The Value of Religion According to the Supreme Court of Canada

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Abstract

This doctoral thesis investigates the normative framework that informs the Supreme Court of Canada's rulings on freedom of religion since the adoption of the *Canadian Charter of Rights and Freedoms*. I seek to answer the question: Why is religion important to protect for the Supreme Court of Canada (SCC)? While scholars usually agree that the SCC understands religion as a subjective and private phenomenon, questions remain regarding whether the SCC values religion as a source of individual autonomy or cultural identity. In this dissertation, I propose an alternative interpretation: I argue that the SCC values religion as a source of authenticity, i.e., as a means through which individuals define and realize their sense of self. Sketching what I term the "authenticity framework" and drawing on the case law, I show that this valuation impacts the SCC's conception of both religion and religious freedom by bringing the focus away from religion and on the conditions, both individual and social, that are required for individuals to develop and embody their authentic sense of self. On the individual level, I demonstrate that the SCC is primarily concerned with religious claimants' sense of integrity and ability to subjectively self-define. As a result, it casts religion analogously to secular beliefs relating to one's self-understanding, which makes it difficult to offer a special protection to religion in law. On the social level, I demonstrate that the SCC is above all concerned with bolstering dialogue across worldviews and equality between citizens. Freedom of religion thus takes the role of a gatekeeper for the ideal of authenticity, protecting not religious liberty but the possibility for all to achieve authenticity in their life. By offering a novel and comprehensive reading of the SCC's interpretation of religion in religious freedom cases, this thesis hopes to provide a new lens through which to think about the role of religious freedom in an egalitarian society.

Résumé

Cette thèse de doctorat porte sur le cadre normatif qui sous-tend les décisions de la Cour suprême du Canada (CSC) en matière de liberté de religion depuis l'adoption de la *Charte canadienne des droits et libertés*. Je cherche à répondre à la question suivante : Pourquoi la religion est-elle importante à protéger pour la CSC? Bien que les chercheuses et chercheurs s'entendent généralement pour dire que la CSC considère la religion comme un phénomène subjectif et privé, des questions subsistent quant à savoir si la CSC accorde de la valeur à la religion parce qu'elle constitue une source d'autonomie individuelle ou d'identité culturelle pour la personne croyante. Dans cette thèse, je propose une interprétation alternative : je soutiens que le CSC valorise la religion comme une source d'authenticité, c'est-à-dire comme un moyen par lequel les individus se définissent et se réalisent. Élaborant un « cadre de l'authenticité » et m'appuyant sur la jurisprudence, je montre que cette valorisation a un impact sur la conception que la CSC a de la religion, d'une part, et de la liberté religieuse, d'autre part, menant la CSC à mettre à l'avant-plan non pas la religion en tant que telle, mais les conditions, tant individuelles que sociales, qui sont nécessaires pour que les individus puissent développer et incarner leur soi authentique. Au niveau individuel, je défends que la CSC est principalement soucieuse de protéger le sentiment d'intégrité des personnes croyantes et leur capacité à se définir subjectivement. Par conséquent, elle assimile la religion à d'autres convictions de conscience liées à la compréhension de soi, ce qui rend difficile d'offrir une protection spéciale à la religion en droit. Sur le plan social, je défends que la CSC est avant tout soucieuse de favoriser le dialogue entre diverses visions du monde et l'égalité entre les citoyens. La liberté de religion prend donc le rôle de défenseuse de l'idéal d'authenticité, protégeant non pas principalement le droit à la religion, mais plutôt la possibilité pour chaque individu d'être authentique. En proposant une lecture originale et exhaustive de l'interprétation de la religion par la CSC dans les cas concernant la liberté de religion, cette thèse espère offrir un nouvel angle de réflexion pour penser le rôle de la liberté de religion dans une société égalitaire.

Introduction

This dissertation is about the value of religion for the Supreme Court of Canada. Like other liberal democracies, Canada is ideologically committed to the value of religious pluralism. This commitment translates in various pieces of legislation, starting with section 2(a) of the 1982 *Canadian Charter of Rights and Freedom*, which guarantees "freedom of conscience and religion."[1] Beyond the right to religious freedom, other provisions reinforce Canada's commitment to supporting religious pluralism. To speak only of the *Charter*, section 15 identifies "religion" as one of the prohibited grounds for discrimination.[2] Section 35, on its part, offers protection to "existing aboriginal and treaty rights of the aboriginal peoples of Canada,"[3] which may include a right to practice customs and religious rites.[4] With respect to religious education, section 29 reiterates the privileges granted to denominational, separate, or dissentient schools in the *Constitution Act, 1867*.[5] This provision, which applies in various ways today across Canadian provinces, compels provincial governments to fund Roman Catholic or Protestant separate schools fully where either group forms a minority.[6]

More broadly speaking, section 27 of the *Charter* enshrines Canada's commitment to the value of diversity, including religious diversity, by insisting on the fact that all rights and freedoms "shall be interpreted in a manner consistent with the preservation and

[1] *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, Schedule B to the *Canada Act 1982* (UK), 1982, c 11, section 2(a).
[2] *Canadian Charter of Rights and Freedoms*, section 15(1).
[3] *Canadian Charter of Rights and Freedoms*, section 35(1).
[4] See for instance the case of *R. v. Sioui*, 1990 CanLII 103 (SCC), [1990] 1 SCR 1025.
[5] See *The Constitution Act, 1867*, 30 & 31 Vict, c 3, section 93(1); *Canadian Charter of Rights and Freedoms*, section 29.
[6] The provision does not apply to provinces that did not have publicly funded denominational schools at the time of their entry into Canada and was repealed by the legislature in Quebec in 1997. See Spencer Boudreau, "From Confessional to Cultural: Religious Education in the Schools of Québec," *Religion & Education* 38, no. 3 (2011/09/01 2011), https://doi.org/10.1080/15507394.2011.609104.

enhancement of the multicultural heritage of Canadians."[7] The principle of multiculturalism was enacted into policy in the *Multiculturalism Act* of 1988, where the Canadian Parliament made its commitment to the value of pluralism particularly clear. Among other things, the *Act* aims to "foster the recognition and appreciation of the diverse cultures of Canadian society and promote the reflection and the evolving expressions of those cultures."[8]

The provisions cited above make it obvious that Canada is in principle committed to the value of religious pluralism. However, they do little to inform us on the specific ethical value associated to religious pluralism or, for that matter, to religion itself as a right protected under the umbrella of the commitment to religious pluralism. While information can be gathered through documents such as Hansard transcripts or court rulings, the ethical value associated to religion and religious pluralism often remains implicit in the reasoning of judges and legislators. As sociologist of religion James Beckford observed, this valuation nonetheless impacts the means that a society is willing to implement to defend the place of religion in its whole in crucial ways.[9] To have a clear view of *how* religion is treated by a legal or legislative body implies, in other words, that we have an idea of *why* religion is considered important to protect. Failing to do so might not prevent us from observing how religion is handled. But it will most likely constitute an obstacle to fully

[7] *Canadian Charter of Rights and Freedoms*, section 27.

[8] *Canadian Multiculturalism Act*, RSC 1985, c 24 (4th Supp), para. 3(1) (h). Even in Quebec where multiculturalism is contested for undermining the place of French culture in the Canadian whole, intellectuals and politicians have promoted what has been termed "interculturalism." This principle, described in the Bouchard-Taylor Commission Report on Accommodation Practices Related to Cultural Differences as "seek[ing] to reconcile ethnocultural diversity with the continuity of the French-speaking core and the preservation of the social link" also alleges to value diversity, only with the more explicit objective that minorities make a unique contribution to the building of a society that acknowledges the aspirational goals of the cultural community representing the majority. See Gérard Bouchard and Charles Taylor, *Building the Future: A Time for Reconciliation*, Gouvernement du Québec (2008), 19, https://numerique.banq.qc.ca/patrimoine/details/52327/1565995. See also Michel Seymour and Jérôme Gosselin-Tapp, *La nation pluraliste : Repenser la diversité religieuse au Québec* (Montréal: Les Presses de l'Université de Montréal, 2018), 157-60; Gérard Bouchard, *Interculturalism: A View from Quebec*, trans. Howard Scott (Toronto: University of Toronto Press, 2015); Daniel Weinstock, "Interculturalism and Multiculturalism in Canada and Quebec: Situating the Debate," in *Liberal Multiculturalism and the Fair Terms of Integration*, ed. Peter Balint and Sophie Guérard de Latour, Palgrave Politics of Identity and Citizenship Series (Houndmills, Basingstoke, Hampshire: Palgrave Macmillan, 2013).

[9] See James A. Beckford, *Social Theory and Religion* (Cambridge, U.K.: Cambridge University Press, 2003), 100-02.

grasping why things are the way that they are, which in turn might be revealing of various nuances regarding religion's treatment in society.

This dissertation seeks to clarify the value that the Supreme Court of Canada attributes to religion and religious freedom as one of the rights that perhaps most clearly testifies to Canada's commitment to the value of religious pluralism. Drawing on the Supreme Court of Canada's decisions concerning freedom of religion from the adoption of the *Charter* to today,[10] I argue that religion is considered important to protect in contemporary Canada primarily because it is a source of authenticity for the believer; that is to say, a means through which individuals define and realize their sense of self. As I aim to show through this work, the specific ethical value attributed to religion by the Court has significant ramifications on the way that the Court—the institutional body that is ultimately in charge of resolving conflicts involving religion—proceeds to work out the issues it is presented with. By bringing the focus to the ethical salience of authenticity in religious freedom cases, my hope is to make sense of and shed new light on some of the most central issues in the field of law and religion in Canada.

Capturing the Value of Religion in a Pluralist Society

At the risk of being redundant, my work in this dissertation focuses on the Court's understanding of religion. With this statement, I want to highlight that I do not primarily aim to uncover what religious *pluralism* means for the Court, although my analysis will lead me to formulate observations on the latter notion. Yet, because the concept of religion as it relates to religious freedom necessarily encompasses a plural dimension—it is, in

[10] While my focus on freedom of religion will allow me to produce a thorough and comprehensive analysis of the Court's conception of religion in the context of this right specifically, it implies that decisions dealing with religion outside of section 2(a) will be left out. This means that I exclude from my analysis the jurisprudence on religious discrimination (e.g., *Bhinder v. CN*, 1985 CanLII 19 (SCC), [1985] 2 SCR 561; *Central Alberta Dairy Pool v. Alberta (Human Rights Commission)*, 1990 CanLII 76 (SCC), [1990] 2 SCR 489; *Central Okanagan School District No. 23 v. Renaud*, 1992 CanLII 81 (SCC), [1992] 2 SCR 970; *Commission scolaire régionale de Chambly v. Bergevin*, 1994 CanLII 102 (SCC), [1994] 2 SCR 525.), Aboriginal rights (e.g., *Sioui*; *Delgamuukw v. British Columbia*, 1997 CanLII 302 (SCC), [1997] 3 SCR 1010.), and the rights of religious organizations (e.g., *Greater Montreal Protestant School Board v. Quebec (Attorney General)*, 1989 CanLII 125 (SCC), [1989] 1 SCR 377; *Lakeside Colony of Hutterian Brethren v. Hofer*, 1992 CanLII 37 (SCC), [1992] 3 SCR 16; *Vriend v. Alberta*, 1998 CanLII 816 (SCC), [1998] 1 SCR 493.). My analysis is also limited to the legal interpretation of the value of religion and to that of the Supreme Court of Canada more specifically. Legal reasoning from lower courts and legislative reasoning, which would also be interesting to assess, are therefore excluded.

theory at least, available to individuals of all faiths—, important connections exist between the Court's conception of religion and religious pluralism that need to be clarified before we begin. To assist us with this endeavour, I propose to draw on Beckford's tripartite division of the common meanings of "religious pluralism."[11] Although Beckford warns us not to conflate the three meanings, I want to bring attention—now and throughout this dissertation—to the connections between each meaning as they relate to the legal understanding of the value of religion. In doing so, I will be providing information about my method for uncovering religion's value for the Supreme Court.

The first component of religious pluralism that Beckford identifies, and that is worth distinguishing when we speak of religion in the context of religious freedom, is the extent of religious diversity in a society. In Canada, Peter Beyer and Lori Beaman have conducted extensive research on religious diversity in the country and have identified the expansion of forms of religious diversity as one of the most consequential contemporary developments regarding religion. They explain that, in recent years, "the contours of religious diversity changed, themselves becoming more diverse: the ways of being religiously diverse are becoming more diverse, not just the possibilities within a given category of diversity."[12] Besides the decreasing number of Christians and growing presence of members of so-called "world religions" other than Christians and people who self-describe as having no religion, Beyer and Beaman draw attention to the increasingly "varied ways that persons individually appropriate and construct their personal religious identities."[13] In her study of religion, spirituality, and secularity among the Millennial generation, Sarah Wilkins-Laflamme makes a similar observation, noting that religion and spirituality have a "new flavor among today's emerging adults."[14] According to Wilkins-Laflamme, the context of uncertainty created by the growing presence and awareness of non-believers in society, among other factors, leads many Millennial believers to be "more

[11] See Beckford, *Social Theory and Religion*, 73-79.
[12] Peter Beyer and Lori G. Beaman, "Dimensions of Diversity: Toward a More Complex Conceptualization," *Religions* 10, no. 559 (2019): 1, https://doi.org/https://doi.org/10.3390/rel10100559.
[13] Beyer and Beaman, "Dimensions of Diversity," 2. While not considered in Beyer and Beaman's article cited here, the latest population census confirms this trend. See "The Canadian census: A rich portrait of the country's religious and ethnocultural diversity," Statistics Canada, 2022, accessed December 12, 2022, https://www150.statcan.gc.ca/n1/daily-quotidien/221026/dq221026b-eng.htm.
[14] Sarah Wilkins-Laflamme, *Religion, Spirituality, and Secularity among Millennials: The Generation Shaping American and Canadian Trends* (Abingdon, Oxon: Routledge, 2022), 28.

inclined to leave aspects of religious practice and identity to the wayside … while still maintaining their belief."[15] It is perhaps not so surprising in this context to see new diversities of religious identities emerge. Indeed, like Beyer and Beaman, Wilkins-Laflamme finds that Millennials' ways of identifying with and belonging to religion are increasingly varied compared to older generations.[16]

In the field of the law, this shifting outlook is bound to pose new challenges for the determination and justification of the scope of religious freedom. In particular, judges' awareness and appreciation of the magnitude of religious diversity in contemporary Canada is likely to influence their conception of religion and the role that it plays in people's lives by drawing attention in a more acute manner to the differences across experiences of religion. Although this thesis does not address the value of religion for Canadian citizens, we can expect that the extent of religious diversity impacts how the Court reasons about the value of religion for individuals. As a right with a universal scope, judges may want to ensure that the right to religious freedom resonates with the contemporary context, which implies to consider in their rulings the varieties of forms of religion that are meaningful to citizens today, including the new and varied ways that persons individually appropriate and construct their religious identities.

A second aspect of religious pluralism that Beckford identifies and that is relevant to consider in the context of a study on the value of religion is the legal acceptance or recognition of religion. That is to say, in Beckford's words, "the manner in which religious collectivities are permitted to operate and are regarded as part of the public sphere."[17] Because of the normative force that is allotted to the judicial system in the liberal state, the law plays a crucial part in determining which kind of religion and which religious groups have the legitimacy to exist in the public sphere. As Robert Cover famously argued in his forward to the 1983 Harvard Law Review, the law's force is at once to create its own

[15] Wilkins-Laflamme, *Religion, Spirituality, and Secularity among Millennials*, 27. See also the data and report from Statistics Canada: "Religiosity in Canada and its evolution from 1985 to 2019," Insights on Canadian Society, Statistics Canada, 2021, accessed December 8, 2022, https://www150.statcan.gc.ca/n1/pub/75-006-x/2021001/article/00010-eng.htm.
[16] See Wilkins-Laflamme, *Religion, Spirituality, and Secularity among Millennials*, particularly chapters 3, 4 & 5.
[17] Beckford, *Social Theory and Religion*, 76.

system of meaning and to "kill" competing interpretations by imposing it own view over the others.[18] In other words, when a religious worldview cannot be reconciled with the legal conception of how things should be, the law mobilizes its normative power to require religious claimants to conform to its own vision.

In this context, the way that the law imagines religion plays a determining role in deciding whether a specific religious practice has or does not have the legitimacy to exist in the public sphere. The kinds of religion that do not conform to the law's vision of religion are much more likely to be deemed illegitimate in the public sphere. As Benjamin Berger observes, when the law deals with religion, "[l]aw says, "For *my purposes* religion is the following." However, in this modest claim is the seed of the larger claim: "And if you appear before me, this is the only definition that will attract the recognition of the state.""[19] In this sense, if, as I suggested above, the extent of religious diversity has the potential to impact the law's conception of religion, then it may also be the case that judges' appreciation or lack of appreciation for the extent of religious diversity also plays a part in the quality of the protection granted to religion. In terms of uncovering the value of religion for the Court, these connexions indicate that we may learn a great deal about the Court's conception of religion by looking at the quality of the protection granted to religion through the right to religious freedom, as the nature and scope of the legal acceptance and recognition of religion are telling of which particular aspects of religion are considered most important to legally safeguard.

To be sure, as Beckford noted, the extent of religious diversity and the acceptance of religion in the public sphere are two distinct phenomena that ought to be differentiated. It is not a given that judges are aware of or even interested in the diversity of ways in which people relate to their religion when they formulate claims pertaining to religion and decide what the limits of religious freedom are. Many scholars have indeed drawn attention to the fact that despite the religious diversity of Canadian society, law's understanding of religion

[18] See Robert M. Cover, "Foreword: Nomos and Narrative," *Harvard Law Review* 97, no. 1 (1983).
[19] Benjamin L. Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto, ON: University of Toronto Press, 2015), 103 [emphasis in original].

remains, to a great extent, modelled on Christianity.[20] Yet, as we sense through the criticism of those arguing that this conception of religion is unfair since it risks making it more difficult for non-Christians to successfully formulate a claim for religious freedom, the extent of religious diversity today appears to be exercising a pressure on the legal system to keep in touch with the increasingly varied ways in which individuals experience their religion in Canada.

Moving on to the third meaning of religious pluralism that Beckford pins down and that I want to clarify before I begin my analysis, we have the *normative*—as opposed to the two abovementioned *descriptive*—usage of the term "pluralism." This third meaning is the one that brings us the closest to the main topic of this dissertation.[21] According to Beckford, there are three principal normative meanings of pluralism that ought to be differentiated. On the first view, pluralism is valued because the coexistence of a diversity of communities is thought to "lead to a harmonization of difference and an ending of conflict and intolerance."[22] Diversity is, in this sense, considered a good in itself. By supporting difference across groups, the idea is that communities of faith will find ways to live peacefully together—if they do not, they break with the very principle that warrants them the liberty to maintain their own difference. On the face of it, this valuation of pluralism seems to be the one underlying the *Multiculturalism Act*, which emphasizes the "understanding and creativity that arise from the interaction between individuals and communities of different origins"[23] and maintains that the state must play an active role in facilitating "cooperation among the diverse communities of Canada."[24] In this form, pluralism is strongly associated with one's distinct cultural identity and community of belonging.

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[20] See for instance Lori G. Beaman, "Religious Freedom Written and Lived," in *The New Religious Question: State Regulation or State Interference?*, ed. Pauline Côté and Jeremy T. Gunn (Brussels: P.I.E-Peter Lang, 2006); Lori G. Beaman, "The Myth of Pluralism, Diversity, and Vigor: The Constitutional Privilege of Protestantism in the United States and Canada," *Journal for the Scientific Study of Religion* 42, no. 3 (2003).
[21] The second meaning, that of the legal acceptance or recognition of religion in the public sphere, is also central to my study. It is important, however, not as my primary object of study, but as a means through which I can obtain crucial information on my primary object of study, namely religion's value for the Court.
[22] Kieran Flanagan quoted in Beckford, *Social Theory and Religion*, 79.
[23] *Canadian Multiculturalism Act*, para. 3(1) (g).
[24] *Canadian Multiculturalism Act*, para. 5(1) (d).

A second type of valuation that Beckford identifies stresses the important role that religious pluralism plays in individual freedom. On this view, Beckford explains that "the opportunity for individuals to choose their religious affiliations and, if necessary, to change these affiliations is regarded as essential."[25] This approach, which gives primacy to the individual rather than the collective, attributes a completely different value to religious pluralism by connecting diversity and religion to individuals' autonomy. What is valued under this approach is not so much the communities of faith in themselves, but the agency that individuals have within them to interpret and make choices regarding their own religious beliefs and practices.

The third and most "radical" view of religious pluralism according to Beckford is one that "places a positive value on the capacity of individuals to combine elements from different religious groups or traditions."[26] This differs from the previous ones as it does not place value on separate collectivities in themselves, nor on the human capacity to choose freely one's community of faith. Instead, religious pluralism is valued as maintaining and encouraging "a free flow of ideas, symbols and practices across the boundaries of traditions and organisations."[27] The existence of diverse communities of faith is therefore essential, as Beckford puts it, "for what they allow people to take out of them."[28]

Beckford's observations on the different normative meanings of religious pluralism are highly relevant to my analysis of the Supreme Court's understanding of the value of religion. As I will highlight in the next chapters, they mirror particularly accurately the range of reasons proposed by scholars, including myself, for why the Court values religion. Indeed, recurring debate in the field concerns whether the Court values religion as a source of cultural identity—Beckford's first meaning of the moral value of pluralism—or individual autonomy—Beckford's second meaning. My argument, on the other hand, will reveal a meaning similar to Beckford's third understanding of the value of religious pluralism, based on individuals' ability to self-determine what is meaningful for them as

[25] Beckford, *Social Theory and Religion*, 79.
[26] Beckford, *Social Theory and Religion*, 80.
[27] Beckford, *Social Theory and Religion*, 80.
[28] Beckford, *Social Theory and Religion*, 80.

believers, all while not ignoring the important role that the existence of a diversity of communities (religious and non-religious) play in this self-determination.

My endeavour is different from Beckford's, however, insofar as I focus on the "religious" component of "religious pluralism." Beckford's depiction of the three meanings of pluralism as a moral value reach well beyond religion. His definitions could apply to a variety of types of communities that have nothing to do with religion. In this sense, while Beckford's model clearly delineates the difference between the fact of religious diversity and its moral approval in society, it seems to blur the line between the meaning of pluralism in general and religious pluralism specifically. Before asking ourselves what leads us to value "religious pluralism," perhaps an important question is to find out why—and if—we value "religion." If all the reasons that we can find to value religion are not exclusive to religion, then perhaps instead of asking ourselves *why* we value religious pluralism; we should be asking ourselves *if* we value religious pluralism, or if, perhaps, we might not be valuing a much more general, and therefore different, idea of pluralism.

This is precisely where this dissertation is heading. By arguing that religion is valued by the Supreme Court as a source of authenticity, I will show that the Court accords importance to religion for features that it shares with other aspects that inform a person's sense of self. In doing so, my goal will be to highlight the gains and losses that conflating the normative meaning of religious pluralism with pluralism can bring about in the handling of religious freedom claims. But first, we must first have a clear understanding of why we value religion in society.

The Moral Ideal of Authenticity

This dissertation is, to reiterate, about the value of religion and also, quite centrally, about authenticity as a moral ideal with powerful force in contemporary Western societies. Authenticity as I intend it in this thesis refers, roughly speaking, to a state of the human person whose behaviour in society aligns with their core feelings about themselves. It is an ideal in Western societies insofar as paying careful consideration to what we find meaningful within ourselves and not simply letting ourselves be guided by outside norms

and constraints are valued. In this sense, the ideal of authenticity brings attention to the fact that we feel good about ourselves when we are able to act in a way that we find coherent with how we feel about the world, especially when we experience those feelings strongly.

