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## Reflections on the Path of Religion-State Relations in New Zealand

*Rex J. Ahdar\**

### I. INTRODUCTION

Recently, religious controversy has caught most New Zealanders rather unprepared. New Zealand earned the ire of some Islamic nations when two of its major city newspapers reprinted the Danish cartoons depicting the Prophet Mohammed.<sup>1</sup> That was followed by an outcry over the screening of an episode of *South Park*, the American satirical television cartoon show, which showed a statue of the Virgin Mary menstruating.<sup>2</sup> The Prime Minister, Helen Clark, denounced the screening of the episode as “quite revolting.”<sup>3</sup> She insisted, “I think the critical thing is we show respect for other people’s beliefs.”<sup>4</sup>

In New Zealand, public consternation and debate over religious matters is unusual, for religion seldom appears to occupy a prominent place in the lives of most of its citizens. In one sense, this may be viewed as a positive thing; for New Zealand, by and large, has not witnessed the large-scale and bitter religious turmoil that has beset many nations. This is, of course, a broad generalization, and it would be remiss to ignore, for example, the spasms of fierce sectarian feuding between the transplanted Protestant and Catholic communities in the late nineteenth and early twentieth centuries that punctuated this seemingly serene religious landscape.<sup>5</sup> Furthermore,

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1. See T. Hume, *Trade Officials on Alert After Media Show Mohammed Cartoons*, SUNDAY STAR-TIMES, Feb. 5, 2006, at A1.

2. See M. Young & E. Kiong, *TV Chief Rejects Bishops’ Boycott Call over ‘Tasteless’ Cartoon*, N.Z. HERALD, Feb. 20, 2006.

3. See A. Young, *South Park’s ‘Mary’ Episode Revolting, Says PM*, N.Z. HERALD, Feb. 21, 2006.

4. *Id.*

5. See, e.g., RORY SWEETMAN, BISHOP IN THE DOCK: THE SEDITION TRIAL OF JAMES LISTON (1997) (recounting the unsuccessful prosecution of a Roman Catholic bishop for sedition in 1922); G.A. Wood, *Church and State in the Furthest Reach of Western Christianity*, in CHRISTIANITY, MODERNITY AND CULTURE: NEW PERSPECTIVES ON NEW ZEALAND

various emergent public expressions of religiosity by the indigenous people (the Maori) have been vigorously and swiftly suppressed by the state.<sup>6</sup> Nonetheless, the general picture, I suggest, is one of comparative tranquility; at least in comparative global terms. As professor John Stenhouse notes, “what is striking about New Zealand’s past is not that bigotry existed but that it so seldom erupted into violence. By world standards, New Zealanders handled their religious differences remarkably well.”<sup>7</sup> The explanations for this fortunate turn of events are undoubtedly diverse and complex. It may be that the comparative absence of religious tension, violence, and rancor is simply due to New Zealand’s relatively short history as a modern nation state.

Perhaps the comparative calm reflects a somewhat benign indifference and coolness toward organized religion in general by sizeable segments of the population. Certainly, that has been the predominant view of many New Zealand historians who, guided by implicit assumptions of the steady march of secularization, depicted religion slowly receding into irrelevance.<sup>8</sup> As Sir Keith Sinclair—perhaps the leading post-World War II New Zealand historian—dryly observed, “The prevailing religion is a simple materialism. The pursuit of wealth and possessions fills more minds than thoughts of salvation.”<sup>9</sup> Similarly, sociologist Michael Hill stated that

[d]espite 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 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

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HISTORY 207, 229–332 (John Stenhouse ed., 2005); P.S. O’Connor, *Sectarian Conflict in New Zealand, 1911–1920*, 19 POL. SCI. 3 (1967).

6. For example, the Tohunga Suppression Act 1907 made it a criminal offence for *tohunga* (an expert, priest, or healer) to practice on the “superstition and credulity” of Maoris or to profess to possess supernatural healing powers. See Malcolm Voyce, *Maori Healers in New Zealand: The Tohunga Suppression Act 1907*, 60 OCEANIA 99 (1989).

7. John Stenhouse, *God’s Own Silence: Secular Nationalism, Christianity and the Writing of New Zealand History*, 38 N.Z. J. HIST. 52, 68 (2004).

8. See *id.*

9. KEITH SINCLAIR, A HISTORY OF NEW ZEALAND 261 (1961).

denominational label, nominalism was evident in the considerably lower proportions who engaged in regular religious activity.<sup>10</sup>

However, this received historical view of religion may well be misleading. The downplaying of the importance of religion in ordinary New Zealanders' lives, and in the shaping of society, may owe much to a prior commitment by scholars to see the nation forge an enlightened, secular, left-liberal path.<sup>11</sup> This Article briefly traverses the evolution of religion-state relations in New Zealand.

Part II will summarize roughly the first century of this evolution. This Article argues that the *de jure* stance of non-establishment, religious equality, and pragmatic secularism was also marked by a *de facto* or cultural establishment of a generic, yet heavily Protestant-influenced, Christianity. Part III outlines some key trends in the latter half of the twentieth century. First, there has been a steady erosion of the *de facto* Christian establishment and a concomitant acceleration of the secularization of public institutions and social life. Yet, secondly, there has been a counter-thrust to this secularization in the official recognition of Maori spiritual concerns as part of a broader program recognizing the historic obligations owed to the Maori people by the government. Finally, increased immigration from Asia and Africa has contributed to a steady growth of the Muslim, Hindu, and other non-Christian faith communities. When viewed together, these trends illustrate that the challenges posed by this growth in religious pluralism pose some urgent and difficult questions for New Zealand policy makers, human-rights agencies, and courts. Part IV concludes with speculation as to how the future religion-state landscape in New Zealand will continue to evolve.

## II. THE PAST

### *A. Pluralistic Roots, Religious Equality, and Secularism*

Three interrelated themes mark the foundational period of official New Zealand religion-state relations: pluralistic roots, an ongoing commitment to religious equality, and a pragmatic secularism.

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10. Hill, *Religion, in* NEW ZEALAND SOCIETY: A SOCIOLOGICAL INTRODUCTION 295 (Paul Spoonley et al. eds., 2d ed. 1994).

11. See Stenhouse, *supra* note 7, at 58.

*1. Pluralistic roots*

First, New Zealand has never had an established church.<sup>12</sup> As the Supreme Court clarified at the turn of the twentieth century, “There is no State Church here. The Anglican Church in New Zealand is in no sense a State Church. . . . 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.”<sup>13</sup>

There were various early regional attempts at religious establishment by the European immigrants. The Free Church of Scotland founded settlements in both Otago and Southland. The Otago settlement was begun in 1848 by the Reverend 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.”<sup>14</sup> Unfortunately for them, their dream of a Free Church theocracy, a “Geneva of the Antipodes,” was to founder.<sup>15</sup> Canterbury, led by John Robert Godley, was to be “a new-world exemplar of an Anglican state.”<sup>16</sup> Again, these early settlers never realized their hopes. Further attempts include a Roman Catholic stronghold on the West Coast of the South Island, the fledgling Nonconformist settlement in Albertland in Northland, and the small Scandinavian Lutheran settlements in places such as Dannevirke.<sup>17</sup>

This history of numerous attempts to establish religious colonies supports the argument that what the Europeans brought was not a homogeneous thing called Christianity.<sup>18</sup> Instead, the migrants saw themselves very much in denominational terms, as first Anglicans, Presbyterians, Methodists, Catholics, and so on. New Zealand was

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12. See J. HIGHT & H.D. BAMFORD, *THE CONSTITUTIONAL HISTORY AND LAW OF NEW ZEALAND* 378 (1914).

13. *Carrigan v. Redwood*, [1910] 30 N.Z.L.R. 244, 252. The Court of Appeal affirmed this in 1998. See *Mabon v. Conference of the Methodist Church of New Zealand*, [1998] 3 N.Z.L.R. 513, 523 (“Unlike England and Scotland, New Zealand does not have a national established church.”).

14. HUGH R. JACKSON, *CHURCHES AND PEOPLE IN AUSTRALIA AND NEW ZEALAND 1860–1930*, at 17 (1987).

15. ALLAN K. DAVIDSON, *CHRISTIANITY IN AOTEAROA: A HISTORY OF CHURCH AND SOCIETY IN NEW ZEALAND* 34 (3d ed. 2004).

16. JACKSON, *supra* note 14, at 17.

17. See DAVIDSON, *supra* note 15, at 54–55; JACKSON, *supra* note 14, at 17–18.

18. LLOYD GEERING, *2100: A FAITH ODYSSEY—THE CHANGING FACE OF NEW ZEALAND RELIGION* 8 (1995).

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.”<sup>19</sup>

There was a modest initial preference for the Anglican Church,<sup>20</sup> leading some to describe that Church as having a quasi-establishment role in the colony. But as scholar Antony Wood observed, “The Anglican Church’s pre-eminence was a shadowy affair in comparison with its position in the home country or in older established colonies of settlement.”<sup>21</sup> New Zealand was settled as a British colony at the time when the principle of non-establishment was gaining favor in Britain and the disestablishment of the Church of England was being seriously debated.<sup>22</sup> It was also the period when the remaining legal disabilities upon Roman Catholics, Nonconformists, and Jews were being repealed in Britain.<sup>23</sup> The settlement of New Zealand reflected these changing philosophies and gave no official preference to any particular religion.

This pattern of pluralistic settlement played a significant role in nineteenth-century New Zealand’s formal separation of church and state. 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.<sup>24</sup>

## *2. An ongoing commitment to religious equality*

A second theme has been an ongoing commitment to religious equality. We can trace this back to the Treaty of Waitangi 1840, a founding document whereby the leaders of the indigenous inhabitants, the Maori people, ceded sovereignty to the British Crown in return for becoming British subjects and securing the continued protection of their lands.<sup>25</sup> The New Zealand Court of

19. *Id.* at 13; see also Lloyd Geering, *Pluralism and the Future of Religion in New Zealand*, in RELIGION IN NEW ZEALAND SOCIETY 218 (Brian Colless & Peter Donovan eds., 2d ed. 1985).

20. For examples of this preference, see G.A. Wood, *Church and State in New Zealand in the 1850s*, 8 J. RELIGIOUS HIST. 255 (1975).

21. *Id.* at 267.

22. Peter Lineham, *Freethinkers in Nineteenth-Century New Zealand*, 19 N.Z. J. HIST. 61, 71 (1985).

23. Wood, *supra* note 5, at 213–14.

24. Lineham, *supra* note 22, at 76.

25. The treaty is reproduced in full in the First Schedule of the Treaty of Waitangi Act 1975, 1975 N.Z.T.S. No. 114. The precise meaning and significance of the Treaty is a subject

Appeal described the Treaty of Waitangi as “a solemn compact between two identified parties, the Crown and the Maori, through which the colonisation of New Zealand was to become possible . . . [and which] requires each party to act reasonably and in good faith towards the other.”<sup>26</sup>

The signing of the Treaty of Waitangi on February 6, 1840, unexpectedly included an oral assurance of religious freedom and equality to the Maori people. This came about due to the initiative of the Roman Catholic bishop, Bishop Jean Baptiste Francois Pompallier.<sup>27</sup> In response to Pompallier’s request for protection of the Catholic Church by the British Government, Governor William 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 the provision “would have been embodied in the treaty.”<sup>28</sup> The Reverend Henry Williams, the person charged with translating the agreement into the Maori language, 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.”<sup>29</sup> The note was relayed to the Governor, who in turn passed it on to Pompallier, who read it and expressed approval. Williams then read a carefully written statement to the Maori assembly:

E mea ana te 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

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generating much controversy in contemporary New Zealand. The Maori understanding, buttressed by the official Maori language version of the Treaty, is that something less than full sovereignty (*kawanatanga* or “governorship”) was ceded to the British and thus full authority (*rangatiratanga*) remained with them. *See, e.g.*, JAMES BELICH, *MAKING PEOPLES: A HISTORY OF THE NEW ZEALANDERS* 193–96 (1996); *see also* PHILIP JOSEPH, *CONSTITUTIONAL AND ADMINISTRATIVE LAW IN NEW ZEALAND* 42–95 (2d ed. 2001).

