

**LAW'S RELIGION AT STAKE: TRINITY WESTERN UNIVERSITY
AND THE PROSPECT OF RELIGIOUS LEGAL EDUCATION**

ABSTRACT

In this paper, I use the ongoing controversy over Trinity Western University's proposed law school as the starting point and backdrop of an inquiry into the prospect of religious legal education in Canada. I ask what legal education is, and in particular, whether it can be religious. To answer this question, I turn my attention to legal education central goals, which are to teach the law, to develop critical thinking skills and to cultivate humanity and a sense of citizenship in law students. I argue that each of these goals are compatible in principle with the idea of religious education, which invites the conclusion that the teaching of law from a religious perspective is possible. This conclusion prompts a reflection on the relationship between legal education and liberalism. Such a reflection is particularly relevant to the legal community, as it regards the most profound – some would say sacred – of its ideological foundations.

RÉSUMÉ

Cet article prend comme point de départ l'actuelle controverse autour de la création d'une faculté de droit à l'Université Trinity Western. Cette controverse sert de toile de fond à une discussion sur la perspective d'un enseignement religieux du droit au Canada. La question posée est celle de savoir ce qu'est l'éducation juridique, et en particulier si celle-ci peut être religieuse. Cette question commande de s'attarder aux principaux objectifs de l'enseignement du droit tels qu'identifiés dans la littérature, soit ceux de faire connaître le droit positif, de développer l'esprit critique des étudiants, ainsi que de cultiver leur humanité et leur conscience citoyenne. La thèse avancée veut que chacun de ces objectifs est compatible à priori avec l'idée d'un enseignement religieux, ce qui suggère que l'enseignement du droit selon une perspective religieuse est possible. Cette conclusion invite une réflexion sur le rapport entre l'enseignement du droit et le libéralisme. Cette réflexion est particulièrement pertinente pour la communauté juridique, en ce qu'elle concerne ses fondements idéologiques les plus profonds, voire sacrés.

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INTRODUCTION

In 2012, Trinity Western University (TWU), a private Christian university in British Columbia, submitted a proposal for a law school program to the Federation of Law Societies of Canada (FLSC). The FLSC's mandate is to "review existing and proposed law school programs to determine whether they comply with the national requirement".¹ The "national requirement" lists competencies and skills law students must acquire before graduation, as well as programs and resources law schools must put in place in order for them to do so.² TWU's proposal was approved by the FLSC in late 2013, and by the British Columbia government the next day.³ But soon after, several provincial law societies decided to conduct their own approval processes, in the name of "public interest" and their mandate to regulate the legal profession pursuant to provincial legislation.⁴ Their concern was with TWU's requirement that all students and staff sign a "Community Covenant", a "statement of commitment to the Christian faith that includes (among other things) an undertaking to refrain from "sexual intimacy that violates the sacredness of marriage between a man and a woman"", thus prohibiting sexual relations outside of marriage and homosexual sexual relations.⁵ As numerous commentators have

¹ Federation of Law Societies of Canada, "Canadian Common Law Program Approval Committee: Report on Trinity Western University's Proposed School of Law Program" (December, 2013), online: Federation of Law Societies of Canada <<http://docs.flsc.ca/ApprovalCommitteeFINAL.pdf>>. In a parallel process, a special committee was established by the FLSC to determine if additional, "public interest" considerations should be taken into account in deciding if TWU's graduates should be eligible to enroll in Canadian law societies. In the same month, the special committee answered this question by the negative, thus giving TWU full permission to go forward. See Federation of Law Societies of Canada, "Special Advisory Committee on Trinity's Western Proposed School of Law: Final Report" (December, 2013), online: Federation of Law Societies of Canada <http://www.flsc.ca/_documents/SpecialAdvisoryReportFinal.pdf> at para 2 [FLSC Special Committee Final Report].

² FLSC Special Committee Final Report, *supra* note 1 at 2.

³ Mark A. Witten, "Tracking Secularism: Freedom of Religion, Education, and the Trinity Western University Law School Dispute" (2016) 79 Sask L Rev 215 at 249 [Witten].

⁴ *Ibid.*

⁵ FLSC Special Committee Final Report, *supra* note 1 at para 5.

pointed out, this disposition discriminates against LGBTQIA2S+⁶ people,⁷ as well as common law partners and all non-evangelical Christians.⁸ For this reason, the British Columbia,⁹ Ontario and Nova Scotia law societies rejected TWU's proposal, decisions that were challenged in court by the university.¹⁰ This led to two rulings in favor of TWU, one by the British Columbia Court of Appeal¹¹ (overturning the British Columbia Supreme Court's decision) and one by the Nova Scotia courts (first and second instances).¹² On the other hand, the Ontario courts (first and second instances) ruled against TWU.¹³ In February 23 2017, the Supreme Court of Canada agreed to hear appeals from the British Columbia law society (against the British Columbia Court of Appeal's decision)¹⁴ and from TWU (against the Ontario Court of Appeal's decision)¹⁵. Both appeals will be heard together, and commenced on November 30, 2017¹⁶. The remaining provinces approved TWU's law school, at the exception of Newfoundland and

⁶ I use this acronym to designate all individuals who might be impacted by TWU's covenant due to their sexual orientation and/or gender identity, although I recognize that there are important variations in the way these individuals would be affected.

⁷ See for example: Elaine Craig, "The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program" (2013) 25:1 CJWL 148 [Craig]; Dianne Pothier, "An Argument Against Accreditation of Trinity Western University's Proposed Law School" (2014) 23:1 Const Forum Const 1 [Pothier]; Letter from Bill Flanagan, President, Canadian Council of Law Deans to John Hunter and Gérald Tremblay, President, Federation of Law Societies of Canada (20 November 2012), online: <<http://www.cclcd-cdfdc.ca/images/news/CCLDnov20-2012lettertoFederation-reTWU.pdf>> [Flanagan].

