clear desire to finish their secondary schooling in Hamilton and feared for repercussions from their father if they should express a contrary viewpoint to his. Their wishes were accorded due weight by the Court and it made extensive orders to safeguard the children's future.[108] The eldest two boys, R and C, were to remain in high school, with R, the elder, being placed under the sole guardianship of the Department to avert undue pressure being placed upon him by his father. The two primary school-aged girls, L and A, were to remain in such schools under the custody of the Department. They could still live with their parents but only on condition they regularly and punctually attended school and regular medical checks were maintained. The fifth child, J, a boy, received the same direction as his sisters. The youngest two children, J (aged four) and D (ten months) did not require custody orders to be made in favour of the Department but the declaration that they were in need of care and protection would remain in force. Judge Inglis' final words bear quotation:

> The central issue in this case is not the parents' religious and moral beliefs. The parents have the right to the religious persuasion and beliefs of their choice. The central issue is the children's rights, which the Courts must defend. The children have a right to an education, academically and socially, which will equip them for independence and to make their own mature and responsible decisions and choices . . . The parents have the right to choose their own lifestyle. So do the children have the right to choose *their* own future lifestyle . . . In each case, as the experience of R and C [the two eldest] has already shown, the values and moral standards inculcated in all these children by their parents will stand all the children in good stead in confronting the evils and temptations always present in any society.[109]

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107 Ibid.
108 See ibid at 109-112.
109 Ibid at 112-113 (emphasis in original).

(d) An autonomy limitation?

The Court of Appeal in *Re J* also intriguingly pronouced another limitation upon parental control over religious upbringing:

> The right of parents to manifest religion extends to bringing up and educating children in that religion *until such time as their children are able to exercise their own freedom of religion* (see art 18(4) of the International Covenant [on Civil and Political Rights 1966]).[110]

It should be noted that the gloss that the Court places upon the parents' liberty—termination of the parental right to control the children's religious upbringing at the point when they are able to exercise their own religious liberty—is not mentioned at all in article 18(4). Although the comment is *obiter* (since the child in *Re J* was only three-years-old) it squarely raises the issue. Does the acknowledgement of a child's freedom of conscience signal the emergence in the near future of a novel, independent, legal right of religious liberty for a child?

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[110] *Re J* [1996] 2 NZLR 134 at 145 (emphasis added).

The traditional common law position is very clear—children have no independent right of religious liberty. The child's right to freedom of religion, if alluded to at all by the courts, has been subsumed under the parents' religious freedom and religious upbringing rights. There has never been the slightest suggestion that in a parent-child disagreement over the child's religion, a court would override the parents' wishes and uphold the child's. For example, in a 1960 American case, *In re Guardianship of Faust*, the Supreme Court of Mississippi held that the lower court did not have power to tell a father (not shown to be in any way unfit) that his sons should be left in a particular public school or be allowed to attend the church of their own choice. The lower court wanted the two boys, aged fifteen and fourteen years, "to know what their rights were in open court."[111] It issued a decree that since the boys had joined a church in the local town, they had a right "to attend the church of their own choosing and . . . to worship God according to the dictates of their own conscience." On appeal, the Supreme Court denounced this decree, affirming the traditional right of parental religious education and training: "Generally speaking, and apart from teachings subversive of morality and decency, the courts have no authority over that part of a child's training which consists in religious discipline."[112]

Writing in 1955, American scholar, Leo Pfeffer, was adamant: "A child subject to parental custody has no independent constitutional right to control its own religious upbringing."[113] Moreover, to apply the free exercise of religion guarantee in the First Amendment to children within their parents' custody would, he insisted, be "meaningless" and serve "no useful purpose."[114] More than a generation later, John Coons affirmed the traditional stance:

> Let us be clear that both American law and the churches have recognized the independent religious rights of children exactly to the same extent—that is, not at all . . . I have yet to encounter a case in which a child successfully (or even unsuccessfully) invoked the guarantee of free exercise to overturn a decision of the parent . . . We will know that such a thing [an independent religious right of the child] exists when the Court orders a sheriff to escort the child to a church service that the parents have forbidden or to avoid one that

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111 *In re Guardianship of Faust*, 123 So 2d 218, 219 (1960).
112 Ibid at 220.
113 Leo Pfeffer, "Religion in the Upbringing of Children" at 354 (this is the heading to his discussion).
114 Ibid.

they have commanded.[115]

Although the American Supreme Court has spoken of children having constitutional religious rights,[116] it has never held that there were something separate from the parents' right to religious liberty.[117] It was the parents' religious rights and freedoms which were being vindicated against state intrusion and, in doing so, the court assumed the children's would be also. It was assumed the parents' and children's views on religion were harmonious, that the rights rode in tandem. Outside the United States, other common law jurisdictions appear to have taken an identical approach. I say "appear" since there is virtually no discussion in the cases of such a supposed right. Such cases as there are, admittedly not of recent pedigree, point to the non-existence of the right.

For example, in the 1940s English case, *Lough* v *Ward*,[118] the Court granted an injunction to parents of a teenage girl to restrain the defendant religious order from continuing to harbour her in their institution. The girl, Dorothy Lough, was aged sixteen years and seven months, when she left her parents' home to enter the defendants' religious establishment, "The Abbey of Christ the King." Without her parents' consent, she had taken vows of obedience, poverty and self-sacrifice with the Abbey in response to what she described as the call of God to a religious life. The upset parents brought an action to recover damages and an injunction against the defendants for wrongfully enticing their daughter away thereby depriving the father of her services. Cassels J spent some time surveying the "sect", noting it was very small (consisting of only fourteen members) and had some peculiar rituals. Nonetheless, he acknowledged the defendants were earnest and serious-minded believers, adding: "Some people may think that they are much misguided; but this is a land which tolerates many kinds of religious beliefs."[119] On the question of enticement the Court noted although Dorothy was seventeen (by the time of trial) she was "somewhat

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115 John E Coons, "The Religious Rights of Children" in Witte and van der Vyver (eds), *Religious Human Rights in Global Perspective: Religious Perspectives* (1996) 157 at 159.

116 See eg *Prince* v *Massachusetts*, 321 US 158, 165 (1944).

117 *Yoder* Comment, at 1145; Pfeffer, "Religion in the Upbringing of Children" at 354. The *Yoder* Comment observes that while the Supreme Court has not said children have religious rights distinct from their parents' religious rights "these cases do not stand for the proposition that such an independent right does not exist." That is technically true but there is no hint such a right does exist with much to suggest it does not: see Burger CJ in *Yoder*, at 231.

118 *Lough* v *Ward* [1945] 2 All ER 338.

119 Ibid at 341.

foolish and certainly self-willed."[120] It held that a case of enticement had been made out. The girl made it plain that she wished to remain in the Abbey and had no desire to return home. Cassels J noted, moreover, that she was not being kept in the Abbey against her will, that she was (according to the defendants) free to leave at any time, and that she was, in his Honour's opinion, "happy where she is."[121] Notwithstanding this, the court believed she ought not to remain with the defendants. Her consent had not been freely given. Further, the girl's long-term interests did not lie with the Abbey. The proprietors were "a couple suffering from a form of megalomania, taking delight in high-sounding titles."[122] They were merely "playing at keeping a nunnery" and if their interest should wane, the girl would be "thrown upon a world of which she knew nothing, with the breach between her and her parents widened beyond all possibility of bridging."[123] The parents' rights had been violated and the court granted them an injunction as well as exemplary damages of £500.[124] Whether a court in New Zealand today would so readily grant injunctive relief in similar circumstances (involving a sixteen or seventeen year-old wishing to join a small religious community) is doubtful.

III AN AUTONOMY LIMITATION AND THE INFLUENCE OF THE CRC

Is there a realistic likelihood an independent legal right of religious freedom for a child will be recognised? Does the CRC give this notion greater force?[125]

1 Foreshadows from the fractured family

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120 Ibid at 343.
121 Ibid.
122 Ibid at 350.
123 Ibid.
124 An American case in 1900 likewise sustained a parent's objection to the decision of a sixteen year-old girl to enter a convent and take vows: *Prieto* v *St Alphonsus Convent of Mercy* 52 La Ann 631, 27 So 153 (1900). See also *Iredell* v *Iredell* (1885) 1 Times LR 260 (injunction granted by the Court of Chancery against third parties preventing them from communicating with the applicant father's sixteen year-old daughter and curtailing their secret interviews with her designed to induce her to adopt their religion instead of her father's).
125 I have explored this topic in Ahdar, "Parental Religious Upbringing in a Children's Rights Era" in Beaumont and Wotherspoon (eds), *Christian Perspectives on Law and Relationism* (2000) (forthcoming) and Ahdar, "Children's Religious Freedom, Devout Parents and the State" in Edge and Harvey (eds), *Law and Religion in Contemporary Society* (2000) ch 7 (forthcoming).

There are certainly instances historically where the courts acknowledged children can possess well-developed religious convictions and in such situations a belated change in the child's religious upbringing would be wrong. Friedman in 1916 summarised:

> Once the religious education of the child has progressed so far that definite religious ideas have been impressed upon its mind to the extent that a change would unsettle its tranquillity and disturb its mental poise, the parents are precluded from further interference with the continued development of that religious education which the child had thus acquired.[126]

Friedman's description is accurate but for the reference to parents plural. The cases where courts were loath to disturb a child's settled religion were not ones involving an intact family with united parents but ones involving a "fractured" family where there was a dispute between parents or guardians. The case most often cited is *Stourton* v *Stourton,* an 1857 decision.[127] A Roman Catholic father had died leaving a widow, also a Roman Catholic, and a son. The widow in due course became a member of the Church of England and, without any interference on the part of the child's Catholic relatives, raised the boy as an Anglican. The boy's uncle, now wished the boy to be educated as a Catholic and to that end desired that he, or another member of the family, be appointed guardian, either alone or jointly with the mother. After interviewing the boy, aged nine, the Court held that the child had acquired a sufficiently strong Anglican identity that it was too late for him to be now educated in the faith of his father. Knight Bruce LJ was concerned that the mother may have so availed herself of the opportunity to make a religious impression on the boy's mind that it would be "dangerous and improper"[128] to attempt to change that impression now. The Court requested an interview with the child. The boy seemed to his Honour, "to be in point of intelligence rather above than below mediocrity"[129] and to have a greater grasp of theological and doctrinal issues that most English boys of his age. Any attempt to now alter his Protestant orientation would be "unsafe and improper"; his temporal happiness, tranquillity and health (and his spiritual welfare) would suffer.[130]

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126 Friedman, "Religious Education," at 493.
127 *Stourton* v *Stourton*, 8 DM and G 760; 44 ER 583.
128 Ibid at 767; 586.
129 Ibid.
130 The boy: "spoke on the subjects of transubstantiation, the attributes of the Virgin Mary, the invocation of the saints, and the authority of the Pope, in a manner convincing me that the Protestant seed sown in

The child's religious identity, if sufficiently ascertained, continues to be a factor in some modern custody and access proceedings. A good illustration of the child's religious identity being given due respect is *C* v *F*.[131] The mother, an ex-Exclusive Brethren, sought "staying access" for her eleven-year-old son. The boy had, the court found, a firm commitment to the Exclusive Brethren. Judge Inglis considered staying access would be unduly oppressive for the child given his religious convictions:

> I am satisfied if there is to be access at all it must be on terms that are appropriately sensitive and pay proper respect to G's [the boy's] own religious beliefs. In the particular circumstances of this case it would be quite wrong to allow G to suffer the martyrdom of having his religious beliefs treated as if they were of no account. It is the same as putting a plate of pork in front of a child brought up as an orthodox Jew and telling him that in the interest of family unity he has to eat it.[132]

As the mother had been "withdraw from" (ostracised) the requirement that the boy spend a significant amount of time with her pursuant to the staying access order would have required him to violate the strict separationist tenets of the Brethren.

2 *Tentative movements toward an independent religious right of a child*

There have been sporadic and tentative assertions of a child's independent right to religious liberty over the years. The partial dissent of Justice Douglas in *Wisconsin* v *Yoder*[133] has been the springboard for advocates of a child's right to religious liberty in America. For him, the Amish children's rights needed exploration lest parental decisions now stymie the children's future opportunities and choices. He cautioned:

> If the parents in this case are allowed a religious exemption, the inevitable effect is to impose the parents' notions of religious duty upon their children. Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views . . . [I]f an Amish child desires to attend high school and is mature enough to have that desire respected, the State may well be able to override the parents' religiously motivated objections.[134]

Frieda Yoder had testified that she was guided by her personal religious beliefs to

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his mind has taken such hold, that if we are to suppose it to contain tares, they cannot be gathered up without great danger of rooting up also the wheat with them." Ibid at 767-768; 586.

131 *C* v *F* (1992) 9 FRNZ 439.

132 Ibid at 441.

133 406 US 205 (1972).

discontinue school after the eighth grade.[135] But the children of the other respondent Amish parents, Vernon Yutzy and Barbara Miller, had not expressed their views. Justice Douglas would have adjourned the matter so that the Wisconsin courts could canvass the views of these two children. The exemption ought not be granted until then. It was "the future of the student, not the parents," which was at issue and on such an important matter as education, the children had a right to be heard. The majority disagreed with Justice Douglas' analysis. The case before them today was the *parents*' religious freedom not that of their children.[136] The State had not tried the case on the basis that the respondent parents had prevented their children from attending school against their (the children's) expressed wishes and such evidence as there was (Frieda Yoder's testimony) indicated no parent-child conflict. Such a situation of conflict must await decision another day, but the majority gave a clear message it would not look favourably on the argument. Recognition of the claim of the State to be championing the child's rights and wishes ahead of the parents

> would, of course, call into question traditional concepts of parental upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom . . . [137]

In England, the landmark case on children's rights in England is *Gillick*.[138] Briefly, the House of Lords, by a bare majority, held that it was lawful for a doctor to give contraceptive advice and treatment to a girl under sixteen against her parents' wishes. Furthermore, a girl under that age had the legal capacity to consent to medical examination and treatment, including contraceptive treatment, if she had sufficient maturity and intelligence to understand the nature and implications of the proposed treatment. Mrs Gillick, a devout Roman Catholic and mother of five daughters, had sought a declaration from the court that her parental rights would be violated if Health Authority doctors gave contraceptive advice or treatment to her daughters without her consent. Although the Departmental circular to doctors advised such a course ought to occur only in exceptional

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134 Ibid at 242.
135 Ibid at 243 and 231 (fn 21).
136 Ibid at 231 per Burger CJ (expressing the views of the six members of the Court).
137 Ibid at 231 (emphasis added).
138 *Gillick* v *West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112.

cases, it nonetheless left it to the individual doctor's clinical judgment.

The Court of Appeal[139] sided with Mrs Gillick upholding that traditional view of parental authority: save in emergency situations or where the Court invoked its wardship powers, parents retained the right to control the upbringing of the children until the age of majority. This restatement of parental sovereignty proved unpalatable to the majority of the House of Lords. For Lord Fraser it was simply unrealistic ("contrary to the ordinary experience of mankind"[140]) to say that children in Western Europe remained in fact under the complete control of their parents until the age of majority where upon they magically acquired independence. Social customs change and the law ought to reflect this.[141] The unquestioning authority of the Victorian parent highlighted by the *Agar-Ellis* decisions belonged to another era. Lord Fraser emphasised that rights of parents did not exist for the parents' benefit but were for the child and were justified only to the extent that enabled the parents to perform their duties towards the child.[142] These parental duty-rights were, moreover, "dwindling rights" which diminished in proportion to the increasing maturity, intelligence and understanding of the child.[143] Lord Scarman's approach was similar. The *Agar-Ellis* decisions were characterised as "horrendous"[144]; parental rights were derived from parental duty and "existed only so long as they were need for the protection of the person and property of the child."[145] As Lord Fraser had done, Lord Scarman discovered the roots of the principle that parental rights derive from the need to discharge parental duties in *Blackstone's Commentaries*. For the law to impose inflexible and rigid boundaries on when parental control finished and when children's autonomy began was inappropriate since "nature knows only a continuous process, [and] the price would be artificiality and a lack of

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139 [1985] 2 WLR 413.

140 [1986] 1 AC at 171.

141 Ibid.

142 Ibid at 170. A proposition which his Lordship found supported by *Blackstone's Commentaries*, 17th ed (1830) vol 1, at 452 where he wrote: "The power of parents over their children is derived from . . . their duty."

143 Lord Fraser (ibid at 172) quoted Lord Denning's observation in *Hewer* v *Bryant* with full approval. There, the Master of the Rolls, after lambasting *Agar-Ellis*, had opined: "The common law can, and should, keep pace with the times. It should declare . . . that the legal right of a parent to the custody of a child ends at the 18th birthday: and even up till then, it is *a dwindling right* which the courts will hesitate to enforce against the wishes of the child, and the more so the older he is. It starts with a right of control and ends with little more than advice." *Hewer* v *Bryant* [1970] 1 QB 357 at 369 (emphasis supplied).

144 *Gillick* at 183.

realism in an area where the law must be sensitive to human development and social change."[146] Parents had dwindling rights commensurate with the growing maturity of their child:

> The underlying principle of the law was exposed by Blackstone and can be seen to have been acknowledged in the case law. It is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decision.[147]

Whilst the ratio in *Gillick* is strictly confirmed to medical matters, the emergence of the mature, "*Gillick*-competent", minor has obvious applications to other fields of parental-child decision making such as religion.

In Canada, two minority judges of the Supreme Court in *B(R)*,[148] Iacobucci and Major JJ, added the same autonomy gloss that the New Zealand Court of Appeal added in *Re J.* They stated:

> The parents of Sheena are constitutionally entitled to manifest their beliefs and practise their religion, as is their daughter. That constitutional freedom includes the right to educate and rear their child in the tenets of their faith. In effect, until the child reaches an age where she can make an independent decision concerning her own religious beliefs, her parents may decide on her religion for her and raise her in accordance with that religion.[149]

The parents had proceeded on the assumption that Sheena was of the same religion as them and thus would likewise refuse a blood transfusion. "Yet, Sheena," remonstrated the minority, "has never expressed any agreement with the Jehovah's Witness faith, nor, for that matter, with any religion."[150] (She was, at the relevant time the medical procedure was sought, a prematurely-born baby). Iacobucci and Major JJ saw "an impingement upon Sheena's freedom of conscience which arguably includes the right to live long enough to make one's reasoned choice about the religion one wishes to follow as well as the right not to hold a religious belief."[151] The minority extend the scope of a minor's religious liberty further than *Gillick's* mature-minor situation. Parental religious upbringing is circumscribed

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145 Ibid at 184.
146 Ibid at 186.
147 Ibid.
148 *B(R)* v *Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315.
149 Ibid at 434-435.
150 Ibid at 437.

not just by the assertion of a contrary religious conviction by a maturing child. It is also circumscribed so as to preclude parental decisions which would have an irreversible or permanent effect upon the child's religious rights in the future. Feinberg's thesis of a child's right to an open future (Chapter 6) is vindicated.

3 *Article 14 of the CRC*

Article 14 provides:

> 1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
>
> 2. State Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Commentators differ as to what this article means. Some see it as changing the current approach, little, if at all. Carolyn Hamilton believes that it does not give the child an independent right to choose their own religion, rather article 14 follows the "orthodoxy", namely that "the right to religious choice is seen as very much a parental right."[152] Others are not so sure. Hafen and Hafen discern a constriction, if not complete evaporation, of the traditional independent parental right of religious upbringing:

> the parental rights recognized by the CRC apparently extend only to giving parents a role in enforcing the rights the CRC grants to the child, without recognizing an independent parental right. This approach illustrates the tendency of the CRC's autonomy model to view parents as trustees of the state who have only such authority and discretion as the state may grant in order to protect the child's independent rights.[153]

This construction (reflected in Figure 7 in the previous chapter) is certainly plausible. Article 14(2) does speak of parents having the power only to "direct", not command, the child's religious development. Moreover, the direction is in the exercise of the *child's* not the

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[151] Ibid.

[152] C Hamilton, *Family, Law and Religion* (1995) at 144. Coons, "Religious Rights of Children," at 159-160 likewise speculates the CRC does not confer an independent right of religious liberty upon the child.

parents' right. That it is the child's liberty at issue is underscored by the "dwindling right" echo of *Gillick*—direction is to be "consistent with the evolving capacities of the child." As children mature, their opinions on religion may well differ to those of their parents. Parental direction should, the article seems to be saying, relax accordingly. The right of religious freedom is, after all, the child's. States will respect parental guidance to the extent parents respect their children's own freedom of conscience; but no more. The implication is that states will not support parents who insist upon religious education or practices their children do not desire, at least where the children are sufficiently mature and intelligent to gainsay their parents' religious predilections. This wide reading of article 14 is supported by some children's rights advocates. Peter Newell, for instance, argues:

> Respect for evolving capacity surely means that there should not, for example, be a continuing assumption that the child has the same religion as his or her parents. Article 12 demands respect for the views of the child once capable of expressing them; Article 14 suggests that children should acquire the ability to choose their religion with increased capacity . . . It is important that children should have the freedom to "escape" from the parents' religion and culture, and also from those of the state in which they find themselves.[154]

The parent's role would, as several children's rights theorists (particularly liberal paternalists) have advocated, "be limited to that of a surrogate decision maker, who decides on behalf of the child according to what that child might be expected to want were he or she in a position to make a decision."[155] Now, if the child is old enough and intelligent enough to express a reasoned view on his religious preference, the need for a surrogate is dispensed with. The parents' role is limited to the pre-*Gillick* competency stage, and then is restricted to decisions which the child, when mature, might agree with.

As we saw in the previous chapter, devout parents typically do not wait until their children have reached the age of reason or moral accountability, but raise them meanwhile in the faith in the hope that their children later will thank them. Actually, parents cannot win, for if they choose to refrain from any religious upbringing their children may later blame them for not introducing them to the faith at an age when it could best take root.

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153 Hafen and Hafen, "Abandoning Children to Their Autonomy," at 471.

154 Peter Newell, "Children's Civil Rights in the Family" (unpublished manuscript): quoted by Hafen and Hafen, ibid at 471 fn 117.

The legislative history of the CRC illustrates the controversial nature of article 14.[156] This article was highly contentious, so much so that disagreement over the scope of the child's right of religious liberty threatened to de-rail the adoption of the entire Convention.[157] Delegates from the Holy See and various Islamic nations entered reservations from this article to preserve traditional religious childrearing practices.[158]

The text of article 14 went through many drafts. Early drafts, whilst providing for a child's right to freedom of conscience, also endeavoured to affirm the traditional right of parents to raise children in their religion. For example, there was a 1983 proposal submitted by the United States delegate which, inter alia, required States Parties "to have respect for the liberty of parents . . . to ensure the religious and moral education of their children in conformity with their own convictions."[159] This proposal did not survive "lengthy debate"[160] on the choice of an appropriate text by the 1984 Working Group. A United Kingdom draft of that same year which referred to the "authority" of parents to provide direction to the child consistent with evolving capacities of the child[161] was later amended to refer to the "rights and duties"[162] of parents to provide direction. Concern by the representative of the Holy See, as well as representatives of various Islamic countries, that the traditional rights of parents to rear children in the parents' faith[163] would be threatened saw the retention of what is now article 14(2), but this pressure did not result in the insertion of wording that would have unambiguously confirmed those religions' traditional understanding of the parents' right to rear children in their chosen faith. Lopatka speculates

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155 Ibid.

156 See Sharon Detrick (ed), *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Preparatoires"* (1992) at 238-248.

157 Geraldine Van Bueren, *The International Law on the Rights of the Child* (1995) at 155.

158 Cynthia Price Cohen, "United Nations: Convention on the Rights of the Child" (1989) 28 ILM 1448.

159 Contained in para 57 of document E/CN.4/1983/62, a revised United States version of their 1982 proposal. See Detrick, *Travaux Preparatoires,* at 240.

160 Detrick, ibid at 240.

161 See ibid at 241.

162 The amendment was proposed by Finland and was "found acceptable by a majority of delegations": Detrick, ibid at 243.

163 See Detrick at 241 for text of the Holy See's concern. In a paper submitted by the Bangladesh delegate (E/CN 4/1986/39, Annex IV, at 2) they stated: "Article 7 (*bis*) [the draft article on religious freedom as it then stood] appears to run counter to the traditions of the major religious systems of the world and in particular Islam. It appears to infringe upon the sanctioned practice of a child being reared in the religion of his parents." Detrick, at 244. See also Cohen, "UN Convention on the Rights of the Child" at 1451: "Objections to freedom of religion . . . were launched by the Islamic delegations . . . According to their

that the article represents "a remarkable step forward towards general respect of a child's personality."[164] He draws a distinction between the small child and an older child. For "a small child", the CRC appears to permit that child to be forced to adopt the religion of his or her parents. This interpretation is reinforced by the failure to adopt a provision included in early American drafts that "no child [be] subject to coercion which would impair his freedom to have a religion or belief of his choice."[165] Lopatka submits that, with regard to the small child, article 14 "practically does not work."[166] By contrast, he suggests that with "an older child" the article has a clear meaning since in that situation the parents' direction must accord with the evolving capacity of that child. Lopatka may well be correct since, in practical terms, a small child cannot easily object, whereas an adolescent or teenager may well take umbrage at what he or she perceives to be religious coercion by parents.

(4) New Zealand?

In a 1993 High Court custody case, *H* v *F*, Fraser J made a number of observations about religious upbringing in light of the CRC. He began by noting that the Convention "lends strong support to the concept of a child's freedom to choose religion."[167] In accordance with section 23(2) of the Guardianship Act 1968, his Honour considered the three Exclusive Brethren children's wishes. The children steadfastly maintained they wished to remain in the Brethren fellowship with their maternal grandparents and aunt. They had been cared for by these relatives for the last three years while their parents resolved certain marital difficulties. The parents decided to renounce the fellowship and were consequently excommunicated. Having unsuccessfully sought the return of their three children, the current custody proceedings were instituted. Returning to the children's wishes, Fraser J determined not to give them much weight. Having spent a lengthy period in a religious enclave and

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view, it is not possible for a child to be able to choose a religion or to change his or her religious faith. This is a privilege available only to adults."

164 Adam Lopatka, "Appropriate Direction and Guidance in the Exercise by a Child of the Rights to Freedom of Expression, Thought, Conscience and Religion" in Verhellen (ed), *Monitoring Children's Rights* (1996) at 291.

165 See Detrick, *Travaux Preparatoires*, at 240 (Para 57 of document E/CN.4/1983/62). As Lopatka, ibid, notes the no coercion proscription is drawn from the ICCPR and the Declaration on Religious Intolerance 1981.

166 Lopatka, "Appropriate Direction," at 291.

167 *H* v *F* (1993) 10 FRNZ 486 at 495.

having been systematically imbued with separatist teachings, reinforced with separatist practices, the children's views could not be safely relied upon: "Having regard to the environment in which they are living and the strength of the views held by the Exclusive Brethren, I think it is inconceivable that children of this age would express any view to the contrary."[168] The tenor of Fraser J's reasoning here is that the Brethren's efforts at indoctrination had been too successful for their own good. Fraser J's decision to downplay the children's wishes was buttressed by the negative view he took of the Brethren's teachings generally. In a number of respects the teachings of the Exclusive Brethren were "incompatible" with the Convention.[169] Having said, earlier in his judgment, that the CRC lent support to the concept of a child's religious liberty, Fraser J later backtracked. Freedom of conscience and religion must, he noted, bear some relationship to the age of the child.[170] Moreover, article 14(2) of the Convention recognised the parental right to provide religious direction. For him, the CRC had *not* significantly undermined the traditional parental right of religious upbringing:

> It may be observed that the view that: "Parents have an inherent right to bring their children up in the manner that they, the parents, think proper and indeed to engender into their children the same sort of views and outlook that the parents believe to be correct" is commonly held by the adherents of many religions and denominations and certainly appears to be subscribed to by members of the Exclusive Brethren fellowship in respect of their own children. In my opinion, that view is not inconsistent with art 14 read as a whole and in context.[171]

The Exclusive Brethren parents then had "the right and the responsibility to bring up their children as they [thought] right in accordance with their own conscience and beliefs."[172] As it transpired, the best interests in this custody battle lay with children being returned to their parents despite the disturbance this would involve to their religious identity to date.

As noted earlier, the Court of Appeal in *Re J* propounded, obiter, an autonomy limitation upon the parents' right of religious childrearing. The assertion of a child's right to religious liberty at the point when they reach sufficient maturity to understand the nature of

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168 Ibid at 493. The children, V(11), C(10) and R(8), had spent their whole lives in the Exclusive Brethren Fellowship.

169 *H* v *F* (1993) 10 FRNZ at 499.

170 Ibid.

171 Ibid.

convictions, the court would still want to independently assess the merits of the exercise of religious autonomy in question.

Could such a right be implemented within the existing legal framework? In New Zealand, there is already legislative acknowledgement that parent-child conflicts may exist, ones which would gain from an authoritative third party's intervention to break the deadlock. Section 14 of the Guardianship Act 1968 permits a child of or over the age of sixteen who is affected by a decision, or by a refusal of consent, by a parent or guardian in "an important matter" to apply to a Family Court judge for a review of the parent's decision. The Court has a discretion to review the matter and, if it so desires, make such orders it deems fit.[176] A child's disagreement over a religiously-sensitive matter—such as whether to attend a church or a state school—would seem to be just an "important matter".

5 *Conservative Christian objections*

(a) Family autonomy threatened and parenthood undermined

From Chapter 6 it will be recalled that CCs vigorously maintain that the family is not just an aggregation of individuals but is an entity in its own right. For CCs, family autonomy should be respected and the office of parenthood (exercised faithfully and without abuse or neglect) encouraged. For them it is self-evident that the granting of legal rights of redress to children usable against their parents is potentially damaging to family integrity. If families are good places then both parents and children have an shared interest in seeing the family preserved. As an American Christian lawyer, Kimberlee Colby argued, the "interest in familial privacy is not strictly parental but is a relational right shared by the parents and child."[177] The incentive to resolve parental-child conflicts within the family is diminished in proportion to the ease with which the state will arm the child with legal recourse: "the

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away of all one's property, or forbids the use of modern medicine) despite parental opposition." *Family Law* (1997) at 96.

176 There have been remarkably few such s 14 applications to date. Indeed, the leading text comments: "Not surprisingly, there appear to be no reported cases illustrating the use of this procedure." *Family Law in New Zealand* 9th ed (1999) vol 1 at para 6.208.

177 Kimberlee Wood Colby, "When the family does not pray together: religious rights within the family" (1992) 5 Harv J L and Pub Policy 37 at 71.

existence of third party support of the child's rebellion undermines the likelihood of successful familial discussions and compromise."[178] Interestingly, an English academic, Andrew Bainham, has recently suggested that the "collective family interest" may need to be acknowledged along with the children's and parents' interests in the usual balancing process:

> A third factor may need to be thrown into the equation which might be described as the "collective family interest". In short, children are not just individuals, with individual interests. They are also members of a family unit and have an interest which forms part of the collective interests of that unit . . . There may . . . be a collective interest of the family (of which they are a part) which needs to be taken into account. And it is conceivable that, in some instances, the combined interests of the parents and the family taken as a whole may outweigh the interests of a particular child.[179]

For many CC parents, an enforceable legal right available to mature children and usable against them represents a graphic undermining of parental authority, itself an attenuated notion compared to earlier decades. It is a diminution in parental rights *par excellence*. As Coons argues:

> If a system of rights were to make the parent hostage to the religious preferences of children the identity of the family would be deeply compromised. It is one thing for the state to raise barriers against physical abuse and to protect the child when the family is already moribund. It would be quite another to strip ordinary parents of their authority to make the family into a representation of their own values. The family is for most of us the primary medium of moral expression.[180]

(b) Substitution of an inferior decision maker—the State

Children are inherently dependent, "a concept less of law than of nature."[181] Adult domination is an inevitable fact of life. The question is *which* adult is the best decision maker for the child. Again, to quote Coons:

> Children do not arrive with the capacity for authentic autonomy. In their early teens some few acquire (and many do not) a maturity of personality that might support a broad self-determination. Even in cases of precocity, however, external adult forces—physical, intellectual economic—render autonomy for most teenagers a thoroughly unrealistic ideal . . . The simple point is that, even in the

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178 Ibid at 83.

179 Andrew Bainham, "'Honour Thy Father and Mother': Children's Rights and Children's Duties" in Gillian Douglas and Andrew Sebba (eds), *Children's Rights and Traditional Values* (1998) ch 6 at 99.

180 Coons, "Religious Rights of Children," at 174.

181 Hafen and Hafen, "Abandoning Children to Their Autonomy" at 484.

> run-of-the-mill affairs that are entirely lawful the only practical question for most children will be which adult is allowed to set the boundary and meaning of liberty. Will it be the bureaucrat, the teacher, or the parent who will have authority to define the good life. Someone big will decide whether Alice goes fishing, goes to bed or goes to Sunday School.[182]

The practical operation of a child's right of religious autonomy would see the state (in the guise of the court) determining whether the religious decision at issue was best for that child.[183] The child's wishes would not be decisive for the court would retain the ultimate authority to decide if the course of action was objectively in that child's best interest. In the fractured family the court does its best but it does so reluctantly and under no illusion that its decision is a second-best one given the vicissitudes of family breakdown. Courts face many risks. The unwitting possibility of judicial bias, especially in such a delicate and controversial subject of religion, cannot be discounted.[184] Courts may also unwittingly gravitate toward some norm or orthodoxy in religious upbringing. Religious upbringing practices of parents of minority faiths which deviate too far from the judicial approximation of the norm are the kind most likely to be penalised. The fear of standardisation runs parallel with the increased power of the state.[185]

The religious freedom of CC parents to raise their children in their faith thus faces a new potential legal challenge. The root cause of this is the tendency for the welfare of the child standard to be given a majoritarian interpretation—the standard is often (but not always) interpreted as reflecting society's understanding of the good life and a good upbringing for children. Moreover, as Chapter 6 explained, modern family law increasingly reflects liberal, modernist thinking—the Wellington worldview. The relevant benchmark for setting standards is not the particular religious community, with its unconventional or restrictive lifestyle and antiquated worldview, but some judicial approximation of the New

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182 Coons, "Religious Rights of Children", at 163.

183 Colby, "When the family does not pray together" at 76.

184 Judge Owen in the NSW Supreme Court once cautioned: "The law which is absolutely partial in matters of religion has to be administered by Judges who, like other men, are liable to be swayed by their own views on this, the most important and most difficult subject that can engage the mind of man . . . The Judge, if he entertains strong views on the subject is liable, however he may desire to be fair and impartial, to have his judgement warped by an intense conviction of the truth of his own particular opinion, or by his disapproval of the teaching of the church to which the child's father belonged. If he is indifferent, or holds views now known as agnostic, his examination must be equally, if not more, unsatisfactory." *In re Butler* (1889) 6 NSWWN 10 at 12.

Zealand community at large. A small religious community and its idiosyncratic view of children's upbringing is not the touchstone. Fraser J in *H* v *F* made this point clearly:

> That is not to say that Exclusive Brethren parents do not have the right and responsibility to bring up their own children as they think right in accordance with their own conscience and beliefs, but when it comes to the Court deciding what is in the best interests of children, whose own parents do not subscribe to those views, the standards to be applied are not those of the Exclusive Brethren but those of society at large.[186]

This statement was endorsed by Judge Bremner in *Piper* v *Piper*, who put it this way:

> [W]hat is being said is that a parent has no absolute right to bring up the children as he or she thinks fit where there is a conflict between parents. If there is a conflict between parents and beliefs, the ordinary standards of society must be adopted.[187]

As we saw in Chapter 1, the ordinary standards of modern New Zealand society tend to be increasingly secular and non-Christian. New Zealand is becoming a post-Christian society. The insignificance of religion in the eyes of public policy makers is underscored by a recent extensive research study by the Department of Justice.[188] The lengthy report examined the way custody and access disputes were being dealt with by the Family Court and conducted in-depth interviews with all participants in the disputes. Reflecting the Wellington worldview, religion was not however examined as a factor, nor raised as an issue in the interviews.[189] Beyond the lone passing remark that "spiritual concerns" were one of the instances of "difficult cases",[190] religion was completely ignored in the report. In a social climate in which the attitude of the majority ranges from lukewarmness to studied indifference to institutional religion, there is the potential for any believer who seems to take their religion "too seriously" to be dubbed a fanatic. Liberal society prefers liberal religion (Chapter 3). As *some* of the cases discussed earlier illustrate, believers who are

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185 See Colby, "When the family does not pray together" at 81; Hafen and Hafen, "Abandoning Children to Their Autonomy" at 484-485.

186 (1993) 10 FRNZ at 500. This approach is to be found of course in other areas of law also. See eg *Gray* v *Nelson Methodist Presbyterian Hospital Chaplaincy Committee* [1995] 1 ERNZ 672. Goddard CJ, on the issue of a sexual relationship between a pastor and a parishioner, comments (at 706): "To the extent that it is necessary for the Court to express a view, the view that it expresses should not be seen as the view of the individual Judge to whom it has fallen to decide this case, but rather as this Court's best endeavour to reflect the sentiments of the community on this subject."

187 [1994] NZFLR at 627.

188 Georgie Hall and Angela Lee, *Family Court Custody and Access Research Report No 8: Discussion Paper* (December 1994).

189 This was confirmed by correspondence from the Department with the author dated 29 May 1995.

countercultural, who endeavour positively to stand apart from the majority, who emphasise the supernatural over the natural, revelation over scientific rationality, will continue to struggle.

IV PARENTAL CONTROL OVER CHILDREN'S RELIGIOUS UPBRINGING: THE FRACTURED FAMILY

What are the rights of the religious parent in a "fractured" family—one where the parents are separated or divorced?[191] Separated couples may, and, in the vast majority of instances, do, concur on the children's religious upbringing and reach an amicable settlement. Where they disagree over religion, however, and the matter requires adjudication, there is some evidence that the religious freedom of the separated or divorced parent (to inculcate the children in the faith of their choosing) is often attenuated. Religious practices and instruction in the intact family which would be generally tolerated by the state are sometimes looked at askance by courts faced with disputes over custody or access. The problem is primarily one for parents belonging to minority faiths or sects.