26. *New Zealand Maori Council v. Attorney General*, [1987] 1 N.Z.L.R. 641, 673 (C.A.).

27. J.B.F. POMPALLIER, *EARLY HISTORY OF THE CATHOLIC CHURCH IN OCEANIA* 63 (1888).

28. T. LINDSAY BUICK, *THE TREATY OF WAITANGI: HOW NEW ZEALAND BECAME A BRITISH COLONY* 152 (3d ed. 1936); *see also* HUGH CARLETON, *THE LIFE OF HENRY WILLIAMS* 314 (rev. ed. 1948).

29. BUICK, *supra* note 28, at 153; CARLETON, *supra* note 28, at 315.

the Wesleyans, of Rome, and also the Maori custom, shall be alike protected by him.”<sup>30</sup>

Despite skepticism, this verbal assurance has taken on a renewed importance in the latter part of the twentieth century, sometimes being referred to—alongside the three written articles—as the “Fourth Article” of the Treaty.<sup>31</sup> Although its legal validity has been questioned,<sup>32</sup> the promise does evidence an early commitment to religious equality, even if only nominally.

The earliest Parliamentary debates are also indicative of this desire for religious equality. An unexpected debate occurred at the opening session of Parliament on May 26, 1854, about whether there should be an opening prayer.<sup>33</sup> James Macandrew, a Presbyterian MP (Member of Parliament) from Dunedin, offered to fetch a nearby Anglican parish minister to ensure there would be “an acknowledgement of dependence on the Divine Being.” It was “clear to [Macandrew] that the House of Representatives, being the first embodiment of a New Zealand nationality, should be

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30. WILLIAM COLENSO, *THE AUTHENTIC AND GENUINE HISTORY OF THE SIGNING OF THE TREATY OF WAITANGI* 32 (1890). However, there were some that questioned the motives of the assurance and deemed the assurance nominal at best. Claudia Orange argues that the English missionaries hoped that the Roman Catholic faith would suffer by association with *ritenga* (what James Busby, the first British official stationed in New Zealand, termed “heathen practices”), which they attacked as decadent and which they wished to eliminate. She adds,

The official recognition seemingly given 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.

CLAUDIA ORANGE, *THE TREATY OF WAITANGI* 53 (1987).

31. See, e.g., NEW ZEALAND LAW COMMISSION, *MAORI CUSTOM AND VALUES IN NEW ZEALAND LAW* 72–74 (Study Paper 9, March 1, 2001), available at <http://www.lawcom.govt.nz/ProjectStudyPapers.aspx?ProjectID=112>; E.T. Durie, *Will the Settlers Settle? Cultural Conciliation and the Law*, 8 OTAGO L. REV. 449, 460 (1996).

32. This contemporary characterization of Governor Hobson’s promise as being equal to the written provisions is misleading. The better view is that the promise was intended to have moral and not legal weight. See MICHAEL KING, *THE PENGUIN HISTORY OF NEW ZEALAND* 163 (2003) (“The assumption that it might be used to enforce state protection and encouragement of Maori religious practices—‘ritenga maori,’ in Williams’s translation—is misplaced.”).

33. See Allan K. Davidson, *Chaplain to the Nation or Prophet at the Gate? The Role of the Church in New Zealand Society*, in *CHRISTIANITY, MODERNITY AND CULTURE: NEW PERSPECTIVES ON NEW ZEALAND HISTORY* 311, 312–14 (John Stenhouse ed., 2005); Wood, *supra* note 20, at 255.



consecrated,” and so he proposed a motion to that effect.<sup>34</sup> Dr. Walter Lee, MP, immediately raised a counter-motion that the House “be not converted into a conventicle, and that prayers be not offered up.”<sup>35</sup> A vigorous debate ensued. Some considered that 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.<sup>36</sup> Edward Gibbon Wakefield, MP, tried to assuage fears by pointing out that in America, “where State religion was absolutely repudiated,” the practice of opening the legislative houses with prayer was allowed.<sup>37</sup> Some members were by now becoming impatient and sought to short-circuit potentially “fruitlessly prolonged” discussion, so Frederic Weld, MP, 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.”<sup>38</sup>

Wakefield, MP, worried that “New Zealand should be singular in this respect among the Christian countries of the earth”<sup>39</sup> if proceedings began without a prayer. Dr. Walter Lee, MP, responded with doubts as to how the Jew could join with the Christian in a prayer and added, “[A]s the Constitution had very properly rid them of State religion, the House should take care how they voluntarily submitted to it.”<sup>40</sup> Weld’s amendment was rejected by twenty votes to ten.<sup>41</sup> The House then returned to the original motion and passed it (with no vote count recorded):

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-

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34. New Zealand Parliamentary Debates 4 (1854–1855).

35. *Id.*

36. *Id.* (statement of James Edward Fitzgerald).

37. *Id.* at 5.

38. *Id.*

39. *Id.* at 6.

40. *Id.*

41. *Id.*

eminence to that Church or religious body to which he may belong.<sup>42</sup>

The Reverend F.J. Lloyd was introduced, read prayers, and never appeared again, the prayer being given thereafter by the Speaker of the House. That same first Parliament, on August 28, 1855, also rejected a salary of £600 for Anglican bishop George Selwyn.<sup>43</sup> While “recognizing the zeal and energy” of the bishop and the “valuable services” rendered by him to the colony, the House could not vote a salary to him “without departing from the principle of perfect equality of all religious denominations—a principle which [the] House [had] already affirmed and to which the maintenance of which it [stood] pledged.”<sup>44</sup>

### *3. Pragmatic secularism*

A third theme can be characterized as pragmatic secularism. This is a secular stance born of a practical desire to avoid religious friction, as opposed to an ideological animosity toward institutional religion.

One example of this pragmatic secularism can be found in the history surrounding the Education Act of 1877. Education has often been a major battlefield for church-state conflict, and New Zealand was no exception. The churches began their own schools at first. Abolition of the provinces in 1876 gave rise to the 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 the background of increasing sectarian tension.”<sup>45</sup> The passage of the Education Act of 1877 is an important and fascinating story that has been well documented by historians.<sup>46</sup> 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

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42. *Id.* (emphasis added).

43. See Wood, *supra* note 20, at 264–65.

44. *Id.* at 512 (Mr. Forsaith being the speaker).

45. DAVIDSON, *supra* note 15, at 65.

46. See, e.g., IAN BREWARD, GODLESS SCHOOLS? A STUDY OF PROTESTANT REACTIONS TO THE EDUCATION ACT OF 1877 (1967); DAVIDSON, *supra* note 15, ch. 7; JOHN MACKEY, THE MAKING OF A STATE EDUCATION SYSTEM: THE PASSING OF THE NEW ENGLAND EDUCATION ACT, 1877 (1967).

in the forenoon and two in the afternoon shall be consecutive, and *teaching shall be entirely of a secular character.*"<sup>47</sup>

In addition to including a "secular clause," the House of Representatives deleted from the Education Bill the provision for religious exercises. The Legislative Council attempted to resurrect the provision but failed. Scholars emphasize that the secularity of the national education program was not primarily an anti-religious sentiment or advocacy of secularism, but rather was an attempt to defuse sectarian strife.<sup>48</sup> Ian Breward, in the major work on this subject, observed,

Careful study of the debates and divisions shows that there was very little doctrinaire secularism amongst 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 denominationalism.<sup>49</sup>

Another example of this pragmatic secularism can be found in *Doyle v. Whitehead*, a 1917 case.<sup>50</sup> In *Doyle*, Sir Robert Stout, Chief Justice of the Supreme Court, made a rare judicial statement pronouncing New Zealand to be a secular state. The Wellington City Council passed a bylaw prohibiting playing golf on Sundays in Town Belt Reserves.<sup>51</sup> Following a complaint from the Ministers' Association and clergymen of the Presbyterian Church—apparently concerned with the bad example to the youth at the adjacent Presbyterian orphanage—the respondent, who breached this bylaw, was charged. A Magistrate acquitted him on the grounds that the bylaw was made for no other reason than to enforce Sunday observance and was thus invalid in terms of the relevant legislation. The Supreme Court unanimously upheld this finding. Chief Justice Stout 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

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47. Education Act 1877, § 84(2) (emphasis added).

48. DAVIDSON, *supra* note 15, at 65; GEERING, *supra* note 18, at 10.

49. BREWARD, *supra* note 46, at 18.

50. [1917] N.Z.L.R. 308, 314 (S.C.).

51. *Id.* at 309.

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 by law.<sup>52</sup>

Thus, an examination of history reveals both legislative and judicial policy that reflects a practical compromise in avoiding and resolving religion-based controversies. This pragmatic secularism, alongside New Zealand's pluralistic roots and commitment to religious equality, formed a distinct backdrop to the de facto establishment of Christianity.

*B. A Concurrent Trend: A De Facto or Cultural  
Christian Establishment*

While New Zealand may not have had a legally established church or religion, a solid case can be made that there was a de facto or cultural establishment of a generic Christianity.<sup>53</sup> Ivanica Vodanovich, for instance, has argued that "the New Zealand model . . . combine[d] separation of church and state, with recognition of the state as 'Christian,'" and that the state was committed to a "non-specific and non-sectarian" Christianity.<sup>54</sup> James Belich similarly has discerned a "vague, shared Protestantism" as loosely binding the nation.<sup>55</sup> This mirrors the view of some American commentators that, despite the formal separation of church and state in the United States, there was a de facto establishment of a nondenominational pan-Protestantism for the first 200 years or so.<sup>56</sup> In Philip Wogaman's words, the United States experienced a kind of social or cultural establishment of Protestantism that was "like the wallpaper of a room—very much in evidence but scarcely noticed."<sup>57</sup>

52. *Id.* at 314.

53. The argument was first advanced by this author in Rex Ahdar, *A Christian State?*, 13 J.L. & RELIGION 453 (1998–99).

54. Ivanica Vodanovich, *Religion and Legitimation in New Zealand: Redefining the Relationship Between Church and State*, 3 BRIT. REV. N.Z. STUD. 52, 52 (1990).

55. BELICH, *supra* note 25, at 439. Belich applied this characterization to the Pakeha (European) population, but it could be extended to entire populations, Maori included.

56. See James Davison Hunter, *Religious Freedom and the Challenge of Modern Pluralism*, in ARTICLES OF FAITH, ARTICLES OF PEACE 55, 71 (James D. Hunter & Os Guinness eds., 1990). See also JOSÉ CASANOVA, PUBLIC RELIGIONS IN THE MODERN WORLD 135–66 (1994), for an excellent discussion of the decline of the Protestant "cultural hegemony" in America in the late twentieth century.