⁸ Faisal Bhabha, "Hanging in the Balance: The Rights of Religious Minorities" (2016) 75 SCLR (2d) 265 at 268 [Bhabha].

⁹ British Columbia's law society had initially voted in favor of TWU's law school, but reversed its decision after consulting its members by way of a referendum (Witten, *supra* note 3 at 249).

¹⁰ Witten, *supra* note 3 at 249.

¹¹ *Trinity Western University v The Law Society of British Columbia*, 2016 BCCA 423, [2016] BCJ No 2252.

¹² The decision of the Nova Scotia Court of Appeal is found at: *The Nova Scotia Barrister's Society v Trinity Western Society*, 2016 NSCA 59, 401 DLR (4th) 56.

¹³ The decision of the Ontario Court of Appeal is found at: *The Law Society of Upper Canada v Trinity Western University*, 2016 ONCA 518, 398 DLR (4th) 489.

¹⁴ *Law Society of British Columbia v Trinity Western University*, [2016] SCCA No 510.

¹⁵ *Trinity Western University v Law Society of Upper Canada*, [2016] SCCA No 418.

¹⁶ Mariane Gravelle, "Supreme Court of Canada hears appeals in TWU" (30 November 2017), *National Magazine* (blog), online <<http://www.nationalmagazine.ca/Articles/November-2017/Supreme-Court-of-Canada-hears-appeals-in-TWU.aspx>>.

Labrador, which postponed its decision until after the litigation process.¹⁷ At stake in this process is the ability of a private, religious institution, to discriminate against LGBTQIA2S+ students in the name of freedom of religion.

However, the debate around TWU's proposal largely exceeds the issue of discrimination. Indeed, because this issue was raised in the context of the creation of a law school, it was tangled up with questions about the type of education that would be dispensed by the law school and the type of graduates it would produce. In fact, the FLSC examined not only whether the discrimination carried out by TWU against prospective students would result in fewer opportunities and choices for LGBTQIA2S+ students¹⁸, but also whether TWU would be capable of teaching legal ethics, constitutional law and human rights law¹⁹ and whether students would acquire a critical mind.²⁰

These questions, and others raised in the same vein, prompted a broader, deeper conversation about the nature and purpose of legal education, to which a number of authors have contributed. For instance, Victor M. Muñoz-Fraticelli defended a conception of “institutional diversity” in legal education that would accommodate Christian education in all of its differences.²¹ Carissima Mathen and Michael Plaxton in turn approached the debate by reflecting on “the practice of legal education at secular law schools”,²² arguing that “many of the criticisms directed at TWU's proposed law school

¹⁷ Witten, *supra* note 3 at 249. Shannon Kari, “Dividing the bar: Trinity Western's law school proposal has sparked a fundamental debate about religious freedom and discrimination” *Can Lawyer* (6 February 2017), online: <<http://www.canadianlawyermag.com/6328/Dividing-the-bar.html>>.

¹⁸ FLSC Special Committee Final Report, *supra* note 1 at para 52-53.

¹⁹ *Ibid* at para 41-45.

²⁰ *Ibid*.

²¹ Victor M. Muñoz-Fraticelli, “The (Im)possibility of Christian Education” (2016) 75 SCLR (2d) 209 [Muñoz-Fraticelli].

²² Carissima Mathen and Michael Plaxton. “Legal Education, TWU and the Looking Glass” (2016) 75 SCLR (2d) 223 at 224 [Mathen and Plaxton].

would apply, in some measure, to many or all of its secular counterparts”.²³ They open the conclusion of their article with the following statement: “The TWU controversy is not about one law school in isolation. It is about what legal academics as a profession think legal education ... is and should be.”²⁴

I would add that the TWU controversy is about what legal education *can* be, and in particular whether it can be *religious*. In fact, the questions raised and arguments made in relation to TWU’s proposed law school have implications for any type of religiously-based legal education. For instance, whether or not religious norms and values are couched in a covenant, the question remains of whether they can be put aside to teach legal norms and values, when a conflict effectively exists between the two. Similarly, whether or not professors employed by religious law schools are required to sign an official “statement of faith”, they may be deeply committed to their faith, to the point that some could question their ability to think critically and to teach this ability successfully. Thus, at stake in the debate over TWU is the very prospect of religious legal education.

In this essay, I propose to examine this prospect, starting from the example provided by TWU, but expanding its scope. I ask whether religious legal education is conceivable in the Canadian context or whether it should be resisted. To answer this question, I suggest that we go back to legal education central goals, as identified in the relevant scholarship and as invoked by some of TWU’s critics. These goals are to teach the law (train lawyers and jurists)²⁵, to develop critical thinking skills (help them be good

²³ *Ibid.*

²⁴ *Ibid* at 244.