A fundamental aspect of our understanding of the ideal of authenticity is the belief that only I can discover who I really am. Only I have the capacity to dive into the confines of my own self to determine what makes me truly myself. As I will argue in Chapter 3, authenticity's emphasis on individual subjectivity sits comfortably with one of the Court's most explicit statements on the nature of religion in *Syndicat Northcrest v. Amselem*.[29] In this pivotal decision, the Court describes religion as a primarily personal phenomenon, stating that "[i]n essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith."[30]

While personal convictions are an important component of authenticity, the need to know oneself and one's core convictions in order to achieve authenticity does not exhaust the meaning of being "authentic." Authenticity also possesses a social dimension insofar as it requires us to do something about what we find within ourselves; namely, to live our life in accordance with it. For those who manage to do so—and there is no guarantee that someone will since authenticity is an ideal—the promise of authenticity is to lead the individual to experience feelings of self-respect, inner peace, worthiness, and self-fulfilment.

The demand of authenticity to act in accordance with our most core feelings is a personal one. It is, in other words, an individual condition of authenticity. Yet the power of the ideal of authenticity today is not restricted to the individual. In terms of the collective, the force of the ideal of authenticity is to lead us to think about the organization of life in society with this individual objective in mind. As I argue in Chapter 4, the collective valuation of personal feelings for the determination of our lives impacts how we think about fairness—at least when freedom of religion is concerned. In considering what is fair, the ideal of authenticity prompts us to remove the obstacles that may prevent individuals from living in accordance with their feelings about themselves and, conversely, encourages

[29] *Syndicat Northcrest v. Amselem*, 2004 SCC 4 (CanLII), [2004] 2 SCR 551.
[30] *Amselem*, para. 39.

us to recognize and consider the personal feelings of individuals where these feelings have the potential to affect the course of a person's life. To put it in the words of Charles Taylor, the modern culture of authenticity prompts us to adopt a politics of recognition whereby all members of society must come together through a mutual recognition of differences to ensure that everyone can be true to themselves.[31] When applied to the context of religious freedom, this vision of fairness is, as I show in Chapter 4, likely to modulate the scope of the protection that the Court thinks it is allowed and expected to grant to religion today.

My proposition in this thesis is to assess the Supreme Court of Canada's rulings on freedom of religion through what I term an "authenticity framework." This framework, which I develop in Chapter 2, draws attention to four conditions—two individual and two social—that are required for the ideal of authenticity to be achievable by the members of society. Specifically, I suggest that authenticity can be achieved by an individual with a capacity for *introspection*, or contact with their feelings, and *integrity*, or the will to act in accordance with those feelings. I furthermore consider *dialogue*, or a dynamic understanding of the people and groups who form the society we evolve in, and *equality*, or the possibility to exist as our true self without constraints, as social conditions supporting the ideal of authenticity. Looking at the case law through this original framework, I demonstrate that the Supreme Court is less interested in protecting religion than it is in protecting the conditions of authenticity. On the individual level, I show in Chapter 3 that the Court is primarily concerned with religious claimants' sense of integrity and ability to subjectively self-define (i.e., not necessarily along the lines of one's religious custom). As a result, it casts religion analogously to secular beliefs relating to one's self-understanding, which makes it difficult to offer special protection to religion in law. On the social level, I argue in Chapter 4 that the Court is above all concerned with bolstering dialogue across worldviews and equality between citizens. The freedom of religion thus takes the shape of a gatekeeper for the ideal of authenticity, protecting not primarily religious liberty, but the possibility for all to achieve authenticity in their life.

[31] See Charles Taylor and Amy Gutmann, *Multiculturalism and "The Politics of Recognition"* (Princeton, N.J.: Princeton University Press, 1992).

For those who are familiar with the jurisprudence on religious freedom, these conclusions are not totally new or ground-breaking, particularly those pertaining to the Court's subjective understanding of religion and careful attention paid to equality. As the next chapters will highlight, many scholars of law and religion in Canada have supported similar conclusions in their work in various ways. Yet, even where the debates do revolve around the idea of the value that is attributed to religion by the Court, or when the values that are explicitly supported by the Court in rulings on religious freedom are examined, the debate is rarely, if ever, formulated as a debate concerning the value attributed to religion by the Court. Perhaps this is due to the fact that assessing the value of the already difficult to grasp concept of "religion" in the legal realm is a particularly elusive endeavour that, to a large extent, requires us to make assumptions based on implicit or unsaid considerations. Unlike determining the place attributed to religion in society, for instance, which can be assessed by looking at the concrete outcome of Court decisions in society or by simply reviewing the rationale provided by the Court to allow or limit a religious practice, considering religion's value implies making much more abstract postulates regarding what led the Court to make the claims that it made in order to reach a decision. Because of their ambiguous nature, these postulates will always be highly contestable. Nonetheless, despite the pitfalls associated to formulating such claims, the fact that we do not at present have a clear view of why the Supreme Court values religion represents a serious lacuna. Not only has this approach blurred the image of the puzzle we are trying to assemble, I believe that it has led us to neglect the specific challenge that religious freedom can pose to a society that aspires to be egalitarian. In this respect, my claim regarding the Supreme Court of Canada's valuation of religion as a source of authenticity provides us with new ground to reflect on and criticize the application of the right to religious freedom by calling attention to the offshoots—whether positively or negatively apprehended—of a legal valuation of religion that renders pluralism in general more paramount than religious pluralism specifically.

Outline of the Dissertation

This dissertation is organized around what I term "areas of uncertainty" in the field of law and religion in Canada. Two of them, identified in Chapter 1 as core issues cutting across

the scholarship on law and religion in Canada, will serve as lodestars throughout this work. The first question concerns the ongoing uneasiness of scholars of law and religion to determine whether the Supreme Court sees religion primarily as a source of individual autonomy for the believer or as a source of cultural identity. Although scholars usually acknowledge the complexity of the matter, many have taken position in the debate, arguing that the Court favours one view over the other. In Chapter 1, I tackle this area of uncertainty as a debate on the value that the Court grants to religion—a framing that, per my reading, has remained grossly implicit thus far. Casting the debate as one of value is, however, essential to paint a fuller and more accurate picture of the Court's understanding of religion, as it allows us to clearly grasp how each piece of the puzzle fit with the next one.

The second broad question identified in Chapter 1 that will feed this work concerns the proper use of equality in rulings on freedom of religion. In this respect, I point to two main perspectives that make significantly different usage of the notion of equality in their approach of religion in Canadian law: one setting equality as a desirable goal and the other problematizing the notion in the context of the application of fundamental rights such as freedom of religion. Building on the argument provided by the latter approach, I suggest that the debate surrounding the proper place of equality in Court rulings is revealing of the fact that the moral force guiding the Court in religious freedom cases is not centered around religion specifically but around the idea that all individuals are equal in worth.

This idea is further developed in Chapter 2, where I build the authenticity framework through which the jurisprudence will be analyzed. Drawing on the picture that contemporary theorists paint of the emergence of the ideal of authenticity in modern Western societies, I establish four cardinal conditions of authenticity; namely, introspection, integrity, dialogue and equality. In Chapter 3, I take up the two individual conditions of authenticity—introspection and integrity—to provide an explanation for three areas of uncertainty regarding the way that the Court has handled religion in religious freedom cases. First, I clarify why the value of religion at times appear to reside in the fact that religion is a source of autonomy and other times in the fact that religion is a source of identity. Second, I contextualize the reasons surrounding the adoption of a subjective sincerity test to assess the validity of claims founded on religion. Finally, I explain and

nuance why religion at times appear to have lost some of its force as a fundamental right in contemporary Canada. In providing these explanations, this chapter highlights how valuing religion as a source of authenticity moves the *locus* of the valuation away from religion and onto the authentic self—a self which religion can, but need not, inform. The result is a view of religion that does not possess any distinctive features that could serve as grounds to grant it a special or robust protection in law.

Chapter 4 focuses on the repercussions of valuing religion as a source of authenticity on the right to religious freedom. Drawing on the social conditions of authenticity—dialogue and equality—I provide an explanation as to why the Court is so adamant to use education to broaden children's knowledge and appreciation of a variety of worldviews against some religious parents' will. I furthermore recontextualize the question, pinpointed in Chapter 1, regarding the proper use of equality in religious freedom cases by examining the ways in which religion is cast against identity-based claims. This chapter shows that the Court's valuation of religion as a source of authenticity has transformed the freedom of religion into a gatekeeper for the ideal of authenticity, rendering it particularly difficult, if not impossible, for claims of religious freedom to succeed if they are cast as disrupting the social conditions required for individuals—religious or not—to contemplate achieving authenticity in their life.

Throughout this dissertation, what I will propose is an interpretative reading of Supreme Court rulings; that is to say, an explanation for why things are the way they are in matters of religious freedom. My aim is not to resolve any of the issues that will be raised throughout this work, although my analysis focuses on and is guided by a number of these so-called unresolved questions. Instead, my goal is to make these issues clearer, to better contextualize why they exist and, in some cases, to get us to reflect on whether we are ready to work with them or if we should rather engage in a different path. None of this will tell us the best course of action moving forward. But it represents a crucial step towards addressing these issues in a meaningful and just manner. It is also my opinion that moving past these issues or taking a decision regarding the best path forward would be facilitated if the proponents of different views had a clearer understanding of the broad picture in which the resolution of conflicts involving religion occurs. This would provide us with

more angles to tackle the shortcomings of the current approach all while stressing what is at stake should we decide to change course of action. In this sense, my aspiration in providing a novel and comprehensive reading of the Supreme Court of Canada's interpretation of the value of religion in religious freedom cases is to provide a new lens through which to think about the role of religious freedom in an egalitarian society. I begin this work by reviewing the Court's understanding of religion and religious freedom in Canadian society.

Chapter 1. Understanding Religion in Canadian Law

Official documents such as constitutions, human rights codes, laws, and jurisprudence hold a particular power in Western democracies insofar as they lay out and define the rights and freedoms of citizens. In a way, the official documents of a country serve to organize the world for its citizens. Accordingly, the way the object of these rights and freedoms is defined in official documents, as James Beckford rightly notes, "can have serious practical consequences: [it] can make a difference to people's individual lives and to their collective interests."[32]

Producing such broad definitions can be a challenging endeavour. This is especially true for matters such as religion that are notoriously complex to grasp in one single and coherent definition. In this respect, the question raised by Peter Beyer of "whether it is possible to agree upon a single definition that adequately covers all those social phenomena that sociological observers think should count as religion"[33] seems to be only answerable in the negative.

Nonetheless, assessing the scope of the freedom of religion implies that we have an idea of what religion is. Thus, when state representatives legislate or adjudicate on religious freedom, they must, in a way, define religion. In turn, religious individuals and communities have a strong interest in describing their religious experiences in terms that align with these officially endorsed definitions of religion. Arthur Greil and David Bromley observe that "[t]o have others accept one's claims to be practicing religion can secure legitimacy for one's beliefs. It can also be the source of political, social, and material

[32] James A. Beckford, "The Politics of Defining Religion in Secular Society: From a Taken-for-Granted Institution to a Contested Resource," (Boston: Brill, 1999), 23.
[33] Peter Beyer, "Defining Religion in Cross-National Perspective: Identity and Difference in Official Conceptions," in *Defining Religion: Investigating the Boundaries Between the Sacred and Secular*, ed. Arthur L. Greil and David G. Bromley (Amsterdam: JAI, 2003), 163.

capital."[34] Conversely, failure to express a religious practice in terms that are cognizable and palatable to these understandings of religion can result these practices being considered whimsical and thus illegitimate.

The impact of prevailing conceptions of religion on the individual is obvious when we look at the issue through a comparative perspective. In the United States, for example, religious expression is seen as a crucial component of religion. This understanding can be witnessed in how the First Amendment of the United States Constitution is interpreted. The First Amendment makes it clear that the protection available for religion encompasses both the freedom *of* religion (the Free Exercise Clause) and the freedom *from* religion (the Establishment Clause).[35] However, the Establishment Clause has generally been understood as best ensured by safeguarding freedom *of* religion. As Ahmet Kuru explains, the dominant ideology regarding the management of religion in the United States "demands the state to play a passive role by allowing public visibility of religion."[36] In order to remain neutral towards religion, the state makes sure that all members of society, regardless of their religious allegiance, can express their religious beliefs. Hence, even though the Establishment Clause prohibits the government from establishing religion or favoring one religion over another (or even over non-religion), Kuru observes that "officially sanctioned public visibility of monotheism" are common and widely accepted in American society:

> The Pledge of Allegiance daily recited in public schools includes the phrase "one nation under God." "In God We Trust" appears on all U.S. currency. Several official oaths, including the presidential oath of office, customarily contain the statement "so help me God" and are often made by placing the left hand on a Bible. Sessions of the U.S. Congress begin with a prayer by a publicly funded chaplain, and the sessions of the U.S. Supreme Court start with the invocation "God save the United States and this Honorable Court."[37]

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[34] Arthur L. Greil and David G. Bromley, "Introduction," in *Defining Religion: Investigating the Boundaries Between the Sacred and Secular*, ed. Arthur L. Greil and David G. Bromley (Amsterdam: JAI, 2003), 5.
[35] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". U. S. Constitution, Amendment 1.
[36] Ahmet T. Kuru, "Assertive and Passive Secularism: State Neutrality, Religious Demography, and the Muslim Minority in the United States," in *The Future of Religious Freedom: Global Challenges*, ed. Allen D. Hertzke (New York: Oxford University Press, 2012), 236.
[37] Kuru, "Assertive and Passive Secularism," 236.

If we look at applications of the Free Exercise Clause, we notice that religious expression is also highly prioritized. For instance, American law has put great emphasis on the right of citizens to be exempted from seemingly neutral general laws whenever these laws interfere with one's capacity to practice one's religion. This is made explicit by the adoption of the Religious Freedom Restoration Act by the U.S. Congress in 1993. This Act, which was adopted "swiftly and pervasively"[38] in response to the Supreme Court ruling *Employment Division v. Smith*—a ruling that made it more difficult to obtain a religious exemption from a law of general application—recognized that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise",[39] and reinstated the previous framework of religious exemptions. The Act was passed nearly unanimously, making it clear that the *Smith* decision, which restricted the scope of available space for the expression of religious beliefs, did not sit comfortably with the dominant conception of religion in the country. For this reason, it was thought essential to "restore" religious freedom so as to ensure that the freedom could actually capture the object it aimed to protect.[40]

This conception of religion has consequences for Americans. For example, Kuru observes that Muslim minorities, who have generally enjoyed great religious freedoms in the country, have been able to focus on countering Islamophobia.[41] The fact that religious expression—including Islamic expression—is seen as an essential component of religion in the United States results in an economy of time and mental resources for members of Muslim communities, who can thus direct their energy towards advocating for other rights and interests.

In contrast, in France, the focus is not so much on freedom of religious expression, but rather on freedom of thought. This idea is reflected in the wording of the 1789

[38] Barbara A. McGraw and James T. Richardson, "Religious Regulation in the United States," (Oxford University Press, 2019-08-28 2019), 6.
[39] *Religious Freedom Restoration Act of 1993*, Pub. L. No. 103-141, 107 Stat. 1488 (November 16, 1993), 42 U.S. Code § 2000bb.
[40] The Act continues to be applied today only to the federal government; however, several individual states have passed legislation with a similar intent. See "2015 State Religious Freedom Restoration Legislation," Civil & Criminal Justice, 2015, accessed January 16, 2023, https://www.ncsl.org/research/civil-and-criminal-justice/2015-state-rfra-legislation.
[41] Kuru, "Assertive and Passive Secularism," 238.

Declaration of the Rights of Man and of the Citizen (reiterated in the Constitution of France), which seems to imply that religion is a matter of opinion. Article 10 of the Declaration states that "[n]o one may be disquieted for his opinions, even religious ones, provided that their manifestation does not trouble the public order established by the law."[42] While the concept of religion itself is rarely directly addressed in French legislation and jurisprudence, which prefers the term "worship,"[43] the close connection between religion and matters of conscience is evident in the country's model of laïcité.[44] Beckford explains that France's "ideology of laïcité regards religion as, at best, acceptable in the private sphere although fundamentally incompatible with the institutions of a secular Republic and, at worst, antithetical to the capacity for rational freethinking and to the primary loyalty of French citizens to their country."[45] Under this conceptualization of religion, it becomes important to protect at once the religious beliefs of individuals (as opposed to their religious practices), and individuals from non-rational values that could lead them to question their loyalty to the state.

Yet, when individual beliefs are cast as both essential to a free society and potentially threatening, it becomes pressing to regulate them. In fact, France has gone so far as to pass legislation against the illegitimate "inculcation" of beliefs through a law prohibiting the so-called "abuse of weakness," which is a concept akin to mental manipulation and brainwashing.[46] The regulation of belief in France reflects prevailing

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[42] *Declaration of the Rights of Man and of the Citizen of 1789*, Article 10.

[43] In French: *culte*. Religious groups and institutions are also designated in these terms as "worship associations" (French: *associations cultuelles*). See David Koussens, "La religion « saisie » par le droit. Comment l'État laïque définit-il la religion au Québec et en France ?," *Recherches sociographiques* 52, no. 3 (2011), https://doi.org/10.7202/1007659ar; Patrice Rolland, "La religion, objet de l'analyse juridique," *Archive ouverte en Sciences de l'Homme et de la Société* (2013), https://halshs.archives-ouvertes.fr/halshs-00872395.

[44] These principles were first laid out in 1905, when France adopted a law that formalized the separation of the state from religion. See Loi du 9 décembre 1905 concernant la séparation des Eglises et de l'Etat, (1905).

[45] James A. Beckford, "'Laïcité,' 'Dystopia,' and the Reaction to New Religious Movements in France," in *Regulating Religion: Case Studies from Around the Globe*, ed. James T. Richardson (Boston, MA: Springer US, 2004), 28.

[46] See LOI n° 2001-504 du 12 juin 2001 tendant à renforcer la prévention et la répression des mouvements sectaires portant atteinte aux droits de l'homme et aux libertés fondamentales, JUSX9903887L (2001). For a detailed discussion on the topic, see Susan J. Palmer, *The New Heretics of France: Minority Religions, la République, and the Government-Sponsored "War on Sects"* (Oxford: Oxford University Press, 2011); James T. Richardson and Massimo Introvigne, "Brainwashing Theories in European Parliamentary and Administrative Reports on Cults and Sects," in *Regulating Religion: Case Studies from Around the Globe*, ed. James T. Richardson (New York: Kluwer Academic/Plenum Publishers, 2004).

ideas about religion that influence the scope of freedom of thought. Indeed, these laws were primarily tailored to target the leaders of new and alternative religious movements deemed "cults" or "*sectes*," whose religious views differed from those of recognized religions in France.

The French conception of religion, as essentially a matter of inward belief, may also disadvantage those whose religion necessitates an outward expression of faith through practices such as wearing an accessory, or an article of clothing commonly referred to as religious symbols. Indeed, in 2004, following the submission of the Stasi Commission's report on the application of the principles of laïcité, France passed a law prohibiting students from wearing religious symbols in the school system.[47] The prohibition was deemed necessary to ensure that schools remain neutral spaces that can foster equality and unity across religious allegiances.[48] While France's Constitution promises to "ensure the equality of all citizens before the law, without distinction of origin, race or religion,"[49] its conceptualization of religion, which acknowledges mainly institutionalized forms of religious belief, fails to consider a limitation on religious practice as a breach of religious freedom. Once again, we see that religious freedom is dependent upon prevailing conceptions of religion, and that these prevailing conceptions impact the lives of citizens.

These two examples make it clear that each state has its own way of dealing with religion, which reflects majoritarian ideas about religion. One similarity across contexts, however, is how the legal system is envisioned as a neutral arbitrator merely interpreting and applying the laws and regulations laid out in the country's official documents, as well as, at times, producing new or clearer definitions that are in keeping with the spirit of the official documents. As scholars note, however, this narrative works more to legitimize the law's role as the ultimate arbitrator within the liberal state than it accurately depicts

[47] See LOI n° 2004-228 du 15 mars 2004 encadrant, en application du principe de laïcité, le port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics, MENX0400001L (2004).
[48] See "Enseignements élémentaire et secondaire. Respect de la laïcité: Port de signes ou de tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics," 2004, accessed December 14, 2020, https://www.education.gouv.fr/bo/2004/21/MENG0401138C.htm.
[49] *Constitution of October 4, 1958*, Article 1.

reality.[50] In fact, courts of law are susceptible to the same biases as everybody else. Jeremy Gunn observes that frequently, judges—just as much as other state representatives—go so far as to draw on a kind of autofiction to assert the proper meaning of religious freedom that they deem most convenient:

> the differences among … countries cannot be explained simply by their histories and different legal systems and cultures, but also by understanding the "founding myths" and the "perceived identities" that are widely (and naively) shared by the populations. … Those who are responsible for the regulation of religion (including parliamentarians, administrative officials, and judges) will often see "neutrality," "equality," and "non-discrimination" not through some relative "objective" lens, but through the rose-coloured glasses of the founding myths and perceived identities.[51]

Legal sources may appear transparent and impartial, but much remains implicit in legal reasoning. Moreover, this implicit reasoning has an impact on individuals who use the courts to defend their faith. In the words of American legal scholar Kent Greenawalt: "[c]ourts have not always said how they decide what counts as religious, but they must use some approach, whether or not they make it explicit."[52] It is in this context that scholars of law and religion, such as Benjamin Berger, urge us to deconstruct the "conventional story" whereby law in the liberal state is depicted as "a structure above and apart from the particularly and contingently cultural",[53] and examine the sources that inform law's understanding of the world and view of religion. Dissecting law's rulings on religious freedom can be a productive way to reveal these presumptions in order to see more clearly law's biases and identify the challenges that they pose for society.

Drawing on scholars who offer insightful accounts of Canadian law's intertwinements with religion, this chapter seeks to examine the legal assumptions about

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[50] See for example Cover, "Nomos and Narrative."; Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999); Berger, *Law's Religion*; Kelsey Curtis, "The Partiality of Neutrality," *Harvard Journal of Law & Public Policy* 41, no. 3 (2018).

[51] Jeremy T. Gunn, "Managing Religion Through Founding Myths and Perceived Identities," in *La nouvelle question religieuse : Régulation ou ingérence de l'État? / The New Religious Question: State Regulation or State Interference?*, ed. Pauline Côté and Jeremy T. Gunn, Dieux, Hommes et Religions / Gods, Humans and Religions (Brussels: P.I.E. Peter Lang, 2013), 39.

[52] Kent Greenawalt, *Religion and the Constitution, Volume 1: Free Exercise and Fairness* (Princeton, NJ: Princeton University Press, 2014), 129.

[53] Berger, *Law's Religion*, 13.

religion at the level of the Supreme Court. In many respects, Canada's understanding of religion differs from that of the United States and France outlined above. There is not nearly as much state-sanctioned, public, visible monotheism in Canada as there is in the United States, nor is Canada's separation of Church and State as strict as that of France. Indeed, while the preamble of the *Canadian Charter of Rights and Freedom* reads that "Canada is founded upon principles that recognize the supremacy of God and the rule of law,"[54] this statement is, nonetheless, not aggrandized in political discourse, and probably remains unknown to many citizens. Moreover, in Canada, laws prohibiting private citizens or students from wearing religious symbols in their day-to-day life are generally unthinkable, even in the majority French-speaking province of Quebec where France's model of laïcité appears to be more appealing than it is to the rest of Canada.[55]

Another particularity of the Canadian context is the existence of a formal and general definition of religion within the law, which was authored by the Supreme Court in a 2004 ruling on freedom of religion. This definition constitutes the basis for the framework through which religious freedom claims are assessed today. However, as we will see in this section, even this explicit definition does not tell the whole story of the dominant conception of religion in Canadian law, hence the importance of looking beyond the 2004 decision and examining the Supreme Court's overall handling of religious freedom issues to accurately grasp its understanding of religion.