In the fractured family the views of the child are customarily elicited and given due weight (commensurate with age and maturity of the child) by the courts. Children have a bigger say about religion in this setting.[192] In the intact family there is generally no occasion to intrude and inquire as to the child's religious preferences. Little would be gained by such an inquiry and probably much would be lost.[193] In a fractured family, however, the inquiry

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190 Hall and Lee, *Family Court Custody and Access Research Report*, at 100.

191 I examined this subject in depth in Ahdar, "Religion as a Factor in Custody and Access Disputes" (1996) 10 IJLPF 177 and Ahdar, "Religion in Custody and Access: The New Zealand Experience" (1996) 17 NZULR 113.

192 See the brief discussion of children's religious freedom by L'Heureux-Dubé J. in the Canadian Supreme Court access case, *Young* v *Young* [1993] 4 SCR 3 at 98 (the Court should take into account, in determining form of access, that the two daughters, aged six and eight, disliked their Jehovah's Witness father's efforts at religious instruction).

193 Jon Elster expounds what he calls a "rule-utilitarian" argument in this context: "Were it possible, within the undivorced family, to ensure the child's autonomy in religious (or political) matters without interfering unduly with family life, I believe one ought to do so. We do not do so, however, because the degree of state control and intervention required would be very harmful to family life and, ultimately, to children's autonomy. The remedy would be worse than the disease. In disputed custody cases, on the other hand, judicial intervention is already a fact, and application of the liberal principle adds no disruption to a family that has already broken up.": "Solomonic Judgments: Against the Best Interest of the Child" (1987) 54 U Chicago L Rev 1 at 15-16.

causes no additional intrusion and may be most relevant in deciding what is in the child's best interests, especially where the child has developed a religious identity.

In some jurisdictions the custodial parent has the prima facie right to determine the children's religious upbringing and thus greater deference is paid to what that parent desires by way of religious instruction, church attendance and so on.[194] In New Zealand, both parents have an equal right to determine the children's religious upbringing, even when they are separated or divorced. In *N* v *N*, for example, Judge Inglis explained:

> By ss 3 and 6 Guardianship Act 1968 both parents have equal rights "of control over the upbringing of a child": "upbringing" includes education and religion. No parent is entitled to take it for granted that he or she may make unilateral decisions on matters of that kind. So that while the mother's preferences [the custodial parent] in this case must obviously be taken into account, so must the father's preferences.[195]

1 Neutrality affirmed

Courts have repeatedly stated it is no part of their function to pronounce upon the merits of any particular religious belief.[196] In *C* v *F*, for example, Judge Inglis observed:

> The question of whether G's religious beliefs as a member of the Exclusive Brethren are reasonable or unreasonable according to general community standards . . . is a question which no Court in this country is entitled to ask or to attempt to answer.[197]

The disinclination to pass judgment on a parent's particular religious beliefs is matched by a similar desire to be impartial where a comparison of faiths is invited. "It is not the function of the Court to adjudicate on the merits of different religions"[198], said Judge McAloon is one case. Liberal neutrality of *aim* is affirmed. However, the courts can, and regularly do prefer

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194 See eg Australia: see *Ruldoph* v *Dent* (1985) 10 Fam LR 669 at 672; Canada: see *Young* v *Young* [1993] 4 SCR 3 at 127 per McLachlin J (although her Honour notes this power invested in the custodial parent is not absolute); United States: see *Johnson* v *Nation*, 615 NE 2d 141, 145-146 (Indiana App 5 Dist 1993)(the custodial parent's right is "paramount" unless it "unreasonably interferes" with the access parent's visitation rights).

195 (1987) 2 FRNZ 534 at 537 (Fam Ct).

196 See eg *Ormond* v *Ormond*, unrep, Family Court, Hastings, FP 20/186/86, 9 September 1986, Judge Inglis QC, at 14: "It should be emphasised that the Court cannot be concerned with the validity or otherwise of Mrs Ormond's religious beliefs and practices . . ."; *Gallyer* v *Gallyer* [1975] NZ Recent Law 189 at 189 per O'Regan J (Sup Ct): "It is not for Courts to be critical of the religious beliefs of any person and I acquit myself of my such intention."; *Parker* v *Reekie*, unrep, District Court, Henderson, FP 476/94, 16 June 1995, Judge J M Doogue, at 6: "I do not believe it is for the Court to pass judgment on the applicant's [a Jehovah's Witness] particular religious beliefs."

197 (1992) 9 FRNZ 439 at 441 (Fam Ct).

one religion over another based on its secular or temporal effects upon the children. Neutrality of *consequences* is unattainable, as we saw in Chapter 3. A good statement of the courts' approach is by Judge McAloon in *Grosmith* v *Grosmith:*

> In a case such as this where the hub of the dispute between the parents is one of religion it is not . . . the role of the court to make a determination of the veracity of any particular religion. Still less is it the court's function to endeavour to reconcile a person's particular religious beliefs with what may be regarded as the mainstream religions. One will look at the effects of a particular religion on the children concerned and will endeavour to evaluate whether the effects of that religion or the consequences of a child being exposed to a particular religion will be beneficial to that child or not. It is only on this basis the court will make any value judgment on the consequences of a particular religion in so far as those consequences affect the child.[199]

Religious beliefs are usually acted out and thus constitute "conduct" for the purposes of the welfare test in section 23(1) of the Guardianship Act.[200]

The evaluation of the temporal or secular effects of religious beliefs is, however, itself problematic. One difficulty is that it is not always easy to distinguish between evaluating a religion's secular effects and evaluating the religion itself. Some argue the distinction is in fact illusory.[201] To lose custody on the basis of religious consequences not beliefs would

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198 *P* v *F* (1983) 2 NZFLR 27 at 29 (Fam Ct). Similarly, Judge Inglis QC warned: "The concern of the Family Court is not to say which of two different methods of practising Christianity is the better, for the Court cannot take sides on matters of religion." *N* v *N* (1987) 2 FRNZ 534 at 536 (Fam Ct).

199 Unrep, Family Court, Timaru, FP 176/194/85, 12 February 1987, at 5. See also *H* v *F* (1993) 10 FRNZ 486 at 500 (adopting the English Court of Appeal's statement in *Re R (A Minor)(Residence: Religion)* [1993] 2 FLR 163 at 171 per Purchas LJ: "The impact of the tenets, doctrines and rules of a society upon a child's future welfare must be one of the relevant circumstances to be taken into account by the court . . ."); *Piper* v *Piper* [1994] NZFLR 625 at 627 per Judge F W Bremner: "I am only concerned at this hearing as to the tenets of the church or a religion as it affects the child."; *Ormond* v *Ormond*, unrep, Family Court, Hastings, FP 20/186/86, 9 September 1986, Judge B D Inglis QC at 14: "It should be emphasised that the Court cannot be concerned with the validity or otherwise of Mrs Ormond's religious beliefs and practices; but it must be concerned with the consequences for the children of the stand she has taken."; *Wilton-Hill* v *Hill*, unrep, District Court, Taupo, FP 069/111/92, 24 January 1996, Judge P Whitehead, at 14.

200 That provision states that the court "shall have regard to the conduct of any parent to the extent only that such conduct is relevant to the welfare of the child."

201 Mucci, for example, notes: "Conduct is, in fact, so inextricably related to belief that to propose. . . that the denial of custody based on the effects of certain religious beliefs is not the same as, and does not involve, making a moral judgment on the character of the beliefs themselves, is disingenuous in the extreme." Joseph Mucci, "The Effect of Religious Beliefs in Child Custody Disputes" (1986) 5 Can J Fam L 353 at 359-360. See also Andrew Bainham, "Religion, Human Rights and the Fitness of Parents" [1994] CLJ 39 at 40: "The state is now apparently required to distinguish between religion per se and the social effects of that religion. Such an approach seems scarcely credible since all religions are in effect 'package deals'. . . to discriminate between parents because of the consequences of their religion is arguably to discriminate quite simply on the basis of religion." Mucci's criticism was noted in *Wilton-Hill*, at 14: "[I]t was the consequences or the effects upon the children of the differences the parties in this case had over their religious beliefs that was important not the religious belief itself and

seem little consolation to the devout parent. If this is neutrality then, as Bradney put it, it is "a peculiar kind of neutrality."[202]

There is another problem with an exclusively temporal or secular effects approach. It does not and indeed cannot, pursuant to its concept of neutrality, consider or weigh the spiritual merits of particular religions. The ontology here is pure naturalism; the spiritual realm must, for practical purposes, be ignored. We saw this most graphically earlier with the Jehovah's Witnesses blood transfusion cases. For such believers, eternal damnation might well be the consequence if the transfusion is administered. But this is a metaphysical speculation in secular liberal eyes and besides it pales before the prospect of a dead child. This is partial analysis of welfare at its worst from some religious perspectives. The calculus of cost and benefits involved in assessing children's welfare is distorted if these spiritual aspects are left out. Practices which, from a purely secular viewpoint, appear unduly restrictive or even deleterious, may, from a spiritual perspective, be of inestimable advantage. Yet the court cannot be concerned with these spiritual benefits.[203] Exclusive preoccupation with the temporal, the here and now, risks disadvantaging those faiths who place less weight upon this short-run, earthly life and its sacrifices, compared to the unseen and eternal benefits of spiritual obedience.[204]

The secular effects approach has its flaws but in a liberal democracy there appears to be no obvious alternative.[205] To exclude scrutiny of the tangible or objective consequences of parental beliefs upon the children would be dangerous. At worst, a more "veneer of religious justification"[206] would be enough to immunise parental conduct of a most deleterious nature from examination. The most harmful of practices (in temporal terms) could be justified in the name of religion.

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notwithstanding the article by Joseph Mnookin[sic] I reiterate that is the correct position for this Court to take."

202 A Bradney, *Religion, Right and Laws* (1993) at 49.

203 See Carl Schneider, "Religion and Child Custody" (1992) 25 U Mich J LRef 879 at 905: "A court is an instrument of this world, and will be among the things rejected by someone who rejects the things of this world. Such a person is simply using standards which no secular court can adopt, and often the best a court can do is to strive to be as understanding and accommodating as possible while not compromising legitimate interests of the other people who are involved in the dispute."

204 This attitude is summed up, Scripturally, by the verse: "What good will it be for a man if he gains the whole world, yet forfeits his soul?": *Matthew* 16: 26 (NIV).

205 See Schneider, "Religion and Child Custody" at 889, 891, 905.

206 *In the Marriage of Paisio (No 2)* (1978) 5 Fam LR 281 at 284 (Aust Full Fam Ct).

2 *Treatment of religious effects by the courts in custody and access disputes: some examples*

(a) Social marginalisation

Most of the deleterious effects upon children associated with the religions can be grouped under the rubric "social marginalisation". Typically, the religious groups which encounter the most difficulty in custody and access disputes are those which are countercultural: they see their faith responding in the form of a radical and separatist response. Religious communities such as Jehovah's Witnesses, Exclusive Brethren and certain so-called "fundamentalist" independent Christian fellowships feature much more regularly than more acculturated faiths such as Anglicanism or Methodism.

Some, but not all,[207] courts have viewed social marginalisation of the children due to the parents' religious conviction as having negative consequences for the welfare of the children. In *H* v *F*, Fraser J noted that "a cardinal belief"[208] of the Exclusive Brethren was the duty to separate from evil and worldly things. His Honour then detailed the non-ownership or use of computers, fax machines, cell phones and the like. Members were discouraged from going to university, a godless institution in the Brethren's eyes. Brethren children at school did not, said the principal, participate in film, video or computer activities or school sports nor did they have lunch at school with other pupils and so on. Fraser J viewed this dimly:

> In many respects . . . their lives, compared with the general standards and usages of the community at large are restricted and confined . . . For

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207 By contrast, other decisions indicate the social marginalisation argument is not always persuasive. In a 1971 case, the prospect that the child "would lead a narrower and more confined life" was in itself no cause for criticism, McMullin J emphasising that the Jehovah's Witness parents were entitled to bring up the child in that faith: *Re D (An Infant)* [1971] NZLR 737 at 743 (Sup Ct). The court ultimately awarded custody of the child to the aunt however since the child, now aged 11, had been with the aunt and reared by her since shortly after birth. In *Wilton-Hill* v *Hill*, the court noted the religious differences between the parents "largely involve[d] cultural and entertainment activities and membership of various clubs." The court was concerned that the Jehovah's Witness father would not attend the children's Christmas and Easter concerts or activities nor encourage them to belong to Pippins and Brownies. While this displayed a certain mean-spiritedness and the father having had "the best of both sides" (enjoying such activities as a child himself but now scorning them as an adult), Judge Whitehead was not willing to place much emphasis upon this. Whether or not it was selfish and inconsiderate for the father to disabuse young children of the (non) existence of Father Christmas, this was not a matter of sufficient moment upon which to decide custody.

208 *H* v *F* (1993) 10 FRNZ 486 at 490.

> those who live, with their families, inside the fellowship, accepting its constraints, the way of life provides a sheltered, but blinkered, contentment.[209]

In *Ormond* v *Ormond*, the mother of five children aged between six months and nine years, joined a small fellowship of "born-again" Christians in central Hawke's Bay. This fellowship numbered a mere three adults, including the mother, plus a number of children, and was itself a schism from a small local community of "reborn" Christians. Mrs Ormond's involvement with the fellowship—headed by a dominant, charismatic leader—led her to part company with her husband and wider family. Judge Inglis, in a lengthy judgment, was concerned with the consequences for the children of the stand the mother had taken. The separatist and restrictive teachings of the fellowship were noted:

> [T]he children would necessarily be brought up with a view of life that would distinguish them from the majority of other children. For example, it is a precept which the mother feels bound to follow that girls or women should not have their hair cut or wear trousers. Biblical authority exists for that viewpoint.[210]

The Family Court viewed this, together with other factors, as making it plain that the children's involvement in this fellowship was not in their best interests. This was "not necessarily because of the nature of those beliefs, but because of the effect the practice of those beliefs has on the children in the particular circumstances."[211]

(b) Religious fervour

Religious fervour per se is not cause for criticism. However, a point may be reached where, in the court's view, the parent is placing his or her religious commitment before the children's welfare. This can be a fine line.

In *C* v *C*, the Jehovah's Witness mother had "presented herself before the Court as a sensible, practical person who, despite her committal to the Church, had the welfare of her children at heart."[212] Likewise in *Grosmith* v *Grosmith*, the court took a benign view of the Jehovah's Witness father's devotion. Judge McAloon commented: "I accept Mrs Grosmith's

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209 Ibid at 490 and 493.

210 *Ormond* v *Ormond*, unrep, Family Court, Hastings, FP 20/186/86, 9 September 1986, Judge B D Inglis QC at 14. According to the mother, hellfire and damnation would follow otherwise.

211 Ibid at 201.

comment that the religion displays an intensity which is not disclosed by some other religions. At the same time it must be acknowledged that there are other religions which require equal dedication and devotion from their adherents."[213]

By contrast, in two cases involving "born again" Christian fellowships, the parents who belonged to those organisations were seen to be putting their religion before the children's best interests. In *Lyndon*, the father's "extreme view"[214] about the mother ("a witch" according to him) had led to estrangement of the teenage son from his siblings and mother. In *Ormond*, the mother was adamant she had been guided by God in her decision to leave her husband and to take the children with her. She would leave with the children anyway unless their father allowed her to take them. She was, as Judge Inglis described it, "guided by God's word, and no secular argument can prevail against that . . . those who are not for her are against her."[215] This type of intransigence gave cause for concern when it led to the children being uprooted from the family farm and wider family circle and being transplanted instead in an unfamiliar locale and in new schools divorced from the support and care of the extended family. The mother was "considering her own welfare, not the children's welfare."[216]

In *K* v *K*, the father was described as "devout" and "intensely Catholic,"[217] as was the mother. The difference was that the father had a belligerent and openly defiant attitude to the civil law where he perceived it to conflict with his religious beliefs. Mr K had "made it perfectly clear that in the light of this tenet he would not obey court orders where such were seen to conflict with his religious obligations."[218] The child needed to be sheltered from such "extreme views"[219] not subjected to them.[220]

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212 [1975] Rec Law 137 at 137.
213 Family Court, Timaru, FP 176/194/85, 12 February 1987, at 9.
214 (1986) 3 FRNZ 37 at 39.
215 *Ormond* v *Ormond*, Family Court, Hastings, FP 20/186/86, 9 September 1986, Judge B D Inglis QC, at 12.
216 Ibid at 23.
217 *K* v *K (No 1)* (1988) 4 NZFLR 257 at 263 and 270.
218 Ibid at 270.
219 Ibid at 277.
220 The father however ultimately had his way. A later hearing awarded him custody following the boy's repeated and strenuous efforts to remain with his father despite being in his mother's custody. Notwithstanding the court's "greatest sympathy" for Mrs K, the boy's best interests were now served by Mr K, described this time by Holland J as "a thoroughly unreasonable bigot," having custody. *K* v *K (No 2)* (1988) 5 NZFLR 283 at 285.

(c) "Indoctrination"

Courts do not like the idea of a parent "indoctrinating" the children in a particular religion. In *Gallyer* v *Gallyer*, the court thought there would be no likelihood of the mother, a Jehovah's Witness of equivalent standing to a minister, "not indoctrinating them in her views."[221] That mother was denied custody, whereas the Jehovah's Witness mother in *C* v *C* was a more "sensible, practical person." The court noted the children "were lively, well-turned out children who appeared normal, happy and well-adjusted and not showing any degree of indoctrination towards the Jehovah's Witness faith.[222] The mother, it was noted, at present only read Scripture to the children and studied the Bible with them—there was no attempt at "deep and involved persuasion."[223] She displayed an attitude of gentle persuasion as opposed to committing the children "completely and absolutely to her faith against their will."[224] The children's right to an open future was being preserved.

In *Hill* v *Hill*, the mother, an Anglican, feared that if the children were in their father's custody "there could be no control over the religious indoctrination of [them]."[225] The mother's notion of indoctrination appeared to be the Jehovah's Witness father taking the children door knocking and to meetings during the week: she had no objection to Sunday School type instruction—something she envisaged providing herself. A "balance"[226], as she put it, in the children's religious upbringing was conceded but, it seems, anything beyond Sunday School instruction would be excessive.

Now no court could do other than frown upon "indoctrination", if the term is used in its common pejorative sense as akin to brainwashing. Yet the obvious problem is defining it. Coerced or forced religious instruction seems to be at the core. But ascertaining this can be difficult. Many children would rather play sport or watch television than go to church or read the Bible, but is requiring them to do so indoctrination? With very young children the question is even more difficult. If the parent was instead simply "inculcating" or

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221 [1975] NZ Rec Law 189 at 190.
222 *C* v *C* [1975] Rec Law 137.
223 Ibid.
224 Ibid.
225 Unrep, District Court, Rotorua, FPN 69/111/92, 24 December 1993, Judge Evans, at 4.

"instructing" the children in the faith (which is the primary, non-emotive meaning of indoctrination[227]) then eyebrows, presumably, would not be raised.

The Canadian Supreme Court has tried to draw the distinction between indoctrination and "genuine and otherwise proper discussion"[228] between a parent and his or her child on religious matters. In *Young*, Cory and Iacobucci JJ commented: "curtailment of explanatory or discursive conversations or exchanges between a parent and child should be rarely ordered in our view."[229] The fuzziness of the indoctrination/discussion dichotomy is illustrated by the conflicting decisions of the Supreme Court, both delivered the same day and both involving access by Jehovah's Witness fathers. In one, the majority of the Court set aside a trial order prohibiting the father from "discussing" his religion with the children.[230] In the other, the majority upheld a trial direction that the father "may *teach* the child the Jehovah's Witness religion but does not have the right to *indoctrinate* her continually with the precepts and religious practices of the Jehovah's Witnesses."[231]

One solution to the indoctrination/discussion problem would be to prohibit any discussion of religion at all. This seems clearly contrary to received ideas of religious freedom but was done in one New Zealand case. In *Piper* v *Piper*, religious differences appeared to be at the heart of the parents' conflict. The father had some very firm and, as the court acknowledged, completely genuine views on religion which took, again, a strong separatist line. He was not in favour of the children joining clubs and organisations run by "worldly people". He had "considerable difficulties" with the children's involvement in "Maori culture".[232] The mother in turn referred to the unsettling effects of the father's periods of access with the children. They had returned home "confused [and] talking about devils and evil"[233] although, she noted, there had been an improvement in this respect of late. Judge Bremner, in ordering interim access, saw the need for some firm constraints

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226 Ibid.

227 The *New Shorter Oxford English Dictionary* (1993) defines "indoctrinate" as "1. teach; instruct in a subject, bring into knowledge of something—2. imbue with an idea or doctrine; *specifically* systematically to accept (*esp* partisan or tendentious) ideas uncritically; brainwash."

228 *Young* v *Young* [1993] 4 SCR 3 at 110 per Cory and Iocabucci JJ.

229 Ibid.

230 *Young* v *Young*.

231 *P(D)* v *S(C)* [1993] 4 SCR 141 at 152 (emphasis added).

232 [1994] NZFLR 625 at 627.

233 Ibid.

upon both custody and access. The mother's present custody was confirmed but subject to her not having them "involved in any religious education." Likewise, the father's access was subject to the condition that "he will not discuss any religious doctrine with them."[234]

Compliance with these orders is arguably easier than with the vague notion not to indoctrinate. Yet even so it is hard to be crystal clear as to what is required. A wary parent would refrain from any mention of religion lest this be construed by a suspicious and hostile estranged spouse as indoctrination. A more zealous, albeit imprudent parent might walk the tightrope and risk losing access indefinitely or face contempt of court.

V CONCLUSION

The potential impact of the CRC upon parents' right to control the religious upbringing of their children does not appear great. In the intact and united family, CC parents still retain their rights as guardians to raise their children in the faith. Where religious upbringing practices endanger the life, health, safety or educational opportunities of children, the state, in its *parens patriae* capacity, may intervene. This paternalistic jurisdiction is reinforced by certain protection provisions of the CRC such as articles 6 and 19. In the fractured family, the CRC has had little or no influence upon custody or access decisions involving religious upbringing. In one case (*H* v *F*), the judge considered the traditional parental right of religious upbringing was not inconsistent with the recognition of a child's religious liberty in article 14 of the Convention.

I explored the possible introduction of an independent right of religious liberty for a child. CCs have not, in so many words, raised this as a concern. My examination was based upon the likely reaction of most CCs if the issue were ever squarely put to them. Recognition of an "autonomy" limitation upon parental rights of religious upbringing is likely to be accelerated by article 14 of the CRC. Movements in that direction by courts in New Zealand and overseas are evident already. The potential impact of a legal right of religious liberty for a mature minor is, at one level, hardly problematic. In practical terms, I suspect very few cases would ever be brought and judicial vetoes of parental wishes would

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234 Ibid at 628. The interim orders were later confirmed.

be rare. In addition, a legal right to challenge parental religious designs for children pales in the wake of the many powerful non legal pressures (the media, peer pressure and so on) to dissuade children from following in the faith. Once more, the symbolic impact of any law change is the real CC concern. The state appears to be taking the side of children against parents and alarm is caused by the prospect of it intruding more into the most sensitive of area of the transmission of the faith to one's offspring. The paucity of litigation that is likely eventuate—should a legal right of religious liberty for children be recognised—is no consolation for CCs: one or two prominent "test" cases (recall *Eric Sides*) can carry great sway.

In terms of my model of engagement (Chapter 4), the prediction of largely peaceful co-existence between CCs and the state is borne out. There have been very few cases where parental religious upbringing conduct has been scrutinised by a court. Those where the parents' behaviour was impugned have, moreover, involved religious groups at the fringe of CC (the Exclusive Brethren), or outside it altogether (Jehovah's Witnesses). Further, I suspect most CCs would agree with the outcome in cases such as *The Seven P Children* and *Liu*, where CC parents lost.

In the few cases of conflict resulting in litigation the pattern has been uneven. Do illiberal religions fare badly in courts comprising judges acting in accordance with the Wellington worldview? There is some limited evidence (by no means uncontradicted) that the more intolerant, unreasonable, dogmatic and indoctrinating the parents are, the less favourably a court treats them. Sometimes such parents simply lose. On the other hand, there are also instances where judges have shown sensitivity to the religious convictions of CCs (and others) and have done their best to accommodate these believers, even if the court does not agree with them.

Chapter 8

PARENTAL CORPORAL PUNISHMENT AND THE UNITED NATIONS CONVENTION

In this chapter I examine the present law concerning the right of parents to physically punish their children. I then consider movement toward abolition of that right in New Zealand. Finally, I assess the impact the United Nations Convention on the Rights of the Child 1989 (CRC) will have upon the right of parental physical punishment of children.

Conservative Christian (CC) parents endorse corporal punishment of their children where the occasion so requires. Physical chastisement is certainly not all that discipline of children entails, but most CCs believe it is an integral part of it. Abundant Scriptural support, particularly from *Proverbs*, direct the CC in this matter.[1] For some CCs the issue of corporal punishment of children is so critical they even see their children's eternal salvation dependent upon its parental exercise.[2] If CCs needed contemporary reinforcement of the Biblical endorsement of physical discipline they need only have turned (as they indeed did, and continue to do so) to Dr James Dobson's 1970 best-seller, *Dare to Discipline*.[3] Dobson, a qualified child psychologist, provided intellectual succour to what CCs saw to be right parenting based on scripture and tradition.

There is a keen realisation by CCs that corporal punishment can go much too far and

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1 See *Proverbs* 13:24; *Proverbs* 29:15; *Proverbs* 29:17; *Proverbs* 23:13-14; *Proverbs* 22:15; *Proverbs* 3:11-12. See also *Hebrews* 12:5-11. Lists can be found in, for example, James Dobson, *Dare to Discipline,* British ed (1971) at 205-206 and in a lengthy critique of the CC position on this subject, Philip Greven, *Spare the Child: The Religious Roots of Punishment and the Psychological Impact of Physical Abuse* (1992) at 48-49.

2 See Larry Christenson, *The Christian Family* (1970) at 112: "God has ordained issues of the greatest importance to hinge upon the discipline of the rod—even involving the child's external salvation." *Proverbs* 23:13-14 is cited by Christenson here ("Withhold not correction from the child: for it thou beatest him with the rod, he shall not die. Thou shalt beat him with the rod, and shalt deliver his soul from hell.")(KJV). See also C G Ellison, "Conservative Protestantism and the Corporal Punishment of Children: Clarifying the Issues" (1996) 35 JSSR 1 at 3.

3 Dobson's *Dare to Discipline* is widely sold and used in New Zealand, as are his other books commending corporal punishment: see eg *The Strong-Willed Child* (1992) and *Solid Answers* (1997) ch 8. Dobson updated his original book in the 1990s: see *The New Dare to Discipline* (1996). Dobson's success with this book spawned an organisation devoted to fostering family life called "Focus to the Family." The daily broadcast from Focus on the Family is broadcast on Radio Rhema, the CC radio network throughout New Zealand. There is a local branch, "Focus on the Family New Zealand", whose Director is Stephen Tetley-Jones, a Radio Rhema talk-show host: see Julie Belding, "Society needs family advocate," *Challenge Weekly* ("*CW*"), 9 Nov 1999, at 5.

degenerate into child abuse.[4] CCs refuse to equate corporal punishment and abuse: "We must make a distinction between abusive hitting and nonabusive spanking."[5] Physical abuse is condemned outright by CCs[6] and the prospect that some foolish parents will distort the scriptural mandate into a license for criminal violence is not sufficient justification for society to jettison the teaching and the benefits it brings.

Soon after the ratification of the CRC by the New Zealand Government in 1993, some CCs predicted the parental right to smack children would come under threat.[7] One commentator even believed that the smacking debate was "effectively decided"[8] when ratification of the CRC occurred. As we shall see, the UN Committee on the Rights of the Child has consistently interpreted article 19(1) of the CRC to include smacking with its concept of "violence". New Zealand CCs have been quick to respond, launching a petition to retain section 59.[9] In 1997, following the release of the UN Committee's report, which criticised the retention by the New Zealand Government of parental right of corporal punishment, CCs publicly urged the Government to remain firm in its resolve.[10] The Rev Graham Capill warned politicians intent on banning smacking that they would be "buying into a big fight" with Christians, and many non-Christians, one which would exceed the reaction to the Homosexual Law Reform Bill in the mid 1980s[11] (that debate is discussed in the next chapter).

I THE PRESENT LAW

1 Parental immunity: section 59

The Common Law has long recognised the right of parental corporal punishment.

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4 See eg Dobson, *Dare to Discipline*, at 55-56.

5 Den A Turnbull and S Dubose Ravenel, "To Spank or Not to Spank", *Focus on the Family*, April 1998, 2 at 2.

6 See eg Dobson, *Solid Answers*, at 139.

7 See eg Arlene Goss, "Spare the rod," *CW*, 7 Sept 1994, at 7; Omen, Letter to *CW*, 7 Sept 1994, at 7.

8 "World wide concern," (no author listed), *CW*, 7 Sept 1994, at 8.

9 A campaign to continue the "right to smack" was commenced by the Hamilton branch of a CC organisation, Women For Life. See the advertisement in *CW*, 7 June 1995, at 3. The petition secured 27,117 signatures and was presented to Parliament on 8 August 1995: Letter to author from Mrs Dianna McKay, Hamilton Branch Secretary, Family Education Network, 23 March 1998.

10 The Minister of Justice Doug Graham alluded to the petition as well as "between 10 and 15 letters a day from parents" in announcing that the Government had no intention of outlawing parental smacking of children: see "Govt rules out ban on smacking," *Otago Daily Times ("ODT")*, 17 Aug 1995, at 1.

11 Mark Toomer, "'Corporal punishment', abuse link groundless," *CW*, 19 Feb 1997, at 3.

Blackstone observed a parent "may lawfully correct the child, being under age, in a reasonable manner."[12] Courts understood such correction to include moderate physical punishment. New Zealand codified the common law right of physical chastisement in 1893,[13] the modern encapsulation being section 59 of the Crimes Act 1961:

> **59. Domestic Discipline**—(1) Every parent of a child, and subject to subsection (3) of this section, every person in the place of the parent of a child is justified in using force by way of correction towards the child, if the force used is reasonable in the circumstances.
>
> (2) The reasonableness of the force used is a question of fact.
>
> (3) Nothing in subsection (1) of this section justifies the use of force towards a child in contravention of s 139A of the Education Act 1989.

Section 59 was amended in 1990 to remove the statutory immunity for teachers and child carers.[14] The term "justified" in section 59 is defined in section 2 of the Crimes Act as meaning in relation to a person, "not guilty of an offence and not liable in any civil proceeding." Thus parents who come with its terms are protected against criminal prosecutions for child assault and also against civil liability arising from, for instance, tortious actions for trespass to the person.[15]

To come under the protection of section 59 the parent must satisfy both limbs of provision: proper purpose and appropriate degree of force. First, any force used upon the child by the parent must be "by way of correction." Any bad reason on the parent's part—revenge, spite, rage, arbitrariness, caprice or fury (some of the states of mind denounced in the case law[16])—will be fatal to the claim for immunity. Judge Somerville, in a thorough recent examination of the subject, *Ausage* v *Ausage,* reminded:

> It is to be borne in mind that s 59 authorises the application of force which would otherwise be an assault and that it is the purpose for

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12 1 *Blackstone's Commentaries* 452; quoted in the leading New Zealand article of this topic: John L Caldwell, "Parental Physical Punishment and the Law" (1989) 13 NZULR 370 at 371.

13 Section 68 of the Criminal Code 1893.

14 Section 28(1) of the Education Amendment Act 1990 inserted a new section 139A into the Education Act 1989, prohibiting corporal punishment in early childhood centres and registered schools. Registered schools include all state schools (primary, intermediate and secondary) as well as private schools registered pursuant to s 35A of the Act. Section 28(2)(3) of the 1990 Amendment amended s 59 of the Crimes Act to give it its current wording above.

15 See Caldwell, "Physical Punishment," at 372.

16 See Caldwell, ibid at 373-375, for an examination of the case law. A passage often cited is one by the Court of Appeal in *R* v *Drake* (1902) 22 NZLR 478 at 487 per Edwards J: "The self-same act may be either an obviously just act of parental correction or an act of revenge . . ."

> which it is used which is the principal ground of defence . . .
>
> In inflicting punishment the parent must act in good faith, having a reasonable belief in a state of facts which would justify the application of force.[17]

Second, the use of force must be "reasonable in the circumstances." In deciding this question of fact, New Zealand courts have noted that the assessment takes place against prevailing social attitudes to childrearing.[18] While the Court has "an unfettered discretion", Judge Somerville in *Ausage* nevertheless set forth some obvious factors that ought to be taken into account: "[1] The age and maturity of the child"; [2] Other characteristics of the child such as physique, sex and state of health; [3] The type of offence; [and] [4] The type and circumstance of punishment."[19] So, hitting a very young child (or for that matter, an older teenager) for a minor misdemeanour would be unreasonable, as would hitting a frail child.[20] Two factors have been rejected. Claims that either a parent's religious or cultural background justify a greater degree of force than would otherwise be considered reasonable have not been accepted. I shall discuss religion shortly, but, as for culture, the Family Court in *Ausage* distinguished earlier authority which had accepted cultural background as a relevant factor under this limb of section 59. The respondent father in *Ausage* was a Samoa *maitai* (elder) and a leader in the Samoan community in Christchurch. Judge Somerville distinguished a 1985 High Court case,[21] in which the court had regard to the harsher disciplinary regime for children which pertained in Niue.[22] Since that case had been decided, the CRC had been ratified by New Zealand. Children were entitled to equal protection under the CRC regardless of, inter alia, their race or culture.[23] To Judge Somerville:

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17 *Ausage* v *Ausage* [1997] NZFLR 72 at 80.

18 See eg Judge Inglis QC in *Kendall* v *DGSW* (1986) 3 FRNZ 1 at 10: "What is 'reasonable' must be a matter of degree and will depend on large measure on what can be perceived to be the current social view at any given time." This is quoted in *Ausage* (at 79) where Judge Somerville opined: "Social conditions and child-rearing practises are not static, as is obvious from s 59 itself which, when originally enacted, included schoolmasters as having parental rights of correction."

19 *Ausage* [1997] NZFLR at 79-80.

20 In a recent High Court decision, the Court stated: "The use of a 'smacking stick' on a young woman approaching teenage or on younger children must be very difficult to justify": *Y* v *Y*, unrep, High Court, Auckland, HC 122/97, 27 February 1998, Baragwanath J, at 15. For further illustrations see Caldwell, "Physical Punishment", at 376-381.

21 *Erick* v *Police*, unrep, High Court, Auckland, M 1734/84, 7 March 1985, Heron J.

22 Whilst the parent's Niuean cultural childrearing practices were relevant, the force used in this instance had, even under the more harsh Niuean standards, been unreasonable.

23 The Preamble of CRC and art 2(1) declare that the rights and freedoms set forth belong to every child without distinction of any kind, irrespective of the child's or his or her parent's . . . *race*, colour, sex,

> [O]ne of the prime objectives of the Convention is to protect all children, regardless of race, colour, sex or religion, by the imposition of a uniform code to apply world-wide . . . I cannot accept that the degree of physical violence, if permitted under art 5, would differ depending on the culture of the child or parent . . . I have formed the view that the degree of force which might be reasonable to apply for the purposes of correction under s 59 does not differ according to ethnic background or religious belief. There is to be one universal standard which applies to all families in New Zealand.[24]

2 *Two illustrations*

The limits of the parental right of physical discipline are illustrated in two cases involving devout Christian parents. Unfortunately, in both instances the parents went much too far.

In *Director-General of Social Welfare* v *E*,[25] the Family Court considered whether three children of Mr and Mrs E were in need of care and protection in terms of section 14 of the Children, Young Persons and Their Families Act 1989 (CYPFA). The Department of Social Welfare argued that excessive physical discipline had been administered to the children, aged nine, seven and three. The parents, described as "qualified intelligent professional people"[26] by Judge MacCormick, belonged to fledgling congregation, the "New Vine Church". At the time of trial, it comprised only four families in New Zealand, including that of its pastor. His doctrines relied upon "very literal"[27] interpretations of the Bible, particularly the headship doctrine of wifely submission to her husband (see Chapter 6). The crux of the problem, however, was the physical punishment regime followed by the parents at the behest of the pastor. The regime was patently excessive. Following an instance of misbehaviour, the children would be smacked with a strap up to ten times. Mr E admitted in evidence that his three daughters could receive up to ten straps ten times a day! Following discussions with their pastor, the discipline was decreased to a maximum of five smacks, five times a day. The report commissioned for the Court detailed unusual and anti-social conduct by the children at school. Serious long-term adverse effects were predicted. The Es

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language, religion, political or other opinion, national, *ethnic or social origin*, property disability, birth or other status" (art 2(1)) (emphasis supplied).

24 *Ausage* [1997] NZFLR at 79.

25 *DGSW* v *E*, unrep, Family Court, North Shore, CYPF 4-6/96 & FP 242/96, 6 September 1996, Judge KG MacCormick.

26 Ibid at 2.

acknowledged that their disciplining of the children had been excessive. Nevertheless, they, or rather Mr E, wished to retain the right of physical chastisement in the future since it "accords with biblical authority."[28] Passages from the *Proverbs* were pleaded in support. The judge affirmed that adults such as the Es were entitled to form and hold their own religious beliefs in accordance with section 15 of the New Zealand Bill of Rights Act 1990.[29] But they also had to accept the consequences arising from their choice of beliefs. The right of parental discipline was acknowledged (although section 59 was not expressly referred to) and Judge MacCormick was aware that many conservative Christian parents strongly endorsed corporal punishment as a Biblically-based part of child-rearing.