57. PHILIP WOGAMAN, PROTESTANT FAITH AND RELIGIOUS LIBERTY 194 (1967)

The de facto Christian establishment was manifested in many ways. The laws and institutions in New Zealand naturally reflected Christian values given the religious composition of the population.<sup>58</sup> Moreover, the governing elite were predominantly Christian.<sup>59</sup> While public education was ostensibly secular, schools permitted religious—specifically Protestant—teaching on a limited basis under what came to be known as the “Nelson system.” This ingenious scheme, commenced in 1897, was the brainchild of Nelson clergyman Reverend J.H. McKenzie. It was argued that because schools were open for five hours a 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 Education Act of 1877, which allowed school buildings to be used on days and at hours *other than* those used for public school purposes. Supporters of religious education realized that this enabled religious instruction as well as the statutory minimum of four hours of secular education to take place within the customary school hours.

The legislation currently in force—the Education Act of 1964—repeats the secular clause,<sup>60</sup> simply formalizing this long-standing arrangement.<sup>61</sup> Section 78 authorizes the technical “closure” of a school for up to one hour per week to allow religious instructors to give instruction or for religious observances to be conducted during school hours in a manner approved by the board of that school. Such instruction has to be undertaken by voluntary instructors, not teachers, but may take place within school buildings. Section 78A allows “additional religious instruction” if the majority of parents of pupils at a school desire and if the instruction does not detract from the normal curriculum. Under section 79, parents have the right to withdraw their children from any such religious instruction or observances if they so wish.<sup>62</sup>

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(quoting Martin E. Marty).

58. For example, according to the 1896 Census figures, some ninety-four percent of the population were Christian. Anglicans were the largest denomination (at forty percent). See Wood, *supra* note 5, at 208 n.4.

59. See *id.* at 226–27.

60. See *supra* note 47 and accompanying text.

61. Education Act, 1964 § 77, available at [http://www.legislation.govt.nz/libraries/contents/om\\_isapi.dll?clientID=82169&infobase=pal\\_statutes.nfo&jump=a1964135&softpage=DOC](http://www.legislation.govt.nz/libraries/contents/om_isapi.dll?clientID=82169&infobase=pal_statutes.nfo&jump=a1964135&softpage=DOC).

62. See generally BREWARD, *supra* note 46, at 37–46; Colin McGeorge, *On the Origins*

Others have observed the de facto establishment of Christianity. Sir Ivor Richardson, a former President of the Court of Appeal, 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, “[i]f 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 patently incorrect.”<sup>63</sup> However, he continued,

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] A.C. 406, 464-465, the family is built on Christian ideals, and Christian ethics have made a tremendous impact on the development of our law, as is only natural considering that the majority of New Zealanders come from a Christian background.<sup>64</sup>

New Zealand has its own instances of what some American scholars have dubbed “ceremonial deism,”<sup>65</sup> a term that refers to a “class of public activity . . . accepted as so conventional and uncontroversial as to be constitutional.”<sup>66</sup> The symbolic or ceremonial examples of Christianity’s special position in New Zealand society<sup>67</sup> include:

- The opening prayer is said by the Speaker of the House of Representatives.<sup>68</sup>

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*of the Nelson System of Religious Education, in* GODLY SCHOOLS? SOME APPROACHES TO CHRISTIAN EDUCATION IN NEW ZEALAND 1, 1–16 (Bryan Gilling ed., 1993).

63. I.L.M. RICHARDSON, RELIGION AND THE LAW 61 (1962).

64. *Id.*

65. The United States Supreme Court has used this term on occasion. *See, e.g.*, *County of Allegheny v. ACLU*, 492 U.S. 573, 595 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083 (1996).

66. Epstein, *supra* note 65, at 2091 (quoting Arthur E. Sutherland, Book Review, 40 IND. L.J. 83, 86 (1964) (reviewing WILBER G. KATZ, RELIGION AND AMERICAN CONSTITUTIONS (1963))).

67. *See generally* Wood, *supra* note 5, at 210–12.

68. Standing Orders require the prayer to be said. The wording of the current prayer was settled in 1962 but is not written into the Standing Orders nor is it regarded as binding on

- Official oaths are sworn on the Bible (but affirmation is available also).<sup>69</sup>
- Public holidays include religious occasions such as Christmas Day, Good Friday, and Easter Monday.<sup>70</sup>
- The monarch, Elizabeth the Second, is “by the grace of God” the Queen of New Zealand, and one of her titles is *Fidei Defensor*, the “Defender of the Faith.”<sup>71</sup>
- The national anthem is a hymn entitled “God Defend New Zealand.”<sup>72</sup>
- Blasphemous libel is a criminal offense.<sup>73</sup>

The foregoing examples stand in stark contrast to New Zealand’s official non-establishment and are found in various forms throughout the country’s history. They reflect an unofficial, yet firm establishment of Christianity in official State affairs. But despite the prominence of de facto Christianity, this unofficial establishment has begun to erode, as will be described in Part III.

Part II has illustrated how New Zealand’s history of church-state relations has been heavily influenced by the counterpoint between official secularism and a de facto Christian establishment. These two factors have continued to evolve concurrently, creating the unique

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the Speaker. It reads:

Almighty God, humbly acknowledging our need for Thy guidance in all things, and laying aside all private and personal interests, we beseech Thee to grant that we may conduct the affairs of this House and of our country to the glory of Thy holy name, the maintenance of true religion and justice, the honour of the Queen, and the public welfare, peace, and tranquility of New Zealand, through Jesus Christ our Lord. Amen.

DAVID MCGEE, *PARLIAMENTARY PRACTICE IN NEW ZEALAND* 92 (1st ed. 1985).

69. See Oaths and Declarations Act 1957, § 3 (oath on the Bible, New Testament or Old Testament) and § 4 (right to make an affirmation instead of an oath). The Oaths Modernization Bill 2005 is currently before the House of Representatives. Its principal aim is to modernize and standardize the texts of certain oaths. It does not abolish Biblical oaths in § 3.

70. See Holidays Act 2003, § 44(1).

71. See Royal Titles Act 1974, § 2.

72. See Allan K Davidson, *Christianity and National Identity: The Role of the Churches in ‘the Construction of Nationhood,’* in *THE FUTURE OF CHRISTIANITY: HISTORICAL, SOCIOLOGICAL, POLITICAL AND THEOLOGICAL PERSPECTIVES FROM NEW ZEALAND* 16, 27 (John Stenhouse et al. eds., 2004) (The word “God” appears eleven times in the five verses of Thomas Bracken’s hymn.).

73. Crimes Act 1961, § 123. A prosecution needs the leave of the Attorney-General. *Id.* § 123(4). The only prosecution (unsuccessful) in New Zealand under the section was *R v. Glover*, [1922] G.L.R. 185.

situation that now stands. Part III will briefly describe how these trends have evolved into New Zealand's present state of church-state relations, and how this situation is affected by the New Zealand Bill of Rights Act (NZBORA).

### III. THE PRESENT: EROSION OF THE DE FACTO CHRISTIAN ESTABLISHMENT

#### *A. Cultural Disestablishment and the NZBORA*

The unquestioned reflection of the Christian ethic and a diffuse Christianity continued until about the 1960s.<sup>74</sup> This decade might be described as the beginning of the erosion of the cultural or de facto establishment of Christianity.<sup>75</sup> There has been a gradual but unmistakable disestablishment or wresting of generic Christianity from its position of cultural ascendancy. Today, looking back, some Christian commentators believe there was an important change, even a "paradigm shift,"<sup>76</sup> in the 1960s. This decade, they believe, saw the beginning of New Zealand as a "post-Christian" society.<sup>77</sup> The Reverend Bruce Patrick articulated this sense of loss:

74. See Vodanovich, *supra* note 54, at 52.

75. Interestingly, José Casanova argues that the United States has experienced "three consecutive processes of disestablishment." CASANOVA, *supra* note 56, at 135. The first constitutional process gave rise to the First Amendment. The second process, he argues, was the secularization of higher education beginning last century following the Civil War. *Id.* at 137. The "third disestablishment" is the "disestablishment of the Protestant ethic and the emergence of a legally protected pluralistic system of norms in the public sphere of American civil society." *Id.* at 155.

76. See Murray Robertson, *New Zealand as a Mission Field: The Paradigm Shift*, in THE VISION NEW ZEALAND CONGRESS 46 (Bruce Patrick ed., 1993). Robertson wrote:

I believe God wants us to see that a nation that has been nominally Christian since its founding is now a post-Christian society, and we are engaged in a mission. . . . It has happened over the last 30 years. . . . A shift has occurred. There have been long-term trends, huge subterranean movements within Western culture . . . in the church we haven't grasped what has happened, and by and large we are still operating with the kind of mentality we had prior to the 1960s.

*Id.*

77. Bishop Brian Carrell argued that the 1960s was "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." Brian Carrell, *New Culture, New Challenge*, in NEW VISION NEW ZEALAND 49 (Bruce Patrick ed., 1993).



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.<sup>78</sup>

The various Christian observances and practices historically protected in New Zealand law are continually being challenged. Some have been overturned, while others face a precarious future. The Speaker's prayer in Parliament remains intact, but criticisms are regularly voiced, such as those of one Member of Parliament who in 2003 complained that the prayer "is no longer appropriate for the Parliament of a diverse and multicultural nation."<sup>79</sup> Sunday observance by the commercial sector is a thing of the past, with shop trading on Sundays allowed for all retailers.<sup>80</sup> Restrictions on the sale of liquor on Sundays took longer to be repealed, but such sales are now also permitted.<sup>81</sup> The Easter weekend shop trading ban still prevails, but defiant shop openings at Easter may test the remaining bans on trading on these Christian festive days as well.<sup>82</sup> Bills to repeal these remaining restrictions continue to come before Parliament, although none has yet succeeded.<sup>83</sup>

A potentially powerful force in accelerating the erosion of de facto Christianity in New Zealand is the New Zealand Bill of Rights Act of 1990 (NZBORA).<sup>84</sup> If an anti-establishment style, freedom *from* religion interpretation of the NZBORA's freedom of religion provisions is adopted, then any remaining Christian-based practices will likely be eliminated. The NZBORA marks a significant new era in New Zealand constitutional history. It protects the usual civil and

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78. Bruce Patrick, *After the 1997 Congress*, in THE VISION NEW ZEALAND CONGRESS 1997, 32–33 (Bruce Patrick ed., 1997).

79. Letter from Matt Robson, Progressive Party MP, to Jonathan Hunt, Speaker of the New Zealand House of Representatives (May 6, 2003) (quoted in Davidson, *supra* note 33, at 314).

80. The Shop Trading Hours Act Repeal Act 1990 repealed the former Sunday (and Saturday) restriction found in the Shop Trading Act 1977, § 11(1).

81. Freedom to sell liquor on Sundays was effected by the Sale of Liquor Amendment Act 1999.

82. See, e.g., D. Jamieson, *Wanaka Retailer To Fight Charge over Trading on Easter Sunday*, PRESS (Christchurch), Oct. 18, 2005.

83. See, e.g., the Shop Trading Hours (Easter Trading Local Exemption) Bill 2004 (No. 168-1), sponsored by Doug Wollerton MP.