Besides exposing the ways in which the Supreme Court's conception of religion may impact believers, the examination that I propose in this chapter aims to draw attention to two main areas of uncertainty and debate in the field of law and religion in Canada. The

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[54] *Canadian Charter of Rights and Freedoms*, preamble.

[55] After over ten years of agitated debate, the government of Quebec passed a law in 2018 which prohibits state representatives in a position of coercive authority, including school teachers who are deemed to exercise an influence on their students, to wear religious symbols. The law remains contested within the population and any law that would go further than this one to impose a wider prohibition on religious symbols, is, I believe, unlikely to be adopted in the foreseeable future. See Simon Jolin-Barrette, "*Bill 21, An Act respecting the laicity of the State*," (National Assembly of Quebec, 2019). http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-21-42-1.html?appelant=MC. Moreover, because it was deemed highly probable that the law would be overturned by the courts (and, in particular, by the Supreme Court of Canada), this bill relies on Section 33 of the *Canadian Charter* (the so-called notwithstanding clause) to have effect despite the freedom of religion guaranteed by the *Canadian Charter* and the *Quebec Charter of Human Rights and Freedoms*. In the light of the above discussion, this underscores some differences in the conception of religion in Quebec and in the rest of Canada.

first one concerns the value that the Court attributes to religion. Per my reading, the question of why the Court thinks religion is important to protect has not been convincingly answered in the scholarship. The second area of debate concerns the proper use of equality in religious freedom cases. While some scholars implicitly draw on a principle of equality to reveal the ways in which the law may disadvantage certain forms of religious expression, others claim that religious liberty is increasingly being eroded by appeals to equality. Though these two accounts provide helpful insights into the Court's handling of religion, I maintain that they nonetheless fail to address the very challenge that balancing equality and liberty poses for the Supreme Court in an age of diversity.

My overarching aim in this chapter is to underline the central place of values in the judicial regulation of religion. Values—understood here as moral ideals, or, as described by Norbert Paulo, "goals or aspirations that exceed obligations" such that "they are warranted, but not strictly required"[56]—play an important role in the resolution of freedom of religion cases. Some overarching values, such as equality and respect for diversity, are at times explicitly endorsed (or rejected) as criteria guiding Court reasoning, and have, as a result, been examined in the literature. Yet other values, like the value attributed to religion, remain very much tacit in Court rulings—so much so that very little has been said on the topic. Per my reading, the question of religion's value is conflated in the literature with the question of the nature of religion, leading scholars to overlook the ways in which the two levels of analysis interrelate (a lacuna that I tackle in Chapter 3). By clearly delineating the two matters and by bringing the focus onto the value that the Court ascribes to religion, on the one hand, and the values that it ascribes to Canadian society, on the other hand, this chapter aims to produce a fuller and more accurate account of the Court's handling of religion in religious freedom cases.

With the goal of briefly introducing a few elements of the Canadian legal system, this chapter will examine these issues through a discussion of two topics that have drawn the attention of scholars of law and religion in the last few decades: namely, 1) the Court's understanding of the concept of religion (including its nature, value, and place in society)

[56] Norbert Paulo, *The Confluence of Philosophy and Law in Applied Ethics* (London: Palgrave Macmillan, 2016), 120.

and 2) the way that the Court has proceeded to determine whether freedom of religion can be hindered.

The Concept of Religion

Freedom of conscience and religion in Canada is guaranteed by section 2(a) of the *Charter of Rights and Freedoms*. The *Charter*, however, does not provide us with more information on what this freedom entails, and so the task of defining the meaning and scope of "conscience" and "religion" has been, for the most part, left to the courts. A good starting point to inquire into the law's understanding of the concept of religion is to look at the law's framework for determining whether a claim for religious freedom is entitled to protection from the *Canadian Charter*.

The Court's Explicit Framework

In 2004, the Supreme Court of Canada established a new framework to assess claims for religious freedom. Under this framework introduced in the ruling *Syndicat Northcrest v. Amselem,*[57] the Court explained that the best way to assess a claim for freedom of religion was to determine the "sincerity" of the claim. Consequently, to formulate a legitimate claim for religious freedom, one must first pass a so-called "sincerity test" whereby one demonstrates that one's religious beliefs are, in fact, "real."

The sincerity test was developed and introduced by the Supreme Court in *Syndicat Northcrest v. Amselem.*[58] The Court was tasked with determining whether a religious practice based on a contested interpretation of a particular religious obligation would be eligible for protection under the law. This case involved four Orthodox Jews who set up a succah on the balcony of their condo in Montreal to celebrate the annual nine-day festival of Succot. In keeping with their religious beliefs, they were to dwell in the succah for the whole duration of Succot. However, the declaration of co-ownership they signed when they purchased their unit stipulated that the balconies of the units could not be decorated or altered in any way. Consequently, the condominium syndicate requested the appellants to remove the succah and refrain from erecting them during Succot. The syndicate went on to

[57] *Amselem*.
[58] *Amselem*.

suggest that they could provide them with a space in the building's gardens where they could set up a communal succah every year for the whole duration of the festival. While this arrangement suited three of the appellants, Mr. Amselem rejected it on the basis that he believed his religious obligation was to dwell in his own personal succah. He therefore rejected the syndicate's proposition.

What complicated the matter further was that during the hearings, both parties appealed to a religious authority figure, who presented a different position on the correct interpretation of the biblical text. On the side of the syndicate of co-owners, Rabbi Barry Levy claimed that there was no requirement stating that Jews ought to dwell in their own personal succah. As a matter of fact, Rabbi Levy testified that there was not even an explicit commandment that a succah had to be erected in the first place.[59] On the other hand, Mr. Amselem's expert witness, Rabbi Moïse Ohana, asserted that one could indeed interpret the biblical text as an obligation to erect a personal succah. Rabbi Ohana referred to the Book of Nehemiah, Chapter 8, verses 13 to 18, to support his claim. This passage reads that the Lord had commanded through Moses "that the Israelites were to live in temporary shelters during the festival of the seventh month … . So the people went out and brought back branches and built themselves temporary shelters on their own roofs, in their courtyards … ."[60]

The case was eventually decided in favour of Mr. Amselem in a close, five-to-four ruling where the majority introduced the sincerity test that constitutes the crux of section 2(a)'s analyses today. Writing for the majority, Justice Iacobucci explains that a person is not required to demonstrate that their religious beliefs rest on an accepted religious precept in order to be protected under section 2(a), they must simply satisfy a two-step test whereby they demonstrate:

> [1] that he or she sincerely believes in a practice or belief that has a nexus with religion … [2] that the impugned conduct of a third party interferes with the

[59] *Amselem*, para. 22.
[60] Ne 8:14-16. The passage is cited in *Amselem* without the biblical quote at para. 24 and 32 of the majority ruling, and at para. 163 of Bastarache J.'s dissent.

individual's ability to act in accordance with that practice or belief in a manner that is non-trivial.[61]

This framework is quite broad. On the surface, it allows for the inclusion of a wide array of religious experiences, including forms of lived religion[62] that do not necessarily conform to the normative version of established religions. In fact, being sensitive to the reality of people from different religious background seems to have been one of the objectives of the majority in developing the sincerity test. Expanding on the workings of the test, Iacobucci J. explains that "the court's role in assessing sincerity is intended only to ensure that a presently asserted religious belief is in good faith, neither fictitious nor capricious, and that it is not an artifice."[63] He continues, adding that since religious beliefs are "by their very nature … fluid and rarely static," then "a court's inquiry into sincerity … should focus not on past practice or past belief but on a person's belief at the time of the alleged interference with his or her religious freedom."[64] This means that courts could not overrule one's claim to, say, wear a head covering simply because that person started to wear it recently.

While sincerity was given its full significance in *Amselem*, Lori Beaman observes that "[t]he Supreme Court has alluded to the notion of sincerely held belief since the beginning of post-*Charter* decisions on religious freedom."[65] According to Beaman, the idea that religion is, above all, a matter of sincerity was imported from American law when the Court tackled its first religious freedom cases after the introduction, in the *Constitution Act, 1982* of the guarantee for freedom of religion.[66] Aside from the sincerity test itself, the

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[61] *Amselem*, para. 65.
[62] The expression "lived religion" was popularized notably by Robert Orsi to refer to forms of religious expression that are anchored in the daily life of believers and do not necessarily conform to the formal dogmas of establish religions. See Robert A. Orsi, *Between Heaven and Earth: The Religious Worlds People Make and the Scholars Who Study Them* (Princeton, N.J.: Princeton University Press, 2007).
[63] *Amselem*, para. 52.
[64] *Amselem*, para. 53.
[65] Lori G. Beaman, "Defining Religion: The Promise and the Peril of Legal Interpretation," in *Law and Religious Pluralism in Canada*, ed. Richard Moon (Vancouver: UBC Press, 2008). Citing legal scholar José Woeherling at para. 42 in *Amselem*, the majority observed that the sincerity test is coherent with case law, as "[v]irtually every judicial decision based on s. 2(a) of the *Canadian Charter* … stress[es] the subjective aspect of the believer's personal sincerity rather than the objective aspect of the conformity of the beliefs in question with established doctrine."
[66] Before 1982, there was no constitutional guarantee for religious freedom in the country. The *Constitution Act, 1867* made no mention of freedom of religion. The 1960 *Canadian Bill of Rights*' section 1(c) guaranteed "freedom of religion"; however, this document did not have any constitutional value. For a history of the

novelty in *Amselem* is that the idea that, when it comes to forming a religious belief, a person has autonomy in relation to their own religious community. Prior to that decision, Beaman explains that the idea of sincerely held beliefs in Canadian law had revolved around a person's relationship to the state or society, and merely implied that the state has a duty to ensure that it did not interfere with the sincerely held religious beliefs of citizens of various faiths. In this respect, the *Amselem* decision empowered the subjective aspect of religion.

The majority's enthusiasm for sincerity in *Amselem* was not shared by the principal dissent decision delivered by Justice Bastarache. Rejecting the sincerity test, Bastarache J. suggested that the Court adopt a more stringent three-step test whereby the believer is expected to demonstrate:

> (1) the existence of a religious precept, (2) a sincere belief that the practice dependent on the precept is mandatory, and (3) the existence of a conflict between the practice and the rule.[67]

While sincerity also plays a role in the dissent's proposed test, the requirement to demonstrate the existence of a religious precept places an additional burden on the believer. Under this framework, failure to provide proof that one's belief is based on an accepted objective precept may result in one's claim being considered undeserving of legal protection.

In her book *The Impossibility of Religious Freedom*, Winnifred Sullivan demonstrates how such an approach can have fatal consequences for believers using the courts to defend their faith. Drawing on the U.S. District Court case *Warner v. City of Boca Raton*,[68] Sullivan explores the failure of a judge to protect the religious practice of a group of Catholic, Jewish, and Protestant plaintiffs due to that judge's reliance on notions of

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constitutional guarantee for religion in Canada, see the introduction in Janet Epp Buckingham, *Fighting over God: A Legal and Political History of Religious Freedom in Canada* (Montreal, QC: McGill-Queen's University Press, 2014).

[67] *Amselem*, para. 144. The nature of the required proof is not specified, but the dissent explains that the proof must represent "a body of objectively identifiable data" that "makes it known that [an individual] shares a number of precepts with other followers of the religion." See *Amselem*, para. 135. Expert testimony, such as that provided by a religious leader, is described as an appropriate proof as it can "serve to establish the fundamental practices and precepts of a religion the individual claims to practise." See *Amselem*, para. 140.

[68] *Warner v. City of Boca Raton*, 64 F. Supp. 2d 1272 (S.D. Fla. 1999).

religious orthodoxy. The plaintiffs had erected vertical structures in a cemetery that only permitted horizontal plaques placed directly on the ground to facilitate the maintenance of the cemetery (e.g., mowing the lawn). The vertical structures, including religious statues, vases for flowers, and wood chips, were placed by the plaintiffs to prevent visitors from walking on the tombstones, which they believed would desecrate them. In the process of determining whether this practice constituted an "exercise of religion," which could be exempted from the cemetery's regulations, the plaintiffs were prompted to provide religious texts or doctrine to corroborate their belief. However, as Sullivan points out, the plaintiffs did not believe that this practice was important because it was inscribed in religious texts or encouraged by prominent religious figures; they believed so because their parents and grandparents did the same and taught them it was important to protect tombstones from being stepped on. By focusing on orthodoxy to evaluate the legitimacy of the plaintiffs' claim, the court failed to accurately capture the meaning of their practice and the way that they experienced their religion. As a result, Sullivan explains that "law about religion in the US—what is too often called religious freedom—is broken because, among other reasons, too often law's religion no longer corresponds to the people's religion."[69]

Furthermore, while the plaintiffs were, in fact, able to provide objective sources to ground their claim, Sullivan observes that expert testimony (from religious authorities and academics, including Sullivan herself) did not help to determine whether the plaintiffs' practice constituted an exercise of religion. Since both the plaintiffs and the defendant provided evidence to justify their respective claims, the judge was presented with a diversity of conflicting opinions and ended up only favouring the one that suited him the best. As this case shows, relying on orthodoxy to assess religious freedom claims may be just as tricky as focusing on an elusive notion of individual sincerity. [70]

[69] See Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom*, New Edition ed. (Princeton, NJ: Princeton University Press, 2018 [2005]), preface to the new edition, at xv.

[70] While law in the U.S. also gives importance to sincerely held beliefs in religious freedom claims, Sullivan's argument is that despite law's claim that one's sincerity ought to constitute the point of reference to assess religion, courts often draw on notions of religious orthodoxy to assess the legitimacy of religious freedom claims. As we will see below, this argument also appears to have relevance in the Canadian context.

Returning to *Amselem*, it is interesting to look more closely at the point of contention between the majority's subjective approach and the dissent's objective approach. Even if the test that is used to assess religious freedom cases today is founded on the majority's conception to religion, it is interesting to study this dominant understanding against the dissent's conception of religion. Indeed, the difference between the two approaches makes evident how different conceptions of religion impact the scope of freedom of religion. My suggestion here is to examine the defining characteristics of each approach through the perspective of religious studies. Indeed, the subjective and objective approaches used in law are reflected in the field of religious studies, as they respectively share many similarities with the phenomenological and the materialist approaches to the study of religion. The debates surrounding each approach in the field of religion thus serve as a helpful terrain for identifying some of the challenges at the heart of the current legal framework.

According to the majority judges in *Amselem*, sincerity should constitute the basis for assessing religious freedom claims because religion's *locus* is, above all, within the self. Because of the fundamentally subjective nature of religion, it would be erroneous for courts of law to require that one provide anything beyond proof that one's claim is sincere. Iacobucci J. gives the following definition of religion:

> In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.[71]

Had the majority judges been scholars of religion, they would be adherents of the phenomenologist school. This school considers the first-person experience of religion as the primary, and most essential, viewpoint through which to study religion. Notable phenomenologists of religion have indeed argued that the smallest common denominator between religions is the subjective feeling of connection to the divine that resides within the individual. To cite only a few, William James describes religion as "the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to

[71] *Amselem*, para. 39.

stand in relation to whatever they may consider the divine."[72] For Rudolf Otto, religion is a "creature-feeling" in the face of the apprehension of a "wholly other" that is "beyond the sphere of the usual, the intelligible, and the familiar".[73] Friedrich Schleiermacher similarly describes religion as a feeling of dependence on the grandeur of the universe; an intuition of the "Infinite in the finite" unique to the human kind.[74]

These definitions of religion all resonate with that of the majority in *Amselem*. They all distinctly focus on the individual and on how the individual subjectively feels with respect to his or her religious beliefs. Consequently, in the field of law, it is this connection between the believer and the "ultimate reality" specifically that ought to be the object of legal protection since it is this personal connection that characterizes the essence of religion best. Thus, because the subjective and phenomenological approaches give so much weight to the individual, the best way to assess religion (or, for phenomenologists, the best way to study religion), is through the comprehension of the subjective experience of religious individuals. The way that believers themselves experience their connection to the divine is not only viewed as essential to accurately understand the religious phenomenon; it is also the only way to "access" it.

Not surprisingly, the dissent presents an entirely different concept of religion. Contrary to Iacobucci J., Bastarache J. considers that religion is above all a collective system of meaning. He writes:

> a religion is a system of beliefs and practices based on certain religious precepts. … Religious precepts constitute a body of objectively identifiable data that permit a distinction to be made between genuine religious beliefs and personal choices or practices that are unrelated to freedom of conscience. … By identifying with a religion, an individual makes it known that he or she shares a number of precepts with other followers of the religion.[75]

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[72] William James, *The Varieties of Religious Experience: A Study in Human Nature* (New York: Routledge, [1902] 2002), 29-30, italics removed.
[73] Rudolf Otto, *The Idea of the Holy: An Inquiry into the Non-Rational Factor in the Idea of the Divine and its Relation to the Rational*, trans. John W. Harvey (Oxford: Oxford University Press, 1923), 26.
[74] Friedrich Schleiermacher, *On Religion: Speeches to its Cultured Despisers*, trans. John Oman (New York: Harper & Row, 1958), 36.
[75] *Amselem*, para. 135.

According to this conception of religion, the focal point of religion is not so much to be found in individuals' connection with the divine, but rather in individuals' connection with their religious community. By situating the *locus* of religion in the collective body, the dissent—just like materialists of religion—argue that the best way to assess or study religion is through the collectively endorsed, and, hence, objectively identifiable, sources (such as religious texts or codes of conduct) that serve to channel a group's worldview and self-understanding.

On the one hand, the majority argues that religion is about deeply held personal beliefs that have a nexus with the divine and maintains that such beliefs are best studied through an assessment of the believer's sincerity. On the other hand, the dissent claims that religion is a system of beliefs and practices, which are based on religious precepts, and argues that only objective sources can serve to assess the sincerity of a claim. One side stresses the personal and internal dimension of religion, whereas the other emphasizes the collective and shared dimension of religion. The debate is familiar to scholars of religion: the majority considers religion from a phenomenological perspective, while the dissent views it from a materialist angle.

It is one thing to consider this debate from the perspective of religious studies, but quite another to do so from the perspective of the law. When the debate between phenomenologists and materialists enters the realm of law, it takes on a very concrete outlook. What amounts to, in the field of religious studies, a methodological disagreement regarding the proper way to study religion becomes, in law, a conflict over the scope of religious freedom, which impacts religious individuals using the courts to defend their right to religion in a meaningful way. In *Amselem*, for example, the majority goes on to identify three types of, what I call, "the sincere believer," which follow from the subjective conception of religion. That is to say, three types of believers who could theoretically formulate a legitimate claim to religious freedom. They are described as follows:

> regardless of the position taken by religious officials and in religious texts, provided that an individual demonstrates [1] that he or she sincerely believes that a certain practice or belief is experientially religious in nature in that it is either objectively required by the religion, or [2] that he or she subjectively believes that it is required by the religion, or [3] that he or she sincerely believes that the practice engenders a

> personal, subjective connection to the divine or to the subject or object of his or her spiritual faith, and as long as that practice has a nexus with religion, it should trigger the protection of [freedom of religion].[76]

It is worth exploring these three types as they mark the contours of freedom of religion in Canada in the present time.

The first type of sincere believer is the most straightforward one. It corresponds to the believer who might easily pass the more stringent objective test proposed by Bastarache J. Indeed, while the subjective approach stresses the personal dimension of religion, it does not dismiss that one can find the sources of one's personal connection with the divine within an objectively identifiable framework provided by a collectivity of people. In this respect, the subjective approach encompasses the objective approach: referring to objective sources is a legitimate way to "prove" one's sincerity under the subjective approach. In this first scenario, we can expect that assessing the sincerity of the believer would not be too challenging for the courts.

The second type of sincere believer corresponds to the specific situation of Mr. Amselem: that of an individual subjectively believing that their religion requires them to do something. In such cases, assessing the sincerity of the believer is more complex since the connection with an objectively identifiable religious precept is more tenuous. Nonetheless, the Court may still assess the claimant's credibility within the general framework provided by their religion. The fact that the claim ties the individual to a particular religious group facilitates the judges' task in this regard: they have a point of reference against which to assess the sincerity of the subjective claim.

In *Amselem*, for instance, Avigail Eisenberg notes that Mr. Amselem's argument was that "Judaism plausibly required him to build a succah on his balcony."[77] And, as it turns out, both the majority and the dissent found that claim to be plausible despite its controversial nature within the claimant's community. The difference between the majority and the dissent's approach in this respect is how they reached this conclusion. For

[76] *Amselem*, para. 69.
[77] Avigail Eisenberg, "What is Wrong with a Liberal Assessment of Religious Authenticity?," in *Authenticity, Autonomy and Multiculturalism*, ed. Geoffrey Brahm Levey, Routledge studies in social and political thought (New York: Routledge, 2015), 152.

Bastarache J., the claim is legitimate because Rabbi Ohana pointed to a relevant biblical passage and explained that this passage could be interpreted as requiring the erection of a personal succah. It did not matter that Rabbi Levy's testimony differed; evidence provided from one Rabbi sufficed to establish the proof that the claim was founded on a religious precept. Iacobucci J., on the other hand, opts to avoid the debate over the correct interpretation of the biblical text. In accordance with his statement on the legitimacy of the claim formulated by the second type of sincere believer, Iacobucci J. argues that it was not the role of the courts to determine the content of a religious obligation, and that to exclude non-obligatory religious experiences from the scope of religious freedom is, in any case, undesirable.[78] Instead, he jumps right to the question of the harm that would be done to Mr. Amselem's religious practice should he not be granted an accommodation. Iacobucci J. reasons that if, as Rabbi Ohana testified, "according to Jewish law the obligation of 'dwelling' must be complied with festively and joyously, without causing distress to the individual," then Mr. Amselem's practice would be greatly harmed by "the extreme unpleasantness rendered by forced relocation to a communal succah, with all attendant ramifications, for the entire nine-day period".[79]

Obviously, the majority accepted that Mr. Amselem's claim is sincere, otherwise it would be difficult to see how they could have established that using a communal succah would harm his religious belief. Nonetheless, the majority comes off as reluctant to tell us how precisely they reached such a conclusion without making any reference to a piece of objective evidence. In fact, despite their refusal to address the content of the religious obligation, the majority finds itself drawing on Rabbi Ohana's testimony to establish the harm done to Mr. Amselem.

Relying on expert testimony appears to be a common occurrence in law, despite the prevalence of the subjective approach to religion. Eisenberg, for instance, claims that, in reality, the Court has never relied exclusively on subjectivity to assess the sincerity of a claimant; the Court has thus far always required at the minimum "evidence that practices fit within a broad community of faith."[80] Furthermore, Beaman observes that judges do not

[78] *Amselem*, para. 67-68.
[79] *Amselem*, para. 73.
[80] Eisenberg, "What is Wrong with a Liberal Assessment of Religious Authenticity?," 152.

refrain from using the language of necessity, requirement, compliance, and religious tradition to support their decision to include a religious belief or practice within the scope of section 2(a).[81] This bring us back to Sullivan's critique of the *Warner* case: despite the law's claim that sincerity ought to constitute the main point of reference to assess religion, courts often find themselves implicitly drawing on religious precepts to assess religion. The result may then be that judges end up randomly picking the "objective" evidence that suits them best to support their conclusion. Whereas this bias did not result in a favourable outcome for the religious claimants in *Warner*, it did in the case of *Amselem*. As we can see, at the level of the second type of sincere believer, there remains a significant overlap between the subjective and the objective approaches.

The distinction between the subjective and objective approaches really emerges at the level of the third type of sincere believer. That is, an individual who holds a subjective belief that has a "nexus with religion." Under the objective approach, this type of believer would not have a claim to religious freedom.