> For my part I am well aware that there are a number of parents who believe that limited physical discipline is appropriate on occasion and that there are books such as James Dobson's "Dare to Discipline" that advocate it. But that is not with the background of excessive discipline that has occurred here.[30]

The Court was satisfied that the children were in need of care and protection in terms of both sections 14(1)(a) (the children were being ill-treated and abused with such harm likely to occur in the future) and 14(1)(b)(the children's development and emotional well-being had been impaired and this impairment was serious and could only be avoided if steps were taken to deal with the situation). The children would stay with Mrs C (Mr E's mother-in-law) but would be returned to their parents once the Es had undertaken suitable counselling. Their future parenting would need supervision and monitoring. The children themselves wished to return home and should be returned as soon as that could be safely done. The Es, in his Honour's opinion, were "basically good people",[31] albeit misguided due to the "manipulative" religious influence from their pastor. He ordered an end to further physical disciplining of the girls by either parent following their return. Judge MacCormick refrained from making it a condition of the children's return to the parents' prime care that the Es sever all links with the New Vine Church. He made his views plain nonetheless:

> To make this [severing links] a condition would be to require them

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27 Ibid at 17.
28 Ibid at 16.
29 Ibid at 2.
30 Ibid at 15.
31 Ibid at 33, Judge MacCormick adding: "I hope that doesn't sound condescending."

> [the Es] to choose between their church and the care of their children. I do not consider that to be appropriate . . . I do, however, consider that Mr and Mrs E need to evaluate where membership of their church may have led them. Perhaps they need to ask why it has so few adherents; and how, with its current pastor, it could have sanctioned, only 5 or 6 years ago, the administration of physical punishment to adult women members of the church, by that pastor. That punishment or disciplining appears to have been in a form constituting criminal assault. Quite frankly, the mere thought of that from any pastor, is horrific.[32]

The second decision is one to which reference has already been made: *Ausage* v *Ausage*.[33] The applicant, aged eighteen, sought a final protection order against her father under the Domestic Violence Act 1995, claiming that his disciplining of her on two occasions had been excessive and amounted to domestic violence. The order was granted and the case is most useful in its examination of the limits of section 59, the impact of the CRC and religious approaches to child discipline.

The respondent father, Mr A, was brought up in Western Samoa but now lived in New Zealand where he was a leader in the local Samoan community and an elder in his church. He had six daughters and believed in setting a good example in terms of his family life and children's conduct. Based on his cultural upbringing and devout Christian beliefs, he believed in, and regularly practised, physical chastisement of the children. Scriptural passages from the Old and New Testaments were pleaded in support of his position.[34] Two specific instances[35] of the daughter's alleged misbehaviour led to the present proceedings. When A was sixteen, some money was found missing from the household. Mr A came into A's bedroom between 1 and 3 am and dragged her out of bed. Although she denied taking the money, her father did not believe her and she was punched and hit on her arms and legs. The second incident occurred when A was seventeen and employed. Mr A objected to his daughter's control (via her own bank account) of her earnings, insisting that she was not contributing enough, by way of board, to household expenses. He struck her with the back

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32 Ibid at 35.

33 [1997] NZFLR 72.

34 Namely, *Proverbs* 13:24 ('He who spares the rod hates his son, but he who loves him is careful to discipline.') and *Hebrews* 12:11: Ibid at 74.

35 The applicant testified that minor transgressions would result in the children being told off but more serious transgressions would incur a variety of violent chastisements (which she declined to dub mere 'smacking'). These included being hit on her arms and legs with a belt, a boot, a jandal, a mop handle, a vacuum-cleaner hose, and her father's fist, leading to bruises or broken skin. Similar discipline was applied to her five younger sisters: *Ausage* at 74.

of his hand in the mouth, causing bruising and cuts to her lips and a whip-lash injury to her neck.

To secure a protection order under the Domestic Violence Act, the applicant had to establish there had been domestic violence. However, the respondent father would be immune from suit if his disciplining was "reasonable" in terms of section 59 of the Crimes Act. His Honour was in no doubt that the degree of force used by the father was excessive on each occasion and constituted assault and physical abuse. Thus, the protection of section 59 was unavailing. Judge Somerville noted that the section did not indicate the age at which physical punishment of a child must cease. However, *Gillick*[36] was cited to support the view that, as children mature, parent control ought to relax accordingly. Whilst the CYPFA defined a "child" as one under the age of fourteen, that same legislation envisaged parental control of young persons under seventeen and some degree of discipline was therefore intrinsic to maintenance of control. A parent then, he concluded, retained powers of correction of a sixteen-year-old child but the application of force would be appropriate "on only the rarest of occasions."[37] The punching of A in the early hours of the morning was unwarranted on both counts: the reason was the shame Mr A was experiencing in front of his relatives (who were visiting) rather than a bona fide desire to "correct"; and, secondly, the degree of force used was manifestly excessive. The second incident, when the applicant was seventeen, was an equally clear-cut instance of physical abuse outside the protection of section 59. As I quoted earlier regarding cultural background as a factor, Judge Somerville rejected the argument that the parent's (or child's) religious beliefs were a relevant factor in deciding whether physical punishment was reasonable. The CRC mandated a uniform standard be adopted throughout New Zealand. Religiously-devout parents have no greater freedom to smack than any other parent. His Honour, in his concluding comments, could not resist a little gratuitous sermonising: "the respondent believes that his views are supported by religious teaching, although in this regard I would urge him to adopt the New Testament parental model rather than continuing to follow the Old Testament model."[38]

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36 Quoting a passage from Lord Fraser in *Gillick* [1986] AC 112 at 171.
37 *Ausage* at 81.
38 Ibid at 82.

3 *Impetus for abolition*

There is a groundswell of support from academics[39] and various child-oriented organisations such as the Office for the Commissioner for Children[40] and the Youth Law Project[41] for the abolition of the parental right of corporal punishment. This reflects international trends. Several European nations, led by Sweden in 1979, have abolished the parental right of physical chastisement of children.[42] The recent European Court of Human Rights judgment, *A* v *United Kingdom* (which held that brutal beatings administered by a stepfather on his nine-year-old stepson were "inhumane or degrading treatment" under article 3 of the European Convention on Human Rights) may give further impetus to the ban parental punishment movement in the United Kingdom.[43]

Abolition in New Zealand would, as Caldwell pointed out,[44] require more than simply repealing section 59 of the Crimes Act. Parents could, by virtue of section 20 of that same Act, claim immunity from suit under the common law defence. Thus, it seems, a specific statutory prohibition upon parental physical punishment would be needed. One reform path would be for the statutory immunity in section 59 to be repealed. The common law defence would remain during which—following the Scandinavian example—a major educational campaign would endeavour to change parental opinion. (This, as we shall see, is underway). Finally, subject to the success of such a campaign, a specific enactment outlawing parental punishment would be passed. The scope for prosecutions of recalcitrant parents would exist but could be mitigated by (to take Caldwell's proposal) by the consent of the Solicitor-General being a necessary precondition to criminal proceedings. Whether public

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39 See eg Caldwell, "Physical Punishment"; Urlich, "Physical Discipline in the Home" (1994) 7 Auck ULR 851; Robert Ludbrook, "Corporal Punishment: The Last Days of an Uncivilised Institution?" (1998) Youth L Rev 6. The leading proponents of the abolition of child physical punishment in New Zealand are Waikato University psychologists (and spouses), Professors James and Jane Ritchie. Amongst their many books are *Spare the Rod* (1980) and *Violence in New Zealand,* 2nd ed (1993).

40 See Gabrielle M Maxwell, "Physical Punishment in the Home in New Zealand", Office of the Commissioner for Children, Occasional Paper No 2, September 1993.

41 See eg Carol Parker, "Repeal of Section 59 Crimes Act" (1994) 3 Youth L Rev 15; Gilbert, "Section 59 Crimes Act and the UN Convention on the Rights of the Child . . . the Beat goes on" (1994) 4 Youth L Rev 15.

42 Others include Norway (1987), Finland (1984), Denmark (1986), Austria (1989) and Cyprus (1994). See Peter Newell, "Ending physical punishment of children" (1997) 5 Int J Children's Rights 129 at 133.

43 *A* v *United Kingdom (Human Rights: Punishment of Children)* [1998] 2 FLR 959. Noted by Gillian Douglas [1998] Fam Law 733 and Andrew Bainham (1999) 58 Camb LJ 291.

opinion will be swayed by an anti-smacking campaign remains an open question. "Anglo-Saxon culture", lamented Caldwell, "places far more emphasis on the infliction of pain on children as a means of behavioural control than do other European societies."[45] Moreover, Maori and Pacific Island parents are strongly in favour of corporal punishment.[46] Surveys consistently show a high level of public support for corporal punishment. A 1993 survey revealed that:

> New Zealanders still approved of corporal punishment in the home, with 87% of New Zealanders believing that "in certain circumstances it is all right for a parent to smack a child" . . . Although smacking with the hand is still both approved and used as a standard parental response to the misbehaviour of children of all ages, anything more severe is no longer part of the repertoire of most parents or the experience of most children.[47]

Severe smacking is in decline and alternative methods of discipline have increased their popularity. Nonetheless, support for sparingly-used, "moderate" smacking persists. Indeed, one poll in 1997 found 56 percent of the people polled wished that corporal punishment be reintroduced into schools for serious misbehaviour.[48] The "dark stain on New Zealand child rearing" [49] of smacking, as Professors James and Jane Ritchie put it, may prove hard to eradicate.

The Children, Young Persons and Their Families Service (CYPS)(renamed Child, Youth and Family Services in October 1999) has undertaken an extensive educational campaign in recent years. The Government amended the CYPFA in December 1994, imposing a new duty upon the Director-General of Social Welfare to "promote, by education and publicity . . . awareness of child abuse [and] the unacceptability of child abuse."[50] The "Breaking the Cycle" campaign, which began in May 1995, is one response. Stage 4 of this

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44 Caldwell, "Physical Punishment, " at 372.

45 Ibid at 387.

46 See James Ritchie, "The Social Context of Child Abuse in New Zealand" in Child Abuse: Report of the National Symposium held in Dunedin (1979) and other studies cited in Caldwell, ibid at 383, fn 84. The 1993 survey by Maxwell showed "a tendency for both Maori and Pacific Island families to endorse the use of hitting and thrashing more often than Pakeha, but the difference was not significant": Maxwell, "Physical Punishment in the Home", at 10-11.

47 Maxwell, ibid at 16.

48 "Spare the rod, spoil the child", *ODT*, 30 Dec 1997, at 1.

49 Their characterisation at the 1999 national Plunket Society conference: "Smacking a 'dark stain'", *ODT*, 26 March 1999, at 17.

50 Section 7 (2) (ba) of the CYPFA 1989: inserted by s 4 of the CYPF Amendment Act 1994.

"social marketing" strategy[51] was the "Alternatives to Smacking" campaign launched in September 1998. CYPS literature argues that smacking is outdated and ineffective. It is a form of violence imposed by larger people on smaller people which is undesirable; further, "it can lead to emotional and physical damage" which is most regrettable as there are effective alternatives to smacking.[52] CYPS is not trying to "demonise smackers,"[53] nor does it expressly assert that smacking per se is child abuse—although its language is, at times, equivocal.[54] Its main thesis is that physical punishment is morally wrong, ineffective and can all too readily degenerate into physical abuse[55]; better then to abolish hitting altogether. CYPS favours a change in the law and it invokes the CRC in support:

> Some people have called for smacking to be outlawed. That's of course a decision for politicians to make. However, a simple law change won't necessarily stop people smacking. What CYPS is concentrating on is showing people there are better alternatives and that smacking can be harmful. Although smacking isn't illegal, New Zealand is a signatory to the United Nations Convention on the Rights of the Child. This convention aims to protect children from *all* forms of physical and mental violence. CYPS's campaign is being conducted in this spirit.[56]

The CC reaction, or at least one section of it,[57] was as swift as it was predictable. A beleaguered Rev Graham Capill denounced the "Alternatives" initiative as "an attack on parenting." It was, he believed, a part of a "cunning Government ploy" to implement the CRC and to soften up the public for the eventual repeal of section 59 of the Crimes Act. That section already gave children adequate protection against violence, moreover, to remove

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51 See Susie Hall and Sue Stannard, "Social Marketing as a tool to stop child abuse", *Social Work Now*, no 8, Dec 1997, at 5. I am grateful to Sue Stannard for this article and CYPS materials on the campaign.

52 "Breaking the Cycle: Questions and Answers", Press Release, Sept 1998. See also "Breaking the Cycle: Rationale—Smacking Children: Attitudes and Alternatives," Press Release, Sept 1988; and "There are no superparents," CYPS booklet (undated).

53 "Questions and Answers," ibid.

54 The "No superparents" booklet, at 16, comments: "Physical abuse can also occur when discipline, like smacking, gets out of control. That's why non-violent ways of teaching your children how to behave are best." The "Attitudes and Alternatives" press release quotes with approval researchers who contend smacking children "is about hitting and humiliating them" and that "hitting children is a form of violence."

55 Judith Karp is quoted in "Attitudes and Alternatives" as having demonstrated that "what may begin as physical chastisement can frequently cross the ambiguous line between intended punishment and unintended abuse." Her research "shows that over half the reported incidents of abuse began as physical punishment."

56 "Questions and Answers" (original emphasis).

57 One correspondent to *Challenge Weekly* sought to dissociate himself from the Capill retort. The Rev Capill's view, he argued, was one not strongly held by most Christians: "better to minimise smacking

> is to dictate to parents how they should train their children, and the Government has no right to do that. In pursuing this agenda many cultural and religious sensitivities may well be offended . . . To . . . portray all physical discipline as violent disregards cultural and religious sensitivity.[58]

Capill urged Christians, meanwhile, to be alert and to fight every move to disempower them. One CC, Hamilton businessman Philip Holdway-Davis, who had attracted media criticism in 1997 for defending smacking,[59] promulgated his own alternative to the CYPS campaign. The outcome was "The Safe Smack Pyramid," a regime which featured smacking as the final option after a number of prior disciplinary alternatives had been tried.[60] Following his safe smack methodology would, asserted its author, minimise excessive physical discipline and reduce child abuse, something he believed the CYPS approach simply exacerbated.[61] Perhaps, in the battle for public opinion, CCs may yet find support from libertarian-minded members of the public who resent the type of "meddlesome busy-body" or "ink monitor" intrusiveness represented by CYPS's attempts at social engineering.[62]

The abolition debate continues. In December 1999, Roger McLay, the Commissioner for Children, called for an end to smacking or "belting" (as he called it). He believed it was time for New Zealand to emulate those European nations that had abolished the right of corporal punishment.[63] The Youth Affairs Minister in the newly-elected Labour/Alliance government, Laila Harre, personally supported a change in the law to this effect.[64] Again, Graham Capill, for the Christian Heritage Party, denounced the Commissioner for Children for endeavouring to conflate smacking with child abuse and for his attack on responsible

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in general in an attempt to make such violent cases totally unacceptable," wrote Warwick Jones, "Puzzled by article," *CW* (letter), 13 Oct 1998, at 3.

58 "An attack on parenting," *CW*, 29 Sept 1998, at 3. The method was electronically available on the World Wide Web.

59 Holdway-Davis had personally-funded and marketed a safe-smack video: see Mary Anne Gill, "To smack or not to smack," *Evening Post*, 18 Nov 1997, at 7. He was pilloried as a lunatic "bible-basher" and "fundamentalist" in one column: see Richard Boock, "Strapping the real sin?", *ODT*, 6 Nov 1997, at 9.

60 Philip Holdway-Davis, "The anti-smacking campaign," *CW*, 10 Nov 1998, at 10.

61 The international evidence, as he read it, did not report a decline in child abuse in those nations which had banned smacking: ibid.

62 See eg C H Rawle, "Get those ink monitors out of our lives," *ODT*, (letter), 31 Oct 1998.

63 "Smacking should be illegal: Commissioner", *ODT*, 15 Dec 1999, at 2.

64 Ibid. But note the Minister of Justice, Phil Goff, personally believed in smacking (*The Press*, 16 Dec 1999).

parents.[65]

II THE IMPACT OF THE CRC?

The area in which the CRC may have the most visible impact is in the abolition of corporal punishment debate. The current law has come under sustained attack. Some CCs quite rightly perceived the CRC as a formidable weapon against them in their battle to retain parental physical discipline.

The United Nations Committee on the Rights of the Child—the body established under article 43 of the CRC to monitor states' progress in implementing the Convention's obligations—has criticised the continued retention of the right of corporal punishment of children in New Zealand legislation.

New Zealand was required pursuant to article 44(1) to report within two years of ratification, and thereafter every five years. New Zealand's First Report to the Committee in October 1995,[66] prepared by the Ministry of Youth Affairs, made little mention of the subject.[67] The Report noted that corporal punishment in schools had been abolished and then briefly stated that parents retained the right of physical discipline where reasonable force was used for the purpose of correction, Unreasonable force applied to children was, the Report continued, a criminal offence and there existed "extensive measures"[68] in place for the protection of children from abuse and maltreatment. The Office of the Commissioner for Children's campaign to repeal section 59 was alluded to, as was the International Year of the Family promotion "Smack-Free Week".[69]

The Committee on the Rights of the Child has consistently maintained that corporal punishment is in violation of the Convention. In a statement issued on 15 September 1995 it observed:

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65 "Smacking is not abuse", Press Release, Christian Heritage Party, 14 Dec 1999.

66 Its Second Report is due to be published in May 2000: interview with author by Mereana Ruri, Ministry of Youth Affairs, December 1999.

67 Ministry of Youth Affairs, *United Nations Convention on the Rights of the Child: Initial Report of New Zealand* (1995).

68 Ibid at 43, para 188.

69 Ibid at para 189.

> The Committee is disturbed about the reports is has received on the physical and sexual abuse of children. In this connection, the Committee is worried about the national legal provisions dealing with reasonable chastisement within the family. The imprecise nature of the expression of reasonable chastisement as contained in these legal provisions may pave the way for it to be interpreted in a subjective and arbitrary manner. Thus, the Committee is concerned that legislative and other measures relating to the physical integrity of children do not appear to be compatible with the provisions and principles of the Convention.[70]

The primary article upon which this view is based is article 19(1):

> States Parties shall take all appropriate legislative, administrative, social and educative measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.[71]

Also relevant is article 24(3) which declares: "States Parties shall take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children."[72]

By contrast, the Minister of Youth Affairs, at least in 1994, considered the right of parental corporal punishment to be compatible with the aims and objectives of the Convention. The then Minister, Roger McLay, argued[73] that the application of force was justifiable in certain circumstances; moreover, parental responsibilities to provide "appropriate direction and guidance" to children were recognised by article 5 of the CRC. Secondly, the Minister drew a clear distinction between physical abuse, which article 19 is designed to address, and physical punishment. When physical discipline goes too far and becomes excessive, it becomes unreasonable force and parents lose their statutory protection. At this point (when the boundary is overstepped) article 19 becomes relevant. Thus, he argued, section 59 protected children from unreasonable discipline from their

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70 Quoted in Joan E Durrant and Gregg M Olsen. "Parenting and public policy: contextualizing the Swedish corporal punishment ban" (1997) 19 J Soc Welfare & Fam Law 443 at 457.

71 Emphasis added.

72 Emphasis added.

73 The Minister's arguments are contained in a letter responding to a query from the Youth Law Project. The letter is reproduced in Parker, "Repeal of Section 59 of the Crimes Act" (1994) 3 Youth L Rev 11 at 11. Roger McLay is currently the Commissioner for Children and he seems to have changed his view since 1994: see text accompanying footnote 63 above. For a helpful discussion of whether s 59 breaches the CRC, including the Minister's defence, see Richard P McLeod, "The United Nations Convention on the Rights of the Child: Implications for Domestic Law", LLM Research Paper, Victoria University of Wellington 1995, at 21 et seq.

parents. The Minister's denial of any intention to repeal section 59 in 1994 was important for another reason. It was made against the background of a move by the Office of the Commissioner for Children to have smacking defined as "violence" for the purposes of the Domestic Violence Bill.[74] The Domestic Violence Act 1995 when passed made no reference to the disciplining of children.

The then Minister's interpretation of abuse is directly at odds with the UN Committee's. For the latter, moderate or "reasonable" smacking is not a legitimate form of parental discipline but simply a species of physical violence and abuse. For the Committee all hitting of children is wrong and constitutes abuse in breach of a child's right to physical integrity. If the Committee is the authoritative interpreter of its own Convention then this raises awkward questions. Can a state place an interpretation on an article at odds with the Committee? Is the proper response in the wake of inconsistent interpretations for the state to insert a specific reservation to the Convention by way of exemption?[75] Reservations to the Convention are, naturally enough, frowned upon by the Committee. New Zealand would likely not wish to add a fourth reservation to its current list of three, a list which the Committee has requested New Zealand consider withdrawing.[76]

The Committee on the Rights of the Child, prior to New Zealand's presentation of its initial report in 1997 by the Ministry of Youth Affairs, conveyed 53 questions for written answer. One question concerned corporal punishment and asked: "Has the New Zealand Government considered repealing section 59 of the Crimes Act which allows parents to use reasonable force in disciplining children, as recommended by the Commissioner for Children?[77] The official response was unaltered:

> The Government does not have any plans to repeal section 59 of the Crimes Act 1961. The use of unreasonable force against a child is a criminal offence and extensive measures are in place for the

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74 McLeod, ibid.

75 McLeod, ibid, at 26, doubts this is a viable option in light of article 51(2) which provides: "A reservation incompatible with the object and purpose of the present Convention shall not be permitted". A reservation contrary to a Committee ruling would seem just such an impermissible instance.

76 See Ministry of Youth Affairs, *Convention on the Rights of the Child: Presentation of the Initial Report of the Government of New Zealand* (May 1997). The withdrawal of reservations was one of the 53 questions for written answer requested. The first suggestion of the Committee in its Concluding Observations (ibid at 30, para 21) was that New Zealand be encouraged to withdraw its reservations to the CRC.

77 *Presentation of Initial Report 1997*, ibid at 22.

protection of children from abuse and maltreatment.[78]

The response went on mention CYPS's "Breaking the Cycle" campaign by designed to stem abuse. Public opinion polls reflecting high levels of support of parental corporal punishment were also cited. The stance in 1997 simply echoed that in 1995. In August 1997, the then Minister of Justice, Douglas Graham, stated that he "want[ed] to make it very clear that the National Government has no intention of changing the law"[79] on smacking of children. The Minister noted some ten to fifteen letters per day that had been sent to his office and the 27,000 signature petition which was tabled in Parliament that month. (This petition was, as noted earlier, an effort instigated by CCs to stave off any change to the law following ratification of the CRC).

The New Zealand Government's written answer to the Committee's question on corporal punishment did not satisfy the Committee. In its concluding observations (following its 20-21 January 1997 meeting to consider the initial report), the Committee listed this issue in its "principal subjects of concern," a list containing a dozen or so misgivings.[80] As for future action, "the Committee recommends that the State party review legislation with regard to corporal punishment of children within the family in order to effectively ban all forms of physical or mental violence, injury or abuse."[81] Again, we see the equation of corporal punishment and abuse.

Judicial interpretation of corporal punishment in the CRC era has not (yet) followed the construction preferred by the Committee. Judge Somerville in *Ausage* refrained from "getting into the debate as to whether or not physical discipline applied under art 5 would amount to physical or mental violence under art 19."[82] He found it sufficient to hold that the degree of physical force permissible could not differ depending on the culture of the child or parent. Counsel do not appear to have quoted the Committee's damning observation on the retention of section 59 to the Court. While a ruling from the Committee is not binding on

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78 Ibid.

79 "Govt rules out ban on smacking", *ODT*, 17 Aug 1997, at 1.

80 *Presentation of Initial Report 1997*, at 29-30, paras 8-20. Concerns included, for example, the continuance of New Zealand's reservations, rises in the numbers of single-parent families, youth suicide and poor statistics for Maori children's well-being.

81 Ibid at 31, para 29.

82 *Ausage* v *Ausage* [1997] NZFLR at 79.

New Zealand courts, the warning of Sir Robin Cooke in *Tavita*—that New Zealand courts must not merely pay lip service to international conventions such as the CRC—still resonates.[83] The Court of Appeal in 1996 referred to "the presumption of statutory interpretation that so far as its wording allows legislation should be read in a way which is consistent with New Zealand's international obligations."[84] New Zealand courts may well in the future, I suggest, "read down" the scope of parental physical discipline in light of the UN Committee's disapproval of it and a clear New Zealand Government indication that accords with that view. While New Zealand courts cannot fail to apply section 59 on account of inconsistency with an international body's ruling, we may well find them interpreting cases of smacking in the "grey area" as breaches of section 59.

III CONCLUSION

CCs (usually identified as the principal opponents of change[85]) would seem to face a formidable array of abolitionists: Child, Youth and Family Services (formerly CYPS), the Ministry of Youth Affairs,[86] the Office of the Commissioner for Children, the Youth Law Project, the New Zealand branch of EPOCH (End Physical Punishment of Children), as well as the UN Committee on the Rights of the Child, and judges sensitive to criticism for ignoring international obligations. There is a growing "Wellington worldview" that favours abolition. While public opinion in New Zealand still supports corporal punishment of children, that too is not beyond change.

The CRC is likely to have a much more immediate and direct impact upon the

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83 See Chapter 6 for discussion.

84 *Rajan* v *Minister of Immigration* [1996] 3 NZLR 543 at 551. Affirmed by the Court of Appeal in *New Zealand Air Line Pilots' Association Inc* v *Attorney-General* [1997] 3 NZLR 269 at 289 and *Wellington District Legal Services Committee* v *Tangiora* [1998] 1 NZLR 129 at 137-139. See generally Law Commission, *A New Zealand Guide to International Law and its Sources*, NZLC Report 34 (May 1996) at paras 71-73 and Sir Kenneth Keith, "The Impact of International Law on New Zealand Law" (1998) 7 Waikato L Rev 1 at 23 et seq.

85 Peter Newell, UK co-founder and co-ordinator of EPOCH world-wide, complained that: "Religious justifications for using physical punishment are particularly rife at the moment. Religious fundamentalism, with roots in America, is catching on here . . . recently the new edition of James Dobson's, *Dare to Discipline* was published here." Newell, "Why we must stop hitting children" in Bainham and Pearl (eds), *Frontiers of Family Law*, 2nd ed (1995) ch 18 at 246.

parental right of corporal punishment than upon the right of religious upbringing. The Convention has been a catalyst for the simmering debate on retaining the right of physical punishment of children. The CRC is proving to be a formidable weapon in the armoury of those who seek abolition of "smacking".

In terms of my model of engagement in Chapter 4, we again see peaceful co-existence. Currently, the state does accommodate CC (and other) parents' desire to utilise corporal punishment as a form of child discipline. Parents are permitted to use moderate corporal punishment for the purpose of correction under section 59 of the Crimes Act 1961. Parents who exceed this are violating the law. The two illustrations in this chapter of CC parents who went too far are instances which, I suggest, CCs would equally condemn. As well as accommodation by the state, many CCs have, I suspect, modified their own practice of hitting children. Consonant with the "spirit of the times" my conjecture is that the frequency and severity of smacking is probably lower than what it was a generation ago.

The prospect of conflict between CCs and the state looms in the near future in the face of mounting forces for abolition. Perhaps CCs will be able to successfully join forces with libertarian or traditionalist defenders of parental rights to resist abolition. To do so, they will need to use "the translation strategy" (Chapter 4) and identify the "secular", "practical" benefits of smacking.

If the law should change and the parental right of corporal punishment is banned—perhaps a greater possibility under a Labour/Alliance Government—some, perhaps many, CCs might reluctantly resort to civil disobedience. It is, once more, a question of God's law being higher than human law. In good conscience, some CCs will feel compelled to ignore the latter on this issue. Such CCs have a religious conviction that traditionalist secular parents do not: it is a conscience matter for them, and an acute one given their high regard for the state. If smacking is banned, some CCs will stubbornly and publicly admit they continue to do so—they will invite a confrontation with the state in the way Eric Sides did. Overall, CCs are unlikely to win the corporal punishment debate unless they can garner support from a broader group of parental rights proponents.

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[86] The Ministry of Youth Affairs funded a speaking tour by Peter Newell in November and December 1999.

Chapter 9

HOMOSEXUAL PRACTICE: CHURCH AUTONOMY AND ORDINATION OF GAY CLERGY

Conservative Christians are adamant homosexual practice is sinful and are disturbed at the growing "normalisation" of the homosexual way of life. The liberal modernist state might view homosexuality as neutrally as heterosexuality but for CCs this is contrary to God's revealed order. This chapter begins by outlining the particular CC concerns and the history of their efforts to defeat legalisation of homosexual conduct. A paradigm instance of church autonomy, the right to select clergy, is then selected. Some CCs fear that their churches may no longer be free to deny ordination and appointment to openly-practising homosexual or lesbian candidates for the ministry. After briefly canvassing the case for church autonomy I examine the ongoing church debates. The application of the Human Rights Act 1993 to churches regarding this issue is explored. The Act played and continues to play a prominent role in this ecclesiastical controversy.

I THE CONSERVATIVE CHRISTIAN CONCERN WITH HOMOSEXUAL PRACTICE

1 Attitudes to homosexual practice and homosexual rights

Conservative Christians have a long history of opposition to homosexual rights and what they perceive to be a well-organised agenda to normalise what is, to CCs, a sinful lifestyle. Homosexual conduct is an issue which divides the CC from his or her liberal Christian counterpart. CCs are convinced that homosexual practice is never acceptable. Protestant CCs base their condemnation of homosexual acts on the various Old Testament and New Testament prohibitions.[1] Catholic CCs buttress the Scriptural proscriptions with

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[1] There are four main Biblical passages: (1) the story of Sodom and Gomorrah (*Genesis* 19); (2) the Levitical texts (*Leviticus* 18:22 and 20:13); (3) Paul's description of a decadent pagan society (*Romans* 1:18-32) and (4) Paul's catalogue of sinners (1 *Corinthians* 6:9-10 and 1 *Timothy* 1:8-11). For discussion see John Stott, *Issues Facing Christians Today,* 2nd ed (1990) ch 16 at 338-344.

appeals to tradition and natural law.[2] CCs typically draw a clear distinction between homosexual orientation or identity on the one hand, and homosexual physical acts or practice, on the other. It is only the latter which is condemned. As John Stott puts it: "We may not blame people for what they are, though we may for what they do."[3] The CC response to homosexuals is twofold: first, homosexuals are not to be rejected or despised but are to be shown understanding and compassion.[4] "Homosexuals (including lesbians, transsexuals etc) are loved by God and by Christians."[5] Second, homosexuals are expected to remain celibate and not give vent to their inclinations by practising their homosexuality. Homosexual liaisons or partnerships are not to be undertaken. God's grace and the spirit of self-control can be drawn upon to assist this sexual abstinence.[6] Transdenominational Christian organisations such as Exodus International (which has a New Zealand branch) have been established to provide ongoing prayer, counselling and support for those seeking to abstain from a homosexual lifestyle.[7]

Whilst the majority of CCs are now accepting of the decriminalisation of homosexuality, the aggressive drive by the gay "lobby" for acceptance and affirmation of the homosexual lifestyle as an equally valid alternative to heterosexuality is threatening for many.[8] The Human Relationships Foundation, yet another evangelical interdenominational organisation, cautioned in 1996:

> With homosexual acts decriminalised only a decade ago, we are now seeing a push by the gay lobby to see homosexuality not only by society but in fact as a lifestyle as valid as any other. The church itself is being asked not only to accept homosexual behaviour as normal but to consider ordaining practising homosexuals to the ministry.[9]

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2 See *Catechism of the Catholic Church* (1994) at para 2357.

3 Stott, *Issues Facing Christians*, at 338. He adds: "in every discussion about homosexuality we must be rigorous in differentiating between this 'being' and 'doing', that is, between a person's identity and activity, sexual preference and sexual practice, constitution and conduct." (ibid).

4 See eg Stott, ibid, at 355-361; *Catechism* at para 2358.

5 Julian Batchelor, "Let's talk straight", *Challenge Weekly* (*"CW"*), 16 Feb 1999, at 2.

6 Stott, *Issues Facing Christians*, at 355; *Catechism*, at para 2359.

7 The Exodus ministry in New Zealand is situated at the Hillside Community Church premises in St John's, Auckland. See "Exodus Ministries" in Julie Belding and Bruce Nicholls, *A Reason For Hope: Christian Perspectives on Homosexuality and Healing* (1996) at 143.

8 See eg Bill Muehlenberg, "Homosexuality and Human Rights" in Belding and Nicholls (eds), *A Reason For Hope*, at 52 and John Jamieson, "The Role of the Church in a Modern Society" in Patrick (ed), *The Vision New Zealand Congress 1997* (1997) 226 at 229: "Homosexuality is being constantly promoted. New moves are always being worked out to promote homosexuality as a viable alternative lifestyle."

9 "Preface", in *A Reason For Hope* (emphasis added). This is a publication by the Foundation, a body

Certain CC commentators see homosexual activists at the vanguard of a "cultural, moral and political revolution"[10] to overturn traditional Christian norms. Again, the family is the most vulnerable element in society, with greater promotion and acceptance of homosexuality necessarily, in their view, undermining traditional heterosexual-based family life. There is, in some CC's minds "plenty of evidence of a homosexual/lesbian conspiracy which aggressively and purposefully seeks to undermine and destroy the husband-and-wife, family-centred institution of marriage . . ."[11] More of the undesirable spells less of the desirable: "A legitimate reason for public concern is the harm done to the social order when policies are advanced that would increase the incidence of the gay lifestyle and undermine the normative character of marriage and family life."[12] Many CCs fear for the future of the traditional monogamous nuclear family should the gay lobby succeed in its "agenda [which] includes legalising same-sex marriages, lowering the legal age for sodomy, legalising adoption of children by lesbian and homosexual couples, 'normalising' the teaching of homosexuality in primary, intermediate and high schools, and redefining family."[13] The impact of the gay lobby is felt most acutely in the attempts by homosexual activists, assisted by liberal Christians, to achieve the ordination of practising homosexuals and acceptance of such persons for seminary training.[14] In some denominations efforts to achieve this have, as we shall see, led to much acrimonious debate and threats of complete schism.[15]

In the 1990s the Auckland "Hero Parade" has been an annual locus of resentment, prompting public denunciation by CCs alarmed at this blatant affront to "common

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formed in 1995 "to affirm and promote Christian values as foundational to a healthy society and to personal well-being".

10 "The Homosexual Movement", a response by the Ramsey Colloquium (a group comprising US conservative Christian and Jewish scholars): reproduced in Belding and Nicholls (eds) *A Reason for Hope*, ibid, 1 at 2.

11 Ludwig Feiderhof on behalf of the Public Questions Committee of St Stephen's Methodist Church, Tauranga: "Hero parade contrary to common decency," *CW*, 12 March 1997, at 1.

12 Ibid at 6. See also Muehlenberg, "Homosexuality."

13 Batchelor, "Let's talk straight".

14 See Ramsey Colloquium, "The Homosexual Movement", at 3: "It is a testimony to the enduring role of religion in western life that many within the gay and lesbian movement seek the blessing of religious institutions. The movement correctly perceives that attaining such formal approbation—through, for example, the content and style of seminary education and the ordination of practising homosexuals—will give it an effective hold upon the primary institutions of moral legitimation in our popular culture."

15 See eg "Church faces split over gay minister", *Otago Daily Times ("ODT")*, 20 Nov 1997, at 2; "NZ Methodism in crisis", *CW*, 27 Jan 1998, at 1 (30 evangelical leaders threatening to break away over the David Bromell ordination)

decency."[16] Such castigation is typically portrayed in the secular media as bigotry and "homophobia."[17] In February 1999, a visiting American CC, Mike Gabbard, Director of "Stop Promoting Homosexuality International" mobilised a New Zealand group to carry on the world-wide counter movement.[18] This led to the "Real heroes" advertisement and the involvement of the Human Rights Commission (see Chapter 5). Attendance at the 1998 and 1999 parades by the Prime Minister, Jenny Shipley[19], and several MPs[20] must have been a bitter blow to CC attempts to capture the high ground.

2 *The decriminalisation debate: the Homosexual Law Reform Act 1986*

The issue of homosexual law reform in New Zealand has, like other nations, been a controversial one. Efforts to decriminalise private homosexual acts between consenting adult males have a long pedigree. One attempt in the mid 1970s came to naught.[21] A decade later the climate, at least amongst MPs, had changed.

The Homosexual Law Reform Bill 1985 was introduced by a Labour MP, Fran Wilde. It proved to be a watershed for New Zealand CCs. The Bill became a rallying point and symbolised the drift into a permissive society and away from, as CCs perceived it, New Zealand's precious Christian moorings. Two CC mayors, Sir Peter Tait and Keith Hay began a nation-wide petition to oppose the Bill.[22] The Salvation Army offered staff to

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16 See eg "'Stand for truth, decency,'" *CW*, 18 May 1994, at 1 (Auckland Mayor, Les Mills, and deputy mayor, David Hay, exhorting Christians to oppose gay agenda); Arlene Goss, "Battle for decency," *CW*, 20 April 1994, at 1 (confrontation between CCs and gay proponents at Auckland Town Hall concerning the 1994 Hero Parade); "'Hero Parade contrary to common decency," *CW*, 12 March 1997, at 3.

17 See eg R Boock, "Council lands blow for bigotry", *ODT*, 20 Nov 1997 (criticism of Auckland City Council decision to refuse funding of the clean-up after the Hero Parade).

18 See Julie Belding, "'Stop Promotion of Homosexuality'", *CW*, 16 Feb 1999, at 1 and 3.

19 The Prime Minister defended her attendance to *Challenge Weekly*: the Hero Parade was "not an exhibition of depravity but rather a celebration of the diversity" in modern New Zealand. Such recognition and inclusion was important to ensure people did not feel so excluded as to turn to suicide, suffer mental breakdown and so on: "Church is Crucial", *CW*, 24 Aug 1999, 1 at 5.