²⁵ See for example: Harry Arthurs, “The Future of Legal Education: Three Visions and a Prediction” (2013) Osgoode Hall Law School – 49 Research Paper Series at 2-3 [Arthurs].

at what they do)²⁶ and to cultivate humanity and a sense of citizenship in law students (help them become respectable human beings and citizens).²⁷ As regards the first goal, I argue that religious people can teach the law even when and if they disagree with its liberal premises, as non-religious teachers often do. Even if required by covenant to express this disagreement (which is not explicitly clear in the case of TWU) they are expected to teach the law of the state. This results in law teaching from a critical – religious – perspective. Although unprecedented in Canada, such a prospect is consistent with other critical approaches to legal education, and with liberalism’s commitment to pluralism (section I). In relation to the second goal, I argue that critical thinking takes several forms that can include religious thinking. Moreover, it can be said that religious schools are in a privileged position to teach this skill, being presumably less dedicated to state law than their secular counterparts. To the objection that this is prevented by TWU and other religious schools’ requirement that teachers hold certain beliefs for true, I answer that all beliefs about ethical issues are in some sense non-negotiable, and remark that TWU explicitly and in numerous ways allows for an open discussion about the Bible. Finally, I propose that we trust students’ ability to resist indoctrination (section II). As regards the third and final goal of legal education, I suggest that religious law schools can

²⁶ See for example: Elisabeth Mertz, “Learning to Think Like a Lawyer: Text, Context, and Linguistic Ideology”, in *The Language of Law School: Learning to “Think Like a Lawyer”* (Oxford: Oxford University Press, 2007) at 43-62 [Mertz]; John O. Mudd, “Thinking Critically About ‘Thinking Like a Lawyer’” (1983) 33 J Legal Educ 704 [Mudd]; Emily Robertson, “The Epistemic Aims of Education” in Harvey Siegel, ed, *The Oxford Companion of Philosophy of Education* (Oxford: Oxford University Press, 2009) 11 at 20 [Robertson].

²⁷ See for example: J.S. Mill from “Inaugural Address at Saint Andrews” in Stephen M. Cahn, ed, *Classic and Contemporary Readings in the Philosophy of Education* (New York: MacGraw-Hill, 1997) 185 at 225 [Mill]; Martha C. Nussbaum, “Cultivating Humanity in Legal Education” (2003) 70:1 U Chicago L Rev 265 [Nussbaum]; Sherman J. Clark, “Law School as Liberal Education” (2013) 63:2 J Legal Educ 235; Roderick Macdonald, “What do You Want to Be When You Grow Up?” (2011) YouTube, online: <http://www.youtube.com/watch?v=5HWxpo_Hif0> [Macdonald]; Roger Burridge and Julian Webb, “The Values of Common Law Legal Education: Rethinking Rules, Responsibilities, Relationships and Roles in Law Schools” (2008) 10:1 Legal Ethics 72 at 74-75 [Burridge and Webb].

teach ethical and professional values in a way that instills humanity and a sense of citizenship in their students. I claim that this is true even for the values that religious schools do not take to be primordial, as this goal can only be met to a modest degree by any type of law school, religious or secular (section III). Taken as a whole, these arguments invite the conclusion that the effective teaching of law from a religious perspective is *a priori* possible.

In putting forward this conclusion, my aim is not to promote religious legal education *per se*, as numerous authors have done before me.²⁸ Rather, I wish to invite the legal community to carefully and rationally assess this possibility, leaving aside misplaced assumptions about religion and religious teaching. Such an approach does not require that we embrace religious legal education uncritically, but demands that our critical lens be applied both to the project itself and to our reaction(s) to it.

I. Teaching the law

At the most basic level, law school is concerned with the teaching of positive law. This is because, even for those believing in higher purposes for legal education, future lawyers and jurists need to be trained to confidently identify and apply legal rules and principles.²⁹ However, because Canadian law is based on a liberal agenda and world view,³⁰ teaching law will often mean teaching liberalism. In other words: “Legal education is liberal ... because law is the expression of the state. Laws give expression to

²⁸ This is especially true in the American context. See for example: James D. Gordon III, “Religiously Affiliated Law Schools, Values and Professionalism” (2009) 59:1 J Legal Educ 151 [Gordon III]; Bradley J.B. Toben, “The Added Value and Prerogatives of Law Schools with a Faith Mission” (2009) 59:1 J Legal Educ 158 [Toben].

²⁹ Arthurs, *supra* note 25 at 2-3.

³⁰ See for example Benjamin Berger, “Law’s religion: rendering culture” (2007) 45:2 Osgoode Hall LJ 277 [Berger].

state theory, political values, and collective ideology.”³¹ Consequently, certain critiques of TWU proposed law school maintain that law teachers need to have the upmost respect for liberal values in order to teach their students to endorse and internalize them.³² This, they suggest, would not be the case for TWU teachers because of their approval of the discriminatory covenant, which goes against the liberal value of equality.³³ Is the same true of any religious teacher? Are religious teachers committed enough to liberalism to be entrusted with its teaching? What if some of their religious beliefs go against liberal values?

First, one should be wary of assuming that religious people are not liberal. Second, one should recognize that the number of times when religious beliefs and liberal values enshrined in legal norms will in fact collide is limited. Without settling the question of if and to what extent religion and liberalism are compatible, one can remark that the bulk of legal norms are foreign to religion. Indeed, apart from certain legal issues that raise ethical and moral questions also addressed in religious texts (for example abortion, prostitution or same-sex marriage), law and legal teaching are secular. As Mathen and Plaxton remark:

[T]he idea that adhering to a set of religious beliefs would pose a challenge to the study of positive law *per se* is surely overstated. In our experience, it is rare for students in secular law schools to engage in classrooms debates about the merits

³¹ W. Wesley Pue, “Legal Education’s Mission” (2008) 42:3 *The Law Teacher* 270 at 277.

³² Mathen and Plaxton, *supra* note 22 at 225-226; Craig, *supra* note 7. See also: Letter from the National Association of Women and the Law (March 8, 2013), in Respondent’s record of proceedings, *Trinity Western University and Braden Volkenant v. Law Society of Upper Canada*, Ontario Superior Court of Justice, Divisional Court, Court file 205/14, Tab 8; Letter from The Osgoode OUTLaws, Osgoode Hall Law School (March 18, 2013), online: <<http://www.scribd.com/doc/156265623/Letter-from-Osgoode-Law-Students-to-the-FLSC>>, cited in Mathen and Plaxton, *supra* note 22 at 226, n 17 [Letter from The Osgoode OUTLaws]; Letter from the University of Alberta Faculty of Law – OUTLaw (March 18, 2013), in Respondent’s Record of Proceedings, *ibid* at Tab 15, cited in Mathen and Plaxton, *supra* note 22 at 226, n 17 [Letter from University of Alberta Faculty of Law – OUTLaw].