This type of sincere believer is the most problematic one since, understood broadly, it could open the door to idiosyncratic claims for religious freedom.[82] Those types of claims, although one may argue that they are as legitimate as claims that tie in with a collective body of believers, are much more difficult—if not impossible—to evaluate in law. While this "hypersubjective"[83] category of sincere believer merely gives prominence to the majority's view of religion as located within the self, it does so by claiming, as Louis-

[81] Beaman, "Defining Religion," 203. Similarly, Lefebvre argues that there is a "relative contradiction between the affirmation of the secondary character of dogma, doctrine, or orthodoxy and the persistent reference to these aspects as criteria to judge the sincerity or noneccentric nature of belief." See Solange Lefebvre, "Religion in Court, Between an Objective and a Subjective Definition," in *Reasonable Accommodation: Managing Religious Diversity*, ed. Lori G. Beaman (Vancouver: UBC Press, 2012), 47.
[82] See Sara Weinrib, "An Exemption for Sincere Believers: The Challenge of Alberta v. Hutterian Brethren of Wilson Colony," *McGill Law Journal* 56, no. 3 (2011).; Daniel Weinstock, "Beyond Objective and Subjective: Assessing the Legitimacy of Religious Claims to Accommodation," *Les ateliers de l'éthique / The Ethics Forum* 6, no. 2 (2011).
[83] I borrow this expression from Solange Lefebvre. See Lefebvre, "Religion in Court."

Philippe Lampron observes, that religious beliefs have "an eminently non-demonstrable character."[84]

Similar critiques have been addressed to the phenomenologists of religion. For instance, in his study of Buddhist modernism, Robert Sharf observes that "[b]y situating the locus of religious signification in phenomenological 'inner space,' religion is securely sequestered beyond the compass of empirical or social-scientific modes of inquiry."[85] In other words, at the same time as the phenomenological school tries to capture religion in a more universal manner, it renders the notion more elusive and concomitantly, more difficult to study. According to this critique, scholars of religion thus find themselves in a position where they cannot fully grasp their object of study in any meaningful way.

In the context of the law, this critique amounts to saying that the subjective approach to religion does not offer sufficient judicial security. Since it does not offer concrete tools through which to assess religion, fraudulent claims could too easily pass as legitimate. Just like the scholar of religion who ends up with fewer means to meaningfully grasp the religious experience from an outsider's perspective, courts endorsing this view may end up confronted with an ill-founded claim that the current framework gives them no reason nor means to reject.

Since the *Amselem* decision was rendered nearly two decades ago, it never happened that the Supreme Court was confronted with an idiosyncratic claim for religious freedom. According to Sara Weinrib, since *Amselem* concerned the second type of sincere believer, the majority never got the chance to fully address the type of evidence that would be required from a believer that fits within this third type. Should such a claim be formulated, Weinrib believes that the Court would have to give further guidelines on how to assess these types of claims in order to ensure that potentially fraudulent claims are excluded from the protection for religious freedom.[86]

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[84] Louis-Philippe Lampron, "Pour que la tempête ne s'étende jamais hors du verre d'eau : Réflexions sur la protection des convictions religieuses au Canada," *McGill Law Journal / Revue de droit de McGill* 55 (2010): 750, my translation.
[85] Robert H. Sharf, "Buddhist Modernism and the Rhetoric of Meditative Experience," *Numen* 42, no. 3 (1995).
[86] Weinrib, "An Exemption for Sincere Believers," 739.

We started this section asking ourselves how secular courts of law go about defining religion. Our reading of *Amselem* showed us that the framework that law uses to assess religion is not concretely impartial: it takes position in the debate on the nature of religion to say that religion is above all personal and subjective, and this statement impacts the contours of religious freedom in Canada. While the *Amselem* decision is quite explicit in terms of defining religion's nature for the law's purposes, it does not, however, offer a full picture of law's framework to assess religion. In the next section, I turn to the sources that implicitly inform law's understanding of religion.

The Court's Implicit Framework

In his in-depth study of Canada's constitutional law's entanglements with religion *Law's Religion: Religious Difference and the Claims of Constitutionalism*, legal scholar Benjamin Berger argues that the law's particular understanding of religion is far from coincidental. "[I]n addressing issues of religious difference, equality, and freedom," Berger writes, "law fashions religion in its own cultural image and likeness."[87]

This simple yet strong claim is an intuitive one for the scholar of religion. It ties into some of the challenges related to the translation of the concept of religion from one culture to another, and from one language to another. For instance, when I, as a Western scholar, try to make sense of a concept of religion in Eastern cultures, I necessarily draw from my own cultural references to do so. In this translation, I find myself at a disadvantage, unable to truthfully grasp the original meaning of the concept. I may stress or diminish aspects of the concept of religion simply because I expect it to be comprised of certain elements and not others; because from my perspective, those are the elements that religion is comprised of.

Such challenges related to the translation of the concept of religion are well represented in Chiara Letizia's ethnographic study of secularism in contemporary Nepal.[88] Her study reveals that secularism in Nepal has been rejected by many Nepalese who appear to take issue first and foremost with the expression itself. "Secularism"—a concept that

[87] Berger, *Law's Religion*, 19.
[88] Chiara Letizia, "Shaping Secularism in Nepal," *European Bulletin of Himalayan Research* 39 (2012).

emerged in the majority-Christian West—was translated in Nepalese by "*dharma nirapeksha*", meaning "autonomous from; indifferent, impartial to dharma". Letizia explains that, since the meaning of "dharma" in Nepal is much broader than the meaning of "religion" in the West, the concept of secularism as designating a state free from religion cannot be adequately captured by the expression *dharma nirapeksha*: "the meaning of *dharma nirapeksha* is 'state without religion', something that cannot exist anywhere in the world, as no political power can eradicate values, beliefs and traditions."[89] For this reason (among others), Letizia points out that the concept of *dharma nirapeksha* has remained quite "unpalatable" for many Nepalese since it has been introduced in Nepal in the late 2000s.

This is, in a nutshell, Berger's central premise in *Law's Religion*. In order to be "palatable" for the legal system, religion must always be processed through law's own cultural reference points. And, in the process, just like I might end up altering some of the crucial aspects of "dharma" if I translate it to "religion" for a Western audience, or, vice-versa, if I use "dharma" in front of an Eastern audience to designate the notion of "religion" as it is generally understood in the West, the law's cultural background impacts its ability to truthfully assess religion and religious freedom claims. Whether we are a scholar of religion or a judge, our presumptions about what constitutes religion inform the way we look at religion. The difference lies in the law's power to overrule those conceptions of religion that do not sit well with its own. As Robert Cover argues in *Nomos and Narrative*, when dealing with religion and religious worldviews, the law's force is double: on the one hand, the law creates its own system of meaning, and on the other, it imposes it over competing ones.[90] As we have seen through our review of the *Amselem* case, the law both defines religion and draws on its own definition of religion to rule in conflicts involving religion. The law's definition of religion might not be consistent with the believer's experience of religion; however, the law's position of power in the liberal state implies that when judges assert that, for the purposes of section 2(a), religion should be regarded in such a way, they render their own interpretation the only legitimate one.

[89] Letizia, "Shaping Secularism in Nepal," 85.
[90] Cover, "Nomos and Narrative."

Berger identifies the law's main cultural source as the contemporary liberal political culture. Canadian law's "theory of religion," he claims, is crucially infused with liberal ideas about the world. As such, Berger paints a picture of religion in Canadian law as (1) an individual phenomenon (2) that is an expression of autonomy and choice and (3) that belongs in the private sphere of personal preferences and interests. In other words, the Supreme Court of Canada considers that religion's *nature* is personal; that religion's *value* is that it allows individuals to exercise their autonomy and make choices concerning how to live a good life; and finally, that religion's *place* is in the private sphere.

Given the comprehensive scope of Berger's study of law and religion in Canada, this section will follow his three claims to identify areas of debate in the field. As we will see, while there are opponents to the law's understanding of religion as personal and private, it is generally accepted that Canadian law regards religion through such a lens. It is rather the question of the value that the Court attributes to religion that has been disputed among authors in the field.

Religion's Nature

Upon our reading of *Amselem* from both a legal and a religious studies perspective, Berger's claim that the law considers religion as a personal phenomenon does not come as a surprise. What Berger adds to our reading is an explanation for this preference. The law's penchant for the individual believer rather than the community stems, according to him, from the fact that the modern idea of universal human rights revolves around the respect for the dignity of each individual. Because liberalism "see[s] the individual far more clearly than the associational and relational,"[91] the law is naturally inclined to think of freedom of religion as beneficiating primarily the individual believer. Likewise, in *Fighting Over God: A Legal and Political History of Religious Freedom in Canada*, Janet Epp Buckingham explains that the fact that "[t]he Charter has largely been interpreted as a guarantee of individual rights" has led group rights to be "viewed with suspicion because recognition of

[91] Berger, *Law's Religion*, 73.

group rights may lead to curtailing individual rights."[92] For this reason, freedom of religion largely remained tied to notions of personal belief and individual practice.

While Berger's explanation is original, many scholars share his view that Canadian Courts tend to see religion on a personal basis. Writing on Canada's commitment to multiculturalism, Howard Kislowicz observes that the law "focuses on religion's significance to the individual." That is, the law is primarily concerned with "*personal* convictions, *individual* self-definition and spiritual fulfilment, and the spiritual practices of *individuals*".[93] According to M. H. Ogilvie, this approach to religion is not new. In her study of the *Amselem* decision, she notes that "[t]he characterisation of religion under section 2(a) of the Charter has, since the first case of *R v Big M Drug Mart*, focused on the individual rather than on religious institutions."[94] Indeed, in this first post-*Charter* court case dealing with freedom of religion, the Court noted that

> [f]reedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.[95]

In other words, citizens have the right to be free *from* religion, and may also enjoy freedom *of* religion.

In *Big M*, the case concerned freedom *from* religion: the Court overturned the *Lord Day's Act* compelling businesses to close on Sunday, as the *Act* was deemed to coerce citizens into respecting a Sunday sabbath, insofar as it was deemed to "[bind] all to a sectarian Christian ideal".[96] In *Amselem*, on the other hand, the main concern was with freedom *of* religion: the Court allowed Orthodox Jews to install a succah on their balconies. According to Ogilvie, by drawing on the *Big M* framework, which stressed the importance

[92] Buckingham, *Fighting over God*, 221.
[93] Howard Kislowicz, "Freedom of Religion and Canada's Commitments to Multiculturalism," *National Journal of Constitutional Law* 31 (2012): 11.
[94] M. H. Ogilvie, "And Then There Was One: Freedom of Religion in Canada - the Incredible Shrinking Concept," *Ecclesiastical Law Journal* 10, no. 2 (2008): 201.
[95] *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 SCR 295, para. 95.
[96] *Big M*, para. 97.

of the individual over that of their community, the majority in *Amselem* merely bolstered its claim that religion is above all about the individual believer:

> the earlier emphasis [of *R v Big M Drug Mart*] on the individual, in contradistinction to a powerful state, is transformed [in *Amselem*] into an emphasis on an individual asserting a subjective 'religious' belief, in contradistinction to other individuals asserting conflicting rights to contract and property.[97]

Since the majority in *Amselem* does not believe it is the role of the Court to rule on the doctrinal accuracy of a religious belief, it ends up emphasizing each believer's own interpretation, thus reinforcing its vision of religion as an individual phenomenon.

The law's emphasis on the personal nature of religion must, however, be nuanced since, as we have seen, judges do in fact refer to the requirements and traditions of religious groups before concluding that a claim is sincere. Moreover, in the 2015 ruling *Loyola High School v. Quebec (Attorney General)*,[98] the Supreme Court did recognize that freedom of religion should "account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions".[99] In other words, religious institutions, just like religious individuals, may make claims to religious freedom. While this indicates that the Court does not understand religion in a way that strips it from any collective meaning, the scholarship reveals that there is, nonetheless, a dominant tendency to rely on the individual believer rather than on the community to make sense of, and ground, the legitimacy of religious freedom claims.[100]

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[97] Ogilvie, "The Incredible Shrinking Concept," 201.
[98] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 (CanLII), [2015] 1 SCR 613.
[99] *Loyola*, para. 60.
[100] Kislowicz indeed notes in his analysis of the *Loyola* decision that the Court's reasons are not "explicit about whether the protection of the collective dimensions of religious freedom derives from the value of religious freedom to the individual." According to him, it is possible to interpret the ruling as "supporting the perspective that individuals need religious freedom to be protected on a collective level in order to fully live out their individual religious commitments." See Howard Kislowicz, "Loyola High School v. Attorney General of Quebec: On Non-Triviality and the Charter Value of Religious Freedom," *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 71 (2015): 346, https://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/13/. Alvin Esau furthermore observes that while the minority concurrence in *Loyola* maintained that religious organizations could make religious freedom claims in order to give meaning to the collective dimension of religion, the majority "did not reject the possibility that institutions, and not just individuals, have freedom of religion claims under the Charter, but rather that it was unnecessary to decide on this issue." See Alvin A.J. Esau, "Collective Freedom of Religion," in *Religious Freedom and Communities*, ed. Dwight G. Newman (Toronto: LexisNexis, 2016), 77.

Religion's Value

Yet, there is more to say about the Supreme Court's understanding of religion that does not concern how the law conceptualizes the nature of religion. In particular, the value that the Court attributes to religion plays a role in rulings: if the Court values religion to a great extent, it is more likely to adopt a resolute approach to protecting religion than if it fails to see any inherent value to religion. Moreover, as the debate reveals, the specific value that the Court attributes to religion influences the scope of the protection that it thinks it is allowed or is expected to grant to religion. Just like the question of the nature of religion, the question of its value informs how the Court adjudicates in cases involving freedom of religion. However, the Court is far less explicit on this matter, and uncovering its perception of the value of religion requires paying special attention to the assumptions that guide the Court when it reasons about religion.

Berger's account is that the Supreme Court values religion as a means through which one chooses for oneself how to attain the good life. Since liberal culture understands human flourishing as best served when the individual is able to make their own choices on how to lead their life, the law values religion in the same way that it values personal choices and individual autonomy. This view of religion as the source of individual autonomy seems to be the logical consequence of the liberal society's focus on human rights and the dignity of the individual. Indeed, Talal Asad notes that, through the legal discourse on human rights, "[t]he essence of the human comes to be circumscribed … [as] a *sovereign, self-owning agent … and* not merely a subject conscious of his or her own identity."[101] It becomes essential to safeguard autonomy because it is what allows the individual to make sense of their unique identity. As it turns out, Berger observes that, since the adoption of the *Charter*, the Court's position has been "not to interfere with individual autonomy and … to intervene wherever free choice is constrained."[102] The same goes for religion: in *Big M*, the Court explained that section 2(a) guaranteed both freedom *from* religion (i.e., "not to interfere with individual autonomy") and freedom *of* religion (i.e., "to intervene wherever free choice is constrained"). Even more straightforwardly, Berger notes that the

[101] Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity*, Cultural memory in the present, (Stanford, CA: Stanford University Press, 2003), 135.
[102] Berger, *Law's Religion*, 78.

Court explicitly links religion to individual choice in this decision, claiming that "[t]he essence of the concept of freedom of religion is the right to entertain such religious beliefs *as a person chooses*".[103] Agreeing with Berger's account, Kislowicz adds that *Amselem*'s focus on freely held beliefs "implies that religious convictions are matters of individual choice."[104] Per his view, considering religion as a source of autonomy is a logical consequence of the Court's individualistic approach to religion in *Amselem*.[105]

We could also add, in support of Berger and Kislowicz's claim,[106] Beaman's argument (mentioned above) that, in *Amselem*, the majority positioned the believer as autonomous not only vis-à-vis the state, but also vis-à-vis their own religious community. Indeed, one important consequence of the *Amselem* decision is to acknowledge that believers have agency within their group. As Weinstock notes, such an approach to religion "recognizes that religion is not just something that happens to people, but rather something that people do."[107] Consequently, we could argue that the Court sees the believer as free to disregard some of the religious interpretations of their religious group because it understands religion to be a product of individual autonomy and choice. Believers may adhere to a religious group and they remain free to make their own choices regarding the best interpretation of the good life from within the community. Thus, even if a religious practice is contested, so long as it is tied to the believer's personal understanding of religion it is worthy of protection in the law's liberal imagination.

Berger's claim—that the law understands religion as a product of individual choice—is certainly his most controversial one with respect to his analytical triptych. Other scholars argue that there appears to be a tension in the way that the Court conceives of the value of religion, which pits a view of religion as an individual choice against a view of religion as one's cultural identity. Richard Moon, for instance, contends that, while religion was understood in terms of individual choice in the past, it is not the case anymore. Since

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[103] *Big M*, para. 94, emphasis added.
[104] Kislowicz, "Freedom of Religion and Canada's Commitments to Multiculturalism," 11.
[105] Kislowicz nonetheless notes, quoting Richard Moon, that "there has been a discernible shift from coercion to exclusion … and from liberty to equal respect as the interest protected" in Canadian jurisprudence. See Kislowicz, "Freedom of Religion and Canada's Commitments to Multiculturalism," 16.
[106] My account of Berger's arguments to support his claim is far from exhaustive. For the complete argumentation, refer to chapter 2 of his book Berger, *Law's Religion*, 78-91.
[107] See Weinstock, "Beyond Objective and Subjective," 166.

the adoption of the *Charter*, religious commitment now appears to be tied to cultural identity.[108] According to Moon, this is particularly striking in the way the majority in *Amselem* dealt with the issue of whether the appellants waived their right to freedom of religion when they signed the declaration of co-ownership at the time of purchase.[109] Indeed, despite the majority's claim that religion is individual and personal, it did not seem to consider that religion was analogous to personal choice. As Moon explains, had the majority conceived religion to be a choice, it would probably have ruled that the appellants could have purchased a unit in another building where the erection of structures on the balconies were allowed.[110] If religion is a matter of personal choice, religion loses distinctiveness; its value is reduced to that of other personal choices. Hence, building owners should be able to implement by-laws that limit religious practice in the same way that it can set up by-laws that limit the installation of decorations on the balconies since religious individuals are responsible for their choices, even those that are religious in nature. The logic of personal choice implies, as Moon argues, that "the appellants [are] in the best position to determine, prior to their purchase of a unit in the building, what their religion require[s]."[111] Following this logic, Mr. Amselem could and should have chosen to purchase a unit in another building, since he considered that only a personal succah set up on his balcony would conform with his religious obligations. If, as the logic of choice implies, religious beliefs and practices have intrinsic value only for those who have voluntarily chosen to commit to them, building owners should not be required to accommodate religious practice in their by-laws. Moreover, only those who have voluntarily chosen to commit to a certain belief are in a position to choose whether they want to purchase a unit in a building regardless of whether their by-laws are compatible with their beliefs. According to the logic of choice, should a believer do as the appellants

[108] Richard Moon, "Government Support for Religious Practice," in *Law and Religious Pluralism in Canada*, ed. Richard Moon (Vancouver: UBC Press, 2008). See also Avigail Eisenberg, "Choice or Identity? Dilemmas of Protecting Religious Freedom in Canada," *Recode Online Working Paper* 24 (2014). I will say more on the definition of "identity" in the next chapter.
[109] Richard Moon, "Religious Commitment and Identity: Syndicat Northcrest v. Amselem," *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 29 (2005).
[110] This was the conclusion reached by Justice Binnie. According to Moon, "[i]f religious commitment is, as the majority judgment described it, personal and individual, then Binnie J.'s response seems the right one." Moon, "Religious Commitment and Identity," 210.
[111] Moon, "Religious Commitment and Identity," 210.

in *Amselem* and purchase such a unit, they would merely be exercising their autonomous judgement not to act on that particular belief.[112]

This is not what the majority concluded in *Amselem*. Rather, the majority concluded that the appellants did not and could not have waived their right to freedom of religion when they signed the declaration of co-ownership, for three reasons. Firstly, the by-laws were not unconditional, as they "[permitted] the covering and enclosure of balconies, but only with the consent of the co-owners or the directors".[113] Secondly, the appellants had no choice but to sign the declaration of co-ownership to finalize the purchase of their unit. In this context, the Court found that "[i]t would be both insensitive and morally repugnant to intimate that the appellants simply move elsewhere if they took issue with a clause restricting their rights to freedom of religion."[114] Finally, the declaration did not make any explicit mention that it encompassed fundamental freedoms, such that it is impossible to conclude that the appellants voluntarily waived their right to freedom of religion when they signed the declaration of co-ownership. In other words, the waiver was the problem, not the religion of the appellants. This reasoning seems to reveal that the majority values religion more than it values personal choices; it values religion, Moon argues, because religion is part of one's identity.

If we consider that religion is tied to identity, then any by-laws that prevent Orthodox Jews from practicing their religion are discriminatory. In the logic of identity, upholding a requirement that results in the exclusion of the members of a religious group from accessing property (or any other goods or services), would "[signal] to the members of the non-favoured religious groups that they do not deserve the same respect as others."[115] In a liberal democracy, this simply cannot hold. This seems to be Iacobucci J.'s approach in *Amselem*. Otherwise, as Moon contends, it is difficult to see how he could have concluded that the appellants did not waive their right to freedom of religion when they signed the declaration of co-ownership.

[112] Moon, "Religious Commitment and Identity," 210.
[113] *Amselem*, para. 94.
[114] *Amselem*, para. 98.
[115] Moon, "Religious Commitment and Identity," 212.

According to Moon, the identity approach can be traced back to earlier post-*Charter* decisions. In *Big M*, for instance, Moon argues against Berger that, despite the fact that the Court "formally described the wrong addressed by s. 2(a) as coercion in spiritual matters," it seems to have perceived the wrong of the *Lord's Day Act* to be located in the fact that it "[signaled] to non-adherents that they [were] not full members of the political community," which, in turn, "[contributed] to their social or political marginalization."[116] In other words, the wrong addressed in *Big M* was not really the coercion of individual autonomy, as Berger argues, but rather the exclusion of certain religious identities from public life.

Moon continues his argument by claiming that this explains why the Court did not also overrule the *Retail Business Holidays Act* a year after it overruled the *Lord Day's Act*, in the case of *R. v. Edwards Books and Art Ltd.*[117] As opposed to *Lord's Day Act*, which was intended to encourage the observance of the Christian Sabbath, the *Retail Business Holidays Act* compelled retail businesses to close on Sunday for the secular reason of securing a common day of rest to employees. In this case, the Supreme Court found that the law was legitimate since it only indirectly impacted the religious freedom of retailers who respected a different day of rest and thus had to close their business on two different days to conform with the law and their religion. While the Court recognized that this burdened their religious practice, it maintained that freedom of religion did not "require the legislatures to eliminate every miniscule state-imposed cost associated with the practice of religion."[118] If, as Berger claims, religion is considered primarily as a matter of choice, it is difficult to see why the *Lord's Day Act* was not upheld for the same reasons that the *Retail Business Holidays Act* was upheld. If religion is conceived as a choice, it does not matter whether the law has a religious or a secular purpose; both Acts burden one's capacity to choose to observe Sabbath on another day than Sunday to the same extent. However, in the logic of identity, the *Lord Day's Act* sends a message of exclusion to non-Christians, while the *Retail Business Holidays Act* does not (or, at least, not straightforwardly).[119]

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[116] Moon, "Government Support for Religious Practice," 222-23.
[117] *R. v. Edwards Books and Art Ltd.*, 1986 CanLII 12 (SCC), [1986] 2 SCR 713.
[118] *Edwards Books*, para. 97.
[119] The Court itself seems comfortable with Moon's interpretation of as valuable because it is tied to one's sense of identity. In *Loyola High School v. Quebec (Attorney General)*, Abella J., writing for the majority, quoted Moon as follows: "As Prof. Moon noted: "Underlying the [state] neutrality requirement, and the

According to Eisenberg, the turn post-*Charter* to a conception of freedom of religion in terms of identity is not that surprising if we look at the global context in which the *Charter* was enacted. "Since the 1970s at least," she claims "various groups in the West have increasingly made claims before domestic and international courts for the recognition or protection of some aspect of their identity, in many cases to contest the ways in which they have been incorporated into the state."[120] When the new *Constitution Act* was enacted in 1982, not only did many of the revisions to the document echo this global "political optimism about the potential democratizing effect of using identity to advance individual freedom, equality and group emancipation,"[121] but, more broadly, identity became the focus of rights claims.