20 See Philippa Keane, "Mayor floats into parade," *Sunday Star-Times*, 22 Feb 1998, at A2. A complaint was laid with the Human Rights Commission against Mayor Mills and other conservative city councillors for their refusal to fund a $15,000 clean-up and crowd-control bill for the Parade.

21 This was the Crimes Amendment Bill, introduced by National MP, Venn Young on 23 July 1974. The Bill was defeated, on a conscience vote, by 34 votes to 29: (1975) 399 NZPD 2829. For a full discussion see David Arrowsmith, "Christian Attitudes Towards Public Questions in New Zealand," MA thesis, University of Auckland, 1978, ch 2 ("The Debate on Homosexual Law Reform").

22 The foregoing account is drawn from John Adsett Evans, "The New Christian Right in New Zealand" in Gilling (ed), *'Be Ye Separate': Fundamentalism and the New Zealand Experience* (1992) at 85-86; Brett Knowles, "Some Aspects of the History of the New Life Churches of New Zealand 1960-1990", Ph D thesis, University of Otago, 1994, at 300-308 and Bruce Ansley, "The growing might of the moral right," *NZ Listener*, 26 Oct 1985, at 16-18. See also the full coverage of the presentation of the petition

assist the collection of signatures. Not all Christians approved. The conservative /liberal split is well-illustrated here by the forming of liberal Christian coalition, Christian Action, to oppose the petition.[23] Some 835,000 signatures were collected, the largest in New Zealand's history (although there were recurring allegations of fraudulent and multiple signatures). The petition however proved unsuccessful. The Parliamentary Select Committee which heard submissions on the Bill found division within the Church a significant factor.[24] Homosexual intercourse between consenting males was decriminalised when the Homosexual Law Reform Act 1986 came into force, although the second limb of the reform package—the prevention of discrimination on the basis of sexual orientation—was not passed.

The opponents of the 1985 Bill took advantage of the momentum created to form the Coalition of Concerned Citizens. As Evans observes: "Homosexuality became the trigger for a permanent and broader based political force."[25] Likewise, Knowles agrees that "the rejection of the Petition was perhaps the major factor which lead to the involvement of conservative Christians in the political arena."[26] Pastor Barry Reed, a founder of the Coalition, explained: "God has allowed the Homosexual Law Reform Bill and the petition opposing it to be the catalyst around which people who believe in a normal life can gather."[27] The Coalition stood for "God, Family and Country"[28] (its motto) and while its active life was to be brief, its influence was to be lasting. CCs who had long been quietist and spurned political involvement were now galvanised into participation in the political realm. During the upheaval of the Springbok rugby tour in 1981, "conservative Christians

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in *Challenge Weekly*. A large crowd of placard carrying and banner waving petition supporters ("expertly choreographed" as Ansley out it) presented boxes of signed petitions from each electoral district: see John Massam, "Petitioners present 815,00 signatures," *CW*, 4 Oct 1985, at 3.

23 See "Hostile attack on 'fundamentalists' by pro-bill Christians", *CW*, 25 Oct 1985, at 16. Massam, ibid notes that supporters of the bill—including a group of men holding a placard, 'Christians for the Bill'—were kept separate from the petitioners by police.

24 "Submissions show divided Church", *CW*, 25 Oct 1985, at 16.

25 Evans, "New Christian Right", at 86. Ansley, "Growing might", at 16, quotes Barry Reed, the Coalition's press officer, who observed "Homosexuals came along at the very wrong psychological moment." For a critique of the CCC, see Allanah Ryan, "'For God, Country and Family': Populist Moralism and the New Zealand Moral Right" (1986) 1 NZ Sociology 104.

26 Knowles, "History of New Life Churches," at 308.

27 "Moral coalition to help halt decay", *CW*, 6 Sept 1985, at 1.

28 See *Coalition Courier*, vol 2 no 1, Dec 1986: reproduced as a supplement in *CW*, 19 Dec 1986.

remained calm, pious and quick to lambaste"[29] the activist stance taken by (mainly) liberal Christians. By the late 1980s, the mood and attitude to political involvement by most CCs had irrevocably changed. Christians of a liberal persuasion took umbrage and inveighed against the Coalition,[30] a move which simply stiffened the latter's resolve.[31]

The homosexual law reform debate functioned in much the same way as the United States Supreme Court's abortion decision, *Roe* v *Wade*[32] did in provoking American CCs into action. The Coalition of Concerned Citizens withered but the seeds of CC political activism were to bear fruit in the form of the Christian Heritage Party (launched in 1989) and the Christian Democrats Party (formed in 1995).[33]

3 *Opposition toward anti-discrimination extension: the Human Rights Act 1993*

The CC challenge to homosexual law reform in the mid 1980s had not been a completely futile exercise. Part II of the original Homosexual Law Reform Bill 1985 (which would have amended the Human Rights Commission Act 1977 so as to include "sexual orientation" as a prohibited ground of discrimination) was dropped during the Committee stage of Parliament's deliberations. Many MPs indicated that, while they were in favour of decriminalising homosexual behaviour between consenting adults, they were opposed to "legislat[ing] for public attitudes"[34] by banning discrimination on the basis of sexual orientation. Mrs Whetu Tirikatene-Sullivan, a CC MP, articulated the concerns of CCs in forceful terms:

> I see the Bill as a radical measure. It has two revolutionary purposes. The first is to establish for the first time in New Zealand that homosexual lifestyle is a legitimate option. The Bill is aimed at attesting, affirming, and enshrining that legitimacy in the laws of the country. Its second radical purpose is to attempt to redefine traditional normalcy as we have known it in our society. Its

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29 Evans, "New Christian Right" at 84.

30 See eg Presbyterian Church Joint Public Questions Committee paper, "Theology and Politics: the 'Moral Right' and the 1987 General Election".

31 See the responses by the Coalition apologists, the Rev Richard Flinn and Dr John McEwan in *Coalition Report*, 17 April 1987 (supplement to *CW*)

32 410 US 113 (1973). "For many religious conservatives, *Roe* was like a cold shower.": Stephen Carter, *The Culture of Disbelief* (1993) at 58.

33 See generally Jonathan Boston, "Christian Political Parties and MMP" in Ahdar and Stenhouse (eds), *God and Government: The New Zealand Experience* (2000) ch 6.

34 George Gair (1985) 466 NZPD 7271. See also Frank O'Flynn (Minister of State) (1985) 466 NZPD 7608; Denis Marshall (1985) 467 NZPD 7803.

> proponents are using the Bill and the debate to argue that homosexuality is a normal expression of human sexuality. The Bill seeks to make a socio-political statement that characterises the relatively recent gay liberation revolution.[35]

In 1992 another attempt began to include homosexual discrimination in the list of prohibited forms of discrimination. This was to prove successful. The Minister of Justice, Douglas Graham, introduced the Human Rights Bill in December 1992. The Bill was to consolidate existing human rights legislation, restructure the Human Rights Commission and extend the grounds of unlawful discrimination. Of the five new grounds added,[36] sexual orientation was absent. It took a belated effort by Katherine O'Regan, the Associate Minister of Health, to rectify what the then Leader of the Opposition, Helen Clarke, dubbed "a major omission."[37] Two new grounds of unlawful discrimination were included: the presence in the body of organisms capable of causing illness (addressing the HIV/AIDS issue), and "sexual orientation"—namely, "heterosexual, homosexual or bisexual orientation".[38] To the concerned readers of *Challenge Weekly*, Mrs O'Regan recounted she came from a church-going family and was a member of St John's Anglican Church in Te Awamutu. The main lesson she had imbibed over the years was that tolerance was a part of Christian love. She could not see discrimination against anyone being right: "It's about humanity" she explained.[39]

(a) The CC response

For many CCs it was a case of déja-vu. "Ghost of '85 in new bill" ran the headline in *Challenge Weekly* as leading CC campaigners pledged to take up the battle again.[40] A weary Pastor Barry Reed, exclaimed: "It seems most foolish and irresponsible to drag it [banning homosexual discrimination] up again. How many times do we have to do this?"[41] In January 1993, the Coalition, in conjunction with the Christian Heritage Party, launched a nationwide

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35 (1985) 466 NZPD 7274. See also Geoff Braybrooke (1985) 466 NZPD 7258.

36 These were: disability, employment status, family status, political opinion and age. See Doug Graham (1992) 532 NZPD 13202.

37 (1992) 532 NZPD 13204.

38 (1992) 532 NZPD 1308.

39 See Snowden, "Shared concern for justice, health," *CW*, 20 May 1993, at 4. See also O'Regan's speech in the Second Reading of the Bill (1993) 537 NZPD 16932: "Human rights is about assisting those who are in the minority—those who are also disadvantaged. Human rights demands of us tolerance . . ."

40 *CW*, 29 Oct 1992, at 1.

41 Ibid.

petition to stop the two new grounds of non-discrimination being passed. Petition organisers were not convinced by assurances from Mrs O'Regan that, for instance, churches would not be required to employ homosexuals.[42]

What was the thrust of CCs' concerns here? CCs were anxious about the proposed amendment's ramifications for (i) themselves and (ii) wider society.

First, some CCs foresaw a constriction in their religious freedom. Given their strong convictions about the sinful nature of homosexual behaviour, churches that, say, condemned sodomy might be liable now to be prosecuted, argued the St Peter's Presbyterian Church, Tauranga, in their submission.[43] Churches would be forced to ordain practising homosexuals and Christian schools be required to hire gay teachers.[44] New Image Ministries submitted that its work—counselling homosexuals with a view to encourage them to leave the homosexual lifestyle—would be hindered. Moreover, it perceived an inherent bias in the legislation against those with conservative religious convictions: "religious folk will be inherently disadvantaged, and . . . the Human Rights Commission (unless its views have radically changed) will, on a clash of religious 'rights' and homosexual 'rights' usually judge in favour of the latter."[45] Whetu Tirikatene-Sullivan MP endorsed this view in her speech on the Bill, illustrating her point with an American example:

> Research has pointed out that there is a clash between religious rights and homosexual rights. When that clash has occurred the religious rights have lost. I give an example of the Catholic university in Georgetown, which was approached by gay groups that wanted to hold meetings on campus and to establish networks. The university authorities declined as it went against the university's constitution as a Catholic university. However, under the human rights legislation the university was forced to go against its own constitution. So that is a very good example of religious rights missing out.[46]

Second, certain CCs foresaw disturbing consequential changes to important social institutions if the anti-discrimination proposal was passed. Rob Munro MP articulated a

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42 "Petition but to stop law change," *CW*, 21 Jan 1993, at 1.

43 Parish of St Peter's Presbyterian Church, Tauranga, Select Committee Submission 133W.

44 See eg, Pahiatua Christian Fellowship, Submission 122; Thames Baptist Church, Submission 135W.

45 Their submission to the Select Committee was summarised in the earlier article, "Rights bill infringes Christians' rights," *CW*, 13 Dec 1990, at 5. The same point was made by the Pahiatua Christian Fellowship, ibid.

three-stage process in his speech:

> [H]aving taken the *first step* in 1985-86 [decriminalisation], and having failed to take the *second step* at that stage [anti-discrimination on the grounds of sexual orientation] . . . we should ask what the *third step* will be. If one takes the matter step by step, it is hard to argue that the next step will not be legal recognition of homosexual and lesbian couples and of their rights to adopt children.[47]

Michael Cullen aptly dubbed this phenomenon a "kind of domino theory",[48] a characteristic belief of CCs I alluded to in Chapter 2. John Banks wondered "which moral principle [would] be next to fall victim to the permissive society?"[49] Grant Thomas was similarly exasperated: "Where will all this end? Do we allow moral standards and direction to continue to slide, or do we take a corrective stand and promote the decent society based on Judeo-Christian principles that this nation was founded on?"[50] A litany of adverse consequences downstream were predicted. Thomas believed:

> Lifting all discrimination could make homosexual marriages and the adoption of children into such unions a basis of normal family behaviour. In no way do I support an obligation on churches or registry offices to marry homosexuals. The fact is a church minister or registrar could be prosecuted if he or she were to refuse to perform such a marriage.[51]

Graeme Lee added what he saw as the disturbing prospect of employment quotas for homosexuals and the introduction of gay vilification laws.[52]

The CC MPs challenged the premise that gays were an oppressed, disadvantaged minority.[53] Quite the opposite: "the push for the changes [was] coming from a small, active,

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46 (1992) 532 NZPD 13217. See also her Second Reading speech: (1993) 537 NZPD 16927. The case alluded to is *Gay Rights Coalition* v *Georgetown University*, 536 A 2d 1 (DC 1987)(DC Court of Appeal).

47 (1993) 537 NZPD 16935 (emphasis added). The notion of an incremental extension of homosexual rights is not uncommon in literature by gay commentators: see eg Robert Wintemute, "Sexual Orientation Discrimination" in McCrudden and Chamber (eds), *Individual Rights and the Law in Britain* (1994) ch 15 at 530.

48 (1993) 537 NZPD 16939. Cullen noted the dominoes could go the other way: permitting continued legal discrimination against gays could lead to active persecution of homosexuals.

49 (1993) 537 NZPD 16917. He added: "Twenty years ago, homosexual practices were considered completely abhorrent. Now they are regarded by some as not only acceptable but also fashionable. The thinking of some people has become so warped that it defies common sense."

50 (1993) 537 NZPD 16931.

51 Ibid.

52 See (1992) 532 NZPD 13212 and (1993) 537 NZPD 16968 respectively.

53 For American judicial support see Justice Scalia's dissent in *Romer* v *Evans*, 134 L Ed 2d 855 at 874-875 (1996). Prior to the 1999 general election some commentators argued the "gay vote" was one political parties were keen to secure: see eg Mark Thiele, "Major parties branch out to swing big gay vote", *Sunday Star-Times*, 7 Nov 1999, at C2 and Ruth Langesen, "Labour and Nats chase pink votes", ibid, at A5.

well-organised, and very well-funded group in the community."[54] For Ian Peters it was "an insult to talk in terms of minority groups such as Maori or Samoan, old people, blind people, and those with infirmities, and to lump them in with homosexuals."[55] The "homosexual lobby", a group both "powerful and sinister" had shrewdly cornered the market on rhetoric, noted John Banks: "the lobby's rhetoric subverts language by monopolising all those good words such as 'justice', 'inclusive' and 'tolerance', and attributes the disparaging opposites such as 'unjust', 'exclusive', 'intolerant', and 'prejudiced' to those people who sincerely think differently."[56] Many CCs were annoyed that liberal churches had fostered this marginalisation by their positive public endorsement of the Bill. For example, the submission of the Joint Methodist-Presbyterian Public Questions Committee supported the amendment, castigating those whose "homophobia" was presented as the Christian view.[57] The editor of *Challenge Weekly* "felt sick as [liberal] church after church" supported the Bill; he exhorted Christians to stand firm.[58]

(b) Parliament's approval

Michael Cullen MP observed there had been "a sea change in opinion"[59] in Parliament since Part II of the Homosexual Law Reform Bill (containing the anti-discrimination clauses) had been voted down in the mid 1980s. The dire consequences for New Zealand society that CCs had predicted would ensue should homosexuality be decriminalised had simply not occurred.[60] The majority of MPs refused to be swayed by such predictions. Before them was a plain mischief of unjustifiable discrimination which the law ought to rectify. "Can one argue," asked Michael Cullen rhetorically, "that if a person is engaged as a gardener or as a shorthand typist it is legitimate to refuse that person that job on the grounds that his or her

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54 Rob Munro (1993) 537 NZPD 16935. See also Lee, ibid at 16928 and Tirikatene-Sullivan (1992) 532 NZPD 13216.

55 (1993) 537 NZPD 16925-16926.

56 (1993) 537 NZPD 16916-16917. See Scalia J in *Romer* v *Evans* 134 L Ed 2d at 878.

57 See "The Bill: Catholics want less, Meth's-Presb's want more," *CW*, 20 May 1993, at 4.

58 John Massam, "Standing firm" (editorial), *CW*, 5 Aug 1993, at 2.

59 (1993) 537 NZPD 16973.

60 Michael Cullen mocked: "Some members forecast that gloom and doom would descend and New Zealand would make what happened in Sodom and Gomorrah look like some sort of picnic . . . The fact is that nothing much has happened since that time and the great majority of us have carried on with our heterosexual ways despite the legality of alternative forms of sexual expression." Ibid. See similarly Jim Anderton (1992) 532 NZPD 13217 and Helen Clarke, ibid at 13206-13207.

sexual orientation is homosexual or bisexual?"[61] To the majority of members the answer was "no". The "overwhelming weight of submissions," 497 out of 640 noted Lianne Dalziel, supported the change, as did "the mainstream churches."[62] It was only "a few hysterical individuals who would give themselves the right to impose their own personal prejudices on the rest of society."[63]

The tide had well and truly turned. Two attempts by CC MPs to preserve the religious rights of sincere CCs were unavailing. Geoff Braybrooke had been approached by the Brethren and Pentecostal Churches to secure an exemption for sincere religious employers whose convictions obliged them not to employ homosexuals.[64] Shades here of the *Eric Sides* amendment in 1981(see Chapter 5). Braybrooke's amendment would have permitted an employer, holding a "sincerely held belief", to have applied to the Complaints Review Tribunal for an exemption from the anti-discrimination proscription under the Act. Some members supported the "common-sense amendment".[65] Richard Prebble rationalised it this way: "[Granting such an exemption] would not make a huge difference to the general law but it would prevent a small group of determined people who—with the greatest respect to them, are zealots—from becoming martyrs."[66] It would not "help the cause of liberalism in New Zealand"[67] to make people martyrs. Liberals are tolerant. Nevertheless, the House, on a conscience vote, rejected the amendment.[68] Graeme Lee took up the concerns of conservative churches by floating another amendment. He moved that there be added an explicit exemption from the employment discrimination ban allowing churches to discriminate in employment on the basis of sexual orientation.[69] This too was defeated.[70]

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61 (1992) 532 NZPD 13215. His Second Reading speech was more caustic: "If people insist on going on endlessly about sodomy, they must explain why somebody—heterosexual or homosexual—who commits sodomy is hereby unsuited to be a bus driver. I can assure [Rob Munro] that, by and large, it is difficult to commit the act of sodomy while driving a school bus." (1993) 537 NZPD 16939.

62 (1993) 537 NZPD 16910.

63 Dalziel, ibid. See also John Robertson, ibid at 16921, who referred scathingly to "those who choose to deny basic human rights to minority groups in society", a group holding "deep prejudices that would be a waste of time [to debate with] for they tend not to reason nor to listen."

64 (1993) 537 NZPD 16934. These too, observed Braybrooke, were a minority. It was wrong "to make people go to jail for strongly held religious beliefs." Such groups as the Brethren and Pentecostals were "not bigots [nor were they] prejudiced but they ha[d] sincere beliefs that we should respect."

65 Michael Laws (1993) 537 NZPD 16975.

66 (1993) 537 NZPD 16942.

67 Ibid.

68 By 40 votes to 21: (1993) 537 NZPD 16957-16958.

69 By 45 votes to 20: (1993) 537 NZPD 16969.

II CHURCH AUTONOMY AND ORDINATION OF HOMOSEXUAL CLERGY

This part examines the concern voiced by conservative Christians that the Human Rights Act 1993 may force them to ordain openly-practising homosexual or lesbian candidates for the ministry. First, the case for church autonomy is outlined. Why should religious organisations be exempt from anti-discrimination law? What is special about religious organisations compared to other groups? Second, the debate within several mainline New Zealand churches is analysed. Particularly interesting is the role the Act played (and still plays) in the debate between proponents of the ordination of practising homosexuals and CCs. Finally, the Act is analysed to see precisely what the scope of church autonomy in this controversial area is.

1 Justifications for church autonomy

The reasons why the law defers to churches' regulation of their own internal affairs are seldom articulated. Deference is usually taken to be self-evidently desirable. Three arguments from liberal political theory can be identified as well as several more pragmatic and legal justifications.

(a) Political theory

First, religion can be pro-democratic where it checks the totalitarian tendencies of the large modern state. We encountered this idea earlier (Chapter 6) where families were posited as prime examples of "mediating structures" between individual and state. In *The Culture of Disbelief*, Stephen Carter argued religions, at their best, can serve a valuable role as "independent mediating institutions"[71] operating as a "bulwark against government tyranny."[72] Carter explained:

> Religions are in effect independent centers of power, with bona fide claims on the allegiance of their members, claims that exist alongside, are not identical to, and will sometimes trump the claims of obedience that the state makes. A religion speaks to its members in a voice different from that of the state, and when the voice moves

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70 (1993) 537 NZPD 16956-16957.
71 Stephen L Carter, *The Culture of Disbelief* (1993) at 37.
72 Ibid at 36.

> the faithful to action, a religion may act as a counterweight to the authority of the state.[73]

As Carter colourfully puts it, "Democracy needs its nose–thumbers"[74] and religions can—due to their allegiance to something other than, and higher than, the state—operate to resist tyranny.[75]

Not all religious communities are of the "nose-thumbing" kind however. The conception of religion espoused by Carter is very much that of the dissenting church. There are faint echoes of Luther's remonstrance, *"Ich kan nicht anderst, hie stehe ich."*("I cannot do otherwise, here I stand") here.[76] Some religious communities, however, may be thoroughly acculturated and see the state's policies as consistent with and furthering their religious objectives. Finally, some religious groups may have such an extreme separationist attitude that they completely eschew participation in this-worldly, public affairs. They make no pretence of acting as a bulwark against tyranny.[77]

Second, man is a social being. Groups provide a context for personal growth, expression and fulfilment. "An individual's definition and sense of self depends to a significant extent on the character of the recognition granted by others."[78] Groups formed on the basis of spiritual beliefs are no exception. A religious community, par excellence, affords its members the opportunity to interact, to find a sense of identity and meaning.[79]

Third, religious groups, among other types of association, may be a well-spring for new ideas, arguments and methods of reasoning outside the prevailing concepts and ways of

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73 Ibid at 35.

74 Ibid.

75 "Religion," as McConnell suggests, "makes us aware that the civil order is but part of the timeless moral order ordained by the universal sovereign, and not the mere choice of passing majorities." Michael W McConnell, "Establishment and Toleration in Edmund Burke's 'Constitution of Freedom'" (1995) Sup Ct Rev 393 at 423. See also Peter L Berger, "Afterword" in Hunter and Guinness (eds), *Articles of Faith, Articles of Peace* (1990) ch 7 at 117: "[T]he most important secular purpose any church can serve is to remind people that there is a meaning to human existence that transcends all worldly agendas, that all human institutions (including the nation-state) are only relatively important and are not to be taken too seriously, and that all worldly authority . . . is disclosed to be comically irrelevant in the perspective of transcendence."

76 Quoted in Scott C Idleman "The Sacred, the Profane, and the Instrumental: Valuing Religion in the Culture of Disbelief" (1994) 142 U Pa L Rev 1313 at 1334.

77 See Idleman, ibid at 1348–1349.

78 Frederick Mark Gedicks, "Toward a Constitutional Jurisprudence of Religious Group Rights" [1989] Wisc L Rev 99 at 116.

79 Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy" (1996) 54 U Toronto Fac L Rev 1 at 53-54.

thinking of liberal democracy.[80] Fred Gedicks explains:

> In liberal society, the government has no competence to determine moral ends. In theory, at least, the goals of liberal democratic government must depend on the values held by those it governs—values that originated outside of government in churches, families, political parties, trade unions, private schools, and other voluntary associations. In the absence of these groups, government and society would be deprived of the enriching world-views that these groups contribute to . . . culture and politics.[81]

Some theorists also believe there is a crucial link between religion and the fostering of important civic virtues, such as law-abidingness, honesty, thrift and self–restraint.[82] To speak of the virtue-enhancing propensities of religion generally is sweeping. There are religions and religions: "To ask about religion's value-inculcating role at the close of the twentieth century one must speak not only of high-church Presbyterians, but of snake-handling fundamentalist Christians, Shiite Moslems, and Santerians, to mention only a handful of examples."[83] Moreover, while religion may prescribe valuable moral norms and civic virtues, other institutions may also fulfil this function.[84]

(b) Judicial unease regarding determination of ecclesiastical or theological matters

The incompetence of any human authority to correctly evaluate true from false religion has been described as a "common Protestant conviction": "no mortal man and no human institution can be regarded as infallible."[85] John Locke in his *Letter Concerning Toleration* argued:

> For every church is orthodox to itself; to others erroneous or

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80 Ibid at 52–53.

81 Gedicks, "Religious Group Rights," at 116.

82 John Locke insisted religious belief was needed to foster moral values such as law abidingness and self–restraint: see Sanford Kessler, "John Locke's Legacy of Religious Freedom" (1984–85) 17 Polity 484 at 495 (citing Locke's, *The Reasonableness of Christianity*). A recent comprehensive exposition of the civic virtue rationale for religious freedom is that by Hall who draws upon "the insights of civic republicanism." Hall's theory "grants to religion a central place in the genesis of those individual virtues necessary for the health of American political life, and would protect religious exercise from government encroachment in order to safeguard religion's generative function." Timothy L Hall, "Religion and Civic Virtue: A Justification of Free Exercise" (1992) 67 Tulane L Rev 87 at 133.

83 Hall, "Religion and Civic Virtue," at 45. Steven D Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (1995) at 102 comments: "Are the fruits of religion sweet or bitter? Upon reflection it should be plain, I think, that these questions not susceptible of any general or uniform response. The only plausible answer, rather, is 'It depends . . .'"

84 Schools, universities, families, service clubs, debating societies and sporting organisations are other mediating institutions which contribute to the virtues thought vital to a liberal democracy. See Hall, "Religion and Civic Virtue," at 112–113; Smith, ibid, at 103; John H Garvey, "Free Exercise and the Values of Religious Liberty" (1986) 18 Conn L Rev 779 at 788.

85 Winthrop S Hudson, "The Theological Basis for Religious Freedom" (1961) 3 JCS 130 at 133.

> heretical . . . So that the controversy between these churches about the truth of their doctrines, and the purity of their worship, is on both sides equal; nor is there any judge, either at Constantinople, or elsewhere upon the earth, by whose sentence it can be determined. The decision of that question belongs only to the Supreme Judge of all men, to whom also belongs the punishment of the erroneous.[86]

Courts in the common law world are notoriously reluctant to determine disputes of a religiously-sensitive nature. There is not an absolute barrier to civil adjudication of church disputes—courts have, for example, long been called upon to resolve questions of property division following schism within a denomination—but the jurisdiction is exercised circumspectly. As Beattie J observed in *Gregory* v *Bishop of Waiapu* observed: "the Courts in my opinion must acknowledge that they will be chary of intervening in church matters unless there are valid and strong reasons for doing so."[87] A generation later, Richardson P in *Mabon* endorsed the received view:

> Clearly, and reflecting the separation of church and state, Courts must be reluctant to determine what are at heart ecclesiastical disputes where matters of faith and doctrine are at issue. But the Courts will intervene where civil or property rights are involved . . .[88]

Deference to church autonomy is commonplace in other common law jurisdictions. English courts, for instance, are loathe to determine matters of internal church governance. A recent example is *Wachmann*.[89] The Chief Rabbi disciplined the applicant Wachmann, an Orthodox rabbi, declaring him religiously and morally unfit to hold office. This ruling followed an internal commission of inquiry which substantiated allegations of adultery by the applicant with members of his congregation. Wachmann's employment was terminated and he sought judicial review. The High Court refused this in forthright terms. Despite judicial review extending to bodies "which in earlier days would have surely have been

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86 John Locke, *Epistolia de Toleration (A Letter Concerning Toleration)*,1689, in John Horton and Susan Mendus (eds), *John Locke, A Letter Concerning Toleration—In Focus* (1991) at 24. This version is William Popple's English translation of the Latin text. See also James Madison, *Memorial and Remonstrance Against Religious Assessments* (1785) argument 5. Madison's exposition is reproduced in Arlin M Adams and Charles J Emmerich, *A Nation Dedicated to Religious Liberty* (1990) at 108 et seq.

87 [1975] 1 NZLR 705 at 708. The Supreme Court refused to review the decision by the Bishop of Waiapu to revoke the license to officiate as a vicar of the plaintiff, an Anglican priest. This passage was quoted with approval by Thorp J in *Presbyterian Church Property Trustees Ltd* v *Fuimaono*, unrep, High Court, Auckland, A 1595/85, 16 October 1986, at 33.

88 *Mabon* v *Conference of the Methodist Church of New Zealand* [1998] 3 NZLR 513 at 523. See eg *Fuimaono*, ibid, for an instance of the successful judicial review of a church body's decision to severe pastorial ties with a minister.

thought beyond its reach,"[90] further extension to this body was unwarranted. The Chief Rabbi's discharge of his religious functions was simply not of a public law character. The entanglement of church and state occasioned by permitting review added further force to this conclusion. Simon Brown J observed:

> [T]he court would never be prepared to rule on questions of Jewish law. Mr Carus [counsel for Wachmann], recognising this prospective difficulty, says in advancing his challenge here the applicant would be prepared to rely solely upon the common law concept of natural justice. But it would not always be easy to separate out procedural complaints from consideration of substantive principles of Jewish law which may underlie them . . . the court is hardly in a position to regulate what essentially a religious function—the determination whether someone is morally and religiously fit to carry out the spiritual and pastoral duties of his office. The court must inevitably be wary of entering so self-evidently sensitive an area, straying across the well-recognised divide between church and state. One cannot, therefore, escape the conclusion that, if judicial review lies here, then one way or another this secular court must inevitably be drawn into adjudicating upon matters intimate to a religious community.[91]

The United Kingdom Human Rights Act 1998 was substantially amended during its passage (following intensive lobbying by British churches designed to safeguard their religious freedoms[92]) and now contains section 13(1) which reads: "If a court's determination of any question arising under this Act might affect the exercise by a religious organisation (itself or its members collectively) of the Convention right to freedom of thought, conscience and religion it must have particular regard to the importance of that right."[93]

In Australia, the New South Wales Court of Appeal in 1992 refused an injunction sought by some Anglicans who wished to prevent the Anglican Bishop of Canberra-Goulburn from ordaining eleven women as priests. The Court's reasons were grounded very much in a desire to defer to church autonomy.[94] Interestingly, several Australian antidiscrimination statutes contain exemptions for religious organisations designed to

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89 *R* v *Chief Rabbi, ex parte Wachmann* [1993] 2 All ER 249.

90 Ibid at 253.

91 Ibid at 255.

92 See Julian Rivers, "From Toleration to Pluralism: Religious Liberty and Religious Establishment under the United Kingdom's Human Rights Act" in Ahdar (ed), *Law and Religion* (2000) ch 7 (forthcoming).

93 For discussion see Rivers, ibid.

preserve their autonomy on fundamental matters of church governance and mission.[95] For example section 32 of the Discrimination Act 1991(ACT) reads:

> **32.** Nothing in Part III applies in relation to— (a) the ordination or appointment of priests, ministers of religion or members of any religious order; (b) the training or education of persons seeking ordination or appointment as priests, ministers of religion or members of a religious order; (c) the selection or appointment of persons to perform duties or functions for the purposes of, or in connection with, any religious observance or practice; or (d) any other act or practice of a body established for religious purposes, being an act or practice that conforms to the doctrines, tenets or beliefs of that religion and is necessary to avoid injury to the religious susceptibilities of adherents of that religion.[96]

Finally, in the United States, discrimination in employment on the usual bases (sex, race, national origin etc) is prohibited under Title VII of the Civil Rights Act 1964. Section 702 of that Act provides an exemption for religious bodies where they discriminate in employment on the basis of religion.[97] A good illustration of the resolution of the clash between anti-discrimination law and church autonomy is *Rayburn* v *General Conference of Seventh-Day Adventists*.[98]

The plaintiff was denied a pastoral position in the Seventh-Day Adventist Church and brought an action alleging sexual and racial discrimination. The Court of Appeals held that the suit was barred by the First Amendment. It repeated the Supreme Court's longstanding recognition of the right of clergy selection, "for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrines, both to its own membership and to the world at large."[99] Was the state's interest in eradicating discrimination of sufficient magnitude to override the interests of religious freedom guaranteed under the First Amendment? The Court was in no doubt:

> Here the balance weighs in favor of free exercise of religion. The

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94 *Scandrett* v *Dowling* (1992) 27 NSWLR 483. For analysis see Reid Mortensen, "Church Legal Autonomy" (1994) 14 Qld Lawyer 217.

95 See generally Reid Mortensen, "Rendering to God and Caesar: Religion in Australian Discrimination Law" (1995) 18 U Qld L J 208.

96 For a similar exemption see eg s 75 of the Equal Opportunity Act 1995 (WA).

97 It reads: "This subchapter [ie Title VII of the Civil Rights Act 1964] shall not apply . . . to a religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities."

98 772 F 2d 1164 (1985).

99 Ibid at 1168 per Wilkinson J; following the Supreme Court decisions, *Kedroff* v *St Nicholas Cathedral*, 344 US 94 (1952) and *Serbian Orthodox Diocese* v *Miliojevich*, 426 US 696 (1976).

> role of an associate in pastoral care [the position Rayburn sought] is so significant in the expression and realization of Seventh-day Adventist beliefs that state intervention in the appointment process would excessively inhibit religious liberty.[100]

Judicial review here would also impermissibly entangle secular courts with church authority resulting in "an intolerably close relationship between church and state both on a substantive and procedural level."[101] At a substantive level, conformity due to governmental pressure was not an imaginary risk:

> It is axiomatic that the guidance of the state cannot substitute for that of the Holy Spirit and that a courtroom is not the place to review a church's determination of "God's appointed" . . . The danger is that *choices of clergy which conform to the preferences of public agencies may be favored* over those which are neutral or opposed.[102]

At a procedural level, state entanglement by way of protracted and expensive legal proceedings would be likely if suits such as the plaintiff's were entertained. Church personnel and records would, said the Court, inevitably become subject to subpoena, discovery and cross-examination, remedies dispensed might have far-reaching implications, and continued court monitoring to ensure compliance might be required.[103] Thus, once more,

> There is the danger that churches, wary of EEOC [Equal Employment Opportunity Commission] or judicial review of their decisions might make them with an eye to avoiding litigation or bureaucratic entanglement rather than upon the basis of their own personal and doctrinal assessments of who would best serve the pastoral needs of their members.[104]

(c) International human rights law

New Zealand's recent rights legislation has been passed, in part, to fulfil its obligations under various United Nations (UN) treaties. Moreover, as the Court of Appeal emphasised in *Tavita* (see Chapter 6), New Zealand's adherence to such international instruments should not amount to mere "window-dressing."

Article 18(1) of the International Covenant on Civil and Political Rights 1966 (ICCPR)

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[100] Ibid.
[101] Ibid at 1170.
[102] Ibid (emphasis added).
[103] Ibid at 1171.

makes it clear that the right of religious freedom applies "individually or in community with others." The UN's Human Rights Committee has made this clarification in its exegesis of article 18:

> In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries and religious schools and the freedom to prepare and distribute religious texts or publications.[105]

This statement is in the Committee's 1993 General Comment No 22, a pronouncement which is "an authoritative statement"[106] of the Committee's understanding of the article. The Human Rights Committee's observation on church autonomy simply echoes the mention made in an earlier UN instrument, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief 1981.[107] Article 6 provides a non-exhaustive catalogue of particular freedoms within the rubric of religious freedom. Paragraph (g) is apposite:

> Article 6 . . . the right to freedom of thought, conscience, religion or belief shall include, *inter alia*, the following freedoms . . .
>
> (g) To train, appoint, elect, or designate by succession, appropriate leaders called for by the requirements and standards of any religion or belief.

Unlike the ICCPR, the 1981 Declaration is not strictly speaking binding as a source of direct legal obligation on states.[108] Nevertheless, such declarations still carry weight. The 1981 Declaration has been cited in argument in the High Court, with the Court observing that such declarations, along with other international instruments, may be used in the interpretation of municipal legislation.[109]

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104 Ibid.

105 General Comment No 22 at para 4. The HRC adopted the General Comment (CCPR/C/21/Rev 1/ Add 4) on 20 July 1993. It is reproduced in (1994) 15 Human Rights LJ 233.

106 Malcolm Evans, *Religious Liberty and International Law in Europe* (1997) ch 8 at 208.

107 Adopted without vote by the General Assembly on 25 Nov 1981: GA Res 36/55.

108 Since it was adopted as a General Assembly Resolution which under the UN Charter only has a recommendatory statutes (UN Charter, art 10). See Evans, *Religious Liberty and International Law*, at 257.

109 See eg *Huakina Development Trust* v *Waikato Valley Authority* [1987] 2 NZLR 188 at 217 per Chilwell J (HC) and *Re J (An Infant)* [1995] 3 NZLR 73 at 82 per Ellis J (HC).

2 *New Zealand church controversies*

Ordination of openly-practising homosexual or lesbian clerical candidates has been a matter of sharp controversy within certain New Zealand denominations. Controversy has been confined primary to two churches, the Presbyterian and Methodist Churches (with some smouldering debate in the Anglican Church as well). The gay ordination question has highlighted and, to some extent, exacerbated the liberal/conservative split documented in Chapter 2.