³³ *Ibid.*

of different religious faiths, or, indeed, even to mention what their religious beliefs are.³⁴

Since law and religion more often than not regard different objects, the feared conflict will often be avoided.

Moreover, even in cases where religious beliefs and legal norms do collide, this does not mean that holding such beliefs will prevent one from effectively teaching the relevant norms. This is because one can teach something they disagree with. In the examples cited above and in similar complex, controversial cases, the official legal answer – be it the liberal one – is never the sole one. Consequently, some teachers’ personal views on these issues inevitably differ from the legal, liberal perspective: yet they still teach that perspective. Even in uncontroversial matters, law teachers often disagree with legal norms, without this stopping them from teaching it. When such conflict occurs, teachers can choose to ignore it, or they can invite a class discussion about the matters at stake, during which they may or may not express their personal opinions. The choice is entirely up to them and is rarely questioned. Nor is their ability to teach effectively. This is because disagreement is routine in law school. If existing law teachers are capable of managing it, I believe TWU and other religious law school teachers – however “illiberal” they might be – are as well.

However, if one can teach something they believe is wrong or mistaken, can one teach it if they are *required* – by way of a covenant, a statement of faith, or any other official policy – to hold this belief as true?³⁵ For instance, in the case of TWU, can professors teach the Canadian legal response to same-sex marriage if they not only believe it is wrong but have to express this belief in the classroom? Here, it is important

³⁴ Mathen and Plaxton, *supra* note 22 at 242.

³⁵ I am grateful to Professor Hoi Kong for raising this question.

to note first that it is not explicitly clear from TWU’s policies that such an obligation would exist for its law professors. This is because TWU’s views about same-sex marriage are contained in the Community Covenant Agreement, which regulates the conduct of its members,³⁶ rather than in the Statement of Faith, which lists beliefs TWU teachers are required to agree with and “support ... at all times before the students and friends of Trinity Western University”.³⁷ These beliefs are the following:

1. God’s gospel originates in and expresses the wondrous perfections of the eternal, triune God.
2. God’s gospel is authoritatively revealed in the Scriptures.
3. God’s gospel alone addresses our deepest need [the need for redemption].
4. God’s gospel is made known supremely in the Person of Jesus Christ.
5. God’s gospel is accomplished through the work of Christ.
6. God’s gospel is applied by the power of the Holy Spirit.
7. God’s gospel is now embodied in the new community called the church.
8. God’s gospel compels us to Christ-like living and witness to the world.
9. God’s gospel will be brought to fulfillment by the Lord Himself at the end of this age.
10. God’s gospel requires a response that has eternal consequences.³⁸

It is difficult to derive from such general statements about “God’s creation, the fall of humanity and Christ’s redemption”³⁹ the existence of an explicit obligation on the part of TWU teachers to condemn same-sex marriage. Moreover, the second and eighth statements – which bear the most relevance to the issue – are defined in vague terms that make no mention of marriage. The definitions are as follows:

2. *God’s gospel is authoritatively revealed in the Scriptures.*

We believe that God has spoken in the Scriptures, both Old and New Testaments, through the words of human authors. As the verbally inspired Word of God, the

³⁶ Trinity Western University, *Community Covenant Agreement: Our Pledge to One Another*, online: Trinity Western University <<https://www.twu.ca/office-president/twu-community-covenant-agreement>> [Covenant]. The Covenant indicates that TWU members “covenant together to form a community that strives to live according to biblical precepts” (*ibid*) and lists behaviors that are forbidden and encouraged.

³⁷ Trinity Western University, *Statement of Faith*, online: Trinity Western University <<https://www.twu.ca/sites/default/files/twu-2009-statement-of-faith-revised.pdf>> [Statement of Faith].

³⁸ *Ibid*.

³⁹ Trinity Western University, *Core Values Statement Series No. 1: Obeying the Authority of Scripture* (January 5, 1999), online: Trinity Western University <<https://www.twu.ca/about/core-values/obeying-authority-scripture>> [Core Values Statement No. 1]. According to this statement, these themes « should shape the basic perspective governing all classes » (*ibid*).

Bible is without error in the original writings, the complete revelation of His will for salvation, and the ultimate authority by which every realm of human knowledge and endeavour should be judged. Therefore, it is to be believed in all that it teaches, obeyed in all that it requires, and trusted in all that it promises.

...

8. God's gospel compels us to Christ-like living and witness to the world.

We believe that God's justifying grace must not be separated from His sanctifying power and purpose. God commands us to love Him supremely and others sacrificially, and to live out our faith with care for one another, compassion toward the poor and justice for the oppressed. With God's Word, the Spirit's power, and fervent prayer in Christ's name, we are to combat the spiritual forces of evil. In obedience to Christ's commission, we are to make disciples among all people, always bearing witness to the gospel word and deed.⁴⁰

In addition, the Statement of Faith gives teachers the option to sign it while “clarify[ing] [their] understanding of an article(s) on a separate, attached sheet.”⁴¹ Thus, the meaning and scope of the “truths” it contains – and in particular the question or whether any of these truths have implications for the issue of same-sex marriage – appear to be open for discussion.