Eisenberg's claim here is that liberalism's focus is not merely on the individual as Berger underlined; it is also on identity. This is an important distinction. While both scholars point to the political liberal culture as a source that informs the law's vision of religion, Eisenberg's account stresses a feature of the individual that liberalism holds in esteem. Thus, by pointing out that identity is a crucial component of the individual, Eisenberg refutes Berger and Kislowicz's claim that the Court's individualistic approach to religion presupposes that the Court values religion as a choice or as a source of individual autonomy.

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insulation of religious beliefs and practices from political decision making, is a conception of religious belief or commitment as deeply rooted, as an element of the individual's identity, rather than simply a choice or judgment she or he has made. Religious belief lies at the core of the individual's worldview. It orients the individual in the world, shapes his or her perception of the social and natural orders, and provides a moral framework for his or her actions. Moreover, religious belief ties the individual to a community of believers and is often the central or defining association in her or his life. The individual believer participates in a shared system of practices and values that may, in some cases, be described as "a way of life". If religion is an aspect of the individual's identity, then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual's views and values, it is denying her or his equal worth." See *Loyola*, para. 44. In *Mouvement laïque québécois v. Saguenay (City)*, Gascon J., writing for the majority, quoted the same extract in an abridged version. See *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 (CanLII), [2015] 2 SCR 3, para. 73. These rulings admittedly reveal that the Court is supportive of a view of religion as tied to one's identity. In both cases, the Court went on to draw from the identity argument to ground its reasons in support of religious pluralism, in the case of *Loyola*, and in support of state neutrality, in the case of *Saguenay*.

[120] Eisenberg, "Choice or Identity?," 4.

[121] Eisenberg, "Choice or Identity?," 4. According to Eisenberg, this is reflected in sections of the *Charter* that protect equality (section 15), the linguistic rights of French and English minorities (sections 16-22), the multicultural character of Canadian society (section 27), and Indigenous Peoples' rights (section 35).

Indeed, like Moon, Eisenberg argues that, since the adoption of the *Charter*, the identity approach guides legal reasoning. She notes, for example, that the rationale in *Multani v. Commission scolaire Marguerite-Bourgeoys*,[122] which led the Court to allow the wearing of the Sikh kirpan in Quebec's public schools, rested in part on the idea that "[a]n absolute prohibition [of the kirpan in schools] would stifle the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others."[123] If the Court understood religion to be primarily a matter of choice, then it should have examined "whether the school's no weapons policy undermined Multani's right to exercise his choice about practicing his religion."[124] However, the Court drew on the broader notion of equal respect to support its conclusion that kirpans must be permitted in the school system and, moreover, that the kirpan should not be cast as a "weapon," which "[sends] the message that using force is necessary to assert rights and resolve conflict must fail."[125] Indeed, according to the Supreme Court, this would be sending a distorted and degrading image of Sikhism to non-Sikhs, which, in turn, would harm Sikhs' identity. The harm done to the young Multani's religious practice, in this perspective, is cast as a harm done to Sikhs in general.

A more ambiguous example, which clearly illustrates the tension that Moon described between religion as choice and religion as identity, is the case of *Alberta v. Hutterian Brethren of Wilson Colony*.[126] This case concerned a group of Hutterites who requested an exemption from the mandatory photograph on driver's licences in the province of Alberta on the basis of their belief that the Second Commandment ("You shall not make for yourself an idol, or any likeness of what is in heaven above or on the earth beneath or in the water under the earth"[127]) prohibits them from having their photograph willingly taken. While members of the community had previously enjoyed an exemption, the province adopted a new regulation in 2003 that were aimed at reducing identity theft and made the photo requirement universal.

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[122] *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 (CanLII), [2006] 1 SCR 256.
[123] *Multani*, para. 78.
[124] Eisenberg, "Choice or Identity?," 7.
[125] *Multani*, para. 71.
[126] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 (CanLII), [2009] 2 SCR 567.
[127] Exodus 20:4, cited in *Wilson Colony*, para. 29.

The majority ruled that, since the Hutterites could find alternatives to being photographed for their drivers' licenses, such as hiring drivers from outside the community, the benefits of protecting their religious freedom did not out outweigh the detrimental effects (i.e., identity theft) that might result from granting an exemption. According to Berger, the ruling in *Wilson Colony* "shows the maturing of [the Court's] tendency to focus on choice";[128] because the measure left the Hutterites with sufficient choice regarding their religious practice, the limit imposed on their religious belief was deemed "less serious than a limit that effectively deprives the adherent of such choice."[129]

Per Berger's account, this ruling clearly links religion to the capacity for choice. Berger points out that the majority failed to fully weigh the impact of the province's regulations (which means that the Hutterites will not be able to get their own drivers' licences) on the Hutterites' collective way of life as a self-sufficient and segregated community. Had the Court looked at the issue through the lens of identity, it may have considered that the costs of having to hire a driver from outside the community would constitute a substantial burden for a community that has "historically preserved its religious autonomy through its communal independence."[130] It follows that the existence of alternative solutions, which would allow the Hutterites to live by their religious beliefs while conforming to the law, is not a sufficient reason to dismiss their request for an exemption as it would compromise their way of life. As Justice Abella pointed out in her dissent, the majority's decision does not consider the law's impact on the Hutterites lifestyle, an element essential to their identity.

While the majority's ruling in *Wilson Colony* explicitly links religion to "the right of choice on matters of religion",[131] it also makes it clear that, as Eisenberg points out, choice, in this case, stands "in tension with democratic inclusion."[132] Discussing the deleterious effects of the measure on the Hutterites' belief, the Court acknowledges that

[128] Berger, *Law's Religion*, 82.
[129] *Wilson Colony*, para. 95.
[130] *Wilson Colony*, para. 170. In her dissent, Justice Abella stresses the identity component of religion more strongly than the majority, and did, indeed, consider more seriously the burden that having to hire a driver would have on the community. In her opinion, the Hutterites should have been granted an exemption to the mandatory photograph.
[131] *Wilson Colony*, para. 88.
[132] Eisenberg, "Choice or Identity?," 6.

the Hutterites will not be able to obtain drivers' licences as a result of their religious belief. However, it might be a mistake to attribute the justices' willingness to exclude Hutterites from the driving license system to the Court's appraisal of religion as a choice. Perhaps, the Court did not consider that not granting the Hutterites' exemption would amount to their real, democratic exclusion from their provincial rights given the existence of accessible alternatives.

Eisenberg's reading of *Wilson Colony* draws attention to the notion of inclusion in Court decisions. I will say more on this notion in Chapter 4. For now, I ought to limit myself to one observation. As things stand, we can suppose that it is easier for the Court to conceive of religion in terms of choice when it is able to think of alternatives that allow the believer to maintain their beliefs while still being included in Canadian society. In cases like *Multani*, for example, where the prohibition of the kirpan from public schools would result in a straightforward exclusion of all *amritdhari* Sikhs[133] from the public school system, the identity approach seems to impose itself more strongly. In other words, when one's "choice" to live in accordance with one's own religious beliefs is perceived to necessitate excluding oneself from the public sphere (e.g., enroll in private school), the focus shifts to identity. Conversely, when democratic inclusion is considered compatible (albeit in tension) with the choice to live in accordance with one's own religious beliefs, the focus may remain on choice. In both cases, however, the central issue remains democratic inclusion; identity is only brought up when inclusion is infringed. This reveals that that the identity approach may inform decisions more than commonly thought.

Reading through the literature, it is difficult to determine exactly *why* the Court considers religion to be worthy of protection, despite the relevance of this question to the scholarship on law and religion. Indeed, if religion is deemed important because it is the source of cultural identity, we should expect the Court to grant it greater protection and accommodation, since protecting one's identity is essential to ensure that citizens of all

[133] An *amritdhari* Sikh refers to a Sikh (man or woman) who was initiated in the Khalsa and therefore committed to wearing five outward signs of Sikhism known as the "Five Ks." These symbols are: *kes* (or kesh) (uncut hair), *kangha* (comb), *kachh* (cotton breeches), *kirpan* (sword), *kara* (steel or iron bangle). See Eleanor M. Nesbitt, *Sikhism: A Very Short Introduction*, Second edition. Fully updated, new edition. ed. (Oxford: Oxford University Press, 2016), 45-61.

communities are treated equally. If, on the contrary, religion is considered important because it is the source of individual autonomy, then religion becomes tied to liberty rather than equality. As such, religion becomes more vulnerable to the competing rights and interests of others.

According to Moon, "this tension may be unavoidable" since "religion is both a matter of personal commitment and cultural identity."[134] Nonetheless, he continues, this tension in the legal system can also lead court decisions to seem "unprincipled" or even "incoherent."[135] While I believe that Moon is right in pointing out that this tension is unavoidable, I disagree that it must lead us to see court rulings as unprincipled or incoherent. As I will argue in the next chapters, it is possible to make sense of this tension in Canadian law if we consider that religion is valued by the Supreme Court because it is a source of authenticity. As a source of authenticity, religion can be coherently described at once chosen (i.e., part of one's overt self-definition) and tied to one's identity (i.e., discovered through one's assessment of one's inner feelings).

Religion's Place

But before we turn to this topic, there is still one last aspect of Berger's analytical triptych that we have not yet addressed. That is, the place of religion in society. Understanding the Court's vision of the place of religion is particularly relevant to make sense of cases involving state neutrality. However, as we will see, the current conception of the place of religion also impacts the delineation of the limits that the Court believes may be imposed on freedom of religion.

In Berger's account, the Court views religion as an individual phenomenon that must be protected because it allows the believer to exercise their autonomy; consequently, it ultimately conceives of religion as belonging to the private sphere, where liberalism confines personal preferences.[136] Berger observes that as long as religion remains in the private sphere, courts usually have no problem tolerating it. However, whenever religion

[134] Moon, "Religious Commitment and Identity," 202.
[135] Moon, "Religious Commitment and Identity," 220.
[136] See Berger, *Law's Religion*, 91-98.

enters the public realm, any impact that it has on the organization of life in society may cause it to be excluded from the scope of the legal protection.

One famous example is the case of *Trinity Western University v. British Columbia College of Teachers*,[137] where the Supreme Court drew a clear distinction between religious beliefs and religious practices, stating that "[t]he freedom to hold beliefs is broader than the freedom to act on them."[138] This distinction led Trinity Western University, a private evangelical university adhering to a religiously-based code of conduct prohibiting "practices that are biblically condemned," such as "sexual sins including … homosexual behaviour"[139] to be granted permission to assume full responsibility for its teacher education program despite concerns that teachers trained at the university would be likely to adopt discriminatory behaviours against homosexual students in their employment. However, because there was no evidence that teachers trained at the school acted upon the belief that homosexuality is a sin, the Court concluded that "the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected."[140]

Here is another (yet more general) illustration of Berger's claim: in the law's imagination, religion is ultimately thought to belong in the private realm of preferences in the debate surrounding the wearing of religious symbols by public officials. This debate, which is especially controversial in Quebec and in other countries such as France, reveals that for religious items worn by individuals to be framed as problematic in the public sphere, they must first be cast as impeding—at least to some extent—the person's capacity to deliberate rationally.[141] If we consider that religious items worn by public officials only

[137] *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 (CanLII), [2001] 1 SCR 772.
[138] *TWU 2001*, para. 36.
[139] *TWU 2001*, preamble.
[140] *TWU 2001*, para. 36.
[141] We find many examples of this reading through the Hansard transcripts of the debates of the National Assembly of Quebec surrounding the numerous proposed legislations pertaining to the wearing of religious symbols for public officers in the last decade. Most particularly, religious symbols are regularly assimilated in political discourse as signs of religious fundamentalism and backwardness (i.e., a rejection of women's equality). In the debates surrounding the proposed bill 94 *An Act to establish guidelines governing accommodation requests within the Administration and certain institutions*, Louise Beaudoin from the Parti Québécois claimed that "the kirpan is a well known religious symbol for, I would say, fundamentalist Sikhs… Because it's not the entirety of the Sikh community that thinks that it has to be this way" (March 15, 2011, my translation). In debates held around the proposed bill 62 *An Act to foster adherence to State religious neutrality and, in particular, to provide a framework for requests for accommodations on religious grounds*

symbolically enter the private sphere (i.e., they do not change anything regarding that person's capacity to deliberate rationally), then it becomes harder to claim that those symbols are illegitimate. In this second scenario, religious items of clothing do not threaten the liberal spatial organization of the world, hence they are unproblematic.

Taken from the viewpoint of the state neutrality, Buckingham contends that the increased secularization of the state since the 1980s has contributed to the privatization of religion in Canada. On her account, "Canadians have maintained private religious practices but both institutional religion and the influence of religious perspectives on the public square, where ideas are debated, have declined."[142] According to Mary Anne Waldron, this process of privatization of religion was initiated when the Court reasoned in *Big M* that religious freedom entailed the right to be free from exposure to religion, and, more importantly, free from state-sponsored forms of religion. Indeed, *Big M* deemed state-sponsored religious expression to constitute "a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture."[143] In the process of aiming to treat all the religious groups equally, however, Buckingham and Waldron contend that the Court ended up disfavouring religious worldviews in the public sphere altogether, since only a-religious worldviews became regarded as enabling the state to live up to its promise of equality.[144]

Even if we consider that religion is intertwined with cultural identity rather than with choice, we can still think of reasons why the law may be tempted to confine religion

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in certain bodies Nathalie Roy stated: "You know, for us, at the Coalition Avenir Québec, the niqab, the burqa and the chador, it's a no. It's no because these are accessories of female oppression, accessories of female oppression inherited by radical Islamists" (November 10, 2016, my translation). These examples illustrate the process by which religious symbols are framed as manifestations of irrational beliefs. Depicted as such, these practices are easily discredited as admissible ones in the public sphere.

[142] Buckingham, *Fighting over God*, 19.

[143] *Big M*, para. 97.

[144] Mary Anne Waldron, *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada* (Toronto: University of Toronto Press, 2013), 42-44; Buckingham, *Fighting over God*, 149-50. See also Moon, "Government Support for Religious Practice." In many respects, this critique is not new. In the United States, Barbara McGraw and James Richardson note that this type of argument was common in American scholarship in the second half of the 20th century: "while separationists lauded the U.S. Supreme Court religion-state rulings that challenged and limited Protestant privilege and looked forward to the United States becoming a strictly secular state, conservative Christians lamented the shifting social and legal landscape that they perceived had encroached on their religious liberty." See McGraw and Richardson, "Religious Regulation in the United States," 4.

to the private sphere. Indeed, while we can agree that it is possible to rationally talk through our opinions, most of us would resist saying that it is equally possible to debate what we consider to be immutable traits of our identity. If we consider religion to be part of our identity, religion ends up falling, as Moon contends, "outside the scope of legitimate debate and action."[145] Whether religion is considered to be an expression of choice or one of identity, the law's liberal culture continues to perceive religion as belonging in the private sphere.

This conception of religion as both personal and private is perhaps not so surprising if we consider that Christianity has historically exercised a considerable influence both on the development of the Western society and on the modern understanding of the concept of religion in the West. In his seminal work *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam*, Talal Asad argues that the West's Christian history has had "an overriding importance—for good or ill—in the making of the modern world."[146] In the field of religious studies, this created "[t]he assumption that belief is a distinctive mental state characteristic of all religions."[147] However, as Asad shows, "[i]t is preeminently the Christian church that has occupied itself with identifying, cultivating, and testing belief as a verbalizable inner condition of true religion."[148] In Asad's account, modern definitions of religion that aim to be universalizable—like those that are generated by courts of law and used to assess religious freedom claims—are, in fact, infused with Christian notions concerning religion. In many respects, the law's spatial conception of the world as comprised of a public sphere—where rational political debates are held—and a private sphere—where individual interests and preferences can thrive—is compatible with a specifically Christian view of religion that grants a special place to belief.

According to Beaman, the Supreme Court does indeed have a Christian bias, which "remains largely unidentified and undiscussed in case law."[149] This bias, however, has had the effect of privileging mainstream Christian groups in law because "interpretations of

[145] Moon, "Government Support for Religious Practice," 220.
[146] Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: Johns Hopkins University Press, 1993), 1.
[147] Asad, *Genealogies of Religion*, 48.
[148] Asad, *Genealogies of Religion*, 48.
[149] Beaman, "Religious Freedom Written and Lived," 124.

religious freedom are guided by what constitutes a normal religion, and what constitutes a normal religion is rooted in mainstream Protestantism [in the United States], and in Canada, Protestant and Roman Catholic, tenets."[150] Forms of religion that share key characteristics with Christianity, such as being belief-based and private, are thus more likely to be "palatable" for the Canadian legal system, and hence, to be granted legal protection.

While there are many illustrations of this in law,[151] one striking example is the 2017 case of *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*.[152] In this ruling involving Indigenous religious practices, the Court refused to consider a claim for freedom of religion formulated by members of the Ktunaxa Nation, who opposed to the development of a ski resort on a mountain known to members of the Nation as the Qat'muk. Members of the community believed that the development project would cause the Grizzly Bear Spirit, a core spirit in their religious beliefs and cosmology, to be permanently and irrevocably chased away by the continued presence of humans on the mountain where the spirit resided.

The Ktunaxa did not perform any rituals on the mountain. Instead, they performed rituals in honour of the Qat'muk's Grizzly Bear Spirit in a nearby area. This particular arrangement, however, did not sit comfortably with the Supreme Court. In a seven-to-two decision, the majority ruled against the Ktunaxa, stating that the *Charter* "does not protect the spiritual focal point of worship"[153] but only encompasses "the freedom to hold religious beliefs and the freedom to manifest those beliefs."[154] In other words, freedom of religion

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[150] Beaman, "The Myth of Pluralism, Diversity, and Vigor," 318. In the American context, Sullivan's study of the *Warner v. Boca Raton* case revealed how protestant notions of religion impact the delimiting of the contours of religious freedom. According to Sullivan, our modern understanding of religion has been so infused by "protestant" political ideas and cultural practices that "religion" came to be conceptualized in American society through these ideas and practices rather than its actual "lived" form. "True"—and thus, "free"—religion became conceived and defined as "private, voluntary, individual, textual, and believed", while, for most believers, religion is rather "public, coercive, communal, oral, and enacted". See Sullivan, *The Impossibility of Religious Freedom*.

[151] Beaman, in particular, discusses many in Lori G. Beaman, "The Courts and the Definition of Religion: Preserving the Status Quo through Exclusion," in *Defining Religion: Investigating the Boundaries Between the Sacred and Secular*, ed. Arthur L. Greil and David G. Bromley, Religion and the Social Order (Amsterdam: JAI, 2003); Beaman, "The Myth of Pluralism, Diversity, and Vigor."

[152] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 (CanLII), [2017] 2 SCR 386.

[153] *Ktunaxa*, para. 71.

[154] *Ktunaxa*, para. 63.

does not protect the Grizzly Bear Spirit itself, but merely the right to worship it and the belief in the existence of such a spirit.

This interpretation of what freedom of religion entails is a striking example of the influence of Christian notions of religion on the Court's conception of the fundamental freedom. In particular, it reveals the law's conception of religion as primarily located within the self and, at times, expressed collectively; and rejects conceptions of religions where the sacred and earthly (public) worlds are intertwined and interact with one another. As Kislowicz and Luk observe, "for Abrahamic faiths the possibility of killing a god is nonsensical because of the way that god is understood by most believers".[155] Within a Christian framework, beliefs, such as contemplating the Qat'muk mountain as the place of residence of the Grizzly Bear Spirit, cannot be altered in any way by outsiders because they are securely located within the self. Not only are those beliefs, as we have seen, "sequestered beyond the compass of empirical or social-scientific modes of inquiry",[156] but they are also invulnerable to attacks from non-members of the community. In this framework, freedom of religion cannot be used to include a protection for the spiritual focal point of worship.

This judgement illustrates that the law is uncomfortable with religious freedom claims that imply that the actions of broader society have spiritual consequences for the members of a community of faith. Indeed, whether we look at the Court's conception of the place of religion from the standpoint of religious freedom or state neutrality, or from the standpoint of choice or identity, the scholarship reveals that for the Supreme Court, religion is thought to belong in the private sphere, where it cannot not impact members of other faiths.

The picture that I have drafted so far explores an explicit and an implicit dimension of the law's understanding of religion. Case law explicitly refers to religion as a subjective phenomenon that can only be assessed by determining whether the claimant holds a sincere

[155] Howard Kislowicz and Senwung Luk, "Recontextualizing Ktunaxa Nation v. British Columbia: Crown Land, History and Indigenous Religious Freedom," *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 88 (2019): 219.
[156] Sharf, "Buddhist Modernism."

religious belief. As we have seen, the Court makes it quite explicit that religion's *locus* is in the individual; however, it appears hesitant to affirm that religion lies exclusively in the individual's inner depths and often relies on communal notions to assess individual sincerity. Nonetheless, the Supreme court displays a preference for religious freedom claims whose legitimacy rests on the individual believer rather than on the community.

Regarding the law's implicit understanding of religion, my review of the literature shows that political liberalism and Christianity play a role in the Court's reading and processing of religious freedom claims. Drawing on major scholars of law and religion in Canada, this section demonstrates that the Supreme Court considers religion a personal phenomenon whose place in society is in the private sphere. Regarding the value that the Court attributes to religion, however, there is an ongoing debate. While some argue that the Court views religion as an expression of individual autonomy and choice, others claim that the Court connects religion to identity.

Self-Definition and Fulfilment: The Underexamined Components

Notwithstanding the thorough picture that these scholars' studies provide, it seems to me that a there is a crucial aspect of the Court's conception of religion that has not been given the attention it deserves. That is, the centrality of notions of self-definition and spiritual fulfilment. When outlining its conception of religion in *Amselem*, the majority made it clear that deeply held personal convictions or beliefs did not only have to be "connected to an individual's spiritual faith" (i.e., required to have a "nexus with religion"), but also had to be "integrally linked to one's self-definition and spiritual fulfilment." I maintain that this appeal to self-definition and spiritual fulfillment clarifies the most debated question in the field, namely: on what grounds does the Court attribute value to religion?[157]

[157] Some authors do mention in passing the importance of self-definition or fulfilment for the Court. For instance, Moon describes one's self-definition as crucially informed by one's religion: "it may be that religious commitment is both a personal choice and a deeply rooted part of the individual's identity that shapes his or her worldview and self-definition." See Moon, "Religious Commitment and Identity," 213. On his part, Berger addresses self-fulfilment as the Court's protection of indivual autonomy and choice: "[s]elf-realization is the goal, and autonomous choice is the mechanism." See Berger, *Law's Religion*, 78. This leads him to argue that the Court sees religion as one of many sources that an individual may deliberately select as relevant to their identity: "the value of religion inheres in the fact that it is one of many possible options that an individual might select as an aspect of his or her self-definition and authentic experience." See Berger, *Law's Religion*, 80.

Perhaps part of the reason why this specific component of the Court's definition of religion in *Amselem* was overlooked is because the scholarship has, till now, focused on the question of *how* the Court has interpreted the concept of religion (i.e., the question of the *nature* of religion). When we ask this question, we are led to focus our attention on the level of compatibility between the law's conception of religion, on the one hand, and the actual lived experience of religion, on the other. And, while the question of the Court's conception of religion effectively allows us to uncover the ways in which the law imposes its own vision of the world on competing worldviews—and, more specifically, on those that do not incarnate law's presumptions on the nature of religion—it tells us very little about *why* the Court thinks religion is important in society, or does so very indirectly. However, we will never have a full picture of the law's understanding of religion and its place in society if we do not have an idea of *why* the Court considers religion to be important to safeguard. The answer to that question crucially informs how religion is treated in society; to a significant extent, the value that judges accord to religion determines the means that they are willing to use to protect it.