84. 1990, Act No. 109.

political rights such as rights to vote and to not be subjected to torture; it guarantees freedom of expression, religion, peaceful assembly, and association; and it upholds prohibitions on unreasonable search and seizure, as well as due process requirements such as the right to a fair trial.<sup>85</sup> The Act applies only to the actions of the government and to persons exercising public functions.<sup>86</sup>

Regarding religious freedom, the NZBORA contains four provisions of direct relevance.<sup>87</sup> First, section 13—Freedom of Thought, Conscience, and Religion—provides that “Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.”<sup>88</sup> Section 15—Religion and Belief—addresses the outward, social expression of such belief: “Every person has the right to manifest that person’s religion or belief in worship, observance, practice or teaching, either individually or in community with others, and either in public or in private.”<sup>89</sup> Section 20—Rights of Minorities—provides protection for religious and other minorities: “A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.”<sup>90</sup>

Finally, section 19(1) states, “Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.”<sup>91</sup> Section 21(1) of the Human Rights Act sets out thirteen prohibited grounds of discrimination, including: “(c) Religious belief; [and] (d) Ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions

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85. See generally ANDREW BUTLER & PETRA BUTLER, *THE NEW ZEALAND BILL OF RIGHTS ACT: A COMMENTARY* (2005); PAUL RISHWORTH ET AL., *THE NEW ZEALAND BILL OF RIGHTS* (2003).

86. New Zealand Bill of Rights Act 1990, § 3, available at [http://www.oefre.unibe.ch/law/icl/nz01000\\_.html](http://www.oefre.unibe.ch/law/icl/nz01000_.html).

87. For excellent reviews of the religious freedom protections in the NZBORA, see BUTLER & BUTLER, *supra* note 85, at 399–437, and RISHWORTH ET AL., *supra* note 85, at 277–307.

88. New Zealand Bill of Rights Act 1990, available at [http://www.oefre.unibe.ch/law/icl/nz01000\\_.html](http://www.oefre.unibe.ch/law/icl/nz01000_.html).

89. *Id.*

90. *Id.*

91. *Id.*

or all religions.”<sup>92</sup> Thus, the NZBORA clearly prohibits state discrimination based on a person’s religion or lack of religion.

It is important to note that the NZBORA is not a supreme-law type Bill of Rights as with the United States Constitution<sup>93</sup> or Canada’s Charter of Rights and Freedoms 1982.<sup>94</sup> It expressly denies the courts the power to invalidate legislation that violates the NZBORA’s fundamental rights and freedoms. Section 4 makes clear that

[n]o court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),—

(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or

(b) Decline to apply any provision of the enactment—

by reason only that the provision is inconsistent with any provision of this Bill of Rights.<sup>95</sup>

Despite this limitation on judicial review, courts do have a duty under section 6 to ensure that statutory provisions are to be given a meaning that is consistent with the rights enumerated in the NZBORA. Section 5—Justified limitations—sets out the litmus test for the restriction of rights generally: “Subject to section 4 of this Bill of Rights, 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.”<sup>96</sup>

The NZBORA was recently tested in *Department of Labour v. Books and Toys (Wanaka) Ltd.*,<sup>97</sup> a case involving religious holiday trade restrictions. The defendant, Wanaka Paper Plus, was a bookshop in the popular South Island tourist resort, Wanaka. On Easter Sunday 2004, it decided to open for trading in direct contravention of section 3(1)(b) of the Shop Trading Hours Act

92. Human Rights Act 1993, § 21(1).

93. U.S. CONST. amends. 1–10.

94. Part I of the Constitution Act 1982, Schedule B of the Canada Act 1982 (U.K.), ch. 11, § 2.

95. New Zealand Bill of Rights Act 1990, § 4, available at [http://www.oefre.unibe.ch/law/icl/nz01000\\_.html](http://www.oefre.unibe.ch/law/icl/nz01000_.html).

96. *Id.* § 5.

97. (2005) 7 H.R.N.Z. 931 (D.C.).

Repeal Act of 1990.<sup>98</sup> This provision requires shops to be closed on Good Friday, Easter Sunday, Christmas Day, and ANZAC Day morning.<sup>99</sup> The defendant pleaded guilty, and despite the potential maximum penalty of a NZ\$1000 fine, the District Court ordered that the conviction be discharged without any financial penalty. A major contributing factor to this leniency was, as the court noted, the “anomalous”<sup>100</sup> nature of the trading ban since certain other nearby shops (some selling the very same items as the defendant’s) had been allowed to trade on the day in question by virtue of their being located in a designated tourist area exempted from the trading ban. Wanaka Paper Plus, however, was just outside this narrow zone.

The interest in the case lies in the submission that the Easter trading ban was an unreasonable limitation on the defendant’s right of religious freedom under sections 13 and 15 of the NZBORA. The defendant invoked the Canadian Supreme Court case<sup>101</sup> *R v. Big M Drug Mart Ltd.*<sup>102</sup> to argue that if one is precluded from doing an everyday activity (working, shopping, playing sports) to preserve the religious sensibilities of others, a form of coercion is arguably occurring. One is being indirectly forced to observe a religious

98. 1990 No. 57.

99. ANZAC Day (Australian and New Zealand Army Corps Day) is a solemn commemoration marking the sacrifice of Australian and New Zealand military veterans who served in overseas wars. See Australian War Memorial, The Anzac Day Tradition, [http://www.awm.gov.au/commemoration/anzac/anzac\\_tradition.htm](http://www.awm.gov.au/commemoration/anzac/anzac_tradition.htm).

100. *Books and Toys*, ¶ 26[c].

101. Canadian cases are not binding on New Zealand courts, but Canadian Supreme Court decisions on the meaning and scope of the Charter are highly influential because the NZBORA was modeled, in part, on the Canadian Charter.

102. [1985] 1 S.C.R. 295. The Canadian Supreme Court there held that the Lord’s Day Act was inconsistent with the guarantee of freedom of religion in section 2(a) of the Canadian Charter. *Id.*; see Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 2 (U.K.). The court came to this conclusion despite the Canadian section being worded purely in free exercise terms. The absence of anti-establishment wording did not prevent the court from striking down the legislation on a freedom from religion type interpretation. Indirect religious coercion was present. According to the court, a law which prohibited 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.” [1985] 1 S.C.R. 295. 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.” *Id.*

practice—a practice which is not of one's choosing and which may directly offend one's own conscience. The "arm of the State"<sup>103</sup> ought not to do this, and the New Zealand District Court agreed.

Although, as noted earlier, the New Zealand courts have no power to declare invalid or ineffective any legislation that is inconsistent with the NZBORA, courts have discovered the power to issue indications of inconsistency.<sup>104</sup> In *Books & Toys*, Judge Noel Walsh declined to issue an indication of inconsistency. As a judge of the District Court, the lowest court in the New Zealand hierarchy, he considered he did not have the jurisdiction to make such a declaration. To question the Shop Trading Act would, he cautioned, be unwise and "would have the potential to undermine public confidence in [his] role as a District Court judge, and in the judiciary's independence from the political process."<sup>105</sup> He added that even if he did have jurisdiction, he would have refused to make the declaration sought here. The genuineness of the defendant's religious liberty claim was doubted: "in reality [Wanaka Paper Plus] opened on Easter Sunday purely for economic reasons, and not on the basis that the 1990 Act infringed any of the rights guaranteed by the NZBORA."<sup>106</sup> Although *Books and Toys* failed to overturn the trading ban or even secure an indication of inconsistency, it arguably laid the foundation for later applicants to succeed in obtaining an indication. Once an indication of inconsistency is signaled, Parliament may well decide to abolish the Christian-based trading restrictions.

A relatively recent example of the scope of the NZBORA involved artistic depiction of religious figures, a controversy demonstrating that the crime of blasphemy is now all but a dead letter. In March of 1998, the Museum of New Zealand, *Te Papa*, ran a controversial exhibition containing two works highly offensive to many Christians. The exhibition included the *Virgin in a Condom*

103. *Id.*

104. See Andrew S. Butler, *Judicial Indications of Inconsistency—A New Weapon in BORA Armoury?*, 2000 N.Z. L. REV. 43 (2000). These declarations, originating from a 2002 Court of Appeal decision, *Moonen v. Film and Literature Board of Review*, [2000] 2 N.Z.L.R. 9, are firm judicial pronouncements that legislation is in violation of fundamental rights and, although the enactment in question must still be enforced and cannot be nullified, its continued existence calls for the attention and remedial work of Parliament. For further discussion, see RISHWORTH ET AL., *supra* note 85, at 833–937.

105. *Books and Toys*, ¶ 24.

106. *Id.* ¶ 25.

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.<sup>107</sup> Senior museum officials argued that 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 censorship would simply be inappropriate.<sup>108</sup> Compared to what Christians perceive as the unquestioned acceptance of religious ideas in the era of cultural ascendancy, this appears to be, and is experienced as, a downgrading of religion, a marginalization. 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 NZBORA's protection of freedom of expression in section 14.<sup>109</sup> A similar attempt to invoke the blasphemous liberal ban was launched by a Catholic priest over the controversial South Park episode of the Virgin Mary, mentioned in the introduction to this article.<sup>110</sup> Permission is unlikely to be granted by the Solicitor General for the same reason that was given regarding the *Te Papa* exhibit.

A powerful example of the NZBORA's potential impact on New Zealand's church-state relations came in a 2005 debate that erupted in a weekly lunchtime religious club that held meetings at a

107. See *Violent and Personal Threats to Museum Staff over 'Virgin,'* OTAGO DAILY TIMES, Mar. 10, 1998, at 2; *Virgin Statue on Show Despite Attack,* SUNDAY STAR-TIMES, Mar. 8, 1998, at A2; *Virgin Statue Stays—Protests Ignored,* SUNDAY STAR-TIMES, Mar. 15, 1998, at A1. 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*. For a detailed discussion of this controversy, see Reid Mortensen, *Art, Expression and the Offended Believer*, in *LAW AND RELIGION* 181–198 (Rex Ahdar ed., 2000).

108. *Museum Refuses To Remove Exhibit,* OTAGO DAILY TIMES, Mar. 9, 1998, at 2; *Virgin Statue on Show Despite Attack,* SUNDAY STAR-TIMES, Mar. 8, 1998, at A2.

109. See *No Prosecution over Exhibits,* OTAGO DAILY TIMES, Mar. 28, 1998, at 35. National Party MP, John Banks, and Fr P Denzil Meuli had sought permission to prosecute under § 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.

110. See *supra* note 3 and accompanying text; see also *'Southpark' Action,* OTAGO DAILY TIMES, Mar. 4, 2006, at 4.

Wellington state primary school.<sup>111</sup> Although this incident did not see the removal of a religious practice, it sets the scene for future dismantling of similar religious exercises in public schools. The board of trustees of Seatoun School banned the weekly “KidsKlub” meeting, a Christian club established in 2002 and attended by nearly a third of the school’s four hundred pupils.<sup>112</sup> The board pointed to its obligation under the Education Act of 1964 to “deliver a secular education,” and it had “chosen to maintain a level of consistency by operating in the same manner outside of teaching hours, while the school [was] open.”<sup>113</sup> The board’s legal advisers, Chapman Tripp, a major New Zealand law firm, backed its position.