Second, even admitting that TWU law teachers would be expected to condemn same-sex marriage, they would also be required to teach the law of the state. Consequently, what would happen in all likelihood is that they would address the issue by telling their students “This is what the law says; as Christians, we believe it is wrong in light of the Bible”. Is this something we can allow? Can we allow teachers to contradict in plain terms the legal, *liberal* answer to ethical questions? Whether we embrace or fear this prospect, we have to admit that in other respects, liberalism is already being contradicted. Indeed, liberalism is a challenged doctrine in legal education. Most notably, the “crits” – critical legal studies, critical race theory, critical outsider

⁴⁰ Statement of Faith, *supra* note 37.

⁴¹ *Ibid.*

jurisprudence, OutCrit theory and the like – have long advocated for legal education to be decolonized and stripped of its relation to power, hierarchy and exclusion by the adoption of a “critical legal education” approach that aims to expose and fight patterns of privilege and oppression.⁴² The object of concern and criticism here, the “colonizer” that is being fought, is liberalism itself in some of its core features, for example universalism and the idea of neutrality in law. Similarly, a number of different, but related theories have also been put forward to question the truth and objectivity of (legal) knowledge. Patricia Cross groups these critiques under the label “isms”⁴³: constructionism, feminism, modernism, post-modernism. We could add to this list “postfoundationalism”,⁴⁴ which seems to contain them all. In each of these theories, the core idea is that (legal) knowledge is socially constructed rather than discovered.⁴⁵ It is therefore “not universal and absolute”⁴⁶, but rather “local and historically changing”.⁴⁷ Seen in this light, liberalism as a subject being taught is like the rest of knowledge: only relative.

Thus, liberalism in legal education is being subject to a vast enterprise of deconstruction. This enterprise has been taken seriously, enough to answer calls to

⁴² Francisco Valdes, “Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education” (2003) 10 *Asian L J* 65; Paulo Freire, “Pedagogy of the Oppressed” (excerpt) in Steven M. Cahn, ed, *Classic and Contemporary Readings in the Philosophy of Education* (Oxford: Oxford University Press, 2012) 379 [Freire].

⁴³ K. Patricia Cross, “What Do We Know About Students’ Learning and How Do We Know It?” (Paper delivered at the AAHE National Conference on Higher Education, Atlanta, Georgia, March 24 1998), online: American Association of Higher Education and Accreditation <http://www.aahe.org/nche/cross_lecture.htm> at 4 [Cross].

⁴⁴ Nigel Blake et al, “Foundations Demolished, Sovereigns Deposed: The New Politics of Knowledge” in Henry A. Giroux ed, *Thinking Again: Education After Postmodernism* (Westport, Con, Bergin & Garvey, 1998) 21 at 21. No precise definition of the term is provided, but the authors use it to refer to the idea that “there are no foundations of knowledge, no grounds exterior to ourselves that guarantee the truth of our factual claims, and no supra-human warrant for universal truths in the realm of ethics” (*ibid* at 22).

⁴⁵ Cross, *supra* note 43 at 4-5; see also: Freire, *supra* note 42 at 379.

⁴⁶ Kenneth Bruffee, *Collaborative Learning: Higher Education, Independence, and the Authority of Knowledge* (Baltimore, MD: The Johns Hopkins University Press, 1995) at 222, cited in Cross, *supra* note 43 at 4.

⁴⁷ *Ibid.*

diversify curriculums – to include for example critical race theory classes, mandatory aboriginal law classes and more generally interdisciplinary classes exploring the social dimensions of law – and pedagogies, to better recognize and give a voice to some communities, and help all students examine and question their place and role in society. The result is legal education programs that are infused with multiple perspectives on law.

One could argue that the difference between these endeavors and TWU’s proposal is the source and the nature of the challenge brought against liberalism. In TWU’s case, it is explicitly grounded in religion and targets vulnerable populations. However, one could remark that the doctrines mentioned above are not immune from criticisms either.⁴⁸ In addition and more fundamentally, this objection raises the question : are we to allow certain types of critique only? Rather, if we wish to be consistent and continue to embrace changes brought about by new doctrines, should we not welcome diversity in all of its forms and manifestations? As Faisal Bhabha put it, the TWU controversy is “testing the seriousness of liberal commitments to normative pluralism and diversity”.⁴⁹ If we are serious about pluralism then, we should contemplate “institutional pluralism” as a real possibility.⁵⁰

II. Developing critical thinking skills

Another goal commonly associated with legal education is the development of skills in law students, at the center of which is the ability to think critically about the law

⁴⁸ For instance, some postcolonial, decolonial and anticolonial scholarship on international law challenges the very notion of human rights, a stance that is strongly criticized by Universalists. See for example Boaventura De Sousa Santos, “Toward A Multicultural Conception Of Human Rights” in Berta Esperanza Hernandez-Truyol, ed, *Moral Imperialism: A Critical Anthology* (New York: New York University Press, 2002) at 39-60.

⁴⁹ Bhabha, *supra* note 8 at 265.

⁵⁰ John Garvey, “Introduction” (2009) 59: 1 J Legal Educ 125. See also Muñiz-Fraticelli, *supra* note 21; John Boersma, “The Accreditation of Religious Law Schools in Canada and the United States” (2016) 2016: 4 BYU Law Review 1081.

and legal problems.⁵¹ This is the most basic component of the taught ability to “think like a lawyer”; arguably, its only component.⁵² To “think like a lawyer” is repeatedly touted as a crucial skill for law students to acquire, so often that it has become a sort of mantra in discussions about legal education. As John Mudd remarks:

Ask any lawyer or law professor to identify the most important features of a sound legal education and inevitably at the head of the list will be training to “think like a lawyer.” No one can argue with that ... “thinking like a lawyer” has taken on a mystique that has influenced the shape of legal education.⁵³