To put this more concretely: when we look at cases that deal with freedom of religion, we see that certain forms and expressions of religion are granted protection more vehemently than others. This is the case, for example, in *Multani*, where the Court passionately explained the importance of allowing the Sikh kirpan in Quebec's public schools in order to teach multiculturalism.[158] The fact that the claimant's conception of religion in *Multani* was compatible with the Court's conception of religion may have facilitated reaching the conclusion that religious freedom ought to be protected in this case.[159] However, this reason does not seem sufficient to justify the spirit underlying the *Multani* decision. It is not—or at least not exclusively—because an expression of religion

[158] See *Multani*, para. 76-79.

[159] In *Law's Religion*, Berger's claim is that the wider the divide is between the liberal framework that informs law's understanding of religion and the worldview informing a religious claim, the more likely it is that this claim will not be granted legal protection. As such, Berger argues that the Court ruled in favour of Multani since his claim for freedom of religion was already compatible with law's understanding of religion, hence the practice was not of genuine public concern: "Sheathed, sealed, and tucked away inside the folds of young Multani's clothing, religion does not threaten any of the values or structural commitments of the rule of law. *Multani* holds that this religious difference will be "tolerated," but the underlying message is that it will be tolerated because it conforms to law's understanding of religion and does not meaningfully grate upon any of the central cultural commitments of Canadian constitutionalism." See Berger, *Law's Religion*, 122.

matches the Court's understanding of religion to a great extent that determines whether the Court will grant the expression legal protection. Rather, I suggest that there is a force that drives the Court to protect religion, which is felt more strongly in some cases than in others. This force, I propose, is a moral ideal; specifically, as I argue in this dissertation, the ideal of authenticity. Authenticity is the modern self's ultimate goal, and it is also the path to self-fulfilment. But before we turn to this topic, we must address another important aspect of the judicial regulation of religion in Canada, namely the way that the Court balances religion against other interests.

Balancing Religion

While the sincerity test developed in *Amselem* appears to broaden the scope of section 2(a), the scholarly literature shows, instead, that the test shifted the crux of the Court's analysis to the issue of balancing religious freedom against the rights and interests of others.[160] Like any other right or freedom guaranteed by the *Charter*, freedom of religion may still be limited by Section 1 of the *Charter*, which provides for "reasonable limits prescribed by law" to be placed on rights and freedoms insofar as these limits are "demonstrably justified in a free and democratic society."[161] Determining whether the conditions for a limitation has been met is achieved, broadly speaking, through a proportionality analysis in which the court determines whether the benefits of limiting the fundamental freedom outweigh the deleterious effects of said limitation. At this stage, the goal is to strike an appropriate balance between the interests of both parties named in the case.[162]

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[160] See for example Anna Su, "Judging Religious Sincerity," *Oxford Journal of Law and Religion* 5, no. 1 (2016); Beaman, "Defining Religion."; Beaman, "Religious Freedom Written and Lived."; Berger, *Law's Religion*, 82.

[161] *Canadian Charter of Rights and Freedoms*, s 1. Section 1 reads as follows: "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[162] The process through which the balancing of interests is accomplished is best defined in constitutional law. Constitutional law cases follow the *Oakes* test, which first requires courts to establish that the objective of the impugned measure is pressing and substantial. Secondly, courts proceed to the proportionality analysis, which consists of three steps: 1) establish whether there is a *rational connection* between the limit placed on freedom of religion and the objectives of the impugned measure; 2) assess whether the limit *minimally impairs the right*, or whether there exist less impairing alternatives to limiting the right; and, finally, 3) proceed to a *final balancing* whereby the benefits of limiting the fundamental freedom are weighted against those of maintaining the impugned measure. For administrative law, the courts rather follow the *Doré/Loyola* framework which focuses on the final balancing stage.

In this section of the chapter, I introduce the scholarship that criticizes the Court's appeals to broad and general principles or interests to limit freedom of religion. More specifically, this section aims to underscore a tension between two trends in the scholarship concerning the principle of equality. One perspective, which the previous section of this chapter mostly drew upon, consists of using the principle of equality as a tool to highlight the ways in which the Supreme Court failed to consider certain forms of religious expression (i.e., mostly those of religious minorities). Another perspective consists of problematizing the Court's use of equality as a potential threat to religious liberty. This perspective will be examined in this section.

Weighting Religious Views against Secular Concerns

One of the primary challenges that the Supreme Court must face during section 1 is to consider both the specific and the broad interests of each party, which are at stake in the litigation. When dealing with religion, however, Buckingham notes that it can be "challenging for the state, and for the courts, to give full weight to religious beliefs because they cannot understand them."[163] For secular courts of law, it may require special efforts to consider the full range of interests that religious groups and individuals have at stake in a conflict. Correspondingly, secular and liberal interests may be more readily acknowledged insofar as they are likely to align with the law's own concerns and worldview.

According to Beaman, a close look at section 1 analyses reveals that the balancing of competing interests is often an endeavour "fraught with interesting assumptions about what constitutes the public interest."[164] Indeed, Beaman argues that courts do not refrain from making appeals to "broader social objectives" in a way that works to conceal the law's own cultural commitments at the same time as it endorses them.

In the 1986 case *R. v. Jones*,[165] for example, the Supreme Court ruled that the pastor of a fundamentalist church, who ran a small school comprising three students, was required

[163] Buckingham, *Fighting over God*, 219.
[164] Lori G. Beaman, "Overdressed and Underexposed or Underdressed and Overexposed?," *Social Identities* 19, no. 6 (2013): 124, https://doi.org/10.1080/13504630.2013.842671.
[165] *R. v. Jones*, 1986 CanLII 32 (SCC), [1986] 2 SCR 284.

to get provincial certification despite his claim that this went against his belief that God, and not the state, had ultimate authority over education. The majority found that his claim could not succeed because it would not "be reasonable to permit the appellant to ignore the province's laws on a matter as important as the education of the young."[166] The reason supporting this claim, however, was self-justifying: "No proof is required to show the importance of education in our society or its significance to government. The legitimate, indeed compelling, interest of the state in the education of the young is known and understood by all informed citizens."[167] In other words, from the perspective of the Court: education is crucial and anyone who fails to recognize this is not only "uninformed" but also acting selfishly. Nonetheless, Beaman notes that, in using this rhetoric, "[t]he importance of education is played up as a common state interest, of disproportionately greater weight than the wish to exercise freedom of religion."[168] The claimant's freedom of religion is depicted as being in sharp opposition to common sense, social interests and is, thus, discredited by the same token. As this case underlines, appeals to broader social objectives or interests can quickly become a gatekeeper that enables the Court to enforce its own vision of the world and of society at the expense of religious views.

The Supreme Court also regularly relies on so-called "*Charter* values," sometimes referred to as "Canadian values," in section 1 analyses. Indeed, proportionality analyses are expected to be conducted in keeping with *Charter* protections, which include *Charter* rights, but also, a number of *Charter* values that are said to be fundamental to a free and democratic society.[169] However, the appropriate contribution of such values in proportionality analyses is largely disputed given that these values are not anchored in any objective piece of legislation, unlike *Charter* rights. Nonetheless, they regularly play a

[166] *Jones*, para. 32.
[167] *Jones*, para. 30.
[168] Beaman, "The Courts and the Definition of Religion," 211.
[169] In the ruling *R. v. Oakes*, which is at the origin of the *Oakes* test referred to whenever a right or freedom guaranteed by the *Charter* is infringed by a law, these values are said to include "respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society." *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 SCR 103, para. 64.

crucial role in the Court's assessment of the legitimate scope of freedom of religion in Canadian society.

The impact of *Charter* values in rulings on freedom of religion is particularly striking in the field of education, perhaps because education lies at the very basis of identity-formation.[170] In this respect, the state can gain the advantage by instilling in its citizens a vision of the society that corresponds to its own interests; whether it seeks to affirm religious diversity, or—as it seem to be the case in Quebec—whether it aims to promote a societal culture that is more a-religious.[171]

In the field of education, Beaman, Forbes, and Cusack contend that the values of "tolerance, equality, respect, fairness, understanding, democracy and an appreciation of diversity,"[172] specifically, are mobilized in court rulings to either limit or permit religious expression in schools. For instance, they note that, since the Court imagines "the position of teachers … as carrying out of the values of the nation,"[173] the Court has not refrained from restricting the religious expression of teachers who do not endorse these values. In *Ross v. New Brunswick School District No. 15*,[174] the Supreme Court supported a school board's decision to reappoint a teacher to a non-teaching position after the school received a complaint from a Jewish parent that the teacher in question actively promoted anti-Semitic views outside school-hours. Similarly, in *Chamberlain v. Surrey School District No. 36*,[175] the Court overturned the decision of a school board to exclude books depicting

[170] Another reason for this could be that these cases often concern administrative law, and administrative law, as opposed to constitutional law, allows the court more room to weigh-in interests that are not explicitly laid out in the *Charter*, inasmuch as they tie in with statutory objectives. Nonetheless, as the discussion in *Law Society of British Columbia v. Trinity Western University* reveals, the role of *Charter* values in administrative law remains largely disputed. This case will be addressed below.

[171] In Quebec, this is reflected by the adoption in June 2019 of a law regulating the wearing of religious symbols for public officials in position of coercive authority, *and* for school teachers. See Jolin-Barrette, "*Bill 21, An Act respecting the laicity of the State*." In this respect, Berger notes that debates concerning the place of religion in the educational sphere tend to reflect those that are taking place within the broader society. See Benjamin L. Berger, "Religious Diversity, Education, and the "Crisis" in State Neutrality," *Canadian Journal of Law and Society / Revue Canadienne Droit et Société* 29, no. 01 (2014), https://doi.org/10.1017/cls.2013.56.

[172] Lori G. Beaman, Lauren L. Forbes, and Christine L. Cusack, "Law's Entanglements: Resolving Questions of Religion and Education," in *Issues in Religion and Education: Whose Religion?*, ed. Lori G Beaman and Leo Van Arragon (Leiden: Koninklijke Brill, 2015), 175.

[173] Beaman, Forbes, and Cusack, "Resolving Questions of Religion and Education," 169-70.

[174] *Ross v. New Brunswick School District No. 15*, 1996 CanLII 237 (SCC), [1996] 1 SCR 825.

[175] *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 (CanLII), [2002] 4 SCR 710.

same-sex parented families from the kindergarten curriculum out of fear that they would offend the religious beliefs of some parents. Underlying this decision was the Court's claim that schools should teach tolerance to children, and that tolerance is fostered through the realization that others hold beliefs that differ from that of their own.

In her book *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada*, Waldron argues that the recurrent use of *Charter* values, which often tie in with human rights in religious issues, is highly problematic. According to Waldron, relying on these ill-defined values undermines the fundamental freedoms that were explicitly included in the *Charter* in order to protect the foundations of our democratic society. In preferring *Charter* values over fundamental freedoms, the Court imposes its own vision of society instead of applying the laws that were formed through democratic political debate. This ultimately damages the democratic process by weakening citizens' rights to autonomy. "Although the court may see itself as the guardian of Canadian values," Waldron writes, "its actions run counter to the preservation of robust democratic debate and to respect for individual choice."[176] Moreover, whenever the Court prefers to give weight to *Charter* values, it overlooks that the safeguarding of the democratic process precisely requires the law to protect our rights and freedoms.

Waldron's worries about the increasing role that *Charter* values play in section 1 analysis are shared by Buckingham. Both scholars note that the value of equality, in particular, seems to play a determining role in decisions. Buckingham observes that there has been a tendency, since the adoption of the *Charter*, to support a claim for religious freedom whenever a claim for equality was embedded within the religious freedom claim, and to reject it whenever the claim was at odds with equality. In their estimation, this may have a particularly damaging impact on freedom of religion since religious doctrines and practices may often appear to be at odds with the values of the secular society. In such a situation, the risk of an approach that gives weight to *Charter* values is to endorse limits placed on religious freedom simply because the values underlying a religious belief are deemed incompatible with the values accepted by the secular society.[177]

[176] Waldron, *Free to Believe*, 94.
[177] Waldron, *Free to Believe*, 75; Buckingham, *Fighting over God*, 218.

One example that illustrates how the value of equality can limit religious freedom is the case of *Bruker v. Marcovitz*.[178] This case concerned the refusal of Mr. Marcovitz, a Jewish man, to appear before the rabbinical tribunal to grant Ms. Bruker a Jewish divorce (known as a *get*). For over fifteen years, Mr. Marcovitz had refused to request the *get*, which only men can ask for, despite the fact that the couple had gone through a civil divorce during which Mr. Marcovitz had signed an agreement stipulating that he would appear before the rabbinical tribunal to request a *get*. It was important for Ms. Bruker to receive the religious divorce since, in the eyes of her community, women who failed to obtain a *get* from their husband were considered an *agunah*, meaning, a woman "chained" to her marriage. As such, Ms. Bruker could not remarry in Jewish tradition nor have children that would be considered legitimate by members of her community. For that reason, Ms. Bruker demanded damages from Mr. Marcovitz for having failed to abide by their civil divorce contract.

Insofar as the state was concerned, however, Ms. Bruker's status was the same as that of her ex-husband; the couple was divorced. Obtaining a religious divorce only had meaning and relevance within the context of Ms. Bruker and Mr. Marcovitz's religious community.

In this case, the Court was confronted with the question: Is Ms. Bruker entitled to damages for breach of contract if the breached clause is religious in nature? Mr. Marcovitz had agreed to undertake an action of religious significance in the process of the civil divorce proceedings. However, it was unclear whether the Court could enforce this contract given its religious significance. This would have the effect of coercing Mr. Marcovitz into performing an action that had meaning only in the eyes of his religious community and would thus require the state to intervene in the organization of the religious life of the Jewish community.

The Court ruled in a seven-to-two decision in favor of Ms. Bruker. For Justice Abella, writing for the majority, although the promise to appear before the rabbinical tribunal was of religious nature, the fact that the agreement was reached in the context of a

[178] *Bruker v. Marcovitz*, 2007 SCC 54 (CanLII), [2007] 3 SCR 607.

civil divorce transformed the promise into a civil obligation subject to sanctions if not performed. This, however, is not the only argument that the majority used to justify enforcing the contract. Indeed, Abella J. affirms that it is the Court's will to ensure the equality and dignity of all women. She writes:

> The public interest in protecting equality rights, the dignity of Jewish women in their independent ability to divorce and remarry, as well as the public benefit in enforcing valid and binding contractual obligations, are among the interests and values that outweigh Mr. Marcovitz's claim that enforcing Paragraph 12 of the Consent [to appear before the rabbinical authorities to obtain a *get*] would interfere with his religious freedom.[179]

Writing for the dissent, Justice Deschamps disagrees with the majority's position. According to Deschamps J., since secular law does not have any effect on religious laws, requiring Mr. Marcovitz to undertake an action that is religious in nature would violate the separation of powers between the state and religion, thus harming one of the most fundamental principles of the freedom of religion. She writes:

> The courts may not use their secular power to penalize a refusal to consent to a *get*, failure to pay the Islamic *mahr*, refusal to raise children in a particular faith, refusal to wear the veil, failure to observe religious holidays, etc. Limiting the courts' role to applying civil rules is the clearest position and the one most consistent with the neutrality of the state in Canadian and Quebec law. Gandhi is credited with saying that each person is responsible for his or her own religion. That responsibility goes hand in hand with the neutrality of the state toward religious precepts and, in the case at bar, favours dismissing [Mr. Marcovitz]'s action.[180]

In Deschamps J.'s view, it is not the responsibility of the state to promote a religious norm like that of granting a religious divorce.

The conclusions reached by the majority and the dissent are so different because each side has a different conception of what is at stake in the conflict. While Deschamps J.'s focus is on the state's duty to remain separated from religion, which would therefore protect religious freedom; Abella J.'s focus is on the Court's duty to ensure the equality of all citizens, which then results in an infringement of religious freedom. For the majority, the possibility of advancing the equal treatment of women in Judaism trumps the right of

[179] *Bruker*, para. 92.
[180] *Bruker*, para. 184.

an individual—in this case, Mr. Marcovitz—to practice his religion as he sees fit. The value of equality is invoked by the majority to tip the balance against the freedom of religion of Mr. Marcovitz, and against the freedom of the Jewish community to self-determine and remain free from interference from state interference. In the final analysis, it is because Mr. Marcovitz's practice of religion is considered incompatible with gender equality that his freedom of religion is then restricted.

Another and more recent example of the significance of the value of equality is the case of *Law Society of British Columbia v. Trinity Western University*.[181] In this case, the majority[182] supported the Law Society of British Columbia (LSBC) decision not to approve Trinity Western University's law school on the basis that the university imposes a covenant prohibiting "sexual intimacy that violates the sacredness of marriage between a man and a woman" to all its students.[183]

According to the majority, the decision of the LSBC was in proportionate balance with Trinity Western University's freedom of religion for three reasons: First, the covenant hindered equal access to the legal profession; second, upholding such a policy would restrict diversity within the law profession; and third, the covenant had the potential to significantly harm LGBTQ students enrolled in the school.[184] These reasons, which serve to justify limiting freedom of religion, reflect the *Charter* values of equality, inclusion, and dignity.

In their dissent, Justices Côté and Brown took issue with the majority's appeal to equality, and to *Charter* values in general, for determining the outcome of the case. Per the dissent, *Charter* values are "unsourced," "amorphous," and "undefined" concepts that have "become mere rhetorical devices by which courts can give priority to particular moral

[181] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (CanLII), [2018] 2 SCR 293.
[182] The majority in this case consists in five judges. Chief Justice McLaughlin (as she then was) concurred in reasons and Justice Rowe concurred in the result.
[183] *TWU 2018*, para. 1. The formulation of this article of the covenant was modified since the time of the case of *British Columbia College of Teachers* cited above.
[184] *TWU 2018*, para. 40. The recourse to these values are principles as legitimate limits to freedom of religion is tied to *Charter* values. At para. 46, the majority states: "it should be beyond dispute that administrative bodies other than human rights tribunals may consider fundamental shared values, such as equality, when making decisions within their sphere of authority—and may look to instruments such as the *Charter* or human rights legislation as sources of these values, even when not directly applying these instruments … . This is what the LSBC, quite properly, did."

judgments."[185] Moreover, they argue that appeals to such values in court rulings fails to recognize that "Canadians are permitted to hold different sets of values."[186] In focusing on equality, Côté and Brown JJ. contend that the majority forgot to weigh the respect for religious diversity in their balance of interests.

In an important way, the dissent directly addressed the issues underlined by Waldron and Buckingham. However, while their opinion makes it clear that the Court's tendency to rule in accordance with *Charter* values is not absolute, their position as the dissent nonetheless confirms Waldron and Buckingham's claim that the appeal to *Charter* values is a dominant trend. And indeed, as these scholars note, a similar pattern seem to apply in cases where the religious freedom claim is tied to an equality claim. In such cases, however, the value of equality is mobilized to strengthen the religious freedom claim. One example of this is the case of *Multani*, where the majority highlighted the wrongs of a total prohibition of the kirpan in schools by observing that it would "[send] students the message that some religious practices do not merit the same protection as others."[187] To put it differently, it mattered greatly to the Court that Sikhs are not sent the message that they are not equal.

What these cases show is that appeals to *Charter* values are dependent on the Court's imagining of Canadian society. When a ruling refers to a *Charter* value that impedes on religious freedom, it will acknowledge the impediment. However, it does so by stressing how crucial this impediment is for safeguarding a particular Canadian "essence"—one that the Court itself perceives and chooses to uphold despite not being required to. In this respect, as Asad points out in his examination of the formation of the modern secular state, "the difficulty … is that given the moral heterogeneity of modern society …, nothing can be referred to as a national conscience or a collective moral sensibility."[188] Obviously, religious claimants *are* members of society; yet it is not a given that their claims for freedom of religion align with these so-called "Canadian values." However, when equality comes into conflict with religious freedom, the conflict quickly

[185] *TWU 2018*, para. 309.
[186] *TWU 2018*, para. 308.
[187] *Multani*, para. 79.
[188] Asad, *Formations of the Secular*, 187.

seems to take the shape of a clash in worldviews; and, in these conflicts, the law is always victorious.

Debating the Proper Use of Equality

This discussion brings us to a second area of uncertainty in scholarship on law and religion in Canada concerning the appropriate role of the value of equality in litigation involving religious freedom. In my reading of the scholarship, there seems to be two coexisting "schools of criticism" that both draw on the concept of equality to criticize the Court's assessment of religious freedom claims, but in fundamentally different manners.

The first school of criticism, which I will call the "deep equality school,"[189] draws on a principle of equality to expose law's biases in its understanding of religion. Scholars such as Beaman, Berger, and Kislowicz take equality as an ideal that is fundamentally embedded in the idea of freedom of religion, and, particularly, in the idea of state neutrality towards religion. These authors look at religious freedom cases with the aim of revealing the ways in which the Court has either succeeded or failed to treat individuals across religious traditions with equal respect despite their diverging worldviews. In doing so, scholars of the deep equality school have successfully revealed the ways in which religious individuals adhering to traditions that do not share important characteristics with contemporary political liberalism or Christianity, for instance, may be placed at a disadvantage within the Canadian legal system as the source of their beliefs and practices is located in a cultural universe that is farther from the law's own culture of reference and is thus less comprehensible to the Court. By this logic, equality is framed as something that is unachieved or lacking. What this school of criticism reveals is that law, and concomitantly, the secular state, is unable to live up to its promise of equality.

[189] I use this term in reference to Lori Beaman's book *Deep Equality in an Era of Religious Diversity*, where she argues that day-to-day, banal interactions with religious diversity have the potential to foster the recognition of equality (as opposed to resolutions sought in courtrooms, for example, which tend to depict religion and religious diversity as a problem to resolve). See Lori G. Beaman, *Deep Equality in an Era of Religious Diversity* (Oxford: Oxford University Press, 2017).

The second school of criticism, which I will refer to as the "deep diversity school,"[190] draws on the concept of equality quite differently. Instead of implicitly drawing on a principle of equality to discuss rulings on freedom of religion, scholars such as Buckingham, Ogilvie, and Waldron explicitly separate the two notions. They do so not necessarily to reject the claims formulated by the deep equality school but rather to show that equality, when mobilized as an essential component "Canadian society", has in fact often hindered religious freedom. The deep diversity school starts from the criticism that, in trying to treat all religions equally in the public sphere, the law ends up constraining the scope of all religions to the private sphere. Here, this school stresses that Christian religious practices, which previously enjoyed greater privilege in the public sphere, were particularly impacted in the process. But what this argument really seeks to underline is that in the process of constraining religion to the private sphere, the idea of the "neutral state" became intertwined with non-religion, thus giving the impression that being non-religious amounts to treating all members of society equally. Per my reading, scholars of this school argue that this, in turn, contributed to transforming equality into (or legitimize the use of equality as) an enforceable value in the liberal state. In other words, by connecting equality to neutrality in the democratic society, the Court implicitly made equality an appropriate measurement in cases involving religious freedom. By this school's logic, equality is framed as a potential threat to religious freedom; something that may be mobilized at any time to limit the freedom guaranteed by the *Charter*. What this school of criticism reveals is that when the law praises equality, it may well be implementing its own vision of "Canadian society" at the expense of the very principles of the *Charter* it is tasked with protecting.

These two schools of criticism should not be understood as rivals, nor should their central theses be conceived as fully contradictory. In many respects, the scholars that I have identified as proponents of the deep equality approach or of the deep diversity approach probably agree with each other, especially as their respective findings draw our attention to different challenges that arise in assessing claims for religious freedom in Canada.