KidsKlub is based on a Scripture Union program, and similar groups are held in eighteen other primary schools throughout the country. The club meetings—involving Bible stories, craft activities, dances, and songs—were voluntary, held during the school’s lunch-break, and taught by trained volunteer parents and grandparents. Children who wanted to attend needed the permission of their parents to do so.

A group of parents, stung by the incoming board’s ban, sought a legal opinion from Sir Geoffrey Palmer, a former attorney general and prime minister and the principal architect of the NZBORA. In his written opinion, Palmer concluded that the ban breached the Act’s religious freedom guarantee. Pupils who did not wish to participate in KidsKlub were free to decline, and there was no evidence of any compulsion or peer pressure exerted on children who did not wish to go. However, as for the religious rights of those pupils who wished to attend, the ban presented a case of clear infringement. As noted earlier, section 5 of the NZBORA provides that rights and freedoms may be subject “only to such reasonable limits prescribed by law and demonstrably justified in a free and democratic society.”<sup>114</sup> The Education Act did not proscribe

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111. See BUTLER & BUTLER, *supra* note 85, at 399, 423–24.

112. See S. Dye, *School Split over Religion Club Ban*, N.Z. HERALD, June 10, 2005, at A9, available at [http://www.nzherald.co.nz/topic/story.cfm?c\\_id=133&ObjectID=10329910](http://www.nzherald.co.nz/topic/story.cfm?c_id=133&ObjectID=10329910).

113. G. Palmer & R. Opie, “Freedom of Religion and the Board’s Decision to Prevent the Ongoing Operation of Kidsklub at Seatoun School,” Opinion by Chen, Palmer & Partners, ¶ 11 (May 24, 2005) (on file with author).

114. New Zealand Bill of Rights Act 1990, § 5, available at [http://www.oefre.unibe.ch/law/icl/nz01000\\_.html](http://www.oefre.unibe.ch/law/icl/nz01000_.html).

voluntary religious programs at schools. Just the opposite—voluntary religious programs were expressly permitted. KidsKlub was in accord with the statutory scheme. The reasonableness of the ban is what was suspect here. It was difficult to see how those who did not wish to attend had experienced any curtailment of their rights. Furthermore, children who wished to attend had to have parental consent. In other words, they had to positively “opt-in.” This was a different situation from those where religious instruction or observances were a built-in part of the school program and those not wishing to participate had to positively “opt-out.”<sup>115</sup>

The Seatoun School controversy was raised in Parliament. The minister of education, Trevor Mallard, was reluctant to become embroiled in the debate, simply responding that school boards were autonomous bodies: “I do not back the decision but I back the board’s right to make it.”<sup>116</sup> After reconsidering the matter, and perhaps dismayed by the adverse publicity, the board eventually resolved to reinstitute the KidsKlub meetings.<sup>117</sup>

The Seatoun School case did not involve the more traditional and prevalent form of religious instruction programs run at state primary schools; namely, those run during school hours (not lunchtimes) where the presumption is that children will attend unless their parents take active steps to excuse them. For example, the longstanding “Bible in Schools” program operates in about 60 percent of state primary schools with some four thousand volunteer instructors and about 5 percent of pupils opting out in their respective schools.<sup>118</sup> New Zealand courts may follow the Canadian courts<sup>119</sup> and similarly rule that such Bible in Schools programs are violations of the non-participating children’s religious freedom. The Nelson system of voluntary religious instruction in state primary

115. In some nations, courts have invalidated such opt-out programs on the basis that the requirement on non-participating pupils to withdraw meant the pupils incurred stigma and concomitant peer pressure to conform, and hence their religious freedom was impinged. *See, e.g., Zylberberg v. Sudbury Bd. of Educ.*, [1988] 52 D.L.R. (4th) 577 (Ont. C.A.); *see also* REX AHDAR & IAN LEIGH, RELIGIOUS FREEDOM IN THE LIBERAL STATE 240 (2005).

116. New Zealand Parliamentary Debates, June 21, 2005, at 21757.

117. *School Gives Way on Lunchtime Bible Study*, DOMINION POST (Wellington), July 7, 2005, at A1.

118. Anna Saunders, *On a Legal Opinion and a Prayer: The Religious Divide*, DOMINION POST (Wellington), June 28, 2005, at A8.

119. *See supra* note 101.



schools preserved by the Education Act of 1964<sup>120</sup> has not yet been directly challenged, but there exists a climate sympathetic to its abolition.

*B. Erosion of De Facto Establishment in Other Contexts*

Aside from the impact of the NZBORA, erosion of the de facto establishment of Christianity has taken place in other contexts. One example is in the Queen's title. Queen Elizabeth II may still be the "Defender of the Faith," but explicit acknowledgment of the Christian faith while in her presence was recently deemed inappropriate in her outermost former colony. In February 2002, the Prime Minister, Helen Clark, came under attack for her decision to cancel the saying of grace at the Commonwealth Heads of Government banquet attended by Queen Elizabeth and other dignitaries. She defended, "[t]here was no grace for the same reason as there is none now in New Zealand, because we're not only a society of many faiths, but we're also increasingly secular. In order to be inclusive, it seems to me to be better not to have one faith put first."<sup>121</sup>

By way of a broader and admittedly impressionistic sweep, we can identify the cultural disestablishment of Christianity by considering the changed moral and religious underpinnings reflected in various contemporary laws, particularly those dealing with social morality, broadly defined. Prior to the latter part of the twentieth century, various laws in the social, domestic, and family arena implicitly reflected Christian values, or perhaps one should say "traditional," "biblical," or "conservative" Christian mores.

For example, until the closing decades of the twentieth century, New Zealanders viewed marriage as a lifelong union of two members of the opposite sex. Divorce was difficult to obtain, as were abortions, and homosexual relations between males were subject to criminal sanction. Prostitution was unlawful, as was euthanasia. Time and venue restrictions applied to both liquor sales and gambling outlets.

The laws governing these areas now show a declining Christian imprint. Heated public debate over these issues is a visible expression of the so-called "culture wars" that are being waged here, as in other

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120. *See supra* Part III.A.

121. *Lack of Grace Leaves No Trace*, OTAGO DAILY TIMES, Mar. 9, 2002, at A7.

Western nations.<sup>122</sup> The emergence of small, struggling Christian political parties since the late 1980s—espousing conservative moral policies and emphasizing “family values”—is another manifestation of these contests over the vision of the good society.<sup>123</sup>

Marriage is still a union between a man and a woman,<sup>124</sup> but there is pressure to change the legal definition of marriage to legalize marriage of same-sex couples. The government, in an effort to meet these concerns, passed the Civil Union Act of 2004,<sup>125</sup> which allows same-sex couples (and opposite-sex de facto couples living together in a long-term marriage-like relationship) to enter into “civil unions” with all the usual rights, privileges, and duties of marriage, albeit without the right to describe themselves as married.<sup>126</sup> The civil union legislation aroused much controversy with the Catholic bishops of New Zealand, criticizing it for its potential to “erode the ‘special and unique position’ of marriage and the family.”<sup>127</sup> More strident was the noisy march upon Parliament organized by the Destiny Church, a Pentecostal church whose 5000-strong black-shirted male protesters chanted, “enough is enough” in reference to what the Church maintained was a severe decline in moral standards.<sup>128</sup>

There are examples of cultural disestablishment in a number of other contexts as well. In the 1980s, no-fault “dissolution” replaced divorce with the enactment of the Family Proceedings Act of

122. For an account of the New Zealand *kulturkampf* from the perspective of conservative Christians, see REX J. AHDAR, *WORLDS COLLIDING: CONSERVATIVE CHRISTIANS AND THE LAW* (2001).

123. See generally Jonathan Boston, *Christian Political Parties and MMP*, in *GOD AND GOVERNMENT: THE NEW ZEALAND EXPERIENCE* (Rex Ahdar & John Stenhouse eds., 2000); Wood, *supra* note 5, at 234–35.

124. This was confirmed by the Court of Appeal in *Quilter v. Attorney General*, [1998] 1 N.Z.L.R. 523 (C.A.), where the court upheld the refusal to grant marriage licenses to a lesbian couple.

125. Act. No. 102.

126. The Relationships (Statutory References) Act 2005, 2005 S.N.Z. No. 3, designed to accompany the Civil Union Act, ensures that the same legal rights and duties enjoyed by married couples extend to same sex or opposite sex de facto couples who have formalized their relationship in a civil union.

127. *Late Bids by Church, MP to Block Civil Union Bill*, OTAGO DAILY TIMES, Dec. 6, 2004, at 3.

128. *Five Thousand Protest Against Civil Unions Bill*, N.Z. HERALD, Aug. 23, 2004. The Destiny march drew some fierce criticism, some likening it to a fascist demonstration. See *March Compared to Rise of Nazism*, OTAGO DAILY TIMES, Aug. 24, 2004, at 3.

1980.<sup>129</sup> Abortions are now more readily obtained if the rising annual statistics are a reliable indicator.<sup>130</sup> Since 1986, sexual relations between adults of the same sex are no longer a criminal offense.<sup>131</sup> Decriminalization of homosexuality was a highly controversial issue<sup>132</sup> galvanizing conservative Christians to enter the political fray in much the way that *Roe v. Wade*,<sup>133</sup> the abortion case, proved a catalyst for American evangelicals to engage more actively in the political process.<sup>134</sup> Homosexuality, or more accurately “sexual orientation,” is also a prohibited ground for discrimination along with the traditional grounds (race, religion, sex, nationality, and so on) under the Human Rights Act of 1993.<sup>135</sup>

Decriminalization of prostitution and the regulation of the sex services industry in the interests of public health resulted from the passing of the Prostitution Reform Act of 2003.<sup>136</sup> Interestingly, the stated purpose of the Act was “to decriminalise prostitution (while not endorsing or morally sanctioning prostitution or its use).”<sup>137</sup> However, for opponents of this measure (and the others being discussed currently), the legalization of activities that previously carried a firm moral stigma could not avoid sending a message of state endorsement.

Finally, the gaming laws have been liberalized and new forms of gambling—casinos, Lotto, poker machines, and sports betting—have proliferated. Decriminalization of marijuana is a serious subject for debate,<sup>138</sup> as is the legalization of a restricted form of euthanasia.<sup>139</sup>

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129. Family Proceeding Act of 1990, 1980 S.N.Z. No. 94.

130. In 2003 there were 18,511 abortions performed in New Zealand. In 1996 there were 14,805 abortions performed, whereas in 1990 there were 11,173 abortions. See REPORT OF THE ABORTION SUPERVISORY COMMITTEE (2004).

131. See Homosexual Law Reform Act 1986, 1986 S.N.Z. No.33.

132. See LAURIE GUY, *WORLDS IN COLLISION: THE GAY DEBATE IN NEW ZEALAND, 1960–1986* (2002); see also AHDAR, *supra* note 122, at 221.

133. 410 U.S. 113 (1973).

134. See *e.g.*, STEPHEN CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 58 (1993) (explaining that “*Roe* was like a cold shower” in terms of its awakening effect upon religious conservatives).

135. See Human Rights Act 1993 § 21(1)(m). “Sexual orientation” means “a heterosexual, homosexual, lesbian, or bisexual orientation.” *Id.*

136. Prostitution Reform Act of 2003, 2003 S.N.Z. No. 28.

137. *Id.* at § 3.