For some churches the ordination of practising homosexual or lesbian candidates for the ministry (OPHM) is not an issue. Thoroughgoing conservative denominations—the Pentecostal churches, Open Brethren, Seventh Day Adventists, Salvation Army etc—have not, at least publicly, debated the issue. Absent liberal theological factions within those churches such debate is unlikely to arise. However, these churches take a keen interest in the subject for it is a matter which "affect[s] the entire church not just part of it."[110] For the Catholic Church the requirement of celibacy for priests and nuns officially rules out the possibility of gay clergy: "All the ordained ministers of the Latin Church . . . are normally chosen from among men of faith who live a celibate life and who intend to remain celibate 'for the sake of the Kingdom of heaven'."[111] The Catholic Bishop of Wellington, the Rt Rev John Drew, explained that the celibacy requirement did not stop people with an orientation either way (heterosexual or homosexual) from seeking to train as a priest, but every effort would be made during the six years' seminary training to ensure they accepted and followed a celibate life. He added: "We would never ordain a practising homosexual or heterosexual."[112]

The Anglican Church has been reluctant to firmly state its position on OPHM. The *Tikanga Pakeha* (the Pakeha section of the Church) established a commission to study human sexuality issues. The Bishop of Christchurch, the Rt Rev David Coles, predicted that a diocesan-based policy would be the preferred option. "It is up," he said, "to each bishop to deal with the priests in a pastoral way, in accordance with the theological and cultural

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[110] Dean Comerford, "Homosexual issues affect entire Christian church," *CW,* 21 July 1998, at 3.
[111] *Catechism of the Catholic Church* (1994) at para 1579.
[112] Quoted in Ian Harris, "Sexual equality before God," *Dominion*, 23 Dec 1997, at 8.

emphasis of the diocese."[113] Some dioceses currently had homosexual priests, some celibate, some with partners.[114] The Commission's 1998 report to the Inter Diocesan Conference in Auckland refused to rule out OPHM and argued for a case-by-case approach:

> Given that in the Anglican Church in Aotearoa, New Zealand and Polynesia, the decision to ordain a person deacon or priest lies with the Bishop after due consultation and advice from others . . . it is the view of the Commission that each application for ordination should be dealt with on an individual basis regardless of the candidate's marital status, gender, sexual orientation, or sexual preference.[115]

Some criticised the report's ambiguity[116], while one CC, Max Lane, lambasted the report. In his opinion, the Commission had sacrificed biblical truth and yielded instead to secular opinion. Moreover, far from avoiding polarisation (one of the Commission's aims), Lane believed "the contents of this report will certainly create the polarisation and sad divisions that have sadly affected its sister churches."[117] Anglican CCs would find some vindication in the controversial pronouncement of the international Lambeth Conference of bishops in London on 5 August 1998. Conservatives routed the liberals with 526 voting for, 70 against (and 45 abstaining), a resolution rejecting OPHM.[118] Following the public acknowledgement by the Dean of St Paul's Cathedral, Dunedin, that he was a homosexual, St Matthew's Anglican Church, Dunedin, publicly endorsed the Lambeth statement, putting pressure upon the bishop to take appropriate action.[119]

The Methodist Church experience of OPHM has been most divisive. The catalyst for the polarising debate in that denomination between liberals and CCs was the effort by Dr David Bromell to achieve ordination. Bromell had been a Baptist minister but was asked to resign in 1986 when he declared he was practising homosexual.[120] Bromell moved to Dunedin joining the Methodist church in 1987. Following the completion of a doctorate at

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113 Quoted ibid.
114 Ibid.
115 *Tikanga Pakeha* Commission on Sexuality of the Anglican Church in Aotearoa, New Zealand and Polynesia (May 1998) at 14.
116 See Don Mathieson, "Same sex relationships: ethics, Christian leadership and the law" (1999) 7 Stimulus 34.
117 Max S Lane, "Astonishing," *CW*, 30 June 1998, 1 at 5.
118 See Gledhill, "Liberal bishops routed in vote on homosexuals," *The Times*, 6 Aug 1998, at 1 and "Articles of Faith" (Editorial), ibid, at 19. See Mathieson, "Same sex relationships", at 40.
119 Sharon Fowler, "Homosexuality ruling endorsed," *ODT*, 15 Oct 1998, at 20.
120 For Bromell's own account of his journey see: "'Gay' minister was once heterosexual," *CW*, 27 June 1991, at 9. Bromell was married with one son at the time of his realisation he was a homosexual.

the University of Otago, Bromell was appointed as a supply (relieving) minister in a local parish. He applied for "full connexion" into the ministry in 1990 but the annual Methodist Conference rejected his bid.[121] The matter was deferred in 1991[122] but by late 1997 a decision was reached. Influenced by the Human Rights Act, the annual Conference voted "at 9.50pm Wednesday 12 November 1997", to receive Bromell into full connexion.[123] The vote was not unanimous, with around a third of the Conference expressing strong disapproval.[124] The fallout was immediate, the decision having "ignited a flashpoint of indignation."[125] Disgruntled evangelical Methodists formed the "Wesleyan Methodist Movement" on 21 November with a view to breaking away from the Church.[126] Brian White, President of Methodist AFFIRM warned:

> Many people have already left the Church as the liberal wing moves further and further away from Orthodox Christianity and it was only a matter of time before the remaining conservatives said, "no further."[127]

Many Pacific Island congregations supported the conservatives.[128] The OPHM issue was not the only concern prompting the proposed split but it was "the straw that broke the camel's back."[129] The Rev Dr Bromell was duly appointed as superintendent of the Christchurch Methodist City Mission, a step he described as a "brave move."[130] In an effort to avoid a wholesale schism caused by conservative Methodists breaking off to join like-

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121 For background to his bid see Vic Francis, "Methodist Church split over homosexuality," *CW*, 27 June 1991, at 7-8. A brief report of the 1990 decision is Elain Gousmett, "Methodists ponder 'gay' cleric," *CW*, 29 Nov 1990, at 3.

122 See Anne Manchester, "'Gay' decision evades Methodist leaders," *CW*, 28 Nov 1991, at 3.

123 The exact time was noted by the editor of *Crosslink*, to emphasise its historic significance: Diane Gilliam-Weeks, "Bromell received in to Full Connexion," *Crosslink*, Dec 1997, at 1.

124 According to Gilliam-Weeks, ibid and Brian Kirk, "Homosexual minister admitted," *CW*, 19 Nov 1997, at 3.

125 The description in the Catholic press: Norman Goreham, "Homosexual issue causes split in Methodist Church," *NZ Catholic*, 21 Dec 1997, at 4.

126 The WMM was formed by 30 evangelical Methodist leaders on 21 November 1997: "NZ Methodism in crises," *CW*, 27 Jan 1998, at 1.

127 Quoted in "Church faces split over gay minister," *ODT*, 20 Nov 1997, at 2.

128 See "New Zealand Methodism in crisis." The Rev Tavake Tupou was appointed WMM's first leader.

129 Frith Rayner, "The other side", *Crosslink* , June 1999, at 8-9 (an extensive interview with members of the WMM).

130 "Gay minister says appointment 'brave move'," *ODT*, 2 Feb 1998, at 2. Rowdy demonstrators protested outside the Durham St Methodist Church at his appointment: "Protest at gay minister," *ODT*, 9 April 1998, at 3.

minded brethren from the Presbyterian fold,[131] the 1998 Conference agreed in principle to an "Evangelical Synod."[132] Opposition by liberal elements to the creation of such a synod at the 1999 Conference left conservative Methodists frustrated and pondering their future.[133]

The most acrimonious and protracted debate on OPHM has been that of the Presbyterian Church of Aotearoa New Zealand (PCANZ). At the time of writing the saga has still not been concluded. In a series of General Assemblies since the mid 1980s the issue has proved contentious and evasive.[134] In 1985 the General Assembly of the PCANZ distinguished between homosexual orientation and practice and affirmed that "homosexual acts are sinful." Also affirmed was God's love and acceptance of homosexuals as people. The Church was urged to initiate compassionate ministry to those in a homosexual lifestyle. In 1991 a Special Committee was appointed by the Assembly to consider the question of OPHM and report no later than the 1995 Assembly. Presbyteries were instructed not to proceed to the licensing, ordination or induction of any self-avowed active homosexual until that time.[135] That 1991 Assembly passed a carefully-worded resolution on sexual morality.[136] It affirmed that "God's intention for sexual relationships, as affirmed by Jesus Christ, is loving, mutual and faithful marriage between a man and a woman, and that intimate sexual expressions outside of that context fall short of God's standard."[137] While echoing the need for "compassionate ministry, forgiveness and restoration" of those who fall short in this area, it was clear on OPHM: "those who continue in sexual acts in any context outside of heterosexual marriage are not appropriate persons to be in the leadership of this Church."[138]

In 1993 the Assembly deferred the vote on OPHM thereby allowing the prohibition on

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131 Disgruntled evangelicals from the Presbyterian, Methodist and Anglican churches held meetings in September and October 1998 mooting a possible united evangelical church. See Sharon Fowler, "Idea of new church attracting interest," *ODT*, 26 Oct 1998, at 9.

132 See Blair Mayston, "New Methodist synod 'not split in church,'" *ODT*, 21 Nov 1998, at 6.

133 See "Real issue at stake is the authority of God's Word", *CW*, 23 Nov 1999, at 1 and 7.

134 The following account draws from Presbyterian AFFIRM newsletters and contemporaneous newspaper accounts.

135 *PCANZ Minutes of the 1991 General Assembly* (held at Invercargill, 2-8 Nov 1991) at 83. The vote was carried by 236 to 127.

136 See "Church votes to bar 'gay' leaders," *CW*, 14 Nov 1991, at 1.

137 *PCANZ Minutes of the 1991 General Assembly* at 84.

138 Ibid. (Carried by 212 votes to 124).

Presbyteries imposed by the 1991 Assembly to lapse.[139] This was to establish "a neutral environment"[140] and defuse deepening division until the Special Committee reported. One presbytery was impatient. A Dunedin church in 1995 attempted to license Martin Dickson, an exit student from Knox College. Dickson was "a self-avowed practising homosexual, living with a partner."[141] A Judicial Commission of the PCANZ was set up to deal with the matter following complaints from disgruntled members of the congregation. The Commission reported on 25 August 1995 and upheld seven of the eight formal complaints of the dissentients.[142] The Commission found the Dunedin presbytery had failed to observe procedural fairness and had pre-empted the 1995 Assembly decision. It decided, however, that in the particular circumstances of this case, Dickson ought to be licensed. He had commenced his four-year training at Knox with the assurance from "senior personnel" that his homosexuality would not be an impediment to his being licensed. Although such an assurance was wrong, his legitimate expectations had now to be recognised. Invoking a regulation[143] which gave the Church power to dispose of cases in exceptional circumstances were justice so required, it approved the licensing. The Human Rights Act featured in the Report and I shall return to it later. Dickson's lawyer, Judith Medlicott, was to later remark that the Act had played a prominent role and that "without the existence of the Act the outcome may have been different."[144] So, on 5 November 1998 an historic first for the PCANZ took place. In a ceremony at Knox Church and attended by his parents, his partner and his partner's parents, Martin Dickson, was "licensed".[145] Licensing meant he could now accept a "call" from a parish or act as a chaplain. Ordination would be another step again, however. Many evangelicals within the PCANZ were outraged. St Andrew's Presbyterian

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139 See "Church lifts ban on gay ordinations," *NZ Herald*, 21 May 1993. The Assembly chose to avoid divisive debate on the issue voting 167 to 138 to pass on to other business: ibid.

140 *PCANZ Minutes of the General Assembly 1993* (held at Auckland, 15-21 May 1991) at 115.

141 The Judicial Commission's description: Report of Decision of the Assembly Judicial Commission re Nine Dissents with Complaint Against Decision of Dunedin Presbytery dated 1 November 1994 to license a candidate (25 August 1995) at 1. The Commission comprised four persons including Peter Whiteside, a partner in a Christchurch law firm.

142 Ibid.

143 Regulation 394 which describes the *nobile officium*. AFFIRM criticised this as an improper and highly dangerous use of *nobile officium*: *Presbyterian AFFIRM Newsletter* ('*PAN*'), 1995/5, Nov 1995.

144 "The Presbytery of Dunedin licenses gay student to the ministry," *Crosslink*, Dec 1995, at 1. See also Sharon Lippert, "Homosexual minister licensed," *ODT*, 13 Nov 1995, at 3 for comment from Mrs Medlicott.

145 "Presbytery of Dunedin licenses," ibid.

Church in Manurewa, for instance, described the licensing as "unbiblical and unconstitutional."[146] Presbyterian AFFIRM stiffened its resolve[147] to ensure the Dickson licensing would remain, as the Judicial Commission emphasised, "indeed an exceptional case . . . [which] cannot be regarded by anyone as a precedent."[148]

On 14 May 1996, the Rev Geoffrey Vine, an openly-bisexual Presbyterian minister was "called" by a small Auckland congregation, Knox Church, Parnell. Vine had left his previous permanent post in Northcote in 1992 after division in the parish.[149] Matters again came to a head at the 1996 General Assembly. The following resolution was adopted by 172 votes to 142:

> That Assembly, recognising the need for a clear ruling on practising homosexuals in leadership in the Church, rules that its courts shall not license, ordain or induct practising homosexuals. At the same time, Assembly recognises the deep diversity of convictions in the Church on issues relating to homosexuality generally and calls the Church to move ahead in a spirit of gracious respect and compassion for one another.[150]

Strictly speaking, the ruling was a preference expressed by the Assembly and did not becoming binding until a later Assembly ratified it following extensive discussion among congregations nationally.[151] Presbyterian CCs were pleased but OPHM proponents such as Galaxies (Gay and Lesbian Christians in Every Sphere) were dismayed. "I'm sad," commented a homosexual elder at St Andrew's-on-the-Terrace Church, Wellington "at the stoney hearts of so many people at the assembly."[152] The Rev Dr Jim Stuart of that congregation intimated that the St Andrew's parish would flout the ruling and support the licensing of Ms Alyson Murrie-West, an ordained lesbian elder and ministry student.[153] In 1997 it made good to its promise with the Wellington presbytery licensing Murrie-West following completion of her ministry training. Presbyterian churches in Eastern Southland

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146 "Church condems licensing," *ODT*, 17 Nov 1995, at 4, quoting from the Church's press statement of 16 Nov 1995.

147 See "Disquiet voiced at gay's licensing," *CW*, 22 Nov 1995, at 1.

148 Judicial Commission Report at 10.

149 Claire Gummer, "Bisexual minister chosen," *Express*, 23 May 1996, at 1.

150 *PCANZ Minutes of the General Assembly 1996* (held at Wellington, 30 June - 5 July 1996) at 83.

151 As Diane Gilliam-Weeks, director of communications for the PCANZ explained: "Church explains ruling against gay ordinations," *CW*, 24 July 1996, at 3.

152 Quoting Bill Eglington in "Church ruling opposes homosexual ministers," *ODT*, 6 July 1996, at 2 and "Church against ordination," *ODT*, 8 July 1996, at 3.

153 See "Church against ordination," ibid.

publicly dissociated themselves from the Wellington decision.[154] The licensing was, under at least one view of the 1996 Assembly ruling, permissible, since that ruling did not affect the status of existing homosexual ministers nor the status of any current students for the ministry.[155] Also in 1997, Presbyterians conducted a national non-binding referendum of members in a postal ballot. Some 78 percent of those who returned the ballot supported the 1996 Assembly ruling banning OPHM.[156] The referendum result was dismissed as unrepresentative of the PCANZ by OPHM proponents such as the Association of Reconciling Christians and Galaxies.[157]

Expectations by conservative Presbyterians had undoubtedly been raised in the lead-up to the 1998 General Assembly. Hopes for a definitive verdict were again to be frustrated. The attempt to ratify the 1996 ban on homosexual leadership failed to gain the necessary majority.[158] The Assembly now required a 60 percent vote for successful ratification and thus the simple majority in favour of the 1996 ruling (54.5 percent) fell short.[159] The Assembly voted instead to impose a one-year ban on OPHM,[160] a similar ban on advocacy of views on the subject and for the establishment of a "Commission on Diversity". The latter would hear submissions and prepare plans for separate Synods or streams within the PCANZ to accommodate the differing convictions of members on this vexed topic. AFFIRM were "deeply disappointed - even disgusted" at the "non-decision" of the Assembly[161] but liberal groups were said to be "heartened"[162] albeit regretting that, meanwhile, practising homosexual and lesbian applicants had to wait further. The Commission on Diversity travelled the country hearing submissions[163] and reported on 28 May 1999.

The Extra General Assembly in Christchurch in 1999 saw a majority of members

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154 See "No compromise," *CW*, 4 June 1997, at 1.
155 See Gilliam-Weeks in "Church explains ruling."
156 See "Presbyterians say not to gays," *ODT*, 24 Nov 1997, at 3. AFFIRM defended the 43 percent turnout (only 35,000 of the 81,000 ballot papers were returned) by pointing out that the turnout of *active* members was very good; some 97.2 percent (35,657) of the official average attendance for June 1996 (36,673) according to the *PCANZ Yearbook and Directory 1997*: see *PAN*, 1997/5, Dec 1997.
157 See "Presbyterian say no to gays."
158 See "Sad news," *CW*, 14 July 1998, at 1.
159 The change to the voting rules to require 60 percent was castigated by AFFIRM as "unjust": see ibid at 5 and *PAN*, 1998/3, July 1998, at 3 ("the goal-posts now have wheels on them").
160 *PCANZ Minutes of the General Assembly 1998* (held at Christchurch, 5-10 July 1998) at 110.
161 *PAN*, ibid at 1.
162 Rev Chris Nichol of the Association of Reconciling Christians, quoted in "Sad News," at 5.
163 See Sharon Fowler, "Serious soul-searching for church members," *ODT*, 8 Oct 1998, at 2.

reject three proposals in favour of OPHM. The vote of 146 (46 percent) in favour versus 171 (54 percent) against each of the three motions for OPHM[164] was interpreted as an "impasse"[165] by some commentators but as a victory by Presbyterian AFFIRM.[166] Both sides failed to gain the necessary 60 percent needed to carry the day. What it did mean was that the issue "lay on the table"[167]—both camps resigned to battling on[168]—with another Assembly scheduled for September 2000 in Dunedin to grapple with the issue once again.

3 *The shadow of the Human Rights Act*

A key premise in the church debates has been the belief that a clear ruling from the church authorities on OPHM was required. The PCANZ, for instance, took the understandably cautious approach that nothing short of a clear edict from the General Assembly would guarantee that congregations would enjoy immunity from suit under the Act. The Judicial Commission into the Dickson licensing assumed as much.[169] Presbyterian AFFIRM, whose affiliates had most to lose, articulated their concern thus:

> In the absence of specific [Church] regulations, the church is vulnerable to be forced to accept practising homosexuals as ministers by the provisions of the Human Rights Act, through either a ruling from the Human Rights Commission, or by a decision of the High Court in a test case. The lawyer [Judith Medlicott] who was acting for the practising homosexual who was licensed [Dickson] has publicly threatened that "it ill behoves" anyone to oppose his ordination. A "non-decision" by this Assembly would expose the PCANZ—and potentially *any* congregation—to expensive litigation.[170]

But the prospect of costly lawsuits was not the principal reason why CCs within the mainstream Protestant churches sought a definitive answer on OPHM. For CCs the issue was pivotal. Acceptance of homosexual or lesbian leadership was a watershed—would conservatives or liberals control the direction of the church henceforth?

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164 See "Presbyterians seek to save unity", *CW*, 6 July 1999, at 1 and Michael O'Dwyer, "Assembly remains divided over homosexuals", *Crosslink*, Aug 1999, at 1 and 8.

165 "Impasse on homosexual leaders continues", *ODT*, 3 July 1999, at 2.

166 *PAN*, 1999/5, July 1999, at 3 and Stuart Lange, "A view from the Assembly trenches", *Crosslink*, Aug 1999, at 9.

167 Mark Toomer, "Presbyterian Church upholds historic biblical view", *CW*, 13 July 1999, at 3.

168 See *PAN*,1995/5 at 4 for the AFFIRM resolve not to concede the "war of attrition". The Association of Reconciling Christians and Congregations spokesman, the Rev Chris Nichol vowed the fight would continue too: "Presbyterian Church upholds historic biblical view."

169 Judicial Commission report at 7-9.

Liberal Christians' response was twofold. One typical reaction was to question what all the fuss was about. The Rev Norman West, Co-superintendent of the Otago-Southland Methodist District, mused, "Some day we will look back and wonder why we struggled." And besides, he added, "It may be a surprise to discover the wheels do not fall off the Church when a parish appoints a homosexual minister."[171] The Rev Chris Nichol of the Association of Reconciling Christians believed it "would be wrong for us [the PCANZ] to be separated on the basis of this one rather narrow issue."[172] The other common liberal Christian response was to strongly support OPHM as a "matter of justice"[173] and "the church . . . working for the human rights of all people."[174] For them, one's sexual orientation or practice was as much an irrelevant requirement for leadership as it was for membership. God's love and mercy mandated "inclusiveness" and "tolerance".[175]

CCs answered the latter point by emphasising the holiness as well as the mercy of God and reaffirming the continued relevance of the unchanging moral law. A distinction was drawn between membership, where inclusiveness could rightly pertain, versus leadership, which called for more exacting exclusive standards.[176] As for the recognition of OPHM being a minor matter nothing, could be more from the truth for CCs. It was not even a matter of competing interpretations since the Scripture, properly read, were "very clear."[177] No, it was matter of truth and a question of authority: would the church take its lead and be subservient to the Scriptures or to mere human secular opinion? A defining characteristic of the CC is, as Chapter 2 explained, submission to authority. Presbyterian AFFIRM answered the question, "Why is this issue so important?," in this way. It was not an issue of justice, since no-one had an inalienable right to be a church leader, nor was it a matter of inclusiveness, for the Gospel was about repentance, grace and transformation:

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170 "Should the Presbyterian Church Ordain Practising Homosexuals? A Position Paper," Presbyterian AFFIRM, June 1996, at 8 (emphasis in original).
171 "Te Hahi hits 'the issue.'" *Crosslink*, Oct 1997, at 5.
172 "Sad News," at 5.
173 The Rev Norman West, "Te Hahi,"
174 The Rev Chris Nichol quoted in Toomer, "Presbyterian Church upholds historic biblical view."
175 See eg *Tikanga Pakeha* Commission on Sexuality.
176 See Presbyterian AFFIRM, "Position Paper," at 1-2. See also Stuart Lange, *Homosexuality and the Church*, AFFIRM Booklet No 4 (1998) at 12 and 17 and Rayner, "The other side", at 8 (interview with the Rev Allan Oliver, a WMM minister)

> No, this issue is essentially a *truth* issue: it is a question of SCRIPTURAL AUTHORITY . . . It is not, of course, just a matter of a few proof texts on homosexuality itself. What is at stake is the integrity of many key teachings which, in varying degrees, come close to the heart of genuinely orthodox Christian faith and theology: the doctrines of creation, of humanity as male and female, of marriage, of the Fall, of the call to repentance and holiness, and of the power of Jesus to transform us and set us free. The question is whether the Assembly is now willing to order the life of the Church in accordance with the will of God and the power of the Gospel, as revealed in the scriptures—or whether it wishes to slide off into uncertainty and confusion, and to put secular human opinion in the place of the Word of God as our new de facto "rule of faith and life".[178]

The Rev Chris Dombroski of Methodist AFFIRM agreed.[179] The OPHM issue highlighted "the major problem" affecting the Church, namely, "the question of Authority." Methodists were in danger of making "liberalism" (liberal Western culture) its authority. But, "where does liberalism find its authority? Is it the Scriptures, sermons of Wesley, or somewhere else?" Liberalism was endeavouring to impose justifications for homosexuality upon the Scriptures, "making Scripture subject to liberalism." This was, he continued, plainly wrong. It ought to be God above Caesar and never the other way round: "Those who accept the Authority of Scripture have no basis for fellowship with liberalism."[180] Using the language of the 1990s, one CC remonstrated that "the church needs to quickly find the courage to stand up and become BC, not PC. That is, biblically correct, not politically correct."[181] The failure of liberal Christians to appreciate the significance of OPHM simply demonstrated to the Rev Stuart Lange, national secretary of Presbyterian AFFIRM, that there "are two world views . . . two spirits . . . two logical choices." As we saw in Chapter 2, another defining characteristic of CCs is that they are oppositional and reject the prevailing spirit of the age. Accepting homosexual leadership would be a graphic succumbing to the *zeitgeist*, the spirit of the times.

CCs' attitude to "secular human opinion" mirrors their view of the state (see Chapter

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177 The Rev Chris Dombroski, "Te Hahi hits 'the issue'": "The impasse over the homosexual debate has been put down to different interpretations of Scripture—but not so. Traditional interpretations are very clear, in their non-acceptance. It's only modern liberal Western culture that offers justification."

178 *Presbyterian AFFIRM Newsletter*, 1998/2, at 4 (italics and capitals in original). See also Lange, *Homosexuality*, at 13-14.

179 Dombroski, "Te Hahi." See also "Real issue at stake is the authority of God's Word", *CW*, 23 Nov 1999 (interview with various evangelical Methodist ministers).

180 Ibid.

2). As the state is under God, likewise Caesar's law is subservient to God's law. When the state exceeds its delegated authority and trespasses in spheres properly not its domain, civil disobedience may be the last resort. The belligerent streak in CCs eschews "supine yielding to the pressures of secularisation."[182] Presbyterian AFFIRM hint at possible disobedience if the Human Rights Act were construed to prevent them refusing to license or ordain practising homosexual ministers. It reminded its readers of its Reformation roots: "even if the Ruling [banning OPHM] *were* illegal (and we do not believe that it is), the Assembly would have ultimate responsibility not to the secular law but to the law of God."[183] Any Christian church must "follow its biblical conscience" in clashes between secular and divine law, "even if obedience to a higher law brings a measure of suffering," reiterated the Rev Stuart Lange.[184]

Liberal Christians, by contrast, harboured real reservations on flouting the law, at least on this issue. Liberals, to recapitulate, are prepared to risk breaking the law on matters of social justice such as apartheid and Springbok tour protests. But this issue was different. Liberal Christians supported the Human Rights Act. They had furnished submissions in favour of sexual orientation being added as a ground of prohibited discrimination just a few years earlier. Some denominations where the liberals' sway was stronger were content to comply with the Act. The Methodist Annual Conference of 1993 decided that the Methodist Church ought to "order its life and practice within the intent of the [Human Rights] Act"[185] Methodist president, the Rev Mervyn Dine, said the church "won't be trying to find clauses in the [A]ct to get them out"[186] of abiding by the statute. For proponents of OPHM, the Act was a valuable tool in changing church policy. It is idle to suggest the Act was supported by liberal Christians solely to allow and advance the cause of OPHM, but, once in place, it could nonetheless be usefully invoked. "As minister of Christ's church I don't wish," wrote the Rev Margaret Mayman, "to solve our deep divisions about sexuality by appealing to

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181 Comerford, "Homosexual issues affect entire Christian church," He lamented: "We seem to have come to a point where the word of man has become equal in authority to the Word of God, which it is not."

182 Lane, "Astonishing," at 5.

183 *PAN*, 1998/2, at 7 (original emphasis).

184 "A hard Act to follow," (Opinion feature), *Crosslink*, June 1998, at 13. "There are," he observed, "many 20th century examples of that principle being observed and neglected."

secular legislation . . . But if the state can lead the church closer to the gospel of love and compassion, then so be it."[187] For most CCs, a humanistic, post-Christian state could do nothing of the kind; rather its direction was the opposite. For them, OPHM was an issue that exposed the non-theistic grounding of contemporary human rights theory.

The experience of the churches debating in the shadow of the Human Rights Act supports the supposition of some American judges that the mere prospect of state intrusion may intrude upon a church's process of self-definition and thus entail a "chilling effect" upon religious group autonomy.

Justice Brennan in *Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v *Amos*[188] put the case for judicial deference to religious organisation's control over their internal governance in terms of the importance of self-definition. Any group, but especially a religious one, must be able to define its purpose or "mission". It has, as Gedicks puts it, a "narrative" or vision of itself.[189] It should have the ultimate say over who is a member or not, what are its core concerns.[190] Justice Brennan explained that a religious community

> represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself. Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.[191]

Religious group self-definition may tramall upon individual rights. The organisation may "condition employment in certain activities on subscription to particular religious

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185 The Methodist Church of New Zealand, *Reports and Resolutions of the Annual Conference 1993* at 696. See further "Methodists bow to Human Rights Act," *CW*, 24 Nov 1993, at 3.

186 Ibid.

187 "A hard Act to follow." The Rev Mayman is parish minister at St Ninian's, Christchurch, and a member of the Association of Reconciling Congregations and Christians (ARCC).

188 483 US 327 (1987).

189 Gedicks, "Religious Group Rights," at 108.

190 "We are willing to countenance [religious groups discrimination in employment] because we deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities." Ibid at 109-110.

191 483 US at 342.

tenets."[192] The process of self-definition, the control over one's own narrative, was important enough for Justice Brennan to countenance infringement of individual liberty and the thwarting of the government's interest in a societal policy of non-discrimination.[193] Judicial determination of such matters as clergy selection may require "a searching case-by case analysis"[194] resulting in the very sort of government "entanglement" in religious affairs which is best avoided. As equally disturbing was the "chilling effect" of state intervention in religious organisation governance: "[The] prospect of government intrusion raises concern that a religious organization may be chilled in its free exercise activity."[195] Once more, the church may make its decision with as much an eye toward state standards and bureaucratic intervention as its own religious convictions: "the community's process of self-definition would be shaped in part by the prospects of litigation."[196]

It is difficult not to conclude that the PCANZ's process of self-definition was shaped at least in part by the prospects of litigation. To paraphrase *Rayburn*, that the Methodist and Presbyterian Churches made their decisions with an eye to avoiding litigation and bureaucratic entanglement rather than solely on the basis of their own doctrinal assessments of who would best serve their pastoral needs. At the very least, the passing of the Act gave a heightened sense of urgency to what was already a simmering division. The influence of the Act is all the more problematic since it is by no means clear it ever applied to OPHM in the first place.

4 *The Human Rights Act and ordination of openly-practising homosexual candidates for ministry*

(a) Background

In its original form the Human Rights Bill 1992 did not cover sexual orientation discrimination. As we saw, this ground of prohibited discrimination was added at the Introduction stage by Katherine O'Regan. It would be understandable then if subsequent

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192 Ibid.
193 Ibid at 342-343.
194 Ibid.
195 Ibid.
196 Ibid at 343-344.

sections, particularly the exemptions from the discrimination ban, received insufficient attention. The late inclusion of sexual orientation as a ground of discrimination might have unintended consequences upon persons or groups, consequences insufficiently addressed by the parliamentary draftsman in the Bill's original form. This argument is, however, derogated from by the fact that the Act in its final form did address sexual orientation in framing exemptions in certain fields. Thus, different treatment based on a person's sexual orientation was approved for domestic employment in private households,[197] for employment of counsellors on "highly personal matters,"[198] and for institutions running courses on such counselling.[199]

Some CCs were concerned at their religious liberties being curtailed should sexual orientation discrimination be recognised. In her speech, Mrs O'Regan endeavoured to assuage such fears with this assurance:

> [I]t is not my intention that the legislation should force churches to accept homosexual ministers. It is not my intention that the legislation should prevent churches from preaching that homosexuality is sinful . . .[200]

Many CCs were, nonetheless, not assured.[201] *Challenge Weekly*, for instance, pressed the Human Rights Commission for a clear pronouncement that churches would be exempt from employing OPHM.[202] The Chief Human Rights Commissioner, Margaret Mulgan, was quoted in *Challenge Weekly* to the effect that churches and para-church ministries (such as Lion of Judah) were exempt from employing practising homosexuals.[203] Where a church, she was quoted two months later, could demonstrate that its doctrines, rules or customs did not allow it to appoint homosexual people, it would be immune.[204]

The remainder of this section will analyse the impact of the Act upon OPHM. The Act's import cannot be considered in the round for its prohibitions (and exemptions) apply at

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197 Section 27(2).
198 Section 27(4).
199 Sections 45 and 59.
200 (1992) 532 NZPD 13208.
201 The Coalition of Concerned Citizens was one such group: see "Petition but to stop law change," *CW*, 21 Jan 1993, at 1.
202 The newspaper solicited an "expert opinion" that churches were not exempt from employing homosexuals and lesbians: "Churches' rights questioned", *CW*, 19 Aug 1993, at 1.
203 "Majority favoured discrimination", *CW*, 5 Aug 1993, at 1.
204 "Churches may be off the hook," *CW*, 17 Nov 1993, at 3.

different stages in the ordination process with potentially different outcomes. The journey can conveniently be divided into three principal stages (although sometimes these steps can be conflated): (a) training; (b) licensing and ordination; (c) appointment.

(b) Is there discrimination on a prohibited ground?

A crucial threshold question is whether there is discrimination occurring at all. CCs consistently maintain a distinction be drawn between orientation and practice. For them the objection is practising homosexuals, not those who seek to be leaders and who harbour a sexual "leaning" or "propensity" toward persons of the same gender. The General Assembly of the PCANZ in 1985, for instance, distinguished between orientation and practice in affirming that homosexual acts, not inclination, were sinful. Presbyterian AFFIRM in its 1996 "Position Paper" expanded upon this point thus:

> About 1% of the population . . . struggle with homosexual leanings . . . They can be described as having a homosexual "orientation", a vulnerability in that area. Only some of these people act out their homosexual desires. Some manage to live in self-control and purity. Some marry, some stay single. The issue is not about such people. The issue is about those who actively pursue sexual relationships with those of the same gender, those who are "practising homosexuals" . . . The issue is whether people who unashamedly practise and embrace such a lifestyle are suitable persons to be church leaders.[205]

Unlawful discrimination under Part II of the Act requires the different treatment to be "by reason of" one of the prohibited grounds of discrimination. Is the refusal to train, ordain or appoint a homosexual or lesbian candidate by reason of their "sexual practice", discrimination on a prohibited ground?[206] Sexual "orientation" could mean: the direction of sexual attraction *simpliciter*; the direction of one's actual choice of conduct (taken as a whole or in a specific instance) or the orientation one identifies with.[207] Little judicial light has been shed on the concept to date.[208]

Conservative factions within mainstream denominations maintain such refusals are by

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[205] Presbyterian AFFIRM, Position Paper, at 1.

[206] Section 21(1)(m). That provision declares sexual orientation "means a heterosexual, homosexual, lesbian, or bisexual orientation."

[207] Wintemute, "Sexual Orientation Discrimination," at 494.

[208] In *Moonen* v *Television New Zealand Ltd*, unrep, High Court, Wellington, AP 35/95, 14 August 1996, Grieg J, at 6, held that the s 29(1)(m) definition was exhaustive and did not include paedophilia—further

reason of the candidate's sexual practice or conduct. One's desire, leaning or "orientation" to commit sin (as CC's view it) is to be expected. Persons with sinful propensities (which is everyone) cannot be condemned and cannot be ruled out of leadership because of such weakness or vulnerability alone. Persons who unashamedly give vent to their weaknesses and refuse to refrain from sinful acts, however, are not fit for leadership. The same objection would hold were someone with a propensity or vulnerability to adultery, lying, stealing etc to seek leadership and refuse to refrain from such acts. No one who knowingly, openly and habitually commits sinful acts is fit for the ministry.

The proposition could be tested by asking whether a church would ordain a candidate with a homosexual orientation but who pledged to remain celibate, viz refraining from sexual relations with another member of his or her sex.[209] If such a candidate is ordained then the operative reason would indeed appear to be sexual practice and not orientation.

The Judicial Commission of the PCANZ examining the Dickson licensing refused to interpret sexual orientation literally as referring only to propensity and not conduct: "no distinction can be drawn between homosexual orientation and homosexual practice."[210] They furnished no reasons, however, why this distinction, one maintained by the General Assembly, should be set aside. There is nonetheless the argument that "practice" necessarily includes an "orientation" to that effect also.

It may well be that certain churches might ostensibly reject candidates on the ground of homosexual practice when they are in reality basing the refusal upon homosexual orientation alone. But that would be a question of fact.[211] Parliament has worded the Act in terms of orientation not practice and there seems little warrant to ignore that choice of language.

It is possible that aggrieved homosexual or lesbian candidates could complain of "indirect discrimination" under section 65 of the Act. The provision declares practices which do not appear to contravene the Act to still be unlawful where they have the effect of treating

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exegesis was unnecessary. See generally Isaacus Adoxornu, *Brooker's Human Rights Law* (1996) section J.1A.01.

209 But some CCs question whether a celibate homosexual would pass muster. See eg Lange, *Homosexuality*, at 15-16: "A 'celibate homosexual' whose mind is swimming with inappropriate sexual thoughts and desires is hardly a suitable person to be a spiritual leader."

210 Judicial Commission Report, at 8.

a person differently on one of the prohibited grounds of discrimination. Basing decisions upon homosexual practice could be said to constitute indirect discrimination since this is likely to have a burdensome effect or impact upon those with a homosexual orientation. But section 65 requires the different treatment to be unlawful under another provision of the Act. As we shall see, it is arguable that clergy selection matters are exempt under the Act.[212] If direct discrimination by such bodies on the grounds of sexual orientation is permitted, indirect discrimination by such bodies must likewise be. Furthermore, section 65 provides a defence. The person charged with alleged indirect discrimination can be absolved if she can establish "good reason" for her conduct or practice.[213] Churches could readily submit doctrinal justifications as to why practising homosexual leaders would be inimical to their mission, in terms of section 65, or why heterosexual practice or celibacy is a "genuine occupational qualification" in terms of section 97 of the Act.[214]

On the assumption that sexual practice discrimination is tantamount to sexual orientation discrimination, and that to discriminate on the basis of practice must necessarily be to discriminate on the basis of orientation, I shall now consider the three main stages.

(c) Training

Most churches require some theological or other training to equip persons "called by God"[215] to fulfil their vocation. In some denominations ministry candidates may proceed to training without prior vetting by a church organ. Other churches envisage prior approval: for example, the National Assessment Committee of the PCANZ interviews prospective students for the ministry. If ministry constitutes "employment" the Act may be relevant. Under section 23 it is unlawful for any person to inquire of any applicant for employment in such a way so as to indicate or be reasonably understood to indicate, an intention to commit

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211 See the Opinion for the Human Rights Commission by Paul Rishworth, Professor Margaret Bedggood and Colin Pidgeon QC, May, 1988 (on file with author). I should disclose I had input into a draft version of this opinion.

212 Ibid.

213 On establishing a "good reason" see eg *Northern Regional Health Authority* v *Human Rights Commission* [1998] 2 NZLR 218 at 242 (HC).