[190] The term "deep diversity" was coined by Iain T. Benson in response to the lacunas perceived in the deep equality approach. The contrast between the two approaches is discussed in Buckingham, *Fighting over God*.

Nonetheless, there is a sense that these two schools advance arguments that are difficult to reconcile: one side emphasizes equality by disputing the Court's understanding of religion, while the other side emphasizes liberty by disputing the Court's understanding of neutrality. It is my contention that, in arguing either on one side or the other of the issue, the ongoing discussions have neglected precisely the kind of challenge that this dilemma represents for the Court. As Canada is becoming increasingly religiously and socially diverse due to the influx of migrations and the increasing acceptance and empowerment of identities that were previously marginalized, this issue is likely to be at the forefront of debates regarding the relevant place of religion in society in the years to come.

While I am deeply sympathetic to the arguments formulated by the deep equality approach, I believe that the ones formulated by the deep diversity approach reveal something more valuable to the purpose of this study. The deep diversity's criticism is that the Court has failed to recognize the inherent value of freedom of religion; and in criticizing why this is wrong, proponents of this school have addressed the question of the *value* of religion from a new angle. This new angle, which highlights the potential threat posed to religious freedom by the quest to foster equality at all costs, sheds a whole new light on the issue of the value of religion: it demonstrates that, for the Supreme Court of Canada, religion is, at least in some way, tied to identity, and all identities must be treated equally.

My claim in this section is that, when the Court mobilizes *Charter* values to justify protecting or impeding freedom of religion, it communicates important information about why it ascribes value to religion. The values associated with or opposed to religion, in turn, inform us on which of the features of religion the Court deems worthy of legal protection. In this respect, the Court's concern for equality points to a conception of religion as a source of identity: religious freedom claims seem to fail particularly drastically when they compete with the (equally valuable) aspects of the identity of others. Moreover, it seems difficult to see why religion would be tied to equality if religion were merely considered as the expression of one's individual autonomy.

What the deep diversity school says, however, is that there *is* a moral force guiding the Court in religious freedom cases. Moreover, this force is *not* focused on religion in particular but rather on the equal worth of each individual. As such, religion may triumph

when the religious freedom claim is concerned with recognizing the equal worth of the religious claimant. However, cast as a source of identity, religion may not be considered as more important than other "traits" that are deemed an essential part of one's identity.

The next chapter suggests that a novel point of departure—authenticity—can accurately capture how the Supreme Court understands the value of religion and how their valuation of religion responds to the challenge posed by the balancing of equality and liberty in an age of diversity.

Chapter 2. The Authenticity Framework

What is authenticity and why is it a relevant concept to describe and make sense of the way that religion is handled by the Supreme Court today? In contemporary Western societies, the notion has become widely understood as an ideal. Being authentic is not so much considered as a permanent state of the person, but rather as a goal to be achieved by the individual. As such, the notion is associated with a stringent yet rewarding process that requires one to dive into the confines of one's own self in order to both discover and acknowledge the fundamental characteristics that make one truly oneself. In doing so, the individual is expected to be led to experience feelings of self-respect, inner peace, worthiness, and self-fulfilment.

Nonetheless, struggling or failing to be authentic is not fatal; it is simply not an ideal state. As outlined in Chapter 1, this is a feature of moral ideals. While living by an ideal is praiseworthy, not succeeding or struggling in this enterprise cannot be blamed precisely because of the idealistic nature of the moral value in question. As far as the ideal of authenticity is concerned, it may well be the case that total or permanent authenticity is, in fact, impossible to achieve. In keeping with the spirit of being true to ourselves, we must recognize that we periodically have doubts about how we choose to live our life and sometimes question the goodness of our own feelings. Nevertheless, part of the power of the ideal of authenticity in Western contemporary society has been to lead individuals to conceive of the life truly worth living in terms of authenticity. My life is meaningful only insofar as it services my sense of self; that is to say, only insofar as I live it in accordance with my own standards of meaningfulness.

While it comes to many Westerners rather intuitively that authenticity requires us personally to do certain things like be in touch with our feelings and act in congruence with those feelings, being authentic also seems to require certain conditions that are not directly tied to my own person. For instance, we seem to have a collective understanding of what

the authentic self consists in which flies in the face of individual agency. As Charles Taylor puts it: "I may be the only person with exactly 3,732 hairs on my head, or be exactly the same height as some tree on the Siberian plain, but so what?"[191] Having exactly 3,732 hairs on my head or being the same height as one Siberian plain tree are not, in other words, features of myself that I would, or even that I could, identify as relevant to my identity. Moreover, there are situations where people may personally be aware of their true sense of self but find themselves in a situation where they are unable to act in congruence with it. Homosexuals were once in this position and still are in a number of countries. In contemporary Canada, transgender people are also facing significant challenges in the health care system to achieve their sense of self.

My argument in this dissertation is that authenticity, because it is such a powerful moral ideal in Western societies, impacts rulings at the Supreme Court of Canada. Specifically, I contend that the Court feels bound to keep open the possibility for individuals to realize their sense of self in their life in order to render a fair judgement. This, in turn, orients the Court's gaze to certain aspects of religion when assessing claims of religious freedom, all while diminishing the importance of others.

This chapter seeks to establish what is the value of authenticity in contemporary society and what authenticity actually entails. My goal in doing so is to develop what I call the "authenticity framework"; that is, a set of conditions that are necessary for authenticity to remain a possible ideal for the individual. Those conditions, I argue, are what ultimately guide the Supreme Court of Canada when it deals with claims of religious freedom.

History of the Concept

I want to start this exploration of the ideal of authenticity with a history of the emergence of the concept. While this step might not be necessary to grasp the meaning of authenticity, I believe that it is paramount to identify and contextualize the reasons why we have come to value it today. This, in turn, is an essential step to formulate a criticism of the workings

[191] Charles Taylor, *The Malaise of Modernity*, The Massey Lectures Series, (Concord, Ont.: Anansi, 1991), 36.

of this ideal, especially as it pertains to the way it impacts religious freedom litigation today.[192]

The Roots of the Ideal

Contemporary philosophers who have theorized authenticity as a moral ideal all agree that the roots of the concept of authenticity as we understand it today in the West can be found in the Romantic movement, and more specifically, emerging with the works of Jean-Jacques Rousseau.[193] Rousseau's works were novel, for they compelled us to reassess in a more positive light the place that feelings and emotions ought to play in decision-making at a time where knowledge and observance of the social order were highly valorized.

This is illustrated particularly well in Rousseau's *Julie; or, The New Heloise*. This novel describes the life of Julie, the protagonist, as she decides to marry Wolmar, the man that her father selected for her, despite being in love with her tutor, Saint-Preux. As the story unfolds, Rousseau leads the reader to discover that, although Julie willingly endorsed her father's wishes to marry Wolmar, and therefore conformed to society's expectations about selecting a life partner at that time, her decision to marry Wolmar sets her off on a life of unhappiness because she cannot change her feelings about him despite having made him her husband. As Ferrara notes, Rousseau's underlying suggestion here is that, in some instances, "moral choices may have to be made in which the right solution is to side with

[192] This historical review is not based on primary sources, but on the narratives crafted by contemporary Western philosophers who have theorized authenticity as an ideal in contemporary society. It is so because my goal is to obtain information on the place and role of the ideal of authenticity in contemporary society, which I believe we can gain by looking at how contemporary theorists of authenticity construct the contrasts and connections between the "older" conceptions of the ideal self and the contemporary, authentic conception of the ideal self which is the object of this chapter. Therefore, my account in this section is not original, nor does it proport to historical accuracy. Moreover, because it is my understanding that the narratives produced by each author are generally coherent (they may stress different facets of the history of the development of the ideal but do not contradict each other in their foundations), their respective narratives will be rendered in a consistent and coherent manner.

[193] See Taylor, *Malaise of Modernity*, 27-28; Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge, Mass.: Harvard University Press, 1989), 355-67; Charles B. Guignon, *On Being Authentic*, Thinking in action, (London: Routledge, 2004), 55-70; Somogy Varga, *Authenticity as an Ethical Ideal*, Routledge studies in contemporary philosophy, (New York: Routledge, 2012), 35-42; Alessandro Ferrara, *Reflective Authenticity: Rethinking the Project of Modernity* (London: Routledge, 2002), 7-8; Alessandro Ferrara, *Modernity and Authenticity: A Study in the Social and Ethical Thought of Jean-Jacques Rousseau* (Albany: State University of New York, 1993); Bernard Williams, *Truth and Truthfulness: an Essay in Genealogy* (Princeton: Princeton University Press, 2004), 173-85; Lionel Trilling, *Sincerity and Authenticity*, Charles Eliot Norton lectures; 1969-1970, (Cambridge, Massachusetts: Harvard University Press, 1972), 58-73.

our feelings, as opposed to our ethical principles, if the feelings in question are bound up with the cohesion of our identity."[194] Indeed, while Julie may have genuinely believed that obeying her father was right and valued conforming to his instructions, Rousseau's intentions in his novel are to reveal that the way Julie *feels* about her marriage might have constituted reason enough to dismiss the rational principles to which she would otherwise commit.

Charles Taylor shares a similar interpretation of Rousseau's works with regards to the development of authenticity. One of Rousseau's main goals, he explains, is to lead his readers to understand morality as inseparable from a "voice of nature" within us. "This voice is often drowned out by the passions that are induced by our dependence on others," Taylor writes; however "[o]ur moral salvation comes from recovering authentic moral contact with ourselves."[195] Rousseau calls this feeling of being in contact with ourselves—what we might call "being authentic" today—"*le sentiment de l'existence*," which he describes as "a source of joy and contentment."[196] With him, Taylor explains that our ultimate happiness comes to be conceptualized as "to live in conformity with [our inner] voice, that is, to be entirely ourselves."[197]

The subjective turn brought by Rousseau constitutes a major development for the modern notion of authenticity; however, the picture painted above still does not totally capture the essence of the ideal as we know it today. One missing piece is the idea that I am a unique being with a unique perspective on the world. This idea Taylor associates with the writings of Johann Gottfried von Herder. With Herder, Taylor observes that each one of us comes to be depicted as having an "original way of being human," and, consequently, as having "his or her own "measure.""[198] There is only one version of myself, and only I have access to it because only I know my true feelings about the world. Moreover, because I have a unique interiority, I have a unique way of experiencing the world. What is good

[194] Ferrara, *Modernity and Authenticity*, 105.
[195] Taylor, *Malaise of Modernity*, 27.
[196] In Taylor, *Malaise of Modernity*, 27.
[197] Taylor, *Sources of the Self*, 362. While Rousseau's works are often cited as having generated this transformation, Taylor contends that his works articulated and spread an idea that already circulated at the time. In *Sources of the Self*, Taylor identifies Francis Hutcheson and the Earl of Shaftesbury as having contributed to the popularization of this idea prior to Rousseau. See Taylor, *Sources of the Self*, 248-65.
[198] Taylor, *Malaise of Modernity*, 28.

for me might not be good for you; however, there is no reason why this should invalidate the goodness of that thing for myself since, as Taylor puts it, "[t]here is a certain way of being human that is *my* way."[199]

Rousseau's claim is that we ought to be in touch with our feelings rather than blindly comply with society's expectations about us. Herder's philosophy, Taylor argues, takes this claim one step further by saying that being in touch with our feelings has independent moral significance; it allows us to discover the "way" that is truly ours. This development takes us one step closer to the modern ideal of authenticity: "being in touch with our feelings … comes to be something we have to attain if we are to be true and full human beings."[200] In this outlook, the way that I subjectively experience my feelings and impulses emerges as something valuable that invests my existence with meaningfulness.

One oft-cited illustration of this development is Hegel's take on Diderot's fictional dialogue entitled *Rameau's Nephew*, written some decades earlier.[201] The conversation takes places between the narrator (referred to as "*Moi*") and the nephew of composer Jean-Philippe Rameau ("*Lui*"), who philosophize on various topics, including virtue and vice, and sincerity and hypocrisy. Lionel Trilling notes that, throughout the dialogue, the narrator is depicted as a man of great wisdom, with a "love of simple truth and morality," a "clearly defined self," and a deep commitment to endorsing his role and responsibilities in society. His interlocutor, on the other hand, is the complete opposite; throughout the conversation, the Nephew makes it clear that he lives his life so as to follow his impulses and feelings. At the time the dialogue was written, Trilling notes that the narrator was meant to command esteem, while the Nephew was intended to appear unstable, or as Trilling puts it, as "the buffoon, the flattering parasite, the compulsive mimic, without a self to be true to."[202]

Nonetheless, Trilling observes that Hegel sides with the Nephew. In *Phenomenology of Spirit*, Hegel depicts the narrator as limited in mind and as

[199] Taylor, *Malaise of Modernity*, 28-29 [emphasis in original].
[200] Taylor, *Malaise of Modernity*, 26.
[201] The exact year that this piece was written is unknown, but it is believed to have been published between 1761 and 1774. References to Hegel's take on the dialogue can be found notably in Trilling, *Sincerity and Authenticity*; Williams, *Truth and Truthfulness: an Essay in Genealogy*, 185-91; Varga, *Authenticity as an Ethical Ideal*, 15-17.
[202] Trilling, *Sincerity and Authenticity*, 44.

unreflectively submitting to traditional morality: "Diderot-*Moi*," Trilling writes, "does not [for Hegel] exemplify the urge of Spirit to escape from the conditions which circumscribe it and to enter into an existence which will be determined by itself alone."[203] In other words, Hegel repudiates what Diderot paints as the noble life because he views this way of living as too constricting. What emerges from Hegel's take on *Rameau's Nephew*, then, is a valuation of being true to oneself that is similar to that which Herder suggests. Indeed, if, according to Hegel, Diderot-*Moi* is a failed human being, it is because he accords so much importance to being true to the social norms of his time that he cannot ever be true to himself. The Nephew, on the other hand, is aware of and accounts for his feelings in his actions, which, despite at times leading him to depart from what is deemed virtuous or right, is what allows him to be truly himself and to lead a life truly worth living. As Trilling puts it: "[w]hat any reader naturally understands as a deficiency in [the Nephew], to be forgiven or 'accepted', Hegel takes to be a positive attribute and of the highest significance, nothing less than a necessary condition of the development of Spirit, of *Geist*, that is to say, of mind in its defining act, which is to be aware of itself."[204]

As Trilling observes, most Westerners today would agree with Hegel. Diderot's depiction of the unreflectively compliant character of *Moi* does not, in modern Western culture, generate the esteem it was intended to generate by Diderot at the time he wrote the dialogue. In the few decades that separate the writing of the dialogue and its reading by Hegel, something appears to have changed in our conception of the ideal self.

Taylor draws this connection back to Rousseau, whose writings he claims "immensely enlarged the scope of the inner voice."[205] According to Taylor, Rousseau's account of feelings in decision-making importantly challenged and transformed our conception of the good. Instead of presupposing that "right" and "wrong" exist *a priori* in any given situation, Rousseau's philosophy served as a steppingstone to the popularization of the idea that determining what is "right" or "wrong" should ultimately involve an assessment of our feelings regarding that situation. This development, which Taylor associates with Romantic expressivism, completely redefined the role of feelings in our

[203] Trilling, *Sincerity and Authenticity*, 39.
[204] Trilling, *Sincerity and Authenticity*, 34.
[205] Taylor, *Sources of the Self*, 362.

conception of the good. In this new outlook, my feelings ought to constitute the basis for the good: "the inner voice of my true sentiments *define* what is the good: since the élan of nature in me *is* the good, it is this which has to be consulted to discover it."[206] This "radical view," as Taylor calls it, shifted the locus of the good from the social order to the individual.

The growing popularity of the idea that each person has his or her own "measure" indeed generated important transformations in our conception of the ideal self. In particular, Taylor explains that it transformed our understanding of the elements of our identity that matter the most for life in society. If being a full human being is dependent upon my discovering the characteristics that make me truly myself, then the traits of my identity that are central to me "cannot be socially derived but must be inwardly generated."[207] This, however, puts into question the relevance of granting prominence to one's social position or one's ability to conform to social expectations for life in society. If meaningfulness must be inwardly generated, then what truly matters for my life is perhaps fundamentally my capacity to make choices that are coherent with my own desires and feelings.

This is one major social change that occurs as an offshoot of the rise of the ideal of authenticity. In earlier societies, Taylor explains that identity was by large dependent upon one's social position. Whether I occupied an honorable social position or not was not really my own choice, but more often a consequence of the family and class from which I originated. To a certain extent, this is still true of our contemporary society. Taylor is indeed sure to remind us that we still define ourselves, at least partly, based on our social role. But, as he also points out, the idea brought about by the rise of the ideal of authenticity that *I* am the primary generator of my own identity placed us on a much more equal footing. Insofar as we are all equipped with an interiority in our quality of being human, we are all endowed with the capacity for introspection and self-definition that is emerging as central to the meaning of our existence. Against this background, notions of social hierarchies and honor, which presuppose that value is attributed to human life from the outside, gradually

[206] Taylor, *Sources of the Self*, 362 [emphasis in original].
[207] Taylor, *Malaise of Modernity*, 47.

lose their importance as they are replaced by the notions more familiar to us of universal dignity and equality.[208]

There is, however, one other transformation, which Hegel's critique of *Rameau's Nephew* illustrates, that is of interest to us. That is, the transformation in our understanding of the meaning of "sincerity"; a concept central to the handling of religious freedom claims in courts today. In the current sense, the word "sincerity" is taken to mean "congruence between avowal and actual feeling."[209] I am being sincere when I am speaking free from pretense or hypocrisy; when I am expressing myself truthfully to my actions, intentions, motives, and emotions.

This conception of the sincere person is rather new. Before Hegel, being sincere or honest was taken to mean something quite different; something akin to the so-called noble behaviour of *Moi* in *Rameau's Nephew*. Indeed, Somogy Varga and Charles Guignon explain that "[i]n earlier times, a sincere person was seen as someone who honestly attempts to neither violate the expectations that follow from the position he holds in society, nor to strive to appear otherwise than he ought to."[210] Being sincere in this sense meant to be aware of the expectations towards you and to refrain from departing from these expectations in your actions. At the time, this capacity was viewed as a social virtue. Being a sincere person was highly esteemed as "a means to the end of successful social relations."[211]

Such a sincere person is exactly the type that Hegel attacks in his critique of Diderot's dialogue: "[i]n the condition of sincerity," Varga and Guignon write, "the individual is uncritically obedient to the power of society—a conformity that for Hegel leads to subjugation and a deterioration of the individual."[212] For Hegel, sincerity is not a

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[208] Taylor, *Malaise of Modernity*, 46-47.
[209] Trilling, *Sincerity and Authenticity*, 2.
[210] Somogy Varga and Charles Guignon, "Authenticity," in *Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (2020). https://plato.stanford.edu/entries/authenticity/.
[211] Varga and Guignon, "Authenticity." See also Varga, *Authenticity as an Ethical Ideal*, 15-17; Guignon, *On Being Authentic*, 27-28; 35; Ferrara, *Modernity and Authenticity*, 86-87; Jacob Golomb, *In Search of Authenticity: From Kierkegaard to Camus* (London: Routledge, 1995), 7-15. In its original sense, Trilling explains that sincerity was used to designate a pure, sound, clear or unaltered object. It became used metaphorically to designate a person's character in the early sixteenth century. See Trilling, *Sincerity and Authenticity*, 12-13.
[212] Varga and Guignon, "Authenticity."

desirable trait of character, on the contrary. If this criticism is made possible, however, it is because of the emergence of the ideal of authenticity, which came to contest sincerity's stance as a virtue. Indeed, what appears to be bothering Hegel in Diderot's valuation of sincerity is that "it does not propose being true to one's own self as an end but only as a means."[213] Sincerity implies, as Trilling puts it, "a public end in view, with all that this suggests of the esteem and fair repute that follow upon the correct fulfilment of a public role."[214]

This conception of sincerity as a virtue is difficult to reconcile with the new emerging view that one ought to be true to oneself for *one's own benefit*. In this new outlook, sincerity became increasingly awkward to use as a virtue, and eventually lost its stance as an ideal; only to be replaced by the ideal of authenticity.

What is interesting for our purposes is how the meaning of sincerity was affected as sincerity was replaced. The way in which we use the term sincerity today—referring to a congruence between avowal and actual feeling—still implies a social end; however, this social end matters only insofar as it allows me to be true *to myself*. When I am expressing myself sincerely, I am not merely being truthful to my own sense of self for the sake of it; I am protecting my self-coherence or integrity. In other words, sincerity is how I present myself to others in order to ensure that I can be true to myself. In the process of being replaced as an ideal by authenticity, the meaning of sincerity was recast to reflect what we value the most in the self: that is, being true to oneself, and not to one's role in society.[215] Sincerity then became a tool at the service of the achievement of one's sense of self.

The Premodern Outlook: Inward and Upward

Diderot's conception of the ideal self in *Rameau's Nephew*, which is encapsulated by a character who is fully the master of his own feelings and impulses, can be traced back to an older conception of the self, which has its roots in the premodern world.[216] This latter

[213] Trilling, *Sincerity and Authenticity*, 9.
[214] Trilling, *Sincerity and Authenticity*, 9.
[215] Trilling, *Sincerity and Authenticity*, 11; Varga and Guignon, "Authenticity."
[216] Following Guignon, I refer to the premodern world as leading up to the Protestant Reformation. See Guignon, *On Being Authentic*.

conception, from which the older understanding of sincerity stems, reveals a picture of the ideal self that contrasts with the one that emerges in authors like Rousseau, Herder, and Hegel.

I want to draw attention to this older outlook because it sharply differs from the one that is currently in use in Western societies, and it is therefore particularly useful to contextualize the reasons we are encouraged to be authentic beings today. Nonetheless, there are also many important developments in the premodern world that have contributed to the emergence of the ideal of authenticity in our contemporary society and that can help us gain a better understanding of the modern ideal itself.

The premodern vision of the self is best encapsulated by the term "cosmocentric"; meaning, an understanding of the world that rests on the presumption that "what is good for the individual is defined by the standards that determine in advance the right and proper way to be human in the cosmic order."[217] The ideal self, according to this perspective, is one that is directed "upward"; that is, one who possesses the skills to detach itself from its own personal feelings and needs so as to be able to "give [one's] life over to something greater than [oneself]."[218] Self-knowledge, in this outlook, is irrelevant; what is ultimately valued here is self-mastery.[219]

Contemporary theorists of authenticity give various illustrations of this older vision of the ideal self among the Ancients. Guignon notes that it is within this framework that the maxim "know thyself" of the Temple of Delphi was intended when it was conveyed by Socrates: to know thyself meant "to know above all what your *place* is in the scheme of things" since "what you are and what you should be as that has been laid out in advance by the cosmic order."[220] Following this view, your individual character and preferences have the potential to prevent you from taking your due place in the scheme of things, and they should therefore be repressed. According to Taylor, this is a vision of the ideal self that Plato shares in his own philosophy where the self is encouraged to "have the higher

[217] Guignon, *On Being Authentic*, 14.
[218] Guignon, *On Being Authentic*, 7.
[219] See Taylor, *Sources of the Self*, 115-26.
[220] Guignon, *On Being Authentic*, 13 [emphasis in original].

part of the soul rule over the lower, which means reason over the desires."[221] It is also present in the works of the Stoics for whom, as Varga explains, "the dimension of the self that is considered to be worthy of discovering and nourishing is exactly that dimension of the self that ultimately points towards something that transcends the self."[222]

While this vision of the ideal self seems to exist in a world far remote from our own, Taylor notes in *Sources of the Self* that it perhaps planted the seed that was needed for our vision of the ideal authentic self to grow. In particular, Taylor notes that Plato's philosophy, by presenting the ideal being as a self-collected, self-contained, rational person directed towards the cosmos, was fundamental in introducing the notion that the human soul was a single, unified locus. "The soul *must* be one," Taylor writes, "if we are to reach our highest in the self-collected understanding of reason, which brings about the harmony and concord of the whole person."[223] Thus, while Plato's vision of the ideal self is oriented towards the wider whole, his conception of the self as possessing the ability to tame its own soul indicates a novel form of centering on the individual. According to Taylor, this "centering or unification of the moral self was a precondition of the transformation [towards] … an internalization [of moral sources]."[224] This internalization, however, was a fundamental precondition of our conception of the ideal self as an authentic being who acts in coherence with its own unique feelings about the world.