Can this ability effectively be taught in religious law schools? In exploring this question, one should acknowledge that there are different ways to be critical. As Mathen and Plaxton observe: “although legal education frequently, indeed regularly, requires students to engage in critical inquiry, there is no consensus that this inquiry must take any particular form.”⁵⁴ Accordingly, there are also different ways to *teach* critical thinking. John O. Mudd writes: “Law students can learn to think critically, precisely and clearly in various ways.”⁵⁵ For example, he suggests that students interrogate the social context of law, to help them acquire a broader view of legal issues and thus form a better judgment about them: “If thinking like a lawyer includes the ability to see issues in perspective, we may enhance that skill by involving first year students in questions of the role played by the law and lawyers in society.”⁵⁶ This is precisely what religious law schools identify as one of their unique contributions to legal education: to give students another perspective on the deep, broad issues that law raises.⁵⁷

⁵¹ Mertz, *supra* note 26; Mudd, *supra* note 26; Robertson, *supra* note 26.

⁵² Mudd, *supra* note 26.

⁵³ *Ibid* at 704.

⁵⁴ Mathen and Plaxton, *supra* note 22 at 237.

⁵⁵ Mudd, *supra* note 26 at 709.

⁵⁶ *Ibid*.

⁵⁷ See for example: Gordon III, *supra* note 28; Toben, *supra* note 28.

Moreover, thinking critically about the law requires distance from it. As Paul W. Kahn writes: “We cannot study law if we are already committed to law.”⁵⁸ In this sense, one could even argue that religious law schools are at an advantage in teaching critical thinking skills, being positioned as the “outsider” in relation to state law.

One could object that the concern with religious law schools is not their overall ability to teach critical thinking, but their ability to do so regarding certain ethical issues that are relevant to their faith, when teachers are required to commit to this faith. For instance, in the case of TWU, teachers are expected to accept and present the teachings of the Bible as true. However, as Elaine Craig put it: “Critical thinking does not start with a conclusion of truth.”⁵⁹ Rather:

Critical thinking involves deliberation, reasoning, reflection, and logic in order to decide what to believe or what to do. It requires the ability to discern hidden values and unstated assumptions, to consider and evaluate the reason and logic of competing statements of truth, to observe and evaluate evidence, and to assess context and the reliability of sources of information in order to arrive at a finding of truth.⁶⁰

However, all beliefs about ethical issues can in some sense be said to start with a conclusion of truth. They are personal, deeply-held beliefs that, even when not stemming from religion, have the potential to be just as fixed and definitive. For example, in the case of abortion, those arguing the secular, “pro-choice” position can be as committed to the idea of a right to self-determination as those arguing the “pro-life” position can be committed to the right to life. If we are to deny the possibility of critique in the latter case, should we not question it in the first case as well? In short, when the law addresses difficult ethical questions, it inspires the same type of answers from religious and non-

⁵⁸ Paul W. Kahn, “The State of the Discipline”, in *The Cultural Study of Law: Restructuring Legal Scholarship* (Chicago: The University of Chicago Press, 1999) at 27.

⁵⁹ Craig, *supra* note 7 at 165.

⁶⁰ *Ibid* at 164.

religious individuals: answers that are highly subjective and, in many cases, non-negotiable.

In addition, a close reading of TWU’s policies reveals that despite the requirement that professors recognize to the authority and truth of the Bible, students are explicitly allowed to discuss and even debate its teachings in class. First, TWU recognizes that the Bible does not address all questions⁶¹ and does not provide a single answer to those questions that are addressed.⁶² Consequently, it makes room for alternative viewpoints: “[w]e respect students holding differing convictions and allow them to develop their thinking and the implications of their particular framework of beliefs.”⁶³ The development of students’ personal frameworks of beliefs is even said to be the aim of faith-based learning: “In the end ... our aim is not that students just accept our vision. Rather, we want them to understand and consider our vision in order to develop their own.”⁶⁴ TWU also allows the Christian tradition to be challenged and welcomes its renewal:

Our learning involves faith-affirming initiation and socialization. But it also includes the possibility of renewing and advancing our traditions. As we uphold our evangelical tradition we also subject it to constructive criticism that may lead to re-formation. If conservation is not balanced with critical renewal, there is a

⁶¹ Core Values Statement No. 1, *supra* note 39 (“Scripture expresses God’s message, but it does not necessarily answer all of our questions surrounding that message”).

⁶² Trinity Western University, *Core Values Statement Series No. 2: Pursuing Faith-based Learning and Faith-affirming Learning* (May 31, 1999), online: Trinity Western University <<https://www.twu.ca/about/core-values/faith-based-learning>> [Core Values Statement No. 2] (“for human interpretations and conclusions, several possible Christian points of view often exist. For instance, is it ever justifiable to wage war? In such cases we need to avoid speaking of “the” Christian view. Rather, we allow students to consider the differing Christian positions while pointing them back to biblical principles”).

⁶³ *Ibid.* See also, under the rubric “What is faith based learning”: “We are committed to give fair and balanced representations of a wide diversity of viewpoints, and have a high regard for honest investigation” (*ibid.*).

⁶⁴ *Ibid.* See also: “Faith-based and faith-affirming learning does not aim to nurture replicas of ourselves but persons who consider our vision and then embark on their own faith-based quest.” (*ibid.*).

danger of stagnation of the tradition. Learning at TWU must balance faithfulness to its heritage with its responsible and creative renewal.⁶⁵

Ultimately, TWU states that it “encourages confidence”⁶⁶ in the Bible, but does not require it from the students: “[i]n short, we invite but we do not force or require students to accept a Christian point of view”.⁶⁷ Thus, it appears that the limitations put on teachers’ critical thinking⁶⁸ do not in turn limit students’ critical thinking.