214 On the genuine occupational qualification defence see eg Adzoxornu, *Brooker's Human Rights Law* (1997) at 1N.8.05 and HR97.01 et seq.

215 Many churches have the concept of "the call of God." For a description of the Methodist understanding see *Mabon* v *The Conference of the Methodist Church of New Zealand* [1997] ERNZ 690 at 698-699 (Full Emp Ct).

a breach of section 22, the employment discrimination ban. If ministry constitutes employment (which is seldom so, as we shall see) then asking candidates about their sexual identity or conduct could place the inquirer in jeopardy. This, however, in turn assumes that discrimination in employment of ministers on this ground is unlawful, a proposition which, likewise, is doubtful. Given, however, that the legal status of OPHM was clouded at the time, it was understandable that the PCANZ National Assessment Committee has decided to refrain from asking about candidates' sexuality.[216] Here we see a "chilling effect" at work again—church leadership selection occurs with an eye to prospective litigation under secular law.

Once initial approval for training is granted (where this is a prerequisite) can a seminary or Bible college refuse a student on the grounds of his or her sexual orientation? (Students enrolled in degrees at secular universities could certainly not be declined on such a basis.) Section 40 renders it illegal for vocational training bodies (those providing training to "help fit a person for any employment") to discriminate on any of the prohibited grounds. Pastoral work is not "employment" in the general course, so, prima facie, a Bible college is unlikely to be caught. If it was, however, the exemptions in section 41 would not assist. Nothing there exempts religious bodies nor permits discrimination in the provision of training by reason of an applicant's sexual orientation. Section 57 proscribes discrimination by educational establishments. An "educational establishment" is defined in section 57(2) to include "an establishment offering any form of training or instruction." Section 58(1) exempts certain kinds of educational establishment, including religious ones.[217] Undoubtedly, denominational Bible colleges are maintained primarily for students of that denomination. But the exemption only extends to refusals to admit students of a different sex, race or religious belief, not an applicant's sexual orientation. Prima facie it would appear unlawful to refuse to enrol an self-avowed practising homosexual student. The

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[216] The Judicial Commission Report note that the Committee was mandated not to require such information or to question candidates about sexual identity and behaviour in 1991 when it conducted its interview with Martin Dickson.

[217] It reads: "**58. Exceptions in relation to establishments for particular groups**—(1) An educational establishment maintained wholly or principally for students of one sex, race or religious belief does not commit a breach of section 57 of this Act by refusing to admit students of a different sex, race, or religious belief . . ."

institution would need to take advantage of the incompatible religious belief argument to be outlined shortly. The other exemption from section 57 which religious educational establishments might invoke is section 59. It exempts such establishments where their "courses or counselling [are] restricted to persons of a particular sex, race, ethnic or national origin, or sexual orientation, where highly personal matters . . . are involved." Bible colleges provide courses on the spiritual life and salvation, surely "highly personal matters" and, on my reading, might restrict their intake of students to persons of a particular sexual orientation.

(d) Licensing and Ordination

Following the completion of theological or similar ministry training, the candidate is then ordained to the ministry of his or her church. A formal imprimatur is administered by an authoritative body within the denomination signifying that the person is now recognised as a minister able to discharge unique pastoral and sacramental duties. In some denominations the ordination process is subdivided into two steps: "licensing" then "ordination". In some churches there is a significant gap between the two steps (for example, Methodist clergy are licensed, serve a two-year probation period in a parish, and are then ordained). In others, the two are a matter of days apart often (for instance, the PCANZ).

The Act is relevant at the ordination stage as well. Section 38 stipulates that it is unlawful for qualifying body to discriminate on any of the prohibited grounds. Such a body is one empowered to confer an "approval, authorisation or qualification" that is needed for engagement in a "profession, trade or calling". Section 39(1) provides an exemption for religion but it is not a model of clarity:

> **39. Exemptions in relation to qualifying bodies —**
> (1) Nothing in section 38 of this Act shall apply where the authorisation or qualification is needed for, or facilitates engagement in, a profession or calling for the purposes of an organised religion, and is limited to one sex or to persons of that religious belief so as to comply with the doctrines or rules or established customs of that religion.

Several readings of section 39 are possible.[218]

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[218] I am undebted to the Rishworth, Bedggood, Pidgeon Opinion here. A greatly condensed discussion is in Rishworth, "Bill of Rights, Human Rights" [1998] NZ L Rev 585 at 601-602.

(i) Narrow reading: exemption on the two designated bases only

Section 39 could mean that religious bodies can restrict authorisations to persons of one sex or religious belief but cannot withhold approvals by reason of the candidate's *other* attributes—race, national origin, sexual orientation etc. This construction seems unlikely. It does mirror the language of section 28(2) (discussed shortly) and no doubt the drafters thought it expedient to repeat the phrase used earlier (for employment) in this context. It would mean that churches could not decline to ordain a candidate who was married nor one who was "living in a relationship in the nature of a marriage."[219] The Catholic Church would have difficulty with the former and most denominations would oppose the latter. For these sorts of reasons, the narrow construction seems improbable.

(ii) Wide reading: categorical exemption

The widest reading of the section would afford religious organisations a complete exemption from section 38 because of the type of qualification they confer. Perhaps the section is concerned with identifying the *category* of authorisation which is wholly exempt from the section 38 ban. It is not concerned with immunising particular decisions of the religious body based on nominated grounds. Isolating the key phrases in support of this reading, the section states that: "Nothing in section 38 . . . shall apply" (thus rendering the section 38 prohibition otiose) "where the authorisation is needed for a calling for the purposes of an organised religion" (ordination is invariably restricted to adherents of that church or denomination so as to fulfil the tenets of that faith). Thus, by way of illustration, the Methodist Church is exempt since it ordains candidates for the purposes of Methodism and restricts candidates to those who are Methodist so as to comply with the tenets of Methodism.

This construction accords with the statement of Katherine O'Regan in the Parliamentary debates, the protection afforded clergy ordination decisions by the United Nations Human Rights Committee's General Comment No 22 and the immunity recognised in many common law jurisdictions. This reading does not require the church to point to a rule, doctrine or custom holding that ordination of practising homosexuals is impermissible.

The reference to rules, doctrines and customs in the closing words of section 39(1) is simply to make the obvious point that any restriction upon ordination must necessarily be due to the religious institution's desire to only admit leaders who share the aims and mission of that institution. Again, the phrase is a carry-over from section 28(2). The wide reading does render redundant the closing works of section 39(1), viz "and is limited to one sex [onwards] . . ." But this strained construction is, CCs might argue, required to preserve church autonomy in such a sensitive area as leadership selection. The wide construction would mean that churches would be able to restrict approvals on *any* of the thirteen prohibited grounds in section 21(1). Thus, a denomination would be free, for example, to ordain only persons of one race or ethnic origin. Such a ramification is certainly unpalatable in many people's eyes but is part and parcel of recognising the principle of church autonomy. Churches should be free to select leaders on bases the majority of people in society would abhor. The Human Rights Act's provisions do not govern the life of all private associations. Recognising a degree of private associational freedom, the Act exempts clubs from its coverage.[220] Presumably, churches, clubs and other voluntary associations face public disapproval and evaporating patronage if their leadership decisions are unpopular. A social rather than legal sanction should suffice.

(iii) Exemption under a broad concept of "religious belief"

Much denominational debate has been premised on the need for an authoritative church statement on homosexual leadership. The assumption has been that the section 39(1) exemption requires churches to point to a rule, doctrine or custom precluding practising homosexuals from becoming ministers. Once in place, the institution can then refuse ordination of the basis of the applicant's[221] "religious belief" since he or she does not possess the requisite religious belief. The relevant religious belief here is the candidate's belief that "sexual intercourse between people of the same sex is not a sin", "practising

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219 Section 21(1)(b)(vi).

220 Section 44(4). See further Mai Chen, "Self-Regulation or State Regulation? Discrimination in Clubs" (1993) 15 NZULR 421. Chen argues for the extension of the Act's coverage to private clubs, such as Rotary, which are essentially commercial in nature and vehicles for professional opportunities. She excludes 'expressive' associations such as churches from her reform proposal however.

homosexuals are fit to be ministers" or some similar variant. This argument requires one to attribute to a practising homosexual the belief that his or her own actions are appropriate—surely not a difficult equation. It also requires beliefs about sexual morality and practice to be characterised as a species of religious belief. Again, this is not difficult for if beliefs about what to eat or wear can be classified as religious beliefs, beliefs about sexual behaviour can likewise. Given these premises, the conclusion follows: the candidate's religious belief (about homosexual acts or gay leadership) do not correspond with those of the religious institution. "Religious belief" has to be "stretched" somewhat to accommodate church autonomy. The end result (no practising homosexuals are admitted) is the same as interpretation(ii) above, but the route is tortuous. The onus of proving this exemption (as with all exemptions under the Act[222]) lies upon the defendant institution. It must establish, on the balance of probabilities, that there exists a "doctrine, rule or established custom" of their church to the effect that homosexual leadership is impermissible. In practical terms, what ought to suffice here?

Arguably, there is no need for the institution to have an express, written rule promulgated by its governing body. Evangelicals within the PCANZ have sought such a ruling (out of an understandable abundance of caution) but it ought to not be strictly necessary. Where it exists it is clearly ample evidence, but the institution ought to be able to glean its position on such a matter from its general principles and tradition. The thrust of the Scriptures and "2000 years of Christian sexual ethics"[223] mandate that no practising homosexual be a pastor. It ought to be sufficient to comply with the Act for churches to point to existing general doctrines on celibacy or intimate sexual expression only within marriage. In any event, section 39(1) does not require a specific written rule. It refers also to "established customs." Customs are typically unwritten and must be discerned by those following them. If Parliament required an express written rule it notably failed to stipulate this.

If general custom or tradition suffice then an authoritative statement from the

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[221] Or on the basis of the institution's religious belief. The same end result is achieved due to incompatibility of the two parties' views.

[222] See section 85.

institution on the matter ought likewise to suffice. If the church leadership or national body proffer the view that their "rules, doctrines or established customs" dictate that practising homosexuals be denied (or allowed) ordination, that should be enough. To go behind the assertion of the institution would be dangerous. It would risk the sort of "entanglement" by secular tribunals with ecclesiastical affairs which has been universally decried. The tribunal ought to take at face value the authoritative statement, even amidst internal friction within the church concerned. Otherwise, it risks embarking upon a task it is ill-equipped to undertake—resolving matters of theological controversy. Of course, much turns upon what is an "authoritative" statement.[224] The secular tribunal cannot simply take at face value *any* proffered statement of custom and tradition from *anyone* in that body. The point at issue may be hotly-contested, with various factions claiming to be the authentic voice of the institution. To this extent, the tribunal may be required to evaluate competing evidence from opposing "camps".[225] Hopefully, where this situation arises, the tribunal would act circumspectly and limit its assessment to deciding who is the authoritative spokesperson without becoming embroiled in the substance of the complaint. Where the denomination has a devolved structure with autonomous local congregations and no authoritative umbrella body it is possible that each congregation may need to be an "organised religion" for the purpose of the section.

The very fact that interpretation (iii) can give rise to questions such as: Does a rule or custom exist?, Who is in a position to state it? Do such persons speak for the institution? and so on, perhaps indicates the improbability that this construction was the one intended by Parliament.

Finally, and still dealing with ordination, it is possible that section 37 might apply. It is unlawful for employer, employee, professional and trade organisations to discriminate in granting membership. Section 39(3) provides that the ban applies to "any other organisation

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223 *PAN* 1998/2, at 3.

224 I am most grateful to my colleague John Dawson for this point. It derives from a commissioned opinion he prepared for the HRC ("Religious belief, sexual orientation, and discrimination in the ordination and appointment of clergy", 2 Nov 1998 (on file with author)).

225 Associate Professor Dawson draws a helpful analogy with the determination of a contested Maori customary right. The court may need to determine from authoritative persons within Maori society

that exists for the purposes of members who carry on a particular . . . calling." Religious organisations might be said to deny membership to the particular calling of being a pastor. A church exists, in part, for the purposes of pastors or priests. If section 39 is satisfied there can be no liability under section 38 but conceivably there could still be liability under other provisions. Such a submission is unattractive, especially where the other prohibition concerned (section 37) contains no accompanying exemption.

(e) Appointment

Following ordination the minister is called (or inducted) to a particular parish or ministry (such as a city mission). I shall use the word "appointed" since, in the generality of instances and across denominations, a minister is not "employed" by the church concerned. This conclusion is supported by the Court of Appeal's analysis in *Mabon* v *Conference of the Methodist Church of New Zealand.*[226]

Mabon was dismissed from his appointment to a shared ministry between the Anglican and Union Parishes at Woodville. His original appointment, however, was by the Methodist Church of New Zealand. He instituted personal grievance proceedings under the Employment Contracts Act 1991. On the important preliminary jurisdictional question of whether he was an "employee" of the Church, and thus entitled to bring proceedings under that Act, the answer was clear. Both the Full Court of the Employment Court[227] and the Court of Appeal held he was not an employee. Rather he was an "officer" of the Church; he held a "calling" or "office" pursuant to which he was remunerated by way of a "stipend." Although the Church also paid him superannuation, the law and regulations of the Church expressly stated that: "A minister is not an employee of the Church." This statement in the Church's laws was "unequivocal and categorical."[228] It was not inconsistent with the laws and regulations as a whole, the tenor of which, objectively viewed, consistently maintained that ministers were not employees. On a proper construction, the Church's laws indicated there was no intention to create a legal contract between a minister and the Church. The Rev

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whose evidence is more persuasive so as to verify the existence and content of a particular customary right (his example is *Te Weehi* v *Regional Fisheries Officer* [1986] 1 NZLR 680 (HC)).

226 [1998] 3 NZLR 513.

227 [1997] ERNZ 690.

Mabon himself believed he had a divinely-inspired vocation. The case here was compelling since the Annual Conference had expressly rejected the repeated recommendation of one of its subordinate boards that ministers be treated as employees. The Court of Appeal was fortified in its conclusion in the instant case by the similar approach adopted by "the overwhelming majority of Courts in the common law jurisdictions."[229] They too affirmed that, absent special circumstances, ministers do not have contracts of service (that is, employment contracts) with their church. This is the general rule. It is not to say that churches may not be contractually bound on "subsidiary" or "ancillary matters" such as superannuation or occupation of a house.[230] Nor is it impossible for a church to employ as a servant a person to perform spiritual duties.[231] Nevertheless, in the typical situation an ordained minister is not an employee. Such rights and duties she possesses derive from her terms of appointment. Furthermore, a minister would still have legal recourse by way of judicial review of the decisions of his or her church, a voluntary association.[232]

Although *Mabon* concerned the Methodist Church and its laws and regulations, a lead has been given. The Anglican and Presbyterian Churches were joined as parties and furnished submissions. While the Court of Appeal emphasised that each case depended on the particular terms of appointment concerned (and the laws and regulations of that denomination) the indication is that ministers will seldom, in the absence of very clear documentation, be held to be employees.

If, generally, ministers are officers, not employees, of a church, the scope of operation for the Human Rights Act is greatly narrowed. Decisions by a national church not to appoint a minister to a parish (in the Methodist example), or by a local congregation or presbytery to do likewise, would not fall within section 22. That section prohibits employers from discriminating on the prohibited grounds. But ministers are not employees. Even the

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228 [1998] 3 NZLR at 526 per Richardson P.

229 Ibid at 522.

230 Ibid at 525 (referring to *Diocese of Southwark* v *Coker* [1998] ICR 140 and *President of the Methodist Conference* v *Parfitt* [1984] QB 368).

231 Ibid at 524 (citing Lord Templeman in *Davies* v *Presbyterian Church of Wales* [1986] 1 All ER 705 at 709). For a New Zealand instance see eg *Gray* v *Nelson Methodist Presbyterian Hospital Chaplaincy Committee* [1995] 1 ERNZ 672.

232 A point made by the Full Employment Court in *Mabon* [1997] ERNZ at 719. See eg *Presbyterian Church* v *Fuimaono* for an instance of successful judicial review of the actions against a minister by the General Assembly of the PCANZ.

extended definition of employment in section 2 of the Act does not extend to office holders.[233] Thus, it appears that, in the generality of cases churches will be free under the Human Rights Act to refuse to appoint an openly-practising homosexual or lesbian minister.

Again, there is the potential action under section 65 for indirect discrimination but that, again, is subject to the same caveats: (i) discrimination of this type is not otherwise in contravention of the Act (on the assumption the reasoning earlier is sound) and, (ii) there may well be "good reason" for it.

If ministers *are* employees then churches must avail themselves of the exemption in section 28(2). It reads, in material part:

> Nothing in section 22 of this Act shall prevent different treatment based in religious or ethical belief where—
> (b) The sole or principal duties of the position . . .
> (i) Are, or are substantially the same as, those of a clergyman, priest, pastor, official, or teacher among adherents of that belief or otherwise involve the propagation of that belief . . .

The very presence of section 28(2)(b)(i) might suggest an intention to subject ministers to the anti-discrimination prohibitions of the Act. Arguably, it was included to address the infrequent and exceptional cases where ministerial appointments are found to constitute employment contracts.[234] The exemption is limited to situations where the discrimination is by reason of the applicant's "religious or ethical belief." Once more, to secure immunity the religious institution, would be obliged to satisfy the tribunal that the applicant's beliefs about homosexuality are "religious beliefs" at odds with its (the institution's) own religious tenets. Again, the arguments about custom sufficing would need to prevail.

III CONCLUSION

Conservative Christians have lost successive battles to oppose homosexual law reform. For them, the "normalisation" of homosexual practice and lifestyle underlines the cultural disestablishment of Christianity, reminding them that New Zealand is a post-

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[233] "Employer" includes those who engage "an independent contractor" and those engaging "an unpaid worker": s 2 of the Human Rights Act 1993.

[234] See Rishworth Opinion.

Christian society. The Wellington worldview is characterised by ethical relativism: the modern liberal state recognises diverse conceptions of the good life as expressed in sexual mores and practices.

The addition of "sexual orientation" to the prohibited grounds of discrimination under the Human Rights Act 1993 was opposed by CCs. Amongst their concerns was the possible impact of the Act upon the ordination of clergy. Would CCs' religious freedom be curtailed by the state preventing them from rejecting openly-practising gay candidates for the ministry? The answer to this is still unclear. Debates within certain denominations still rage on the issue of gay clergy. The uncertain application of the Human Rights Act has perhaps made the church debates more complex and urgent. From a CC perspective, the sexual orientation discrimination prohibition in the Act and the cryptic wording of the exemption for churches has played too significant a part. Uncertain application of secular law has, for CCs, had a "chilling effect" on a critical church matter. By the same token, if the Act had unambiguously exempted churches on the issue, I have little doubt CCs would have invoked it with the alacrity their liberal opponents have.

Returning to my model of engagement, one sees an attempt at peaceful co-existence between the two worlds. The state has sought to accommodate religious conviction by inserting exemptions for religious organisations in the Human Rights Act. The liberal state prefers liberal religions but, for those faiths which do not reflect modernist ideals, it is willing to grant exemptions. Accommodation here costs the state little. An exemption for a private association does not threaten the central public institutions (rationality, neutrality, and so on) of the liberal state.

Parliament's aspiration that church autonomy and clergy selection be preserved may be foiled. Conflict between CCs and the state may yet occur due to the clumsy wording of the Human Rights Act and the history of sporadic antipathy between CCs and the Human Rights Commission. The Human Rights Commission proposes to issue a discussion paper on ordination of homosexual clergy and the Act in 2000.[235] If a test case should occur and CCs should lose their right to refuse openly-practising homosexual candidates for the ministry,

the intolerant, totalitarian propensities of human rights laws (as predicted by some CC theorists) will have been revealed. To quote Paul Marshall from Chapter 3 again: "in this liberal society, communities are not free: rather they are constrained to become liberal associations." A test case turning against CCs would see civil disobedience by many conservative churches.

If churches are "off the hook" and their exemption for matters of leadership, training and selection of clergy is confirmed, peaceful co-existence will have been restored. Nonetheless, CCs cannot afford to be sanguine. They will need to remind the liberal state of its own professed tenets, those such as the value of mediating institutions and their unique enriching role in fostering moral and civic virtue. Perhaps the CC conception of the good life may no longer be one that a free and democratic society values—it is too intolerant, bigoted and disruptive of the discourse shaped by ideological pluralism. CCs may need to work that much harder to remind the state of the merits of church autonomy.

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[235] Interview with Sou Chiam, head of the Human Rights Policy Unit, Human Rights Commission, Auckland, 20 January 2000.

Chapter 10

HOMOSEXUAL PRACTICE: CHALLENGING SAME-SEX MARRIAGE

In a post-Christian, pluralist New Zealand, are conservative Christians (CCs) hampered in influencing society and shaping public policy? Can they challenge the introduction of laws which, to them, take society down a degenerative path? Is their positive religious freedom hindered? As we noted earlier, the transformative urge of CCs has traditionally seen them concentrating mainly on matters of personal morality, sexual ethics, and family life, leaving broader, macro, "social justice" issues to liberal Christians. CC energy has been directed at such issues as stemming rising abortion rates, opposing "permissive" sex education in state schools and opposing Sunday trading. The "normalisation" of homosexual practice, especially same-sex marriages, is yet another issue of concern to them. My focus here is different from the previous chapters in this Part, which examined certain threats to CCs' negative religious liberty. I select the introduction of same-sex marriage as a contemporary case study to assess the degree of CCs' positive religious liberty.

After articulating the CC concerns, I examine the current law on same-sex marriage ("SSM") and the prospect of its recognition. The tenor of recent law reform proposals and family case law is towards equal treatment of homosexuality and heterosexuality. The Wellington worldview finds little or no objection with homosexual conduct. I explore possible legal impediments to public opposition by CCs to SSM and conclude with some brief thoughts on whether they can make a successful case against it under the current terms of public debate.

I CONSERVATIVE CHRISTIAN CONCERNS WITH SAME-SEX MARRIAGE

To recapitulate, CCs maintain that homosexual practice is sinful and that homosexual marriage is likewise. The latter is, for them, unnatural, unbiblical and demeans the existing

(and fragile) institution of marriage. Same-sex marriage is a key issue for both sides of the debate, for its recognition would spell a massive and decisive victory for the thoroughgoing "normalisation" of homosexuality. It would entail, as some CCs see it, many unpalatable consequences for society, the traditional family and so on. The Rev Stuart Lange, national Secretary of Presbyterian AFFIRM, articulates the concern:

> While the case for same-sex marriage is usually expressed in terms of discrimination and loss of legal rights, it would seem that the main motivation is the normalisation and full public acceptance of homosexuality. How more respectable can homosexuality get, if the law were to legitimise legally contracted homosexual partnerships as simply 'marriage'? . . . One problem with recognising homosexual marriage is that, by definition, and in every human society that has ever existed, the essence of marriage is a union of a man and a woman. A same-sex marriage is a contradiction in terms . . . A same-sex marriage may one day be recognised in law—but whatever it is, it is not marriage. But for Christians—and for most religions—the objection to the concept of same-sex marriage goes much deeper. Marriage is something established by God, part of the very basis of human life and society. In a word, marriage is sacred. To allow homosexual couples to marry would defile and demean marriage, and would lend to homosexuality a spiritual and moral legitimacy it can never have in its own right.[1]

For the CC, the essence of marriage can never change: "the union of a man and woman for life."[2] Marriage is not a human contract but a God-given institution.[3] The Biblical account of creation, recorded in *Genesis*, establishes that marriage is innately heterosexual: "For this reason a man will leave his father and mother and be united to his wife, and they will become one flesh."[4] Marriage was created by God for mankind's good and reflects the way we are meant to live.[5]

Apart from being inherently contradictory and anti-normative, many CCs believe legal recognition of SSM would entail disastrous societal consequences. The "normative character of marriage and family life"[6] would be severely undermined. Society, at its peril, undercuts the family unit (as CCs conceive it) built upon the traditional concept of

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1 Stuart Lange, *Homosexuality and the Church*, Presbyterian AFFIRM Booklet No 4 (1998) at 19-20.

2 Alan Storkey, *Marriage and its Modern Crisis: Repairing Married Life* (1996) ch 3 (entitled, "A Christian understanding of marriage") at 35. In New Zealand see eg Bruce Logan, *Marriage: Do we need it?* NZEDF report (Nov 1998).

3 Storkey, ibid at 2-5 and 36-39.

4 *Genesis* 2:24.

5 Storkey, *Marriage and its Modern Crisis*, at 37.

6 Ramsey Colloquium, "The Homosexual Movement" in Belding and Nicholls (eds), *A Reason for Hope: Christian Perspectives on Homosexuality and Healing* (1996) 1 at 6.

marriage—permanent, monogamous and heterosexual.[7] In the eyes of some CCs, the litany of adverse consequences logically following from legal endorsement of SSM is long: the adoption of children by same-sex couples[8]; wholesale changes to public education to reflect the new equal status of homosexuality alongside heterosexuality[9]; employment quotas for gays[10]; homosexual vilification laws[11]; even homosexual television stations.[12] The principal concern is the potential disadvantage for children. Children of SSMs would be denied "the obvious right of both a paternal and maternal role model."[13] The Rev Dr Harold Turner even suggested that the deprivation of a natural heterosexual father and mother "should be classified as a form of child abuse."[14] It is taken as axiomatic that children will suffer from being raised by same-sex parents.

A direct effect upon CCs and their religious liberty would be felt also: pressure upon churches to solemnise SSMs[15]; pressure not to speak out against homosexuality as a sin[16]; even, at a practical level, alterations to manses, parsonages and vicarages to accommodate homosexual couples and the introduction of pre-marriage preparation and post-nuptial 'marriage enrichment' courses catering for same-sex couples.[17] Perhaps, speculate some CCs, SSM will result in "the stigmatisation of traditional religion and morality"[18]: conservative religionists who insist upon a traditional sexual code and resist this latest phase of the sexual revolution will, in an ironic twist, be the new pariahs.[19]

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7 See Bruce Logan, "Same-sex marriages seen as threat to religious freedom," *New Zealandia*, May 1996, 14 at 15; Michael Hains, "Same-sex super push ignores treaties" *Cutting Edge*, Nov/Dec 1998, 7 at 8.

8 Logan, ibid.

9 Grant Thomas, MP, Human Rights Bill (1993) 537 NZPD 16931. See further Richard F Duncan, "Homosexual Marriage and the Myth of Tolerance: Is Cardinal O'Connor a 'Homophobe'?" (1996) 10 Notre Dame J L Ethics and Pub Policy 587 at 599-600.

10 Grant Thomas (1993) 537 NZPD 16931.

11 Thomas, ibid; Graeme Lee (1993) 537 NZPD 16968; Whetu Tirikatene-Sullivan (1992) 532 NZPD 13216; Lange, *Homosexuality and the Church*, at 19.

12 Thomas, ibid.

13 Logan, ibid at 15. See also Bill Muchlengberg, "Homosexuality and Human Rights" in Belding and Nicholls, *A Reason for Hope*, 52 at 54.

14 The Rev Harold Turner, "We now know/don't know? The state of play in the homosexual debate", unpub document, May 1997 (on file with author).

15 Logan, "Same sex marriages," at 15; Thomas (1993) 537 NZPD 16968.

16 Thomas (1993) 537 NZPD 16931.

17 Harold Turner, "Logical Conclusions" in Belding and Nicholls (eds), *A Reason for Hope*, at 26-27.

18 Duncan, "Homosexual Marriage," at 600.

II ARE CONSERVATIVE CHRISTIANS RESTRICTED IN THEIR EFFORTS TO THWART THE INTRODUCTION OF SSM?

1 The current position on SSM: the Quilter *case*

Before exploring impediments, if any, to CCs' positive religious liberty in relation to SSM, it is necessary to outline its current status. The position is clear: New Zealand law does not presently recognise SSM. The leading case is *Quilter* v *Attorney-General.*[20]

Three lesbian couples, Lindsay Quilter and Margaret Pearl and two other couples, sought to test the law in light of the Human Rights Act's sexual orientation discrimination prohibition. They sought a declaration that they were lawfully entitled to obtain a marriage licence and marry pursuant to the Marriage Act 1955. The Registrar-General of Births, Deaths and Marriages refused to issue a licence. The plaintiffs argued that following the amendment to section 19 of the New Zealand Bill of Rights Act 1990 ("BORA") in 1993 (which incorporated, inter alia, the prohibition upon sexual orientation discrimination found in section 21(1)(m) of the Human Rights Act 1993) the courts were now required to read the Marriage Act consistently with the BORA. The BORA banned sexual orientation discrimination and, therefore, pursuant to section 6 of the BORA, the Marriage Act should be read consistently with that proscription. The latter Act, to achieve harmony with the BORA, ought to be interpreted so as to include SSM within its concept of marriage. The word "marriage" is not defined in the Marriage Act.

Both the High Court[21] and the Court of Appeal unanimously rejected this argument. Although the Marriage Act did not expressly mandate opposite-sex partners it was "clear beyond doubt,"[22] indeed "the only possible interpretation"[23], that the traditional common law meaning of marriage was assumed. The common law definition is in the 1866 case, *Hyde* v *Hyde & Woodmanse,* where Lord Penzance observed: "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life

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19 See Justice Scalia dissenting in *Romer* v *Evans*, 134 L Ed 2d 855, 878 (1996) who criticises the majority of the Court for "verbally disparaging as bigotry [those displaying] adherence to traditional attitudes."

20 [1998] 1 NZLR 523 (CA).

21 [1996] NZFLR 523.

22 *Quilter* [1998] 1 NZLR 523 at 581 per Tipping J.

23 Keith J, ibid at 555.

of one man and one woman, to the exclusion of all others."[24] The common law simply adopted the Christian understanding of marriage—a permanent, monogamous union of a man and woman. Further, Parliament had recently confirmed the traditional concept of marriage still pertained. Tipping J, who delivered the principal opinion on these construction points, noted that in legislation passed since 1993 Parliament still viewed marriage in traditional terms: the language in the Births, Deaths and Marriages Registration Act 1995 clearly signalled the need for the persons to be of opposite gender.[25]

Because the Marriage Act was so clear it was impossible for it to be interpreted, pursuant to section 6 of the BORA, so as to permit SSM. Courts might well be enjoined to give the BORA a "generous interpretation"[26] in order to protect the fundamental rights and freedoms of citizens, but there were limits. Interpretation did not extend to re-writing legislation. Here, noted Gault J: "The Marriage Act is clear and to give it such different meaning would not be to undertake interpretation but to assume the role of lawmaker which is for Parliament."[27] To re-interpret that Act to embrace SSM would be to impliedly repeal or revoke it, something expressly proscribed by section 4 of the BORA. Tipping J articulates the limit of the interpretative process:

> We may interpret, but we cannot rewrite or legislate. The Bill of Rights must be given its full effect in the necessary process of interpretation, but it may not be used as a concealed legislative tool. It is clearly implicit in what the Bill of Rights says (s 4), and what it does not say, that Parliament has reserved to itself all legislative functions.[28]

All the judges were adamant that legal recognition of SSM was quintessentially a matter for Parliament and not the courts. Marriage was "one of society's fundamental institutions"[29] and the question of its alteration to embrace SSM was one "weighed with policy considerations of the kind Parliament is both constitutionally and practically equipped to decide."[30]

Although the combined effect of the clear meaning of the Marriage Act and the limiting

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24 [1861-73] All ER 175 at 177. Quoted by Kerr J in the High Court: [1996] NZFLR at 483-484.
25 Ibid at 580.
26 Keith J, ibid at 566 (citing *MOT* v *Noort* [1992] 3 NZLR 260 at 268 and 277 (CA)).
27 Ibid at 526.
28 Ibid at 572.
29 Ibid at 581 per Tipping J.

operation of section 4 of the BORA was sufficient to dispose of the appeal, several judges explored, in lengthy obiter discussion, whether denial of SSM constituted "discrimination" in contravention of section 19 of the BORA. Here the Court of Appeal was divided.

The majority (Richardson P, Gault and Keith JJ) held there was no discrimination. Gault J adopted a formalistic concept of discrimination. Gays were not purposely singled out for exclusion but rather fell into the class of persons who were ineligible to marry the person of their choice.[31] That class included bigamists, persons wishing to marry someone under the age of sixteen, persons wishing to marry a close relative, and so on. But, as Thomas J rightly rejoined, this sort of definitional argument is circular and question-begging. If one begins with a definition of marriage as inherently heterosexual "the answer is inescapable."[32] That begs the question as to whether the definition is intrinsically biased to start with. On Gault J's logic, a definition of marriage requiring partners to be of the same race would not be discriminatory either.[33] Furthermore, Gault J's concept of discrimination is too narrow. It only embraces direct discrimination, whereas laws which appear to apply to everyone equally (and deny everyone a particular choice) may, nonetheless, severely burden certain groups more than others.

Keith J took a different tack. For him it was inconceivable that the addition in 1993 of new grounds of discrimination (including sexual orientation) to the general prohibition in section 19 of the BORA could have the effect claimed: "Parliament would not have effected such a major change to a fundamental institution in our society and legal system with a great number of consequential changes (where the law depends on marital status) in such an indirect way."[34] Keith J cautioned that the non-discrimination principle in section 19 needed careful handling—it ought not always be applied in an "automatic comprehensive way."[35] Instead, a "contextual and principled application"[36] was desirable. Both international and

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30 Ibid at 542 per Thomas J.
31 Ibid at 527. For academic criticism see Andrew Butler, "Same-sex marriage and freedom from discrimination in New Zealand" [1998] Public Law 396 at 397-398.
32 [1998] 1 NZLR at 546. See also at 537.
33 Thomas J, ibid at 537-538. This argument, as Thomas J notes, was demolished by the American Supreme Court in *Loving* v *Virginia*, 388 US 1 (1967).
34 Ibid at 555.
35 Ibid at 557.
36 Ibid.

domestic human rights law evidenced a "particularistic and gradualist"[37] approach. Slowly and carefully more grounds of prohibition had been added to more areas of activity. On the question of SSM, the prudent approach might be instead of "extending or redefining the status, the law might make a particular incident or right and duty of marital status available to a wider group."[38] As we shall see shortly, Parliament has indeed taken this approach by providing benefits and protections to same-sex couples in certain areas.

There is a danger, however, on concentrating too much on what path Parliament did or did not intend to follow. The courts' job is to consider whether rights are infringed at the case in hand. Thus, as Thomas J replied, the reasoning of Keith J "confuses Parliament's intent in enacting s 19 with the question which s 19 poses: is there a breach of the fundamental right to freedom from discrimination the grounds of discrimination as set out in the Human Rights Act?"[39] If fundamental rights have been infringed it would be a "serious error"[40] not to declare a violation if and when it occurs.

A minority of the Court found a breach of section 19. Tipping and Thomas JJ adopted the broader, and, it is submitted, correct concept of discrimination that embraces indirect as well as direct discrimination. Laws may not purposely discriminate against an individual or group, but they may nonetheless have a "disproportionately severe impact"[41] on a certain group. Whether by design (direct discrimination) or by effect (indirect discrimination) the injury is the same. Tipping J clarified:

> If something (here legislation) has an impact on a person or group of persons which differs from its impact on another person or group of persons because of sexual orientation, that difference in impact amounts prima facie to a difference in treatment and thus to discrimination. That is so even though analytically it is possible to say that the circumstance applies equally to all . . . In the present case the impact of the prohibition inherent in the Marriage Act against same-sex marriages is much more significant for people with a same-sex orientation than it is for people of heterosexual orientation . . . Prima facie therefore I see the inability of homosexual and lesbian couples to marry as involving discrimination against them on the grounds of their sexual

37 Ibid at 565.
38 Ibid at 568.
39 Ibid at 547. See also Butler, "Same-sex marriage," at 399.
40 Ibid at 554.
41 Ibid at 533 per Thomas J.

orientation.[42]

The broader view of discrimination accords with the recognition of indirect discrimination in section 65 of the Human Rights Act 1993. It also reflects the American interpretation of religious discrimination. There, it has been long recognised that deliberate restriction of religious liberty is rare but that "facially-neutral laws of general application" may nevertheless "substantially burden" religious exercise.[43] This incidental burdening of religious freedom requires suitable justification by the state. The broader concept of discrimination has benefits for CCs in any future allegations of infringement of their religious liberty.

Thomas J was prepared to go beyond a bland pronouncement of discrimination and denounce the restriction in no uncertain terms:

> Based upon this personal characteristic [sexual preference], gays and lesbians are denied access to a central social institution and the resulting status of married persons. They lose the rights and privileges, including the manifold legal consequence which marriage conveys. They are denied a basic civil right in that freedom to marry is rightly regarded as a basic civil right . . . In a real sense gays and lesbians are effectively excluded from full membership of society.[44]

His Honour endorsed the homosexual movement's plea for equal "respect concern and consideration."[45] Gays deserved "much more than tolerance from the majority"[46] if they were to achieve full citizenship. (This is precisely the homosexual movement's desire: "In the past, most gays and lesbians sought, and were satisfied with, tolerance, but now many

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42 Ibid at 575-576.

43 See eg *Employment Division* v *Smith*, 494 US 872, 894 (1990) per Justice O'Connor (generally applicable laws having the effect of substantially burdening a religious practice place the onus upon the government to show a "compelling state interest" in refusing an exemption for the religionist). The majority in *Smith*, however, refused to uphold the compelling state interest test for free exercise exemptions. This led to Congress passing the Religious Freedom Restoration Act 1993, which in turn was struck down as unconstitutional by the Supreme Court in *City of Boerne* v *Flores*, 521 US 507 (1997).

44 *Quilter* [1998] 1 NZLR at 537. Thomas J's language here is reminiscent of Justice Sandra Day O'Connor's "endorsement test" for contravention of the establishment clause of the First Amendment: "[G]overnment cannot endorse the religious practices and beliefs of some citizens without sending a clear message to nonadherents that they are *outsiders or less than full members of the political community*." *County of Allegheny* v *Greater Pittsburgh ACLU*, 492 US 573, 627 (1989) (emphasis added).