138. See, *e.g.*, Kevin Dawkins, *Cannabis Prohibition: Taking Stock of the Evidence*, 10 OTAGO L. REV. 39 (2001).

139. The latest unsuccessful attempt at introducing a form of voluntary euthanasia was

These examples serve to illustrate that the NZBORA, combined with other statutory and cultural changes, have furthered the erosion of *de facto* Christianity happening since the 1960s. Cultural secularism is gradually displacing the *de facto* Christianity of the past and conforming government practice to the theory of official secularism. Offsetting this trend, however, is a counter-thrust of multicultural recognition.

### *C. Emergence of a More Heterogeneous, Multicultural Society*

The erosion of a *de facto* establishment is being met with a strong movement toward active acknowledgement of Maori spirituality and a similar movement toward recognizing other minority religions. This section will describe many examples of how New Zealand's indigenous population has asserted its spirituality, how that assertion has been acknowledged by mainstream culture, and finally, how Islamic activists have asserted their religion in official church-state relations, all leading to a more multicultural society.

#### *1. Official state endorsement of indigenous (Maori) spirituality<sup>140</sup>*

As the cultural disestablishment of Christianity accelerates, the appearance of a more genuine secular state has been belatedly thwarted by a recognition and adoption of a resurgent traditional Maori spirituality. This represents a stark reversal of government policy; historically, New Zealand governments were decidedly unsympathetic to Maori religion. The Tohunga Suppression Act of 1907 is a well-known example. With that Act, the Government sought to curb the activities of Maori traditional healers, or *tohunga*, by making the practice of their medicinal arts a criminal offence.<sup>141</sup>

Official government support for Maori and their spiritual concerns might be traced to the state's belated desire to honor its obligations under the Treaty of Waitangi. Or perhaps, Maori culture and spirituality are just a particularly suitable focus in a climate made up of such diverse ideological streams as post-modernism, anti-

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the Death with Dignity Bill 2003, No. 37-1, introduced by New Zealand First MP, Peter Brown.

140. For a detailed treatment, see Rex Ahdar, *Indigenous Spiritual Concerns and the Secular State: Some New Zealand Developments*, 23 OXFORD J. LEGAL STUD. 611 (2003).

141. See *supra* note 6 and accompanying text. This Act was eventually repealed by the Maori Community Development Act 1962, No. 133, § 44.

colonialism, post-colonial guilt feelings, and fascination with New Age values.<sup>142</sup> “Indigenous belief systems,” suggested one journalist, “carry a romantic dimension that appeals enormously to the starved middle-class inner life in this secular technological age.”<sup>143</sup>

There are numerous examples of the official recognition of Maori spirituality. In 2002, construction on a major four-lane highway was halted, the road eventually being re-designed, when the local Maori sub-tribe, Ngati Naho, expressed concern that the expressway would disturb the lair of Karu Tahi, a one-eyed *taniwha* (spiritual guardian or monster).<sup>144</sup> When AgResearch, a Crown agricultural research facility, sought to develop a genetically modified class of Fresian cow that would produce milk containing the basic human myelin protein, local Maori, amongst others, vigorously objected.<sup>145</sup> The sub-tribe, Ngati Wairere, claimed that alteration of *whakapapa* (genealogy) of humankind by mixing the genetic makeup of humans with other species would be deeply offensive and contrary to *tikanga Maori* (Maori custom).<sup>146</sup> The Maori believed that both *whakapapa* (genealogy) and *mauri* (roughly, the life-force possessed by all things) were intangible *taonga* (treasures) deserving of active protection in terms of the relevant legislation and the Treaty of Waitangi. A further example of state recognition of Maori spirituality, even in the face of public criticism, occurred in 2001 when information surfaced that the Foreign Affairs and Trade Ministry funded the travel of *kaumatua* (elders) to overseas embassies to perform *hikitepu*, or spiritual cleansing ceremonies.<sup>147</sup>

Aside from these controversy-generating instances, the recognition of Maori spiritual concerns is becoming a fairly

142. Erich Kolig, *Of Condoms, Biculturalism and Political Correctness: The Maori Renaissance and Cultural Politics in New Zealand*, 46 PAIDEUMA 231, 246 (2000).

143. Jane Clifton, *Beyond Belief*, N.Z. LISTENER, Oct. 7, 2000, at 24.

144. *See Taniwha Halts Work on Highway*, N.Z. HERALD, Nov. 8, 2002; *Transit May Have To Narrow New Expressway To Avoid Taniwha*, OTAGO DAILY TIMES, Nov. 9, 2002, at A11. The matter was settled when Transit agreed to re-design the road embankment at a cost of \$15,000 to \$20,000. *Deal Settles Row over Taniwha's Lair*, OTAGO DAILY TIMES, Jan. 10, 2003, at 19.

145. *See* Bleakley v. Env'tl. Risk Mgmt. Auth., [2001] 3 N.Z.L.R. 213 (H.C.).

146. *See id.*

147. C. Langdon, *Five Nights in Bangkok To Lift Tapu*, DOMINION, July 13, 2001, at 1; *MP Against Tax-Funded Cleansing*, OTAGO DAILY TIMES, July 14, 2001, at 3. *See* RISHWORTH ET AL., *supra* note 85, at 304.

unobtrusive and commonplace thing.<sup>148</sup> For example, the use of *karakia* (prayers) to commence court proceedings<sup>149</sup> or public meetings<sup>150</sup> is increasingly permitted, and sacred sites (*waahi tapu*) are acknowledged and protected under environmental legislation.<sup>151</sup> The Ngai Tahu Claims Settlement Act of 1998<sup>152</sup> contains extensive statutory acknowledgement of the mythological and sacred origins of natural landmarks, such as Aoraki (Mount Cook), and of Ngai Tahu's special cultural and spiritual association with them.<sup>153</sup> One recent example is illustrative.

There was an urgent need for a prison in Northland, and in 1999 the Government selected Ngawha, a rural location, as the site. The Northland Regional Council, however, declined to grant the necessary resource consents under the Resource Management Act of 1991 (RMA).<sup>154</sup> On April 3, 2001, the Minister of Corrections appealed the Council's refusal to the Environment Court. The Council's refusal of the consents was solely due to the harmful effects the installation would have on the cultural, spiritual, and other interests of certain local Maori.<sup>155</sup>

148. Such recognition is now commonplace, but was rare, if not positively eschewed, twenty years ago. See David Williams, *Purely Metaphysical Concerns*, in WHENUA: MANAGING OUR RESOURCES 289–321 (Mereta Kawharu ed., 2002); RISHWORTH ET AL., *supra* note 85, at 306–07.

149. See *Friends & Cmty. of Ngawha, Inc. v. Minister of Corr.*, 2002 N.Z.R.M.A. LEXIS 37 (C.A.). Justice Wild “appreciated” the *karakia* offered on each morning of the hearing, although he did chide that the next time the judge’s permission be sought beforehand. *Id.* For more on *karakia*, see *Mair v. Wanganui Dist. Court*, [1996] 1 N.Z.L.R. 556 (H.C.).

150. The Complaints Review Tribunal struck out an action by a member of the public objecting to a *karakia* delivered at a public meeting to hear public submissions on wastewater consent applications. *Church v. Hawkes Bay Reg’l Council*, Complaints Review Tribunal, CRT 04/01, Mar. 26, 2001; see also RISHWORTH ET AL., *supra* note 85, at 288.

151. See, e.g., *TV3 Network Servs. Ltd. v. Waikato Dist. Council*, [1998] 1 N.Z.L.R. 360 (H.C.).

152. 1998 S.N.Z. No. 97.

153. *Id.* Schedule 14 of the Ngai Tahu Claims Settlement Act 1998 contains an extensive narrative of the origins of New Zealand according to Maori cosmology (viz., the union of Raki (Sky Father) and Papatuanuku (Earth Mother)). *Id.* As for Aoraki, it “represents the most sacred of ancestors, from whom Ngai Tahu descend . . . the ancestor embodied in the mountain remains the physical manifestation of Aoraki [one of the four sons of Raki], the link between the supernatural and the natural world.” *Id.* For further discussion, see John Dawson, *A Constitutional Property Settlement Between Ngai Tahu and the New Zealand Crown*, in PROPERTY AND THE CONSTITUTION 207–23 (Janet McLean ed., 1999).

154. 1991 No. 69.

155. *Beadle v. Minister of Corr.*, A 74/02, ¶¶ 7–8 (Env’t Ct. 2002). For a comprehensive analysis of this case, see I.H. Williams, *The Minister’s Prison and the Cultural*

Following a lengthy twenty-one-day hearing, the Environment Court delivered a two-hundred-page decision upholding the original decision to designate the site for a prison and granting the resource consents needed by the Government.<sup>156</sup> Unlike the Council, the Court did not find that Maori cultural, spiritual, or health interests would be adversely affected, though not because those concerns were insignificant. The RMA expressly mentions Maori concerns in its purpose provisions:

6. Matters of national importance —

In achieving the purpose of this Act, all persons exercising functions and powers under it . . . 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* [sacred sites], and other *taonga* [treasures].

7. Other matters—

In achieving the purpose of this Act, all persons exercising functions and powers under it . . . shall have particular regard to —

(a) *Kaitiakitanga* [*Kaitiakitanga* is the exercise of guardianship by the *tangata whenua* (first people of the land) of an area in accordance with *tikanga Maori* (Maori custom) 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 . . . shall take into account the principles of the Treaty of Waitangi (Te Tiriti o Waitangi).<sup>157</sup>

Of the various concerns raised by the Maori opponents to the prison—and not all Maori were against the proposal—the most

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*Prison: Lessons from the Northland Prison Litigation*, 20 N.Z. U. L. REV. 320 (2003).

156. *Beadle*, A 74/02, ¶¶ 7–8.

157. Resource Management Act of 1991, 1991 S.N.Z. No. 69, pt. 2, § 5.

fascinating contention was that the prison would interfere with the relationship of the *tangata whenua* (first people of the land) with a *taniwha* (spiritual guardian or monster) named Takauere, the spiritual guardian of this area. The opponents claimed that Takauere's domain encompassed the prison site at Ngawha and that the installation would interfere with his pathways to the surface and his *mana* (authority or prestige).<sup>158</sup>

Several pages of the Environment Court decision were devoted to summarizing the evidence about this *taniwha*.<sup>159</sup> Of the ten who testified, three saw the development adversely affecting Takauere. He was not some sort of mere "mascot" in the *Pakeha* (European) sense, said Mr. Ron Wihongi, a local Maori tribal elder opposed to the prison's construction, and the proposed construction would hinder his free movement and "literally throw mud in his eyes."<sup>160</sup> On the other hand, seven other witnesses denied that the installation would have any effect on the *taniwha*. Mr. Wallace Wihongi, another local Maori resident, doubted its *ana* (lair) embraced Ngawha, and, even if it did, the *taniwha* was adaptable and "would simply find other passageways and other places to reside. The prison and the *taniwha* can co-exist."<sup>161</sup> Another witness suggested that Takauere "was being misused to fight a prison" in a way that he found offensive.<sup>162</sup> Anglican bishop Waiohau (Ben) Te Haara, the senior spokesman for the Ngati Rangi *hapu* (sub-tribe) and one of the *kaitiaki* (guardians) of the Tuwhakino block, which included the prison site, concurred that the protesting Maori's concerns with Takauere were pretextual.<sup>163</sup>

158. This was the submission of counsel for the Regional Council. *Beadle*, A 74/02, ¶ 413.

159. *See id.* at 83–86, ¶¶ 415–35.