Nevertheless, one could wonder if we should trust TWU and its policies in that regard. Here, I believe that even if we doubt TWU, we should not doubt the students. If law schools are meant to teach critical thinking, this teaching will have started earlier and elsewhere in life. Thus, students don’t start law school with empty minds ready to be filled and manipulated. They have voices of their own and come prepared to use them. Let us trust their ability to resist indoctrination.

III. Cultivating humanity and a sense of citizenship

According to Roger Burridge and Julian Webb, “The mission of the liberal law school is the preparation of “good citizens” or “better persons” rather than (simply) good lawyers.”⁶⁹ Citizenship is defined here as an “intelligent participation in the politico-legal

⁶⁵ *Ibid.* See also, under the rubric “What is faith based learning”: “Faith-affirming learning transmits the evangelical tradition but also allows for critique and renewal of that heritage.” (*ibid.*)

⁶⁶ Core Values Statement No. 1, *supra* note 39.

⁶⁷ Core Values Statement No. 2, *supra* note 62. See also these passages where TWU condemns indoctrination: “Promoting respect for the Scripture among university students means neither that we engage in indoctrination nor that we avoid openly discussing the textual, hermeneutical, and alternative viewpoints that any honest view of Scripture must address” (Core Values Statement No. 1, *supra* note 39); “Arbitrary indoctrination and simplistic answers are incompatible with a Christian respect for truth.” (Core Values Statement No. 2, *supra* note 62).

⁶⁸ For some, these limitations amount to a violation of academic freedom. See for example: William Bruneau and Thomas Friedman, *Report of an Inquiry Regarding Trinity Western University* (October 2009), online: CAUT <<https://www.caut.ca/docs/reports/report-of-caut-ad-hoc-investigatory-committee-on-twu.pdf?sfvrsn=0>>. However, one has to observe that teachers at TWU voluntarily accept to limit their freedom in this way when joining the ranks of TWU.

⁶⁹ Burridge and Webb, *supra* note 27 at 74-75.

life of the community.”⁷⁰ Martha Nussbaum adds a cosmopolitan dimension to this imperative: law students, she believes, should acquire “World Citizenship”, which is achieved by exposing them to diverse perspectives.⁷¹ As for the idea that law students should be trained to become “better persons”, Nussbaum suggests that one way of “cultivating humanity”⁷² in students is to develop their empathy and compassion by nourishing their “narrative imagination”, that is: their “ability to think what it might be like to be in the shoes of a person different from oneself, to be an intelligent reader to that person’s story, and to understand the emotions, wishes and desires that someone so placed might have”.⁷³ Other authors have expressed similar views and concerns, all directed to the idea that legal education should not lose sight of the fact that lawyers and jurists are, first and foremost, human beings. For example, Roderick Macdonald, in an address to law school graduates, prompted them to ask themselves not only “What do I want to *do* when I grow up”, but also and mainly “what do I want to *be* when I grow up”.⁷⁴

In the minds of most authors, the acquisition of such human skills is achieved through the teaching of ethics and professionalism.⁷⁵ For our purposes then, the question becomes: can religious law schools teach such topics efficiently? Perhaps unsurprisingly, religious schools claim that they can, and that they are especially well equipped to do so – values being their field of expertise. TWU makes it the focus of its proposal: “The proposal is for a small law school in Langley with a focus on professionalism, ethics,

⁷⁰ *Ibid.*

⁷¹ Nussbaum, *supra* note 27 at 270.

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ Macdonald, *supra* note 27.

⁷⁵ See for example: Craig, *supra* note 7.

skills training and specializations in charities law and entrepreneur law.”⁷⁶ It also emphasizes the “whole person development”⁷⁷ of students, claiming to reject the “marketplace metaphor”⁷⁸ which reduces them to customers, and education in turn, to “a bag stuffed with information and skills that students take with them when they graduate.”⁷⁹

Existing religious law faculties make similar arguments. For example, professor James D. Gordon III, who teaches at the Reuben Clark Law School of Brigham Young University (owned and operated by The Church of Jesus Christ of Latter-day Saints), describes at length the various ways morality and ethics can be taught from a religious perspective. For instance, he notes that religious law schools hold themselves out to teach the importance of (community) service,⁸⁰ honesty⁸¹ and civility⁸² in the practice of law. They also teach their students to use litigation sensibly and in accordance with moral and religious principles.⁸³ In one of Gordon III’s own classes, the following principles are taught in relation to litigation:

11. Forgive;
12. Pursue private settlement;
13. Eliminate revenge;
14. Act to protect others;
15. Consider the effect of civil action upon those who are sued, and
16. Think of rights ahead of responsibilities.⁸⁴

Gordon III also describes a “Professional Seminar” being offered at Reuben Clark, which “integrates religious and moral values into a model of legal professionalism,

⁷⁶ Trinity Western University, *TWU School of Law Statement*, online: Trinity Western University <<https://www.twu.ca/news-events/news/twu-school-law-statement>>.

⁷⁷ Core Values Statement No. 2, *supra* note 62.

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Gordon III, *supra* note 57 at 153. See also Toben, *supra* note 57 at 158, 162.

⁸¹ Gordon III, *supra* note 57 at 155.