45 *Quilter* at 533 (the comment here is a general one referring to vulnerable and marginalised persons generally and not directed specifically to homosexuals).

46 Ibid at 532 (ditto).

are asking for acceptance by demanding that their relationships be legally recognized."[47])

Of the two dissentients (on the question of discrimination), only Thomas J addressed the substantive merits of the present exclusion of same-sex couples from marriage. Tipping J, having found discrimination, was content to resolve the matter in purely legal grounds. Although there was discrimination (by impact) here, it was not unlawful for it was a restriction authorised by Parliament and, by dint of section 4 of the BORA, that societal choice must prevail against any violation of section 19. The restriction upon choice of marriage partner here was, he assumed, one "which society regard[ed] as necessary and desirable,"[48] one which reflected "the current will of the people."[49] There was no need for the Court to gainsay whether the existing justifications for heterosexual-only marriage could pass muster—this was a job for Parliament.

Thomas J, by contrast, tackled the substantive question and found the case for denying SSM wanting. There was simply "no sound reason"[50] for non-recognition of SSM. The only possible objection, in his view, "the biologic inability of gays and lesbians to procreate,"[51] was unconvincing. For him, the emphasis upon procreation misconceived the real essence of marriage, which was "to be found in the nature of the relationship, not in some biological purpose."[52] Once marriage was apprehended as having other facets and qualities—"such as cohabitation, commitment, intimacy, and financial interdependence"[53]—it was plain that homosexual as much as heterosexual couples could qualify. Thomas J even doubted that any attempt to justify exclusion of same-sex couples could withstand scrutiny. He propounded the thesis that "discrimination in all its forms" could not be "reconciled with the democratic ideal of equality before and under the law."[54] Given that "discrimination and democracy are inherently antithetical" he foresaw no likelihood of the existing heterosexual marriage law being vindicated under section 5 of the

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47 Carlos A Ball, "Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism" (1997) 85 Georgetown LJ 1871 at 1874-1875.
48 *Quilter* at 574.
49 Ibid at 576.
50 Ibid at 541.
51 Ibid at 547.
52 Ibid.
53 Ibid at 534.
54 Ibid at 540.

BORA as a reasonable limit demonstrably justified in a free and democratic society.[55] Regarding Thomas J's prediction that a convincing defence for retaining the traditional concept of marriage will not materialise, time will tell. Certainly his opinion (which reads as a powerful brief for SSM) has thrown down the gauntlet to policy makers. Thomas J acknowledged that, due to the inability of judges to strike down legislation inconsistent with the BORA (section 4), the finding of a violation of section 19 might appear somewhat hollow. But, if it resulted in "pressure on Parliament to change the law"[56] or "attract[ed] the attention of the [UN] Human Rights Committee,"[57] then so be it. Thomas J's judgment is in effect a "declaration of incompatibility" (the device introduced by the United Kingdom Human Rights Act 1998[58]) that the Marriage Act derogates from a civil right recognised in the BORA.[59] This type of "judicial indication" was endorsed recently by a full bench of the Court of Appeal in *Moonen*.[60] His judgment was no doubt solace to gay lobby groups such as "Rights Right Now" in their battle to secure SSM.[61]

2 *The prospect of SSM*

It is worth *briefly* speculating upon the likelihood of the law recognising SSM in the near future. The *Quilter* judges made it crystal clear that any change to such a fundamental societal institution must be for the legislature. There are indications that Parliament is increasingly ready to acknowledge the homosexual way of life as not just to be tolerated but to be treated as normal and acceptable. If and when this process is complete, the homosexual movement will have succeeded in a "transvaluation" of traditional values, whereby

> certain areas of conduct, traditionally conceived of as morally wrong and thus the proper object of public regulation and prohibition, are

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55 "Whatever justification is advanced to justify the exclusion of gays and lesbians from the status of marriage . . . cannot be properly attached to the criteria of s 5.": ibid.

56 Ibid at 548.

57 Ibid. One of the three lesbian couples in *Quilter*, Juliet Joslin and Jennifer Rowan, have taken their case to the Committee: see Philip Matthews, "Partners in crime", *NZ Listener*, 18 Sept 1999, at 30.

58 See s 4 of the 1998 Act.

59 See Paul Rishworth, "Reflections on the Bill of Rights after *Quilter* v *Attorney-General*" [1998] NZL Rev 683 at 689. For trenchant criticism of the use of such declaratory opinions see Mark Henaghan, "Same-sex marriage in the Court of Appeal" [1998] NZLJ 40.

60 *Moonen* v *Film and Literature Board of Review*, unrep, Court of Appeal, CA 42/99, 17 December 1999, at 12 per Tipping J. The Court observed: "Such judicial indication [of inconsistency with the Bill of Rights Act] will be of value should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject arises in that forum."

61 See "Lobby group vows to fight on," *ODT*, 18 Dec 1997, at 3.

> now perceived as *affirmative goods* the pursuit of which does not raise serious moral questions and which thus is no longer a proper object of public critical concern.[62]

Evidence of the "particularistic and gradualist" approach to rights, as Keith J put it, is apparent in the 1990s. Instead of changing the definition of marriage, various rights, duties and incidents of marriage have been extended by Parliament to same-sex partners.[63] For example, the Domestic Violence Act 1995 provides protection from abuse by a "partner" (section 2), including a de facto partner of the same gender.

The "phased and nuanced" approach (Keith J) looks set to continue as the Wellington worldview sees few qualms with homosexuality. Thus, for instance, succession law may be changed following the Law Commission's 1997 report,[64] to permit survivors of a homosexual partnership to succeed to their partner's estate. On the other hand, the De Facto Relationships (Property) Bill, introduced in March 1998, does not, yet, extend the benefits of its equal-sharing regime to same-sex couples.[65] In December 1998 Cabinet agreed to amend its residence policy, aligning same-sex relationships with de facto heterosexual ones.[66] The Ministry of Justice in August 1999 issued two discussion papers calling for submissions on the introduction of SSM.[67] In October 1999 the Law Commission formed a "preliminary view"[68] that a change allowing same-sex couples to adopt (where, on the merits, they met the usual sound parenting criteria) was warranted. Its review of the research

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62 David A J Richards, *Sex, Drugs, Death, and the Law* (1982) at 126-127 (original emphasis). Quoted in Robert P George, *Making Men Moral* (1993) at 144-145.

63 Statutory examples are given by Keith J in *Quilter*, at 569-570. There are currently four statutes which recognise same-sex marriage-like relationships: the one mentioned above, as well as s 111(2)(e) of the Electricity Act 1992, s 2 of the Harassment Act 1997 and s 25 of the Accident Insurance Act 1998: see Law Commission, *Recognising Same–Sex Relationships*, NZLC SP4 (December 1999) at para 20.

64 Law Commission, *Succession Law: A Succession (Adjustment) Act*, NZLC R39 (August 1997) at para 19-26 and the definition of "partner" in the draft Act. A partner includes a de facto partner, someone "liv[ing] in a relationship in the nature of marriage" (cl 9(2)). Clause 9(3) defines the latter phrase to "include[ ] a relationship between 2 members of the same sex." (see ibid, at 56-57).

65 See cl 17 of the Bill which refers to "a man and a woman" living together. The Labour Party objected to that and announced its intent to rectify it during the later stages of the Bill. The non-extension to same-sex couples was described as "simply nonsense" by Tim Barnett MP, Labour's human rights spokesman: see "De facto couples get property rights deal," *ODT* 25 March 1998, at 3.

66 "End to same-sex discrimination", *ODT*, 23 Dec 1998, at 3; Ministry of Justice, *Same-Sex Couples: Backgrounding the Issues* (1999) at 17. The period of eligibility for residency was reduced from four years for same-sex couples to two years, the period for de facto opposite-sex couples.

67 Ministry of Justice, *Same Sex Couples and the Law: A Discussion Paper* (August 1999) and *Same-Sex Couples and the Law: Backgrounding the Issues* (August 1999).

68 Law Commission, *Adoption: Options for Reform*, NZLC PP 38 (October 1999) at para 197.

evidence did not satisfy it that same-sex parents would make bad parents.[69] The latest Law Commission paper recommended that a Scandinavian-style registered domestic partnership law be introduced to cater for same-sex couples. To simply legalise SSM would "cause unnecessary and understandable offence"[70], so:

> In the Commission's view the sensible choice is for New Zealand law, by a measure analogous to the Danish legislation, to provide for the registration of same-sex relationships—such partnerships to confer the same rights and liabilities as marriage.[71]

While an advance, some gay activists are not content with this piecemeal, ad hoc reform, nor with the mere "functional equality" presented by the registered partnership model. Some judges in *Quilter*, notably Gault J, believed that "the real complaint" of the plaintiffs was not their liability to lawfully marry but simply that they were "denied rights and privileges which are available to married persons."[72] On that premise, he observed that their proper allegation was marital status discrimination. But for many, functional equality is not the goal; societal recognition of the acceptability of homosexuality is the prize, the "transvaluation" of homosexuality. An American commentator, Ball explains:

> If gay rights activists and litigators were solely seeking the same practical benefits associated with marriage without having to call it "marriage" (if they were seeking, for example, some form of comprehensive domestic partnership legislation that would guarantee the same benefits to same sex couples as are provided to married heterosexual couples), perhaps many—and maybe even most—Americans would be supportive, in the same way that a majority of Americans now believe that homosexuals should not suffer discrimination in employment and housing. But to speak of parity in the benefits associated with marriage is to speak of a functional equality that, while undoubtedly very important, is ultimately unsatisfactory because gays and lesbians currently seek not only equality in the tangible benefits associated with marriage but also full acceptance in a *normative* sense.[73]

Some gay lobbyists would, it seems, nonetheless settle for a registered partnership scheme.[74] For others, the registered partnership option would, commented one of the lesbian couples in *Quilter*, be "absolutely ghettoising", simply creating legislation around a

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69 Ibid at paras 190-196.
70 Law Commission, *Recognising Same–Sex Relationships*, NZLC SP4 (December 1999) at para 28.
71 Ibid at para 29.
72 *Quilter* [1998] 1 NZLR at 528.
73 Ball, "Moral Foundations," at 1876-1877 (emphasis in original).
74 See eg Anita Jowitt, "The Legal Recognition of Relationships Between Couples of the Same Sex: A New Zealand Perspective" (1997) 6 Aust Gay & Lesbian LJ 30 at 47.

partnership that is uniquely for them.[75] It is because "marriage is the single most significant communal ceremony of belonging"[76], "a preferred relationship"[77] that the symbolism engendered by the state recognising same-sex couples as *married* not just registered is so greatly prized. For the homosexual movement it would mark the transvaluation of homosexuality from: (i) despised, criminal, unnatural practice, past; (ii) decriminalised, tolerated conduct, through; (iii) protected human right, and finally to: (iv) approved and respected way of life. CCs equally recognise the symbolism which, for them, would mark *par excellence* the end of the Christian hegemony.

(a) Acceptance of homosexuality in family law

Judges involved with family law matters have, it appears, few qualms about the normalcy or acceptability of homosexuality. Thus, for example, courts have applied the equitable principles governing constructive trusts to permit homosexual partners living in a relationship in the nature of marriage to share in property following a split between the couple.[78] Further, lesbian applicants have been awarded custody and guardianship of children and, despite rejecting an adoption application, one judge nonetheless issued some favourable signals for its future acceptance. Intriguingly, several of the cases have a Christian dimension to them as well.

In *Re an Application by T*,[79] the High Court dismissed an appeal from a decision by the Family Court not to make an adoption order. The case concerned a high-profile proceeding (featured in a television documentary) by the appellant, FT, to adopt J, the child of her lesbian partner C. The couple had lived together for over nine years during which C had had three children by artificial insemination. The appellant had assumed the role of "breadwinner". The youngest child, J, aged four, was to be FT's child. FT had already been

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75 Matthews, "Partners in crime."

76 Thomas J in *Quilter* at 554.

77 "Marriage is the classic example of a preferred relationship. It is one of the most highly-preferred, historically-favoured relations in the law. Thus, the claim for same-sex marriage is not a claim for mere tolerance, but for special preference." Lynn D Wardle, "Same-Sex Marriage and the Limits of Legal Pluralism" in Eekelaar and Nhlapo (eds), *The Changing Family* (1998) ch 23 at 391. See also Robin Mackenzie, "Transsexuals' Legal Status and Same Sex Marriage in New Zealand: *M* v *M*" (1992) 7 Otago L R 557 at 573 et seq.

78 See eg *Hamilton* v *Jurgens* [1996] NZFLR 350 (HC); *Julian* v *McWatt* [1998] NZFLR 257 (DC).

appointed guardian of the two older children. She now sought to be made the legal mother of the youngest child, with C, his natural mother, being made a joint guardian with the appellant. Applying the criteria in section 11 of the Adoption Act 1955, Ellis J held that it would not serve J's welfare to grant the adoption order. Such advantages that existed were outweighed by the significant disadvantage to the boy of the artificial legal relationship sought here. In his Honour's view, a guardianship order in favour of FT would achieve "virtually everything"[80] that an adoption order would. Although the appellant lost, three interesting points were made.

First, Ellis J noted an earlier Family Court case where a lesbian applicant had successfully been granted an adoption order over her five-year-old male nephew, the boy having been in her care since birth. On the particular facts there "it was unquestionably in the child's interest that the adoption proceed." [81] That, admittedly, was not the paradigm case presented in *Re T.* Secondly, the High Court affirmed the lower court's finding that FT met the first criterion in section 11 of the Adoption Act, namely, she was "a fit and proper person to have the custody of J and was of sufficient ability to bring him up, maintain him and educate him." Thirdly, Ellis J reinforced that point with a clear, albeit obiter, statement that homosexuality per se is no impediment, in the courts' eyes, to good parenting. He would not be accused of being "homophobic":

> In at least one of the articles that was placed before the Court, attention was focused on the general perception that the legal system is not friendly to lesbians and gay men. In my view the decision in this case does not involve any criticism at all of the care givers. Indeed it is plain that they provide a stable and loving environment for the three children. It seems to me that the decision is gender neutral and would have been the same whatever the sex of the two care givers, be they two women, two men, or a man and woman.[82]

His Honour added that the fact they were not married posed another hurdle to adoption (section 4 of the Adoption Act) and thus "it [was] the inability to marry that is in issue in this

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79 [1998] NZFLR 769. The reporting of the case is tardy as the decision was delivered on 20 February 1992.

80 Ibid at 774.

81 *Application by RH to adopt RTH*, unrep, Family Court, Napier, A 31/84, 20 February 1985, Judge Inglis QC. Noted in [1985] NZ Recent Law 286. Discussed, ibid at 775.

82 Ibid at 775.

case."[83] The clear signal is that if SSM were to be legalised, courts would be ready to grant adoption orders to partners of lesbian or homosexual parents otherwise meeting the requirements of sound parenting.

Six years later, the lesbian partnership between FT and C had unravelled. C had, in 1994, publicly forsaken her lesbian lifestyle and "became involved in Christianity."[84] The rift was permanent between her and FT (following the latter's commencement of a lesbian relationship with a hitherto friend of C). C left, as an emergency contract address, an address of "a Hamilton pastor at his church" and concluded her letter to FT with the words: "I can't see any emergency that would warrant you contacting my children. If you meet Jesus then I am sure that the children would love to know that their prayers have been answered."[85]

In 1995, C successfully sought the termination of F's guardianship of the three children. The proceeding, *T* v *T* [*child support*], was pursuant to the Child Support Act 1991, with C seeking a declaration that FT be made a step-parent of the children. The Family Court held that FT met the statutory criteria for being declared a step-parent. FT's conduct over the years (especially her attempt at adoption) revealed "the most uncompromising acceptance of fiscal and other responsibility for the children possible."[86] Such an assumption could not be "vacated on the basis of later regret."[87] The law could be as neutral, between heterosexual and homosexual relationships, in imposing burdens as well as granting benefits. The High Court agreed. The Child Support Act's primary aim, the protection of children and their financial sustenance, would be advanced here if the material words were read "in an inclusive manner".[88] The question of SSM was "a very controversial question", one which was "utterly inappropriate" for the Court to discuss today.[89] Yet this issue was different: Parliament had "clearly chosen in this statute to solidly endorse the notion that the parties to a 'relationship in the nature of marriage' (however constituted) have an

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83 Ibid.
84 *T* v *T* [*child support*] (1998) 17 FRNZ 387 at 390 per Judge D R Brown (Fam Ct).
85 Ibid.
86 Ibid at 392.
87 Ibid.
88 *A* v *R* [1999] NZFLR 249 at 255 per Hammond J.
89 Ibid.

unequivocal obligation to materially support the children of such an enterprise."[90]

The next case, *VP* v *PM* [91] is a fascinating decision, for it involves the clash of values explored in this study. The Family Court was confronted by a custody contest over two children following the separation of their parents. The children had stayed with their mother in the four years following the break-up, during which time the mother had commenced a lesbian relationship with another woman (also a mother of two). The same-sex couple intended to live together with their four children. The father, a medical practitioner and a Christian, sought custody and raised his ex-wife's sexuality as an issue. He was concerned at the absence of a masculine figure and harboured misgivings at what sort of role model all-female adult caregivers presented. In addition, given the children's Christian upbringing to date, he believed their mother's lifestyle would confuse them and perhaps even lead them to reject the faith. Judge Mahony asked himself the question: "religious values aside . . . whether lesbian mothers should be given the main custodial role towards their children, particularly where a more conventional home, based on a heterosexual relationship is available."[92] He treated the one empirical study[93] proffered by the mother's counsel—which concluded that children raised by lesbian mothers did not appear to experience negative effects upon their welfare—with caution. Generalisations and broad conclusions of this sort had to give way, in the courtroom, to a particular assessment of the particular relationships at hand. Judge Mahony rejected the notion that the parents' sexuality of itself could disqualify them. It was a matter of their parenting ability:

> It seems to me . . . that good parenting in the particular family circumstances may be the determining factor and the reason why the Court need not be concerned in a particular case for the well-being of children living in the full-time care of a mother in a lesbian relationship. In my view that is the case here.[94]

The mother was commended for being "very gentle, discerning and prudent [and] also very discreet."[95] The judge was satisfied that the children were "not going to be damaged by

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90 Ibid at 256.
91 (1998) 16 FRNZ 621 (Fam Ct).
92 Ibid at 629.
93 F L Tasker and S Golombok, "Children raised by lesbian mothers—the empirical evidence" (1991) Fam Law 184.
94 (1998) 16 FRNZ at 630.
95 Ibid.

the relationship she plans to develop as [sic] her open and committed way of life."[96] The father's negative, dismissive attitude to his former spouse, one which he made no secret of before the children, counted against him. Placing the children in such an environment would psychologically harm them and "compound their confusion and bewilderment" produced by the inter-parental conflict.[97] Judge Mahony's passing comments about the difficulty, if any, posed by the mother's sexuality to the children's religious upbringing are revealing:

> I am satisfied that she [the mother] has thought through an explanation which leaves intact her strong commitment to Christian values. Hers is certainly not the black and white approach of the father, which is nevertheless to be respected . . . These parents themselves are not strong adherents to a particular religious faith where sexual orientation or the sanctity of marriage hold primary place in the religious values system of the family.[98]

The father's "black and white approach" to homosexuality might be respected in the abstract but when acted upon (by criticising the matter before the children) it did not attract judicial sympathy. At the risk of over-simplification, *VP* v *PM* indicates that homosexuality is no bar per se to good parenting and that spouses who denounce it, based upon sincere religious conviction, are in danger of this rebounding against them. They are revealing intolerance or vindictiveness towards a phenomenon which is, in a society increasingly governed by a liberal, modernist worldview, now regarded as neutral or benign.

(b) International pressure?

As we have seen, many CCs are suspicious of international instruments being used as a lever to usher in changes to domestic social policy. Do international covenants ratified by New Zealand require the Government to extend the legal definition of marriage to SSM?

Keith J in *Quilter* devoted some space to this question and his conclusion was "no". Article 26 of the ICCPR, which espouses the equality and non-discrimination norm, recognises states may legitimately carve-out exceptions in certain circumstances. In its *General Comment 18 on Non-Discrimination* in 1989, the UN Human Rights Committee observed that "not every differentiation of treatment will constitute discrimination, if the aim

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96 Ibid.
97 Ibid at 632.

is to achieve a purpose which is legitimate under the Covenant."[99] The ICCPR elsewhere (especially in article 23(2)) assumes the right to marry belongs to opposite-sex couples.[100] Keith J considered that his analysis of the international legal material

> indicates both the limited scope of general guarantees of equality and the non-acceptance of the world community of any support for a right to same-sex marriage based on the principle of equality or the prohibition on discrimination.[101]

Thomas J disputed Keith J's analysis. Although the Human Rights Committee did not *presently* view the denial of SSMs as a breach of article 26, there were signs that in the future might. The Committee had held that the article's prohibition on discrimination extended to discrimination on the basis of "sexual orientation" as well as "sex".[102] Further, the article had been regularly held by the Committee to have an independent, "stand-alone" effect, thus it was possible for the equality norm to be construed independently of other provisions in the ICCPR such as article 23(2).[103] Just as the state would be unable to establish an objective justification for denial of SSM under section 5 of the BORA, Thomas J believed it would struggle to demonstrate a "reasonable and objective" justification under the exception to article 26.[104] Finally, even if the Human Rights Committee did not favour the introduction of SSM, that did not prevent domestic governments still recognising it. To deduce non recognition of SSM in New Zealand from non-recognition internationally was, for his Honour, a *non sequitur*. The Human Rights Committee had to placate members from all parts of the globe, many of whom were "relatively less tolerant of gay and lesbian partnerships" because of their "cultural or religious differences or beliefs . . ."[105] While the

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98 Ibid at 628. It is hard to imagine what form of Christianity the judge is obliquely alluding to other than a liberal kind of Christianity.

99 General Comment 18 on Non Discrimination, 37th session, 9 November 1989, para 13. Quoted by Keith J in *Quilter* [1998] 1 NZLR at 562.

100 See also art 16 of the UNDHR 1948.

101 *Quilter*, ibid at 563. See also Wardle, "Same-Sex Marriage and the Limits of Legal Pluralism," at 389: "The overall global picture shows overwhelming support for exclusively heterosexual marriage . . . Virtually all international conventions have defined it as the union of a man and a woman."

102 See *Toonen* v *Australia* (1995) 69 Aust LJ 602 at para 8.7. Keith J [1998] 1 NZLR at 564, notes that this view was not relevant to the Committee's determination in the case: see *Toonen* at para 11. See also Ministry of Justice, *Same-Sex Couples: Backgrounding the Issues* at 3: "Sexual orientation is not widely accepted as a ground of discrimination in international law. New Zealand is party to no international human rights instrument that specifically prohibits discrimination by reason of sexual orientation."

103 See *Quilter*, ibid at 551-552.

104 Ibid at 552.

105 Ibid at 554.

international covenants "paint a backdrop against which New Zealand's obligations and compliance"[106] ought to be placed, the task of making law was ultimately New Zealand's and New Zealand's alone. An "enlightened approach"[107] domestically ought not to be thwarted by the tardiness of the international community generally. It is interesting here to see international law being downplayed when its thrust appears to not support a liberal measure. As it stands, it seems CCs have the international card in their favour. There is, for now, "no *consensus gentuim*"[108] to accept SSM, and SSM is "allowed in no country or state in the world."[109]

3 *Legal impediments upon CCs?*

CCs have the usual democratic channels open to them. They may lobby, write submissions to select committees, run petitions and so on. On matters homosexual, however, some CCs perceive that the current legal climate will prevent them preaching (in the widest sense) against homosexual rights. For instance, the leader of the Christian Heritage Party, the Rev Graham Capill, commenting on the Human Rights Bill 1992, believed anti-discrimination could "remove traditional freedoms" from society. He warned: "The Church, traditionally, has always held homosexuality to be a sin. Thus, to pass anti-discrimination legislation, on the basis of sexual orientation, will remove the right of the Church to preach and teach against this wrong."[110] Several CC MP's during the Parliamentary debate on this Bill endorsed this fear. [111] Other CCs are not so pessimistic. The editors of the 1996 CC anthology on homosexuality asserted, in the preface, that:

> Moreover, the law does not prohibit people from speaking out against homosexuality. Indeed, the law is to opposite effect . . .

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106 Thomas J, ibid, quoting Cartwright J in *Northern Regional Health Authority* v *Human Rights Commission* [1998] 2 NZLR 218 at 235 (HC).

107 Thomas J in *Quilter* at 542.

108 Hains, "Same-sex super push," at 8.

109 Lynn D Wardle, "International Marriage and Divorce Regulation and Recognition: A Survey" (1995) 29 Family LQ 497 at 500. Although some nations—Sweden, Denmark and Norway—have legalised "domestic partnerships" for same-sex couples: see Thomas J in *Quilter* at 548.

110 Capill is quoted in "Ghosts of '85 in new bill," *CW*, 29 Oct 1992, 1 at 2.

111 See eg Tirikatene-Sullivan (1993) 537 NZPD 16927: "If the legislation goes through I believe that the groups that will be harassed the most will be religious groups that preach honestly, according to their convictions and on the basis of scripture . . . that sodomy is unnatural . . . If this amendment [O'Regan's] is approved, a gay activist could say that he had heard the religious group claim that sodomy was unnatural and he could therefore take a case against the group." See also Graeme Lee (1992) 532 NZPD 13212.

> There are some particular exceptions to the right of freedom of speech. But speaking out against homosexuality is not one of them. Therefore people should not be inhibited about expressing the belief that the homosexual lifestyle is not a healthy or valid one—just as they must recognise the right of the homosexual lobby to promote their cause too.[112]

Katherine O'Regan's assurance during the Human Rights Bill's introduction (Chapter 9) is recalled: "It is not my intention that the legislation should prevent churches from preaching that homosexuality is sinful."[113]

(a) Freedom of expression: section 14 and beyond

Freedom of expression is acknowledged in the BORA. Section 14 reads:

> **14. Freedom of expression** — Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

Further, section 15 declares that the right to manifest religion or belief extends to "teaching . . . either in public or private." The right of Christians to teach and bear witness to the truth in the public arena is protected. But, as with freedom of religion, free speech is not an absolute right.[114] There are limits and ordinary legislation can abridge the right of free expression. The High Court in *News Media*[115] made this point firmly. A paper, *News Truth,* complained of censorship when its weekly advertisements placed by providers of sexual services were found to be "objectionable" under section 3(2) of the Films, Videos, and Publications Classification Act 1993 (FVPCA 1993). The Court remarked that "Bill of Rights considerations do not take matters further."[116] The publisher did indeed have the advantage of section 14 of the BORA, but the FVPCA was a clear Parliamentary derogation from the right of free expression, and nothing in the BORA could invalidate it:

> The restrictive provisions of the Film, Videos, and Publications Classification Act 1993 are inconsistent with that s 14 freedom, to the extent of the limits they place upon it, and are predominant by virtue of s 4. Thus, despite s 14, censorship within the law prevails

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112 Belding and Nicholls (eds), *A Reason for Hope*, Preface. Judge Arnold Turner is also quoted therein: "The law does protect their [Christians'] right to freedom of speech, and Christians should not allow those opposed to their view to silence them and thereby capture the field."

113 (1992) 532 NZPD 13208.

114 See eg *Lange* v *Atkinson* [1998] 3 NZLR 424 at 472 per Tipping J (CA).

115 *News Media Ltd* v *Film and Literature Board of Review* (1997) 4 HRNZ 410.

116 Ibid at 420.

and the interpretation directions of s 6 do not arise.[117]

The Court of Appeal in *Moonen,* however, found "difficulties" with this passage, to the extent the High Court downplayed the need for a censorship provision to be interpreted "so as to adopt such tenable construction as constitutes the least possible limitation on freedom of expression."[118] Even where ordinary legislation clearly trumps the right of freedom of expression there is still the need, pursuant to section 6 of the BORA, to interpret the statute so as to accommodate this freedom.[119] In general, freedom of expression is like freedom of religion—seldom fought over, nor the subject of public controversy. It is perhaps true to say that freedom of expression is "taken for granted",[120] much the same way religious liberty is, despite the vulnerable legal protections which both enjoy.

(i) Two illustrations

Of the many limitations upon free speech in New Zealand, two instances of inconsistent legislation are instructive. Both suggest that some forms of public espousal of anti-gay sentiment is likely to be met with legal sanction in the future.

In *Re Gay Rights/Special Rights: Inside the Homosexual Agenda,*[121] a direct confrontation between CCs and homosexuality advocates took place. The Office of Film and Literature Classification had classified two American videos, "Gay Rights/Special Rights: Inside the Homosexual Agenda" and "AIDS: What You Haven't Been Told" as objectionable in the hands of persons under eighteen years of age. The "Human Rights Action Group" sought a review of the decision, arguing that the videos degraded gays and lesbians. The *Gay Rights* video portrayed, inter alia, that the homosexual claim for "equal rights" was really a claim for "special rights" by virtue of the powerful position in society gays already enjoyed. The *AIDS* video argued that gays were responsible for the spread of that disease.

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117 Ibid. This point was quoted and followed by Gendall J in the High Court in *Moonen* v *Film and Literature Board of Review* [1999] NZAR 324 at 332-333.

118 *Moonen* v *Film and Literature Board of Review*, unrep, Court of Appeal, CA 42/99, 17 December 1999, at 13. The Court of Appeal allowed the appeal and directed the Board to reconsider the classification of the publications, taking fuller account of s 6 of the BORA.

119 See ibid and also the High Court's analysis in the Liam Williams-Holloway saga: *Newspapers Publishers Association of New Zealand (Inc)* v *Family Court* [1999] 2 NZLR 344 at 351-352. See further John Burrows and Ursula Cheer, *Media Law in New Zealand*, 4th ed (1999) at 466-467.

120 Grant Huscroft, "Defamation, Racial Disharmony, and Freedom of Expression" in Huscroft and Rishworth (eds), *Rights and Freedoms* (1995) ch 5 at 211.

The HRAG, supported by a representative of the Lesbian and Gay Archives of New Zealand, submitted that the tapes were a misleading and dehumanising attack upon the gay community, such hate literature espousing a "strict fundamentalist Christian religious view-point."[122] Conservative Christians defended the videos as "very effective and truthful tool[s] to help us to communicate the fact that the homosexual act is wrong and to warn people of the consequences of their behaviour."[123] Pastor Peter Trott of the Potter's House Christian Fellowship (a Pentecostal denomination) asked: "Would a video which showed the folly of adultery, of extortion be considered for restriction—just in case an adulterer or extortioner was offended? I certainly hope not! Then why the double standards when it comes to the sin of homosexuality?"[124] The Classification Office in a written submission defended its decision. The gay community, it believed, was strong enough to withstand such a "biased onslaught" from these "Fundamentalist Christian message[s]."[125] Despite, it said, the bias and misinformation, an adult audience (hence its R18 classification) could cope with the material.

The Film and Literature Board of Review, however, differed, imposing an outright ban on the videos. Expression of opinion, however unpopular, was permissible but this material went further and contained outright lies: "Advocacy of an opinion, no matter how offensive the opinion is ought not to be the subject of censorship. These videos, however, go beyond more advocacy of an opinion . . . They contain opinion based on misinformation . . ."[126] The video's representations included assertions that HIV could be transmitted by casual or airborne contact, that condoms were ineffective in limiting the spread of HIV and that homosexual men were predisposed to paedophilia. These were all untrue. In terms of the legislation, the videos were "objectionable" within the meaning of section 3(3)(e) of the FVPCA 1993. That provision reads:

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121 (1997) 4 HRNZ 422. An appeal to the High Court was heard on 13 October 1999 (Heron and Durie JJ) with delivery of judgment pending.

122 Ibid at 425.

123 Ibid at 426. The evangelistic organisation "Open Air Campaigners" also submitted the videos were "a useful resource tool" that presented "an alternative perspective" on homosexuality.

124 Ibid.

125 Ibid at 427-428.

126 Ibid at 432.

> (3) In determining, for the purposes of the Act, whether or not any publication . . . is objectionable . . . particular weight shall be given to the extent and degree to which, and the manner in which, the publication—
>
> . . .
>
> (e) Represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of that class, being a characteristic that is a prohibited ground of discrimination specified in section 21(1) of the Human Rights Act 1993.

The Board were in doubt that the "dominant effect" (section 3 (4)(a)) of the videos was to represent that people living with HIV and people of homosexual orientation were "inherently inferior" to other members of the public by virtue of those identified characteristics.[127] The videos entailed consequential risks as well—for instance, "confidence in public health cautions could be undermined."[128] In obiter comment they drew an analogy with hate speech: "It is no great stretch of a legal imagination to see that the principles underlying the regulation of racist speech are equally applicable to speech representing that homosexuals and people living with HIV are 'inherently inferior.'"[129]

What of the clash between freedom of speech (section 14) and freedom from discrimination (section 19)? Specifically, how ought one to resolve a conflict between the freedom of expression of conservative religionists and the right of gay citizens to be free from discrimination upon the ground of sexual orientation? Both are "protected" rights under the BORA. The Board's answer was that Parliament had signalled that, at least in this context, freedom from discrimination was the higher norm. After passing the BORA in 1990, the legislature had indicated that the right to free speech (in section 14) was limited when it passed the FVPC 1993. The "definitional balancing" (see Chapter 7) had been undertaken already by Parliament. That FVPCA expressly curtailed free expression by passing section 3(3)(e). Classes of people who possessed a characteristic that was a prohibited ground of discrimination under the Human Rights Act, were entitled to have their dignity preserved from demeaning and degrading publications. Thus, in the legislative scheme of the various Acts, there was

> some indication that in a contest between freedom of expression and

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127 Ibid.
128 Ibid at 433.
129 Ibid.

> the right to be free from discrimination, at least with respect to publications falling within s 3(3)(e) of the [FVPCA 1993], that the right to be free from discrimination should prevail.[130]

Here we have vindication, at least in one instance, of the CC concern regarding the truncation of their religious liberty should the Human Rights Act be passed. As we saw in Chapter 9, Whetu Tirikatene-Sullivan MP speculated that in a clash between religious rights and homosexual rights, religious rights would usually miss out. The *Gay Rights* case sends the message to CCs that religious groups which issue publications that are capable of being construed as demeaning to gays (and others) run the risk of being censured. Certainly, as *Gay Rights* demonstrates, they will be enjoined if they accompany their message with false information. According to their own beliefs CCs ought not to spread lies in any event. A more interesting conjecture would be the legal outcome where no false information was present but demeaning of gays was still discerned. As "publication" has a wide meaning under section 2 of the FVPCA—embracing any "film, book, sound recording, picture, newspaper" as well as "any print or writing"—the restriction upon CCs may be considerable.

The second case is *Zdrahal* v *Wellington City Council.*[131] Here we find another restriction upon freedom of expression in the form of planning law. Section 322 of the Resource Management Act 1991 authorises local authorities to issue abatement notices in respect of activity which is, or is likely to be, "offensive or objectionable to such an extent that it has or is likely to have an adverse effect upon the environment." Zdrahal painted two swastikas on his house. At the behest of his upset neighbours, the respondent Council issued an abatement notice. Pleas by the appellant that his religious freedom (he claimed swastikas were part of his religion) and freedom of expression were violated were rejected. The Planning Tribunal found, applying an objective test, that the signs were "offensive or objectionable." On appeal to the High Court, the appellant pressed in defence section 14 of the BORA. Grieg J, applying section 5 of the BORA, was convinced the legislative derogation from the right of free speech was justified here: "I think there can be little doubt that the objective of the Resource Management Act is such as to warrant the overriding of

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130 Ibid at 434.

freedom of expression."[132]

(ii) "Viewpoint discrimination"

One commentator, Harris, has argued that *Zdrahal* stands as an instance of judicial censorship of viewpoint.[133] The appellant's ideology (expressed through his symbols) was offensive to ordinary members of the public and therefore could not be tolerated. This may be a wrong reading of the case, for Grieg J makes it clear that *Zdrahal* was still "perfectly at liberty"[134] to use swastikas so long as he did so in a less strident and offensive way. A three-foot-square swastika, lit at night with a spotlight, could hardly be approved. On the other hand, it is naïve not to believe that the offensiveness of the ideology behind the sign played a large part. A conventional religious, cultural or sporting sign of similar prominence would likely have passed without demur. Harris' criticism of *Zdrahal* is valuable for alerting us to the American constitutional law concept of "viewpoint discrimination." The United States Supreme Court has consistently held that suppression of speech simply because of the viewpoint or ideology it expresses is unconstitutional. Justice Kennedy, for the majority in *Rosenberger* v *Rector and Visitors of the University of Virginia,* stated:

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys . . . When the government targets not subject matter but particular views on a subject the violation of the First Amendment is all the more blatant . . . Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.[135]

Thus, by way of crude summary, state restrictions, unrelated to content or viewpoint, on the "time, place or manner" of the expression are typically upheld, whereas restrictions aimed at the content (or subject matter) of the speech or its viewpoint are not.[136] It is true that "freedom of expression enjoys far greater protection in the United States than in New

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131 [1995] 1 NZLR 700.
132 Ibid at 711.
133 Bede Harris, "Viewpoint Neutrality and Freedom of Expression in New Zealand" (1996) 8 Otago L Rev 515.
134 *Zdrahal* at 711.
135 132 L Ed 2d 700, 714-715 (1995).
136 See further Harris, "Viewpoint Neutrality."

Zealand."[137] And, as repeated often, the freedoms and rights in the BORA are not higher, entrenched ones like the First Amendment. Nonetheless, the concept of viewpoint discrimination maybe a useful one in the armoury of CCs. A conservative religious viewpoint, with uncomfortable illiberal concepts of sin, hell and divine judgment, may well come to be a viewpoint, like racist speech, which is unworthy of public airing in a "free and democratic society." That point may one day be reached given a wide reading to 3(3)(e) of the FVPCA 1993. Representing "by implication" that homosexuals, *de facto* couples, atheists, or "cult" members, are "inherently inferior" is a form of speech or viewpoint which may no longer be entitled to protection as free expression.