160. *Id.* ¶¶ 416, 419.

161. *Id.* ¶¶ 431–32.

162. *Id.* ¶ 427 (evidence of Mr. Reuben Clarke).

163. Bishop Te Haara's testimony was recounted as follows:

Bishop Te Haara gave his understanding that the *taniwha* was a term used by *tohunga* [traditional healers or priests] to determine the appropriateness or inappropriateness of certain action that must be taken by a tribe whenever there was a disaster or mishap that was about to occur within the tribe. A *taniwha* was regarded as a manifestation of an unnatural occurrence. *Taniwha* were used to support the decision-making of a *tohunga*.

In commenting on evidence by Dr. Hohepa, the Bishop said that in the old days the *taniwha* was used to explain the inexplicable. If bad things occurred then it might be attributed to the *taniwha* being offended, so people considered it



The Court accepted that there were those who sincerely believed in the existence of the *taniwha*, Takauere, which it described for present purposes as “a mythical, spiritual, symbolic and metaphysical being.”<sup>164</sup> The Court respected such sincere spiritual beliefs and noted that Parliament enjoined it to do so by virtue of sections 13 and 15 of the NZBORA.<sup>165</sup> It emphasized that nothing in its ruling ought to be taken as “belittling” the believers in the *taniwha* or “the importance that their belief in Takauere has for them.”<sup>166</sup> However, there were limits in terms of both policy and practical decision-making. The court observed,

Even so, the Act and the Court are creations of the Parliament of a secular State. The enabling purpose of the Resource Management Act is for the well-being of people and communities, and does not extend to protecting the domains of taniwha, or other mythical, spiritual, symbolic or metaphysical beings. . . . Neither the statutory purpose, nor the texts of [the Act], indicates that those making decisions under the Act are to be influenced by claimed interference with pathways of mythical, spiritual, symbolic or metaphysical beings, or effects on their mythical, spiritual, symbolic or metaphysical qualities.<sup>167</sup>

Practically speaking, the Court admitted to difficulties in evaluating questions about such metaphysical matters. In the wake of conflicting evidence about the *taniwha*, it had no reliable or objective way to resolve the dispute. For instance, “the taniwha’s pathways are not physical passages that can be measured and (at least on some accounts) the dimensions of the taniwha range from time to time.”<sup>168</sup> Furthermore, the tribunal had to be persuaded on the facts

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important not to offend the taniwha. Bishop Te Haara did not accept that the taniwha is guardian of the geothermal resource, asserting that it is the hapu of Ngawha who are the kaitiaki.

The Bishop testified that his elders never mentioned *Takauere* to him, and that it is not one of their taonga. He gave the opinion that the concept was being used by people for their own purposes. Bishop Te Haara gave the opinion that using the site for caring for those who have needs and helping to heal them would not offend the taniwha if there is such a manifestation in one’s mind.

*Id.* ¶¶ 423–25.

164. *Id.* ¶ 436.

165. *Id.* ¶ 437.

166. *Id.* ¶ 442.

167. *Id.* ¶ 439.

168. *Id.* ¶ 440.

that the being existed and would be impinged upon. In light of the evidence presented, the tribunal concluded that

[n]one of us has been persuaded . . . that, to whatever extent *Takauere* may exist as a mythical, spiritual, symbolic or metaphysical being, it would be affected in pathways to the surface or in any way at all by the proposed prison, or any earthworks, streamworks, or other works or development for the prison.<sup>169</sup>

In terms of section 6(e), the Court found insufficient evidence that Ngawha was a place of any great ancestral or spiritual significance. For example, there were no *waahi tapu* (sacred sites) on the prison site, and the building of a prison would not offend the relationship of local Maori with the waters of Lake Tuwhakino.<sup>170</sup> Despite this holding, however, it is noteworthy for the purposes of this discussion that the court did seriously evaluate the protesting Maori's argument. Similar objections by other non-Maori citizens based upon their cultural or religious beliefs would not have been accorded the same detailed consideration.

The prison case illustrates a clear state acknowledgement of Maori religion, but state recognition of Maori religious concerns has not gone unchallenged. Some have argued that the recognition unfairly privileges one religion over another<sup>171</sup> or, worse still, that it simply enables the cynical exploitation of traditional religious beliefs for "pecuniary gain" by some Maori.<sup>172</sup> For secular liberals, rationalists, and skeptics in the Enlightenment tradition, it represents a regrettable reintroduction of religion "through the back door."<sup>173</sup>

## 2. Accommodation of Islamic traditions

Maori spirituality has not been the only non-Christian religious sect recognized by the New Zealand government. Courts have also generally recognized that suitable accommodation of a person's religious beliefs may be required in those circumstances where the

169. *Id.* ¶ 439.

170. *See id.* ¶¶ 447–86.

171. *See* David Round, *Here Be Dragons*, 11 OTAGO L. REV. 31, 31–33 (2005).

172. *Id.* at 35.

173. *See* Erich Kolig, *Coming Through the Backdoor? Secularization in New Zealand and Maori Religiosity*, in *THE FUTURE OF CHRISTIANITY: HISTORICAL, SOCIOLOGICAL, POLITICAL AND THEOLOGICAL PERSPECTIVES FROM NEW ZEALAND* 183 (John Stenhouse et al. eds., 2004).

general law unintentionally yet significantly burdens a believer's religious practice. A statutory example is section 28(3) of the Human Rights Act of 1993. An employer must accommodate the religious or ethical belief practices of an employee as long as any adjustment required "does not unreasonably disrupt the employer's activities."<sup>174</sup> The most interesting recent case testing the boundaries of the need to accommodate religious claimants also generated public controversy about the nation's commitment to and the boundaries of multiculturalism.

In *Police v. Razamjoo*,<sup>175</sup> the key issue was whether two female Muslim witnesses would be permitted to wear their *burqas*—full-length, loose-fitting garments covering the body and head save for a narrow slit for the eyes—while giving their testimony in court.<sup>176</sup> Fouzya Salim and Feraiba Razamjoo were Crown witnesses in a case against the latter's brother.<sup>177</sup> Abdul Razamjoo was charged with making a false statement to police as part of an insurance fraud.<sup>178</sup> He reported that his car had been stolen, lodged a claim with his insurance company, and was paid out by the company.<sup>179</sup> Meanwhile, he had deposited the vehicle at the address of a Mr. Salim—another member of the local Afghani community in Auckland—where the two would supposedly remove identifying features and sell the car.<sup>180</sup> Later, the vehicle was located and, when questioned, Mr. Razamjoo denied he had made a false insurance claim.<sup>181</sup> He alleged that Mr. Salim had stolen the vehicle from him.<sup>182</sup> Mr. Salim's wife Fouzya and the defendant's sister, Feraiba Razamjoo (who was living with the Salims at the relevant time) were called by the Crown to confirm aspects of Mr. Salim's account of the events.<sup>183</sup>

The District Court noted that "there could be a considerable significance attaching to the credibility and reliability of the two

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174. Human Rights Act 1993, § 28(3).

175. [2005] D.C.R. 408 (D.C.). For a detailed analysis, see David Griffiths, *Pluralism and the Law: New Zealand Accommodates the Burqa*, 11 OTAGO L. REV. 281 (2006).

176. See *Razamjoo*, ¶ 1.

177. *Id.* ¶ 11.

178. *Id.* ¶ 10.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

witnesses who wished to give evidence whilst wearing their burqas.”<sup>184</sup> Defense counsel protested vigorously that to permit these two witnesses to testify veiled would seriously compromise the defendant’s right to a fair trial under section 25(a)<sup>185</sup> of the NZBORA.<sup>186</sup> The ability to observe the demeanor of the witnesses would be impaired,<sup>187</sup> as would the opportunity to undertake an effective cross-examination.<sup>188</sup> On the other hand, the two women were adamant that to unveil themselves in public would be a grave infringement of their religious beliefs.<sup>189</sup>

The Court heard extensive evidence on whether the wearing of the *burqa* (and other veils) was a religious requirement or simply a cultural one. Judge Lindsay Moore commented wistfully that the court “may well have been considerably assisted by evidence from a cleric or elder”<sup>190</sup> on Islamic attire (and any adjustments that might conform with the faith), but such expertise was not provided. On behalf of the prosecution, Professor Paul Morris, professor of religious studies at Victoria University, gave detailed testimony of the Islamic teaching on the topic. He explained that “[i]n Afghanistan, the practice of wearing the *burqa* is near universal and understood to be authorized by the traditions and texts above [namely the *Qur’an* and *Hadith*].”<sup>191</sup> The defense countered that the practice was simply a benighted cultural imposition.<sup>192</sup> Judge Moore refused to be drawn into a distinction that “is [so] hotly debated within the Muslim world community.”<sup>193</sup> He explained further,

The interrelationship between religious beliefs and cultural practices is inevitably complex. . . . What started as cultural practices may become matters of religious belief, conversely

184. *Id.* ¶ 12.

185. This section deals with criminal procedure. For further discussion of this section, see RISHWORTH ET AL., *supra* note 85, at 663–742.

186. *See Razamjoo*, ¶ 42.

187. *Id.* ¶ 79.

188. *Id.* ¶ 80.

189. *See id.* ¶ 13.

190. *Id.* ¶ 20.

191. *Id.* ¶ 16.

192. *See id.* ¶ 57.

193. Erich Kolig, *Muslim Traditions and Islamic Law in New Zealand: The ‘Burqa Case’ and the Challenge of Multiculturalism* (forthcoming 2006) (manuscript at 4, on file with author).

religious beliefs can result in the generation of new cultural practices or substantial changes to existing ones. . . . The original justifications for, and “validity” of, particular beliefs and customs . . . are subjects for disputation—scholarly and otherwise—but they are generally not amenable to judicial determination.<sup>194</sup>

The question for Judge Moore was not whether wearing the *burqa* was essential or a religious requirement but whether the claimant herself sincerely believed the practice to be required by her faith.<sup>195</sup> Here, Mrs. Salim had told the court that she would rather kill herself than reveal her face while giving evidence.<sup>196</sup> Her unveiling on an earlier occasion for the purpose of being photographed for her driving license was noted<sup>197</sup> but did not undercut the sincerity of her claim in the present situation. Judge Moore concluded,

This Court cannot be drawn into attempting to determine the theological or other “validity” of the practice of wearing the burqa. The evidence of Professor Morris establishes that in the culture from which Mrs. Salim comes, the practice of wearing the burqa is widespread. It is seen as a public declaration of faith. This Court accepts the evidence of Mrs Salim’s faith and beliefs. It accepts that to require her to remove her burqa in public (dire emergencies or other very compelling reasons excepted) would be to shame and disgrace her both in her own eyes and in those of the community of like believers whose customs and beliefs she is proud to uphold.<sup>198</sup>

Judge Moore noted that the present case was one of first impression in New Zealand.<sup>199</sup> Overseas jurisprudence was considered, such as a United States decision where a Florida state court had held there was a compelling state interest in requiring a

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194. *Razamjoo*, ¶ 65.

195. On the question of not weighing the validity of religious beliefs but only the sincerity with which they are held, the District Court quoted from a Maryland Court of Appeals judgment, *McMillan v. Maryland*, 265 A.2d 453 (Md. 1970).