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*

and discusses legal education, the legal system, law practice, and the role of lawyers in society”.⁸⁵ Similarly, Bradley J.B. Toben, from Baylor University School of Law (a Baptist University), argues that religious schools can instill a sense of vocation and a call for service in law students, as they teach them that “the law is not merely a career or profession, but is also a privileged opportunity to serve others.”⁸⁶

From these testimonies, one can infer that TWU and other religious schools are able to teach ethics and professionalism efficiently. However, while they may succeed in teaching *certain*, preferred values (for example service), the question remains whether they can succeed in teaching *other* values, to which their religion might not give the same prominence or that it might even oppose in certain circumstances. In addition, the concern here is not simply whether they can teach these values, but also to what extent they can do so. Emphasizing the difference between *knowledge* and *understanding* of an ethical rule, Elaine Craig maintains that “understanding the ethical dimensions of the practice of law must mean something like grasping the significance, implications, and importance of ethical duties such as the duty not to discriminate”.⁸⁷ In her opinion, TWU is not a learning environment capable of developing such an understanding because of its discriminatory policies.⁸⁸ Yet, as Mathen and Plaxton would ask⁸⁹, do existent, *secular* law schools fare well in that department? Some authors answer in the negative, arguing that they are failing to properly transmit liberal values to their students.⁹⁰ Consequently, they advocate the implementation of a “liberal education” platform, referring both to

⁸⁵ *Ibid* at 154.

⁸⁶ Toben, *supra* note 57 at 162.

⁸⁷ Craig, *supra* note 7 at 162.

⁸⁸ *Ibid* at 160-163.

⁸⁹ Mathen and Plaxton, *supra* note 22.

⁹⁰ Burrridge and Webb, *supra* note 27.

liberalism as an ideology and to the idea of a “liberal arts” curriculum.⁹¹ According to this approach, liberal values should be explicitly promoted in law schools, where students would be provided with concrete answers to ethical and moral questions.⁹²

However, one can ask whether the teaching of liberal values can even have the projected impact on law students. In my opinion, such teaching can only have a limited impact. This is because all values are open-ended: they don’t have a fixed meaning, ready to be applied in all circumstances. For instance, the teaching of equality in law school might do a good job at convincing law students that they “shall not discriminate.” But confronted to real-life examples of practices that seem discriminatory, students will ask themselves: what is equality? What does it require, really? What does one do when this right or value appears to clash with other, equally important – because all “fundamental”, law students will have learned that if anything – rights and values? As the study of law proves over and over, the meaning and scope of liberalism’s core values – human rights – vary according to time, place and subjectivity. The teaching of human rights as ethical values does nothing to help answer the difficult questions that lawyers and jurists face in practice, and does nothing to guarantee that these values will be upheld and materialized in a particular way, that one might wish for. I believe the same is true for religious values, notwithstanding religion and religious schools’ potential attempts to tether or fix their meaning within religious doctrine.

Consequently, in my view, any effort to teach ethical and professional values in a substantial rather than formal way is doomed to fail. In these circumstances, perhaps the mission for legal education should be more modest: it should be to teach values the way

⁹¹ *Ibid.*

⁹² *Ibid.*

they are: plural and changing. Whether or not religious schools can rightly claim to achieve more, they can at least achieve that. This is a mission all law schools can accomplish.

CONCLUSION

In his classic piece “Law’s religion: rendering culture”,⁹³ Benjamin Berger argued that law’s understanding and depiction of religion as a private, individual matter representing the expression of a choice (the exercise of autonomy), was a particular, *cultural* one that has its roots in liberalism.⁹⁴ Thus “law’s religion” in his words meant religion according to law. In my opinion, this argument can be pushed further by suggesting that law’s culture – liberalism – can itself be considered as a form of religion: a deeply held set of beliefs that informs one’s whole being. In the debate over TWU’s proposed law school, it sometimes seemed that liberalism was treated as such.⁹⁵ The number and tone of opinions voiced against TWU’s proposal, in the legal profession and the academia alike, revealed Canadian jurists’ profound commitment to liberalism and liberal values. For instance, a letter from Osgoode OUTLaws stated that “Law schools are to *propagate the values* of the Canadian legal system”⁹⁶ Another from the University

⁹³ Berger, *supra* note 30.

⁹⁴ *Ibid.* See in particular page 310.

⁹⁵ For a similar argument, see: “Critics of law school at Christian Trinity Western University are also being bigots”, Editorial, *Vancouver Province* (22 October 2013), online: <<http://theprovince.com/opinion/editorial-critics-of-law-school-at-christian-trinity-western-university-are-also-being-bigots-too.html>>.

⁹⁶ Letter from The Osgoode OUTLaws, Osgoode Hall Law School (March 18, 2013), online: <<http://www.scribd.com/doc/156265623/Letter-from-Osgoode-Law-Students-to-the-FLSC>> [emphasis added].

of Alberta Faculty of Law OUTLaw maintained that “[law] students should be taught to *uphold the values* of the Canadian legal system”.⁹⁷

In this paper, I have argued that none of the main goals of legal education, as identified in the relevant literature and as invoked by critics of TWU, are inconsistent *a priori* with the idea of religious law schools. First, positive law can be taught in religious institutions by religious individuals, be they liberals or not. Second, law students can learn to think critically about the law in religious settings as well as in secular ones. Third, religious law schools can cultivate humanity and a sense of citizenship in their students, even when such teaching revolves around values they do not endorse as strongly as their secular counterparts.

If this assessment is correct, then we should abandon any view of legal education as the site of liberalism’s promotion and flourishing. Rather, we ought to allow liberalism to be questioned and challenged in law schools, like any other ideology. We should even accept the possibility that it be replaced as the starting point of the conversation, as could be the case in religious schools. In brief: we must refrain from making the teaching of law the preaching of liberalism. If liberalism is law’s religion, let’s not make it law’s orthodoxy.

⁹⁷ Letter from University of Alberta Faculty of Law – OUTLaw (Marc 18, 2013), in Respondent’s Record of Proceedings, *Trinity Western University and Braden Volkenant v. Law Society of Upper Canada*, Ontario Superior Court of Justice, Divisional Court, Court file 205/14, Tab 15 [emphasis added].