(iii) Homosexual vilification law

There is currently no legislation prohibiting public articulation of anti-gay sentiment. Some CC MPs during the Human Rights Bill debate forecast the likely introduction of a homosexual vilification law.[138] More recently, the Rev Stuart Lange suggested such legislation was part and parcel of the drive by gay activists to remove "obvious obstacles" such as conservative churches, who thwart the full social acceptance of homosexuality:

> [I]t is an established part of the agenda of the homosexual lobby to introduce legislation that would make it illegal to speak or write against the practice or ideology of homosexuality. It would be a criminal offence for anyone to criticise homosexuality. A preacher in a pulpit, or a Christian magazine, would be committing an offence to state that homosexual acts are sinful. Such legislation—even when tied in with very commendable legislation against racist statements—would move far beyond protecting the rights of a minority to suppressing the rights of the majority, especially the rights to freedom of belief and freedom of speech.[139]

A model for a New Zealand law is close at hand. In 1993, New South Wales enacted a homosexual vilification prohibition.[140] Section 49ZT of the Anti-Discrimination Act 1977 reads:

> **49ZT Homosexual vilification unlawful**
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> (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person

137 Huscroft, "Freedom of Expression." At 172.
138 See eg Graeme Lee (1993) 537 NZPD 16968.
139 Lange, "Homosexuality and the Church," at 19.
140 The Anti-Discrimination (Homosexual Vilification) Amendment Act 1993.

> or group of persons on the ground of the homosexuality of the person or members of the group.
>
> (2) Nothing in this section renders unlawful . . .
>
> (c) a public act, done reasonably and in good faith, for academic, artistic, religious instruction, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

Section 49ZTA makes "serious" homosexual vilification—ridicule accompanied by threats or incitements to threaten inflict physical harm upon homosexuals—a criminal offence.[141] The homosexual vilification law is carefully couched. The free speech qualification above, in subsection(2), immunises good faith public expression of anti-homosexual sentiment done for "religious instruction" or for the purposes of "public discussion or debate". Christian denunciation from the pulpit or by way of pamphlet of the sinfulness of homosexuality might well be protected. The Rev Lange's concerns seem misplaced if this kind of provision were introduced in New Zealand. Christian motivation is, or at least should be, never the desire to incite hatred or breed contempt for homosexuals. Much will depend on how any such section is interpreted. If a purely subjective meaning is to be given to vilification (do the victims feel ridiculed?) much religious criticism of homosexuality would be suspect. It is possible that some of the work of a homosexual vilification law is already done by the FVPCA 1993, at least concerning publications. As for pulpit denunciations of homosexuality, currently these would appear to be protected. Although a church may be a "public place,"[142] section 37 of the Summary Offences Act 1981 makes it an offence to unreasonably disrupt any "meeting, congregation, or audience."[143] A liberal interpretation of the ban on disrupting a congregation might extend to an immunity from liability for verbal statements made at a religious meeting.

If a vilification law of wide sweep were introduced, or if CCs were otherwise held to be lawfully restricted in arguing publicly against homosexuality and homosexual rights, they

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141 Prosecutions require the consent of the Attorney General: s 49ZTA (2).

142 See section 2 of the Summary Offences Act 1981.

143 This section is the successor to 3C of the Police Offences Act 1927 which explicitly proscribed interference with religious services and the officiating of preachers etc: see Ivor Richardson, *Religion and the Law* (1962) at 29. See also the Maori Community Development Act 1962, s 30(1)(a). The continued state protection of worship was noted by the Court of Appeal in *Mendelssohn* v *Attorney-General* [1999] 2 NZLR 268 at 274.

might well feel aggrieved. If homosexuals are permitted to publicly advocate their cause (viz, the Hero Parade) they ought not to expect legal immunity from genuine public criticism. CCs already accept that they will be cast as intolerant and oppressive, even "morons"[144] by the secular press and others, but a legal ban upon criticism of homosexual conduct arguably goes too far.

(b) CCs' attitude to free speech: ambivalence again

The free speech issue is a delicate and vulnerable one for CCs, for, on other occasions, they are all too ready to invoke the law to suppress expression which disturbs or offends Christian sensibilities. As we saw in Chapter 1, CCs were horrified at the blasphemous artwork exhibited at *Te Papa* shortly after its opening. Offended Christians pressed the Solicitor General for his consent to a prosecution against the Museum for "blasphemous libel" under section 123 of the Crimes Act 1961. The Solicitor-General refused to give leave. The controversy was not one, he said, appropriate for resolution by the criminal courts. Furthermore, he cited the principle of freedom of expression in the Bill of Rights Act as the main factor against allowing prosecutions to proceed.[145] For all intents and purposes then, and despite section 4 of the BORA, the blasphemous libel offence is dead and buried. In a Bill of Rights era, religious vilification (blasphemous libel by a modern name) has no place. The effective repeal of section 123 of the Crimes Act, as Chapter 1 explored, underscores the cultural disestablishment of Christianity in New Zealand. It is no longer a Christian nation and Christian sensitivities merit no special protection.

The ambivalence of most CCs toward freedom of expression is traceable, in part, to their understanding of societal blessing and judgment (see Chapter 2). A good example is the controversy over the erection of statues of two Egyptian gods, Horus and Sobek, in Hamilton gardens by the local city council in 1991. Pastor Graham Ferry, of Hamilton New Life Centre, feared for the ill consequences to be reaped if Hamilton sowed Egyptian gods in

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144 Lange, "Homosexuality and the Church," at 19: "A prominent magazine editor recently wrote off those conservatives who object to Auckland's annual 'Hero' Parade as 'morons'—so much for rational and enlightened public debate!"

145 See "No prosecution over exhibits," *ODT*, 28 March 1998, at 35. See also Burrows and Cheer, *Media Law in New Zealand*, at 325.

its backyard. To the mayor's irritation at this "intolerance", the pastor replied that the "tolerance issue",

> has been perverted and twisted around, because it is tolerance that has brought us to this place in our society we will accept Egyptian gods in our backyard, 11,000 abortions a year, practising homosexuality, an increase in all sorts of social ills round about us. We have tolerated so much that we've violated God's laws of so many aspects of living.[146]

In the minds of many CCs, erection in public of pagan idols, indecent parades of unapologetic homosexuality, blasphemous artwork in a national museum—these and other affronts to God simply guaranteed divine judgment upon society, believers and non-believers alike. Needless to say, the Council's attempt to placate opponents of the statutes—by giving them a "Christian blessing"—did nothing of the sort.[147] Not all CCs, however, are selective advocates of the principle of free speech. As we have seen, the editors of the 1996 homosexuality anthology acknowledged that they "must recognise the right of the homosexual lobby to promote their cause too." *Challenge Weekly*, moreover, did publish a defence of free speech by a Christian missionary as a follow-up to the Hamilton furore. "All too often," chided Matt Finlay, "we expect freedom of speech for ourselves and yet refuse it to others."[148] Muslims may not extend free speech to non-Muslims but that was no reason for Christians not to. St Paul, moreover, was content to preach the Gospel in Gentile cities full of idols without seeking the idols' destruction. The Christian message was sufficiently robust in the marketplace of faith to not necessitate state censorship of conflicting "gods":

> Our message in a multi-racial, multi-religious society must be positive, proclaiming salvation through faith in Christ, and we should not be diverted into negative attacks on things we feel unhappy about. Probably there are many "idols" in Hamilton that will do much more harm to the city than a couple of curious statues from ancient Egypt. What about the "gods" so devoutly worshipped in our country—television, videos, the bottle which fill our homes with immorality and violence, and the mass deification of sport and

146 Abigail Caspan, "God statues cause uproar," *CW*, 24 Oct 1991, at 16.

147 "Egyptian statues to be 'blessed', "*CW*, 31 Oct 1991, at 1. The editor of *Challenge Weekly*, ibid at 2, criticised this as "a pathetic compromise". It added "insult to injury to those alarmed at another project which squeezes the living God out of New Zealand life."

148 Matt Finlay, "Freedom to preach—a treasure that can very easily be lost," *CW*, 5 Dec 1991, at 7.

materialism?[149]

Such a plea, it must be said, has largely fallen on deaf ears.

4 *The CC's task in making a case against SSM*

If, as Thomas J argued in *Quilter*, gays and lesbians are being denied "a basic civil right" by the state's refusal to recognise the legality of SSM, then the onus would appear to be on the state to justify its stance. Arguably, the principal (perhaps only?) public supporters of the traditional (opposite-sex) concept of marriage are conservative religionists. In terms of the BORA, the restriction of marriage to heterosexuals is a prima facie violation of the section 19 right of non-discrimination and would need to meet the section 5 hurdle. Is the restriction a "justified limitation," a "reasonable limit[] prescribed by law as can be demonstrably justified in a free and democratic society."? A free and democratic society is, of course, synonymous with modern, liberal democracy. Liberal theorists insist, and CCs concede (see Chapter 4), that an objective, rational, practical secular reason must be furnished for public policy. A purely religious reason is unlikely to persuade in a "free and democratic society". For many liberals, religious arguments are ruled out entirely as a species of objective, rational arguments in contemporary public discourse. To reiterate, religious justifications are, to liberals, quintessentially subjective, irrational, private, inaccessible and unscientific. While CCs would not agree—given God exists, their arguments are perfectly objective, logical and rational—nevertheless, many are prepared to translate their reasons into a form liberal secularists can digest.

Although it is not the focus of this chapter, it is worth pondering, in passing, whether "objective", "rational" grounds do exist to merit the continued legal non-recognition of SSM.[150] Some doubt there do exist "sound" reasons for denying SSM. As we have seen, Thomas J believed the only possible objection—the biologic inability to procreate—was a weak one. The essence of marriage today was, for him, to be found in other things. Gay lobbyists (and others) believe the usual litany of harms associated with SSM are illusory and

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149 Ibid.

150 See generally Linda McClain, "Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage" (1998) 66 Fordham L Rev 1241.

empirically unproven. Where is, they ask, the evidence that: society will disintegrate; children will be harmed; youth will be corrupted; procreation will diminish; AIDS will spread, and so on?[151] An American liberal theorist, Stephen Macedo, concludes that conservative moralists have "failed badly" to advance "a reasoned, public, secular case for legal discrimination against homosexuals".[152] Others beg to differ. Contemporary natural law theorists, such as John Finnis, promulgate sophisticated arguments against SSM based on notions of the "basic human good" and the like.[153] Some commentators attack specific planks in the gay argument, such as the claim that homosexual or lesbian parenting is shown not to be harmful to children[154] or that the social benefits from heterosexual marriage are matched by those of SSM.[155]

The arguments will continue.[156] Some CCs believe the path of wisdom may be to "preserve the distinctive of marriage (as a relationship between heterosexual couples) and to support some form of legal recognition of same-sex partnerships"[157], a proposal not without support from the Law Commission as we saw earlier. Others view this as a disastrous compromise.[158] The challenge for CCs is whether, given the belated realisation they had long neglected the nurturing of "the Christian mind" (as Blamires described it), they will be able to proffer the prudential, "common-sense" arguments required to halt the recognition of

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151 Jowitt, "Legal Recognition," at 32-34. See similarly, Gillian Ferguson, "And the Brides Wore Purple? The Legality of Same-Sex Marriage in New Zealand", LLB Hons dissertation, University of Otago, 1997, at 33-37. Butler, "Same-sex marriage," at 405, comments that the future of the majority in *Quilter* to advance a reasonable objective basis for denying SSM must have "disappoint[ed] traditionalists."

152 Macedo, "Homosexuality and the Conservative Mind" (1995) 84 Georgetown L J 261 at 263-264 and 293.

153 See John M Finnis, "Law, Morality and 'Sexual Orientation'" (1994) 69 Notre Dame L Rev 1049; Robert P George and Gerald V Bradley, "Marriage and the Liberal Imagination" (1995) 84 Georgetown L J 301. For a New Zealand call to find natural law arguments against SSM see eg Carolyn Moynihan, "Legal status for same-sex couples?", *Humanity*, Oct 1999, at 9.

154 See Lynn D Wardle, "The Potential Impact of Homosexual Parenting on Children" (1997) 1997 U Illinois L Rev 833. Wardle argues that "the social science studies purporting to show that children raised by parents who engage in homosexual behaviour are not subject to any significantly enhanced risks are flawed methodologically and analytically, and fall short of standards of reliability needed to sustain such conclusions." (ibid at 852). By contrast, the Law Commission in its adoption paper (*Adoption: Options for Reform* at paras 190-196) found the social science evidence did not support negative consequences for children of gay parents.

155 See Wardle, "Limits of Legal Pluralism", at 393.

156 For an illuminating discussion see Julia Stronks, "Christians, Public Policy and Same-Sex Marriage: Framing the Questions Before We Shout the Answers" (1996) 26 Christian Scholar's Review 540 and Don Mathieson, "Same sex relationships: ethics, Christian leadership and the law" (1999) 7 Stimulus 34.

157 Arnold R Turner, "Same–sex marriage" (letter), *Reality*, Oct/Nov 1999, at 58-59. See also Lange, *Homosexuality and the Church*, at 20.

SSM.

III CONCLUSION

This chapter explored the positive religious freedom (as Berlin described it) of CCs. Same-sex marriage was chosen as a contemporary controversy to gauge the extent to which CCs might be thwarted in opposing the introduction of this form of marriage. SSM is not lawful yet and, despite movements by Parliament to extend legal rights, privileges and duties possessed by married (opposite-sex) couples to same-sex ones, the situation may remain unchanged. The general acceptance by the law of the homosexual lifestyle may instead see a registered domestic partnership law introduced. In opposing the introduction of SSM, CCs appear to enjoy the same freedom of expression as other citizens do. An anti-gay rights promotion by some CCs was curtailed by the law in *Gay Rights*, but that defeat was clouded by the presence of falsehoods in the publications concerned. There is no instance of CCs having been enjoined from genuine preaching (in the widest sense) against homosexual practice or rights.

Returning to the model of engagement in Chapter 4, peaceful co-existence again prevails. Criticism of gay practice and rights by CCs within their own milieu or sub-culture is ignored. The liberal state is indifferent to such private expression of illiberal sentiment—its major institutions are not threatened by articles in *Challenge Weekly* or talk-back programmes on *Radio Rhema*. Public criticism by CCs of gay conduct or rights in the secular media is unlikely to be restricted, especially if CCs adopt the liberal theorists' "proviso"—translation of religious claims into "practical", "secular" argument is required in a liberal society.

To date, few instances of conflict between CCs and gay advocates have reached the courts. However, conflict is likely to continue to arise as CCs reject ideological pluralism. They still seek to have their values reflected in the institutions of society. CC opposition to such matters as gay rights will continue to rankle liberal modernist sensibilities, especially if CCs express their criticism in its untranslated, Biblical form, viz, homosexual conduct is

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158 Ewen McQueen, "Same-sex marriage" (letter), *Reality*, Dec 1999/ Jan 2000, at 58-59.

"sinful" and "contrary to God's law".

In the future, the "foreign policy" problem (Chapter 3) will be revisited frequently as CCs test the limits of liberal democratic tolerance. The Wellington worldview has accepted the normality of homosexuality. Perhaps gay advocates may succeed in casting anti-gay talk as equivalent to racist speech. If a homosexual vilification law is introduced, CCs will need to secure an exemption to permit reasonable, bona fide criticism based upon sincere religious conviction. If the state will not grant such an accommodation then a charge of "viewpoint discrimination" would seem warranted. Rather than "make martyrs" of a few belligerent CCs, however, the state would likely accommodate them.

Part III

Chapter 11

SUMMARY AND FINAL OBSERVATIONS

To retrace our steps, in Chapter 1 of Part I, I sketched the conservative Christian "narrative" of New Zealand history. Corrosive secularist forces have, in the last generation, eroded New Zealand's Christian foundations. All is not lost, however, if conservative Christians (CCs) motivate themselves to recapture the high ground. Returned to its Christian moorings, New Zealand can be blessed again. I posited a succession of "disestablishments" of Christianity in New Zealand. The first disestablishment (or nonestablishment) was the *de jure* one. The Old World idea of a State Church was firmly rejected and religious equality was recognised in the 1840s and 1850s. Although there was a formal legal nonestablishment, I argued it was accompanied by a *de facto* cultural establishment. New Zealand was committed to a generic, non-sectarian, Protestant-influenced Christianity. About the 1960s, a sea change occurred and the Christian cultural hegemony began to erode. The shift has forced CCs to re-evaluate their social priorities. Neither succumbing to the "spirit of the age" nor withdrawing from society are favoured. Instead, many CCs increasingly stress positive cultural engagement and social transformation lest the already parlous situation deteriorate further.

Chapter 2 analysed the subject group of this study. Conservative Christianity is an umbrella term embracing adherents from Roman Catholicism and Protestantism. Whilst they are to be found in all denominations, they are principally made up of Evangelicals, Pentecostals and Charismatics. CCs share certain core characteristics: deference to divine authority, moral absolutism, a restorationist desire and an oppositional stance towards the

spirit of the age. The fundamental presuppositions and axioms of this group include, for example, beliefs in the supernatural realm (heaven and hell are real) and the pervasiveness of sin in a fallen world. Truth, capital "t", has been revealed, God has spoken, His divine standards are established for everyone, not just Christians. Note the past tense; the important things for mankind are not contingent or mysterious. The animating spirit or *zeitgeist* of contemporary "post-Christian" society is variously described as modernism, secularism or secular humanism. However it is labelled, CCs are convinced it is antithetical to the Kingdom of God. To the extent the State usurps its delegated authority—an increasingly likely possibility in the new era—CCs must face the prospect of principled civil disobedience.

What are the basic axioms and beliefs that undergird contemporary New Zealand law and government? Chapter 3 analysed the distinctive tenets of liberal democracy in this country, what I dubbed the "Wellington worldview". The central characteristics of liberalism—individualism, neutrality as to conceptions of the good life, privatisation of religion, emphasis upon reason and belief in progress—were examined. I argued that the Wellington worldview (the mindset of government, business, media, education and other leaders) reflects liberal premises. For all practical purposes, the powerful operate upon naturalistic premises guided by rational, empirical, scientific knowledge. Ethical relativism also prevails. The liberal, modernist worldview is dominant, but not without rivals, as the recent incursion of Maori and postmodernist beliefs reveal. So far as CCs are concerned, the rules of public debate—secular, practical reasons for public policy must be proffered as well as religious ones—are commonly observed. I argued that the limits of liberal democratic tolerance are met when groups such as CCs challenge central tenets of that ideology. Attempts to "impose" the truth, as CCs perceive truth, are rebuffed, as are efforts to dethrone

reason as the adjudicating touchstone. Religionists who oppose the goodness of ideological pluralism are also likely to be denounced. Tolerance is meted out in proportion to conformity with liberal, pluralist values: CCs must know their place.

Having described the conservative Christian and liberal, modernist "worlds", Chapter 4 sketched a model of engagement. By and large, CCs and the state co-exist amicably. Each mutually adjust to the other. There is, however, the prospect of conflict given the incompatibility of worldviews at certain key junctures. CCs challenge the supposed neutrality of the liberal democratic state. Human nature abhors a vacuum and there is always, as CCs see it, a *de facto* dominant worldview. CCs believe, given their cultural disestablishment, the "pressure points" between them and the state will increase. Whether this will result in CCs simply losing out, or whether their concerns will be at least partially accommodated, are possibilities explored in subsequent chapters.

Part II comprised a series of case studies investigating areas of conflict between CCs and the state. The chapters all broadly concern rights and so Chapter 5 (Human Rights) commenced this section. CCs have consistently viewed human rights rather lukewarmly. Whilst the rights of the weak and powerless are proper matters for Christian energy, CCs are critical of certain aspects of modern human rights theory. The *ideology* of human rights (as opposed to the rights per se) is perceived as non-theistic, individualistic and potentially intolerant, even totalitarian in its outworking. Given the liberal modernist pedigree of rights theory, CCs fear tolerance will not extend to those, such as themselves, who are not "inclusive", "tolerant" and "accepting" of all ways of life. My exploration of some of the major clashes between CCs and human rights advocates and institutions in the last twenty years revealed a legacy of mutual distrust and suspicion.

The centrality of the family to CCs cannot be over-estimated. The next three chapters explored perceived threats to the family from the United Nations Convention on the Rights of the Child 1989. The CC concept of the family (patriarchal, hierarchical, authoritarian, duty-based) is increasingly at odds with liberal, modernist notions. A "constitutionalisation" of family law is underway, and with it, a greater emphasis, inter alia, upon the rights of children. In zero-sum fashion, greater state recognition of children's rights spells, for CCs, fewer parental rights. State intrusion is likely to increase also. CC unease at the CRC is part of a broader, longstanding antipathy to international conventions—global rules which invoke for some CCs the slippery slope of one-world government. My assessment in Chapter 6 was that the CRC will not necessarily involve greater state intervention into the intact family. The welfare test will continue as a secondary standard applied after state jurisdiction has been triggered in the customary way (proven abuse or neglect). The real crux of CC anxiety with the CRC is the clutch of "autonomy" or "participation" rights granted children.

Next, I selected a foremost parental right for CCs (religious upbringing) and the potential impact the CRC's acknowledgement of a right of religious freedom for the child in article 14 might have in this pivotal area. Some CC parents predicted direction over their children's fate might be reduced, especially if the state recognised a maturing child's legal right to pursue his or her choice of faith. Religious freedom, under this view, would be in a sorry state if the state would take the side of children against their parents in religious matters. Chapter 7 concluded that the CRC would add little to developments already occurring here. In the intact family, the *parens patriae* jurisdiction remains as forceful as ever, thwarting parental religious practices that might endanger the child. An incipient right of religious liberty for the mature child is in prospect and article 14 will boost its full recognition. In the "fractured"

family, the religious rights of separated parents remain, as I see it, unaffected by the Convention. CC parents face the prospect of some increased state involvement in religious upbringing matters—not so much a blunt judicial veto of parents' wishes, but a welfare-based assessment of parental decision-making taking due account of children's wishes. There are likely to be very few cases which ever reach the courtroom, but the symbolic effect of the few that do concern CCs. CCs would be wise to avoid "the wages of crying wolf"[1]: protesting too loudly, too often, and thus having a real cause for alarm going unheeded on a future occasion.

In Chapter 8, I examined another CC concern with the CRC—the retention of the parental right of corporal punishment. Here I concluded the CRC may have a direct influence. It has been regularly invoked in the ongoing debate on "smacking" as a persuasive reason for banning the practice. The United Nations Committee on the Rights of the Child disapprove of smacking, equating it with abuse. CCs face an uphill battle amidst a formidable array of governmental and private anti-smacking proponents to retain this practice.

The final two chapters in Part II examined two CC concerns arising from their broader antipathy towards the "normalisation" of homosexuality. Homosexual practice is sinful and ought not, argue CCs, to be equated with heterosexual behaviour. The Wellington worldview, however, increasingly sees such views as archaic bigotry. It is perhaps no coincidence that the watershed decade, the 1960s, which marked the beginning of the cultural disestablishment of Christianity, also witnessed the start of the "sexual revolution". CCs feared the inclusion of "sexual orientation" as another ground for prohibited discrimination under the human rights legislation would have multiple adverse consequences both for them and society.

In Chapter 9, I examined whether a key incident of the right of church

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1 Here I borrow the memorable phrase from a leading article on the *Roe* abortion decision: John Hart Ely,

autonomy—clergy selection—would be curtailed. Does the Human Rights Act 1993's sexual orientation discrimination ban reach churches and the question of ordination of openly-practising gay candidates for the ministry? Would gay rights trump CC rights? That question is still unresolved. I examined the significant role the uncertain prospect of litigation under the Act played in the heated church debates. A liberal modernist ethic—equality of sexual orientations—might yet penetrate the church. Whatever the outcome—either an accommodation under the statute to permit exclusion of gay clergy or full application of the Act—the "sting" of rights ideology will have been felt by CCs.

The final case study analysed the extent to which CCs' positive religious freedom might be curtailed following the 1993 Act. In post-Christian, pluralist New Zealand, are CCs hampered in influencing public policy—specifically, in opposing the introduction of same-sex marriage? Their freedom of expression might be threatened, I concluded, by a movement to equate anti-gay speech with racist and other "hate" speech. But perhaps the bigger obstacle is the cultural and political one. Working within the rules of liberal, modernist public debate, CCs may struggle to generate cogent, secular, practical arguments why same-sex marriage, or *a fortiori*, registered domestic partnerships for same-sex couples, ought not to be recognised. The sexual revolution came and traditional moralists have (apparently) lost. The onus is upon those who resist liberalising measures, and the further recognition of individual human rights, to make a case.

CCs find themselves an increasingly alienated minority in a land once described by a former prime minister as "God's own country."[2] A generation ago, commencing around the

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"The Wages of Crying Wolf: A Comment on *Roe* v *Wade*" (1973) 82 Yale LJ 920.

2 "Just returning to God's own country", a telegram from Richard John Seddon to the premier of Victoria the day before Seddon died on a ship returning to New Zealand, 10 June 1906. See "Richard John Seddon" in Orsman and Moore (eds), *Heineman Dictionary of New Zealand Quotations* (1988) at 573.

1960s, a "paradigm shift",[3] "sea change",[4] "architectonic transferral"[5] occurred in New Zealand, as it did in other Western societies. At the level of "deep culture" (Harold Turner) the basic axioms, premises or worldview began to change. Judeo-Christian values and presuppositions, always admittedly mixed with secular and Hellenistic ones, began to fade. The cultural disestablishment of Christianity and the emergence of a new singular worldview is not complete.

Contemporary Western Christianity is in an "awkwardly intermediate stage of having once been culturally established but not yet clearly disestablished."[6] New Zealand likewise is in "a transitional, 'grey' period",[7] "a type of no-man's land",[8] where Christendom is over and Christians are no longer the dominant force culturally, but Christian forms and habits remain. The new *weltanschauung*, the new society, can only be described as post-something: post-Christian, post-modern and so on. We are "moving between times."[9]

For CCs neither withdrawal into a defensive enclave nor meek conformity to the spirit of the age are preferred options. Minority status may be a fact of life but an acquiescent, subservient, privatised posture is not. To quote Newbigin:

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3 The Rev Murray Robertson, "New Zealand as a Mission Field: The Paradigm Shift" in Patrick (ed), *The Vision New Zealand Congress* (1993) ch 3 at 46: "A shift has occurred. There have been long-term trends, huge subterranean movements within Western culture."

4 Daphne Hampson, *After Christianity* (1996) at v: "In the last decade there has been a sea change. There was a time when it took much courage to say publicly in the media that one was not a Christian. Now it takes none at all."

5 Raymond G Decker, "The Secularization of Anglo-American Law: 1800-1970" (1974) 49 Thought 280 at 286-287. Architechtonic transferrals are "the basic *Weltanschauung* of metaphysical constructs in which man and his institutions are viewed". Decker argued that the architectonic structures, which had "become the substratum for Anglo-American law", had "more often than not been the prevailing Christian constructs": ibid at 287.

6 George Lindbeck, *The Nature of Doctrine* (1984) at 134, quoted in Stanley Hauerwas, *After Christendom?* (1991) ch 1 at 23. Hauerwas himself comments (ibid): "We are not sure whether, as Christians, we ought to or can return to times when the church at least allegedly seemed to have status if not power or whether we must seek some yet undetermined more modest stance in liberal societies."

7 John Flett in "Can the West be Converted? An Interview with John Flett", *Reality*, April/May 1999, 30 at 33.

8 John Flett, "Unpacking Gospel and Culture" in Flett (ed), *Collision Crossroads: The Intersection of Modern Western Culture with the Christian Gospel* (1998) ch 1 at 9.

> [T]rue to its roots . . . [the church] could not accept relegation to a private sphere of purely inward and personal religion . . . Christians can never seek refuge in a ghetto where their faith is not proclaimed as public truth for all. They can never agree that there is one law for themselves and another for the world. They can never admit that there are areas of life where the writ of Christ does not run . . . the church can never cease to remind governments that they are under the rule of Christ and that he alone is the judge of all they do.[10]

Christians must continue to be "salt" and "light",[11] to tell their story (or counter-story), "the old, old story"[12] of sin, judgment, creation, fall and redemption. As trustees of *the* story, CCs are obliged to tell it, to be faithful, bold witnesses. Furthermore, as Stanley Hauerwas puts it: "Without the church the world literally has no hope of salvation since the church is necessary for the world to know it is part of a story that it cannot know without the church."[13] If it cannot be the triumphant "Church of Christendom" and scorns being merely a "Gathered Church" (a secluded community of the faithful), it can still be the "Witnessing Church".[14]

Compelled to fulfil the Great Commission[15] and desirous of recapturing the cultural reins, what is the likely pattern of engagement henceforth between CCs and the state? There will, I suggest, continue to be a variety of responses and outcomes. CCs will continue to peacefully co-exist with the state and the state will turn to them (and other religionists) to advance societal goals in welfare, education and so on. In addition, conflicts will also persist. A contentious point is whether they will increase in number and severity. There is some cause for thinking they will. As the Wellington worldview becomes further de-Christianised, and its working premises and values more secular, humanistic and pluralistic, the potential for

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9 Brian Carrell, *Moving Between Times—Modernity and Postmodernity: A Christian View* (1998).

10 Lesslie Newbigin, *Foolishness to the Greeks: The Gospel and Western Culture* (1986) at 99-100 and 115.

11 *Matthew* 5:13-16.

12 Hauerwas, *After Christendom*?, at 148, quoting lines from the old gospel hymn, "I Love to Tell the Story".

13 Ibid at 36.

14 Thomas Shaffer's tripartite ecclesiological classification: "Stephen Carter and Religion in America" (1994) 62 U Cinn L Rev 1601 at 1608 et seq.

misunderstanding and disagreement widens. CCs can no longer count upon a sympathetic governmental and legal worldview. Contributing to this quandary is the growth in New Zealand of religious minorities, whether conventionally religious (Muslims, Hindus etc) or not (atheists, agnostics, New Agers).

When conflicts do arise—for it is a question of when, not if—the traditional responses by the state will also recur. Clashes between CCs and the government will continue to see both an accommodation of CCs' religious convictions and a disregarding or overruling of CC sensibilities by the law. In this thesis I have concentrated upon instances of overruling by the state. The *Eric Sides* and Christian bookbinder-type cases attract public notoriety, whilst the quiet adjustments and exemptions by state officials or judicial officers go unnoticed. Whether on balance CCs' interests are generally accommodated or vetoed is a difficult question to answer. I have not attempted a large scale, empirical assessment. What I have endeavoured to show is that there are two contrasting worldviews generating different conceptions of the law and that conflicts have arisen. There is a certain inevitable incommensurability, a *differend,* to use a postmodernist expression,[16] between the two groups. Another thesis could no doubt demonstrate a similar juxtaposition and mutual misunderstanding between other groups (Maori, gays, women, Buddhists) and the state. What makes CCs unique is that they are a community that helped define the former prevailing worldview, have had the tide turn against them, and are faced with the challenge of "where to from here". They are now "outsiders" and *their* story is just one of many. This puts them in a peculiar quandary. Hegemony lost is

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15 *Matthew* 28:16-20.

16 See Jean François Lyotard, *The Differend: Phrases in Dispute*, trans Van Den Abbeele (1988) at xi: "a differend would be a case of conflict between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgment applicable to both arguments. One side's legitimacy does not imply the other's lack of legitimacy . . . The title of this book suggests . . . that a universal rule of judgment between heterogeneous genres is lacking in general."

seldom regained.

A particular interest in this study of CCs and the law was the religious freedom enjoyed by the former. What is the prognosis? In terms of CC's negative religious liberty—the sphere of private religious practice wherein state interference is presumptively wrong—I predict an attenuation of this in the future. Internally, CCs will feel pressure to conform to the *zeitgeist*, the prevailing ethos and values of the age. In the same way that Mormons reinterpreted their faith and stance on polygamy following the American Supreme Court's refusal to countenance that practice,[17] some CCs may revisit their views on homosexuality, religious upbringing, smacking and so on. This is nothing new. In the tradition of Luther, however, the belligerent, defiant spirit that characterises CCs will see some resist this gravitational pull. Where CCs perceive the state to be transgressing its God-given bounds, civil disobedience, even martyrdom, remain last resorts.

The positive religious liberty of CCs is also threatened. Public witness to the Truth, dogged adherence to traditional Christian mores, is disruptive of the inclusive, pluralist discourse prevalent in contemporary Western society. In the ongoing *Kutturkampf*[18] or cultural struggle—which is, at its most fundamental level, a clash of belief systems or worldviews[19]— it is possible that CC efforts to influence public policy and the direction of the nation, will become diminished. Partly this may be due to internal deficiencies within CC—a plain loss of nerve, or an inability to generate intelligent, secular arguments sufficient to carry the day. But partly it may be due to political, social, and even legal, impediments that render

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17 Stephen Carter, "Religious Freedom as if Religion Matters: A Tribute to Justice Brennan" (1999) 87 Calif L Rev 1059 at 1085. The leading Supreme Court case upholding bigamy convictions over the Mormon defendants' free exercise of religion claim is *Reynolds* v *United States*, 98 US 145 (1878).

18 See eg Justice Scalia (dissenting) in *Romer* v *Evans*, 134 L Ed 2d 855, 868, 878 (1996) and Charles Taylor, "Religion in a Free Society" in Hunter and Guinness (eds), *Articles of Faith, Articles of Peace* (1990) ch 6 at 108.

19 Charles Colson and Nancy Pearcey, *How Now Shall We Live?* (1999) at xii and 17.

public expression of universal truth unacceptable in a free and democratic, multicultural, "tolerant" society.

Overall, I suspect religious freedom is granted to CCs, and indeed the Church, to the extent it "knows its place". As Dr Josef Goebbels is said to have told the German churches: "You are at liberty to seek your salvation as you understand it, provided you do nothing to change the social order."[20] I have argued that, at any given time, there is always a *de facto* (if not *de jure*) establishment, a prevailing worldview, an ascendant hegemony. Every state "must have its orthodoxy . . . a set of substantive beliefs and values upon which public decisions are based".[21] Whether one wants to call this orthodoxy "religious" is unimportant. (To CCs, a purely immanent, this-worldly worldview is no less religious than theirs.) The point is that an establishment or orthodoxy does, and must, exist. It may be a hybrid, incoherent, contested one, and a convenient label for it may be elusive, but it exists. If I am correct and there is always an established, prevailing orthodoxy, with its concomitant worldview, then it is more accurate to talk of religious *tolerance* rather than religious freedom.[22] The state grants religion those rights and privileges that, according to the state's lights, it considers religion deserves. Here the concept of rights is statist.[23] The state grants religious rights—it defines "religion", religion's permissible forms of expression, its limits, its exemptions, and so on. It holds all the cards and it tolerates religion on *its* terms. The state does not simply acknowledge antecedent rights, ones that exist prior to the state and are superior to the claims of the state. This is to revisit the very foundation of liberal democracy and to gainsay a secular basis to the state. That debate is over, the Enlightenment happened

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20 Quoted in Robert Song, *Christianity and Liberal Society* (1997) ch 7 at 213.

21 Steven D Smith, "The Restoration of Tolerance" (1990) 78 Calif L Rev 305 at 332. See also Newbigin, *Foolishness to the Greeks*, at 132 and Phillip E Johnson, *Reason in the Balance* (1995) ch 2.

22 See Hauerwas, *After Christendom*? at 179 n 27.

and religion lost.[24]

Now tolerance is nothing to be sneezed at. "In the real world," comments William Galston, "there is nothing 'mere' about toleration".[25] Nevertheless, tolerance ought to be seen for what it is.

The ultimate security for religious freedoms for CCs (apart from God) is not the state nor, given an unentrenched Bill of Rights Act, the judiciary. The latter have, on occasions, been ready to treat CCs in the same unsympathetic manner as have others in society. The Court of Appeal in *Lange* reminded us that in the present constitutional and political system: "In substance, the people, rather than the (temporary) government, are to be seen as having ultimate power".[26] It is, as Hauerwas argued, a temptation for Christians to believe that they are protected by legal mechanisms devised by (even) democratic states. "Rather," he continued, "states are limited by a people with the imagination and courage to challenge the inveterate temptation of the state to ask us to compromise our loyalty to God."[27] This echoes the much-quoted observation of Judge Learned Hand a half century ago, one referred to in the 1985 White Paper on the Bill of Rights:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. *Liberty lies in the hearts of men and women*; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[28]

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23 See Carter, "Religious Freedom as if Religion Matters", at 1065-1066.

24 But see Richard John Neuhaus, "Why We Can Get Along", *First Things*, Feb 1996, 27 at 32. Neuhaus argues religion did not lose but religious coercion did.

25 William A Galston, "Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory" (1999) 40 Wm and Mary L Rev 869 at 902. See similarly, Smith, "Restoration of Tolerance", passim.

26 *Lange* v *Atkinson* [1998] 3 NZLR 424 at 463.

27 Hauerwas, *After Christendom?*, at 71.

28 "The Spirit of Liberty", a 1944 address given at Central Park, New York, in Dilliard (ed), *The Spirit of Liberty: Papers and Addresses of Learned Hand* (1952) ch 26 at 189-190 (emphasis added). The passage

Judge Learned Hand's 1944 address on "The Spirit of Liberty" has another passage not referred to by the White Paper. It seems an apt place to finish: "[T]he spirit of liberty is the spirit of Him who, near two thousand years ago, taught mankind that lesson it has never learned, but has never quite forgotten; that there may be a kingdom where the least shall be heard and considered side by side with the greatest."[29]

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is quoted by the authors of the *White Paper* (*A Bill of Rights for New Zealand*), AJHR 1985, A6, at para 4.4.

29 "The Spirit of Liberty" in Dilliard, ibid, at 190. In his comprehensive biography of Hand, Gerald Gunther notes the paradoxical nature of this particular passage: "Hand, for decades an agnostic, delivered an address with religious overtones, including an invocation of Jesus Christ" Gunther, *Learned Hand: The Man and the Judge* (1994) at 552.

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