196. This was repeated in two newspaper reports: *Court Says Women Must Lift Veil when Giving Evidence*, N.Z. HERALD, Jan. 17, 2005; Monique Devereux, *Religious Leaders Say Wearing Veil Is a Personal Choice*, N.Z. HERALD, Oct. 30, 2004. Curiously, this claim was not recorded in the written court judgment.

197. *Razamjoo*, ¶ 21.

198. *Id.* ¶ 67.

199. *See id.* ¶ 86.

Muslim female to remove her *burqa* for a driver's license photograph.<sup>200</sup>

The Court emphasized that more than just the rights of the witnesses and the defendant were at issue here. Besides Mr. Razamjoo's legitimate expectation of a fair trial and two Muslim witnesses' right to manifest their religious beliefs, the public had rights and expectations to an open and public criminal justice system.<sup>201</sup>

The Judge had earlier remarked that neither side had explored the possibility of an intermediate solution "between the giving of evidence whilst veiled" and testimony "in open Court in the ordinary way with the face uncovered."<sup>202</sup> The Court concluded that both these alternatives were untenable and that it would be "contrary to the interests of justice"<sup>203</sup> to require the witnesses to have their faces exposed in court. It similarly concluded that to allow testimony to be given "from beneath what is effectively a hood or mask" represented "such a major departure from accepted practice and the values of a free and democratic society as to seriously risk bringing the Court into dispute."<sup>204</sup> Judge Moore, however, devised an elegant compromise.<sup>205</sup> The two witnesses would be allowed to give their evidence from behind screens so that only the judge, counsel, and female court staff would be able to see the witnesses' faces.<sup>206</sup> In addition, provided the witness's face was fully exposed to view, the witness could wear a hat or scarf to cover her hair.<sup>207</sup> The trial duly proceeded, and Mr. Razamjoo was later convicted.<sup>208</sup>

The results of the *Razamjoo* case fueled some heated public debate. The response from local Muslim leaders was mixed, with some denying that the wearing of the *burqa* in the court setting was a religious duty, and with others urging for a compromise to be

200. See *id.* ¶ 89 (discussing *Freeman v. State*, No. 2002-CA-2828, 2003 WL 21338619 (Fla. Cir. Ct. 2003)).

201. *Id.* ¶ 107.

202. *Id.* ¶ 20.

203. *Id.* ¶ 108.

204. *Id.* ¶ 109.

205. One commentator described it as "Solomonic." Paul Rishworth, *Human Rights*, N.Z. L. REV. 87, 107 (2005).

206. *Razamjoo*, ¶ 110.

207. *Id.* ¶ 112.

208. *Man at Centre of Burqa Court Case Convicted*, N.Z. HERALD, Mar. 24, 2005.

struck.<sup>209</sup> The most forthright criticism came from non-Muslims. The *Otago Daily Times* believed the judge had gone too far in the name of “cultural sensitivity.”<sup>210</sup> Winston Peters, the leader of the New Zealand First Party, railed, “People who come here from countries with extreme religious views and customs should seriously think about resettling where practices of covering up faces are the norm.”<sup>211</sup>

Indeed, the scene had been set in the trial itself. Defense counsel submitted copious material—almost entirely printed off the internet—on the evils of Islamic fundamentalism. To permit the wearing of the *burqa* in New Zealand courts, counsel urged, “must be seen in the context of the political expression of the Muslim religion or Islamism which aims to relegate the Western world back to the dark ages through bombings of innocent people, televised executions and general dehumanisation of women.”<sup>212</sup> The Court castigated this material as “political rather than legal in nature” and dependent “upon factual assertions for which there was no evidential foundation.”<sup>213</sup> The defense submissions were “extravagant and often needlessly offensive in both scope and expression. There were numerous appeals to ignorance and prejudice.”<sup>214</sup>

A recurring concern in the public controversy was the very idea of special allowances or exceptions for other religions and cultures. “When in Rome, do as the Romans do” was the popular sentiment. At trial, defense counsel had urged that any ruling accommodating the witnesses should be viewed as a most dangerous precedent with “the potential to infiltrate New Zealand’s legal system by creating a separate justice system for Muslims in what is essentially a secular society.”<sup>215</sup> By coming to New Zealand, the two Islamic witnesses had tacitly agreed to obey New Zealand laws and so they ought not “now demand special laws for themselves.”<sup>216</sup> One recalls here the

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209. Devereux, *supra* note 196.

210. *Blinded by Burqa*, OTAGO DAILY TIMES, Jan. 20, 2005.

211. Helem Tunnah, *Muslim MP Says Burqa Is Cultural Not Religious*, N.Z. HERALD, October 29, 2004. Following the 2005 General Election, Winston Peters was, amidst some surprise and criticism (given his history of public utterances about the dangers of increasing Asian immigration), appointed as Minister of Foreign Affairs.

212. *Razamjoo*, ¶ 53.

213. *Id.* ¶ 55.

214. *Id.* ¶ 73.

215. *Id.* ¶ 54.

216. *Id.* ¶ 56.

similar American concern expressed in a nineteenth-century polygamy decision where the United States Supreme Court rejected a religious-based exemption from the general law lest this in effect “permit every citizen to become a law unto himself.”<sup>217</sup>

The New Zealand courts have not, however, adopted this sanguine, unbending view. Indeed, the aftermath of the *Razamjoo* case has by no means been negative. Policy-makers, well aware of the issues raised by the case, responded in the form of a proposed statutory effort at accommodation.<sup>218</sup> The Evidence Bill of 2005 provides that a judge may permit a witness to give evidence “in an alternative way” on the grounds of “the linguistic or cultural background or religious beliefs of the witness.”<sup>219</sup>

Consideration of both Maori and Islamic spiritual ideals has been a powerful counter-thrust to the gradual erosion of New Zealand’s *de facto* Christian establishment. These dynamic relations certainly promise more change in the future.

#### IV. THE FUTURE OF RELIGION-STATE RELATIONS IN NEW ZEALAND

The continually changing dynamic of church-state relations in New Zealand makes any long-term forecast of that relationship very difficult. As mentioned earlier, New Zealand, for the most part, has not witnessed the large-scale and bitter religious turmoil that has beset many nations. Professor Anthony Wood contends that “a major factor” in the tolerance exhibited, albeit imperfectly, to non-Christian faiths in the nation’s history has been “the overwhelming, unchallenged Christian composition of the population.”<sup>220</sup> If this is correct, then the diminution of this cultural and religious homogeneity will surely test the track record of tolerance to date. The religious composition of twenty-first century New Zealand is more heterogeneous than a century ago. The latest census shows that Christianity is still the largest religion with some sixty-one

217. *Reynolds v. United States*, 98 U.S. 145, 167 (1879). This fear of “courting anarchy” was reiterated by the majority of the Supreme Court in *Employment Div. v. Smith*, 494 U.S. 872, 888 (1990).

218. Legal Advice: Consistency with the New Zealand Bill of Rights Act 1990: Evidence Bill, ¶ 79 (Ministry of Justice Apr. 5, 2005), <http://www.justice.govt.nz/bill-of-rights/bill-list-2005/e-bill/evidence-bill.html>.

219. Cls. 99(1), (3)(e).

220. Wood, *supra* note 5, at 214.



percent of the population identifying with that faith.<sup>221</sup> Non-Christian faiths are becoming more established although their numbers remain quite small. The leading non-Christian religions are Buddhism (1.2 percent), Hinduism (1.1 percent) and Islam (0.7 percent), but all three are dwarfed by the fastest growing category composed of those who responded they had “no religion” (nearly 30 percent).<sup>222</sup>

With this trend towards a more heterogeneous society, New Zealand can expect more religious freedom claims from Muslim, Hindu, and other minority religious and cultural communities, as well as from secularists, rationalists, and atheists who insist that freedom *from* religion be equally respected. The emerging case law combined with a climate of respect for human rights and the legal machinery to give effect to them gives rise to a cautious optimism that much will be done to accommodate religious difference.

There are, however, necessarily limits to religious tolerance. New Zealand, as with other liberal democracies, will not accept all customs, practices, or rituals presented. It has, for instance, rejected the practice of female circumcision.<sup>223</sup> Yet, there are surely many areas of conduct where a suitable compromise can be struck.

Compromise will be increasingly important in New Zealand as different ethnicities and cultures continue to become more established. Government immigration and migrant resettlement policies have gradually abandoned the longstanding policy of assimilation, and, while New Zealand has not adopted multiculturalism as its official policy, it is careful to promote ethnic and cultural diversity.<sup>224</sup> For instance, in 2001 the Government established the Office for Ethnic Affairs. Chris Carter, the Minister for Ethnic Affairs, stated that it was “important that the Government, and all its departments, endeavour to talk to ethnic

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221. See NEW ZEALAND OFFICIAL YEARBOOK 2004, at 98 (showing statistics from the 2001 census).

222. *Id.* The actual numbers are: Buddhists, 41,634; Hindu, 39,798; Muslim, 23,631; and no religion, 1,028,052. The total population in 2001 was 3,468,813. *Id.*

223. See Crimes Act 1961, No. 43, § 204A. The ban on female genital mutilation was introduced in 1994. See Elisabeth McDonald, *Circumcision and the Criminal Law: The Challenge for a Multicultural Society*, 21 N.Z.U. L. REV. 233 (2004).

224. See, e.g., MICHAEL FLETCHER, DEPARTMENT OF LABOUR, MIGRANT SETTLEMENT: A REVIEW OF THE LITERATURE AND ITS RELEVANCE TO NEW ZEALAND 16 (Sept. 1999), available at <http://www.dol.govt.nz/publication-view.asp?ID=47>.

people, to listen to their needs, and to incorporate an ethnic perspective into the formation of policy.”<sup>225</sup>

The secularity of public life remains a live issue. There is a constituency that would potentially favor a “naked public square,” given that nearly a third of New Zealanders indicate they have no religion. Perhaps the state’s belated adoption of Maori ritual is the beginning of a civil religion with a strong indigenous flavor.<sup>226</sup> The question of whether New Zealand has ever had a significant “civil religion” is one that has exercised many sociologists and historians.<sup>227</sup> The recent recognition of Maori spiritual concerns in state ceremonies and in environmental and other laws may be a harbinger for the inclusion and recognition of further religious values and rituals. Or, it may be that Maori spirituality remains as an exception justified on historic, bicultural grounds. As the twenty-first century unfolds, the answers to these and other thorny questions will hopefully become clearer.

225. Office of Ethnic Affairs, *Ethnic Perspectives in Policy: A Resource 4* (2002), available at <http://www.ethnicaffairs.govt.nz> (accessed November 16, 2005).

226. See Peter Donovan, *Civic Responsibilities of the Churches to People of Other Faiths*, in *GOD AND GOVERNMENT: THE NEW ZEALAND EXPERIENCE* 81–82 (Rex Ahdar & John Stenhouse eds., 2000); Richard V. Pierard, “*In God We Trust . . . All Others Pay Cash*”: *Reflections on Civil Religion*, 10 *STIMULUS* 11, 18 (2002).

227. See, e.g., Michael Hill & Wiebe Zwaga, *Civil and Civic: Engineering a National Religious Consensus*, 2 *N.Z. SOC.* 27 (1987) (arguing that the plausibility of civil religion in New Zealand is highly questionable).