The connection between our modern vision of the ideal authentic self and individual interiority truly occurs, according to contemporary theorists of authenticity, with the works of Augustine. Taylor, Varga, and Guignon all read Augustine's work as a pledge to turn inward in order to be moved upward. Augustine's aim is to bring human beings to connect with God by turning inward whether in his call to "Return to your heart!" in the *Tractates on the Gospel of John*[225] or, in *On True Religion*, his statement "Do not go outward; return within yourself. In the inward man dwells the truth."[226]

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[221] Taylor, *Sources of the Self*, 115.
[222] Varga, *Authenticity as an Ethical Ideal*, 13.
[223] Taylor, *Sources of the Self*, 120 [emphasis in original].
[224] Taylor, *Sources of the Self*, 120.
[225] Cited in Varga, *Authenticity as an Ethical Ideal*, 14.
[226] Cited in Guignon, *On Being Authentic*, 16.

Nonetheless, Augustine's focus on inwardness remains distinct from our contemporary valuation of the inner realm of the self. Guignon notes, for instance, that Augustine promotes "not so much getting in touch with one's own inner self as enabling one to give oneself over totally to God."[227] As such, Guignon argues that Augustine's works paint the self as "theocentric" rather than "cosmocentric." "What constitutes self-realization in this view," Guignon explains, is "release from the ego and acceptance of one's dependence on the source of one's being."[228] While the pathway to being in an ideal state "passes through our attending to ourselves as *inner*,"[229] Augustine's works remain tied to an upward movement to the extent that one's place in the world is predetermined in the natural order laid out by God. Looking inward is here meant to allow us to discover and accept what this place is.

The internalization of the self in Augustine's theology brought with it what Taylor calls a stance of "radical reflexivity." In being called to turn inward, Taylor explains, I am also called to express myself through a first-person standpoint; a standpoint that cannot but underline that "there is a crucial difference between the way I experience my activity, thought, and feeling, and the way that you or anyone else does."[230] What we end up with is a conception of the self with an exclusive access to its own interiority and a conception of interiority as the sole path of access to a higher condition of being.

Per Taylor's reading, Augustine's contribution has been to introduce the idea, in Western culture, that moral sources are embedded in a form of introspection. However, as opposed to the line of thinking discussed above, which suggests that the voice within ought to constitute a legitimate source of morality, Augustine's suggestion is that the relevant moral sources that we find through a work of introspection are ultimately linked to the order of the world laid out by God. I am a full being, following Augustine, when I am in connection *not* with my own inner voice, but with the voice of God within me.

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[227] Guignon, *On Being Authentic*, 16. Varga similarly notes that in Augustine's works, "[t]he self is not seen as a unified source of agency, but as depending on God as the source of one's being." See Varga, *Authenticity as an Ethical Ideal*, 15.
[228] Guignon, *On Being Authentic*, 16.
[229] Taylor, *Sources of the Self*, 129 [emphasis in original].
[230] Taylor, *Sources of the Self*, 131.

The Modern Outlook: The Inward Turn

The call to turn inward in Augustinian theology is further strengthened, at the dawn of modernity, with the Protestant Reformation. Luther's forceful critique of the Church's hierarchy and endorsement of practices such as the confession and the purchase of indulgences encouraged many to tend to their own soul not primarily through their actions but through their own mind; that is to say, through their personal connection with God.[231] With a view to respond to the Reformation, Guignon notes that the Catholic Counter-Reformation followed a similar pathway. Examining one's conscience, for instance, begins to be viewed as the primary objective of the confession, and one's intentions, as opposed to one's actions, are granted greater importance. Following the Counter-Reformation, "lust in the heart" begins to be viewed "as bad as, and sometimes worse than, a person's actual actions."[232] Individuals were in this way encouraged to remain aware of their own thoughts and feelings.

It is during the Enlightenment period, with the rise of modern science and the gradual secularization of society, that the premodern "inward and upward" orientation of the ideal self comes to be severed from its upward dimension. With the Enlightenment, Guignon observes that the vision of self starts to shift from "theocentric" to "anthropocentric": "[t]he self comes to be seen as a *subject*, a center of experience and action, set over against a world of objects that are to be known and manipulated."[233]

According to Taylor, the development of the modern scientific method as a tool to assist us in the project of understanding the workings of the world and of gaining mastery over it played an important role in the gradual detachment of the self's interiority from God. Early modern scientists and philosophers such as Descartes and Locke contributed to this, Taylor argues, by introducing the idea that science requires a certain level of distance from the object studied. In order to gain knowledge of a phenomenon and control it, the modern scientific method suggests one ought to first adopt a disengaged and objective

[231] This view is encapsulated, according to Guignon, in Luther's say, "It is not by works but by faith alone that man is saved." Martin Luther, quoted in Guignon, *On Being Authentic*, 28.
[232] Guignon, *On Being Authentic*, 29.
[233] Guignon, *On Being Authentic*, 32 [emphasis in original].

stance towards it: "[i]nstead of being swept along to error by the ordinary bent of our experience, we stand back from it, withdraw from it, reconstrue it objectively, and then learn to draw defensible conclusions from it."[234] While this approach may seem to draw us away from an internalization of moral sources, Taylor explains that this detachment from our own experience can only be made possible through a radical form of reflexivity. Such a "self-objectification," he notes, "can only be carried out in the first-person perspective. … It calls on me to be aware of *my* activity of thinking or *my* processes of habituation, so as to disengage from them and objectify them."[235] As he sums it up, "[r]adical objectivity is only intelligible and accessible through radical subjectivity."[236]

With the rise of modern science, the turn inward is therefore reinforced, only this time the overarching goal is not knowledge of God, but knowledge of nature. As this shift in focus happens, Taylor remarks that the turn inward fostered by Augustine "takes on secularized forms." "We go inward," Taylor writes, "but not necessarily to find God; we go to discover or impart some order, or some meaning or some justification, to our lives."[237]

Something like a new horizon of meaning seems to be emerging with the Enlightenment. In particular, Guignon argues that what seemed like humans' exponential ability to understand and gain mastery over the world they inhabit contributed to the spreading of a vision of society as something human-made rather than God-made. In the process, society begins to be apprehended as "something 'other' to the real self,"[238] as Guignon puts it, and specifically, as something that constricts the real self.

It is this detachment, in the early modern outlook, of the self from the wider whole that brings with it a whole new vision of the self. Instead of postulating that it is the self that ought to accept its due place in society, the assumption becomes that it is society that ought to be tailored so as to fit the demands of the self. If the world as we know it is human-made, then we can—perhaps we must—make it to our liking. This, however, requires us

[234] Taylor, *Sources of the Self*, 163.
[235] Taylor, *Sources of the Self*, 175 [emphasis in original].
[236] Taylor, *Sources of the Self*, 176.
[237] Taylor, *Sources of the Self*, 177.
[238] Guignon, *On Being Authentic*, 34.

to determine which features of ourselves are the most fundamental for life in society and should hence guide us in the making of our society.

According to Varga, for Kant—one of Rousseau's contemporaries—this feature is our autonomy; that is to say, the freedom that is endowed to us in our capacity as rational agents. By putting to use our faculty to reason rationally, Kant argues that we can generate a society in which we are truly free since, as rational agents, we would then understand the reasons behind the laws and see that we ought to respect them. This vision of the human person as a rational agent positions the subject as possessing the ability to follow a "self-imposed principle."[239] In doing so, Kant's philosophy suggests that one's actions ought to ultimately be determined by one's own agency. Thus, for Kant, Varga explains that "[w]e cannot accept that the cosmic order … should determine our normative purposes," because "[a]ll such views are heteronomous; they involve abdicating our responsibility to generate the law out of ourselves."[240] Abdicating this responsibility, however, would involve forgoing our freedom as rational agents.

With Kant, but also with Rousseau, the idea that the self is distinct from the wider whole in which it finds itself is highlighted. Around this point in history, Taylor observes that "[t]he dignity of free, rational control came to seem genuine only free of submission to God; the goodness of nature, and/or our unreserved immersion in it, seemed to require its independence, and a negation of any divine vocation."[241] To put it differently, with Kant and Rousseau, the ideal self begins to be conceptualized in terms of autonomy; that is, in terms of its capacity to determine its own moral principles either through rational reason or by being in tune with its inner *élan* or voice. The state of autonomy is ideal in either case since it is connected to a condition of freedom. For Kant, autonomy frees the self from being subjected to unreasonable or unjust laws, while for Rousseau, it frees the self from the pressures of society and culture.

The vision of the autonomous self suggested by Kant and Rousseau brings us a step closer to the contemporary ideal of authenticity; yet, the two notions remain distinct in

[239] Varga, *Authenticity as an Ethical Ideal*, 18.
[240] Taylor, *Sources of the Self*, 364.
[241] Taylor, *Sources of the Self*, 315.

significant ways. For Kant, autonomy refers to one's capacity to self-govern in accordance with the general, rational principles of the law.[242] This idea, Taylor notes, "gives a firm but quite new base to the subjectivization or internalization of moral sources,"[243] which, as we have seen, is an essential aspect of authenticity. Moreover, our contemporary notion of authenticity draws from the idea, encapsulated in Kant's vision of the self-imposed principle, that I possess the agency to decide for myself how to live my life.

There is nonetheless a sense that something is lacking before we can call this vision of the ideal self "authentic." Indeed, Varga observes that, as far as the Kantian ideal of autonomy is concerned, one strictly seeks "the coincidence of conduct and ethical principles and the reconciliation of action and reason that involves distancing from immediate, inner impulses."[244] Being autonomous, in this outlook, seems to mean something akin to being rational, which in turn configures a posture that is going to prevent us from becoming authentic.

Indeed, being "rational" is probably not the first adjective that comes to mind when one thinks of someone "authentic" today. Varga expresses the distinction between the two ideals quite simply by explaining that "[o]ne can lead an autonomous life, even if this way of living fails to express a person's self-understanding."[245] From the standpoint of authenticity, expressing my self-understanding is crucial. Being autonomous does not amount to being authentic because authenticity requires a "sense of self-identity"[246] or a "language of personal resonance,"[247] which autonomy does not demand. What is lacking from Kant's vision of autonomy from the perspective of authenticity, then, is a consideration of one's unique relationship to the general principles that govern us. This is precisely the line of reasoning that compelled us to reassess, in contemporary times, laws that women, Indigenous peoples, Black people, and various other groups have pointed out as contributing to their marginalization.

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[242] Taylor, *Sources of the Self*, 363-67; Varga, *Authenticity as an Ethical Ideal*, 18-19.
[243] Taylor, *Sources of the Self*, 364.
[244] Varga, *Authenticity as an Ethical Ideal*, 19.
[245] Varga, *Authenticity as an Ethical Ideal*, 19. See also Ferrara, *Reflective Authenticity*, 5-6.
[246] Varga, *Authenticity as an Ethical Ideal*, 19.
[247] Taylor, *Malaise of Modernity*, 90.

Rousseau's conception of autonomy comes closer to the Western contemporary understanding of authenticity. For Rousseau, true freedom is achieved when I make my own decisions regarding what concerns me in congruence with how I truly feel about things instead of letting myself be influenced or shaped by the demands of society. Taylor terms this conception of autonomy "self-determining freedom." In this outlook, I am called upon to make use of my autonomy to "break the hold of all … external impositions, and decide for myself alone."[248]

While this vision of autonomy seems to fall closer to our conception of authenticity, Taylor contends that it still fails to capture the essence of the contemporary ideal. Specifically, self-determining freedom does not require us to acknowledge the way in which the social sphere marks certain things as meaningful, and therefore guides us in making meaningful choices regarding how to live our life. If we consider the ideal self to be one that completely omits the demands of society, Taylor explains that we then end up suppressing the conditions for the production of meaning and hence destroy the very foundation required for the ideal of authenticity to be realized. However, the fact that self-choosing exists as a moral ideal implies that we recognize the existence of "demands that emanate from beyond the self."[249] While Kant's conception of autonomy failed to consider the way that I personally relate to the norms of society, Rousseau's conception fails to consider how the norms, values, and attitudes that we find in society inform the way I feel about myself and about the good life.

These two components are, however, essential to authenticity. Within the outlook of authenticity, the ideal self is perhaps one with self-determined goals, but these goals must always be considered as part of a broader and more important project, which is that of *defining who I am*. This is the aspect that is missing from Kant and Rousseau's visions of the autonomous self. The contemporary ideal of the authentic self is tightly connected with the idea that the self possesses a self-determined *identity*. One's autonomy should therefore be exercised towards something very specific, which is the expression of one's true nature. This implies, on the one hand, that I keep in touch with my feelings about the

[248] Taylor, *Malaise of Modernity*, 27.
[249] Taylor, *Malaise of Modernity*, 41.

world and not only listen to my rational side. But this also implies, on the other hand, that I am aware of the people who surround me and of the things that matter to them. If I ignore the demands emanating from those who surround me altogether, I will never be able to find out what is meaningful about myself since meaningfulness cannot be generated in a vacuum. To use Taylor's example quoted in the introduction to this chapter, I would not deem that having exactly 3,732 hairs on my head is a feature of my identity because I know that such a characteristic is not a significant feature about myself. Thus, while I am free to self-define, I would not be able to formulate a self-definition without other people. I can only find out what makes me truly myself once I have been made aware of the features that are significant for life in society and have assessed myself against other people.[250]

How then, do we get from the ideal of the autonomous self to authenticity? The way is paved, Taylor argues, by the Modernists' critique of Romantic optimism.[251] Modernist writers take issue with the Romantic view that self-expression is key to our freedom. Human nature, they observe, is not inherently good. Human beings are complex; they have good *and* bad sides. Moreover, human beings are at times contradictory. It seems odd, therefore, to conceptualize the ideal self in terms of "being in tune with the voice of nature within" if there is no guarantee that this voice will lead us towards the good. Furthermore, such a vision of the self is reductive and impoverishing of the inherently multileveled human consciousness. The problem with the Romantic vision of the ideal self, the Modernists claim, is that it presupposes a vision of the self that is inaccurate; that is, a fixed, unified, and pure self. In order to truly account for the self, we should however acknowledge the various and ever-shifting dimensions that constitute the self, including the aspects of human nature that we consider to be ugly. With the Modernists, the concern starts to shift towards *self-affirmation*.[252]

This concern for self-affirmation calls for a whole new kind of reflexive turn. In turning inward, I now have the responsibility of determining which characteristics are enduring qualities of my true self, and which aspects of myself I ought to work over. This

[250] Taylor, *Malaise of Modernity*, 55-69.
[251] Taylor cites various authors, such as Schopenhauer, Nietzsche, and Kierkegaard. See Taylor, *Sources of the Self*, 456-93.
[252] Taylor, *Sources of the Self*, 480.

requires me to "detect and distinguish central impulses, feelings and wishes from ones that are less central or conflict with [my] central motives."[253] By stressing the complexity of the self, the Modernists reinforced the importance of looking inward; only this time, what we find inward is apprehended as fundamentally complex and dynamic; thus, the process of inward-looking calls for more than mere constatation of the state of things. My inward world is not inherently good because it brings me upward, towards a divine principle. It is not either inherently good because my feelings and my reason which make me human are inherently good. My inner world is, in fact, not inherently good in any way; it is simply the main background against which I can assess and articulate myself.

Against the modern and secular background outlined above, Taylor observes that such demands formulated towards the self have generated what he calls a "crisis of affirmation": "For those committed to the goodness of being and benevolence," he writes, "the stark rejection of any spiritual dimension may easily engender a sense that the affirmation [of the self] is insufficiently based, that there isn't that much to affirm after all."[254] If human nature is not inherently good, and if it is not to be viewed in relationship to any objective order of goodness, what makes my self-affirmation moral?

The way that we have answered this question and resolved the crisis, Taylor argues, is by accepting that our understanding of goodness is not something fixed: "the world's being good may now be seen as not entirely independent of our seeing it and showing it as good, at least as far as the world of humans is concerned. The key to a recovery from the crisis may thus consist in our being able to "see that it is good"."[255] According to Taylor, we owe this pathway out of the affirmation crisis to Modernist writers, such as Schopenhauer and Baudelaire, who have made us aware through their life's work that human beings possess the power to transfigure reality through the use of their creative imagination. With them, the world becomes dependent upon the way we look at it. When reality is repulsive, we possess the capacity to transfigure it and make it beautiful.[256] And

[253] Varga and Guignon, "Authenticity."
[254] Taylor, *Sources of the Self*, 448.
[255] Taylor, *Sources of the Self*, 448.
[256] As an illustration, Taylor quotes Baudelaine explaining that "[n]ature is ugly, but the imagination of the artist allows him "de saisir les parcelles du beau égarées sur la terre, de suivre le beau a la piste partout où il a pu glisser à travers les trivialités de la nature déchue" ("to seize upon the bits of beauty scattered about the

while these authors were primarily concerned with describing the world we live in, Taylor's contention is that the strength of their work "cannot but suggest an analogous role in the recovery of [our] capacity to affirm goodness."[257] By using our transfigurative powers, we are able to recognize the good, and by recognizing it, we are, in turn, empowered in our self-affirmation.

An example that comes to mind to illustrate how this may play out is the evolution of our view of homosexuality. Same-sex relationships were, only a few decades ago, considered immoral by many. This transpired in our laws, which prohibited such behaviour altogether at first and, until quite recently, did not recognize the legitimacy of such unions for civil purposes. In today's society, however, same-sex relationships and unions are largely accepted. What was previously viewed as offensive was eventually recast into something largely accepted as beautiful (i.e., love), which we have no reason not to celebrate. This collective transfiguring of reality has had the impact of empowering a number of people to feel comfortable and confident in their self-affirmation.

Not all aspects of human life, however, should be transfigured in such a way. This is why, when it comes to the goodness of my own self-affirmation, looking inward takes on a very special twist. Looking inward becomes an act of deep introspection from where I must assess and decide what is truly central to my sense of self. I might be called to transfigure my own reality in order to accept parts of me that I am uncomfortable with if they are immutable features of myself or if I come to realize that they are central to my sense of self. I might also be called to work towards the transfiguration of our collective reality if I find that the world currently unfairly depicts or does not account for some features that are central to my sense of self. But I might also want to work over some aspects of my personality if I consider them a nuisance to who I want to become. In any case, being in touch with myself is essential to the articulation of my identity as a member of society. However, it is essential to recall that the fact that this process involves introspection does not mean that I can accomplish it alone. I require the others to assist me in defining which features of myself are meaningful. I also require the others to help me

earth, to follow beauty's trail wherever it has managed to slip in admist the trivialities of fallen nature")." Charles Baudelaire quoted in Taylor, *Sources of the Self*, 436.

[257] Taylor, *Sources of the Self*, 448.

determine which features of myself are desirable and which ones are not. I would once again require the help of others if I were led to believe that some features of myself are unduly looked upon in a negative fashion and wished to change that.

Our modern conception of authenticity is inseparable from this idea of a self-affirmed identity. Indeed, while it is undeniable that our identity is partly imposed on us by others, we also believe that we should remain the primary definers of our own identity. Not only are there aspects of my identity, like my sexual orientation, that only I can come to know, but my self-affirming power also allows me to reclaim an identification that was imposed on me by others. One example of this is the battle for the recognition of gender identity, which, among other things, seeks to make us aware of the importance of asking a person for their pronouns before identifying them with pronouns tied to a "male" or "female" identity. When I fail to do so, I impose on someone else my own conception of who they are instead of letting them tell me, which is deemed to be the proper way of doing things in order to be respectful of other people; that is, to be respectful of their sense of self, which I do not have access to.

Our contemporary understanding of the ideal of authenticity emerges from this vision of self-affirmation. Authenticity is the ideal state of the modern self whose self-determined identity can be wholly expressed and embraced as good, even in contexts where there is contestation over the goodness of it. Taylor writes in the concluding chapter of *Sources of the Self* that "[w]hat emerges from the picture of the modern identity as it develops over time is … the diversity of goods for which a valid claim can be made. The goods may be in conflict, but for all that they don't refute each other."[258] What remains central in all cases of self-articulation is that the self-articulation in question is formulated to express one's true sense of self. When that is the case, the claim formulated should be given full consideration. The fact that a claim conflicts with how other people feel about themselves does not make that claim inherently wrong or bad; rather, we take it as an opportunity to reassess whether our reality should be transfigured so as to make space for

[258] Taylor, *Sources of the Self*, 502.

it. This, I contend, is one of the ways that the ideal of authenticity impacts the workings of the legal system.

Kinship Notions: Sincerity, Autonomy, and Identity

Before we assess, against the background of this historical review, the reasons that make authenticity such a compelling ideal today, I want to pause to briefly reiterate the connections of the ideal of authenticity with three notions that are at the centre of my argument on the Supreme Court of Canada's handling of religious freedom claims. While these three notions are related to authenticity, they each remain distinct from it and should be clearly differentiated from the ideal.

The first of the three concepts is the notion of *sincerity*, which authenticity came to replace as a moral ideal in the early nineteenth century. Sincerity, in its current meaning, is tightly connected to authenticity insofar as it is the means by which I protect my sense of self. Being sincere is what allows me to act in society in a manner that conforms with how I feel about myself. It is different from authenticity because it implies a public end—that of being seen and treated as the person that I feel I am—, while authenticity is something that I accomplish for my own sake, in order to feel a sense of self-fulfilment in my life. In other words, sincerity is valued as a tool with authenticity in view, while authenticity is valued in itself.

The second notion that is related to authenticity is *autonomy*, or, as I have also called it, self-determining freedom. Authenticity calls on me to make my own choices based on my self-assessment. In this sense, it relies on the notion of autonomy. An individual who is not acting autonomously cannot be considered authentic. In order to be truthful to myself, I must be able to make choices that enable me to be express my sense of self. Authenticity diverges from autonomy, however, by requesting more than freedom of action. I can decide to hide from my community that I am homosexual, but this kind of exercise of my autonomy will bring me further from a state of authenticity. What authenticity demands is that one's actions and choices reflect one's self-understanding.

In order to be authentic, I must use this power that I have to express myself autonomously towards the development of my *identity*. This is the third notion that is

related to our contemporary understanding of authenticity. My identity is derived from both self-assessment and self-affirmation. The idea that I have the power to self-articulate my own identity according to how I truly feel about myself is also a central aspect of authenticity. But self-identifying as something does not make me authentic. Knowing that I am homosexual, for example, does not mean that I am at peace with being that way. I might be able to self-identify as such but forming a relationship with a person of the same sex and feeling good about it might require hard work from myself. However, as long as I do not reach this state, I am not considered to be living in a state of authenticity. While our power to self-articulate is essential to our contemporary understanding of both identity and authenticity, here again, authenticity demands something more then mere self-articulation. What is implied in the logic of authenticity is a performance of who I am that matches my self-assessment, and with which I am at peace.

These three notions—sincerity, autonomy, and identity—are all central to an analysis of the rulings on religious freedom at the level of the Supreme Court, as we have seen in Chapter 1. The so-called "sincerity test" serves to determine whether a claim for religious freedom is legitimate or not, while autonomy and identity appear to be in tension when it comes to grounding the reasons *why* a religious freedom claim ought to be protected by the law or not. It is my contention that much clarity can be gained around the use of these three notions if they are considered within the broader outlook of authenticity. The argument that I will put forward in Chapter 3 is that the Court has adopted a "framework of authenticity" to assess claims of religious freedom, whereby religion is viewed as a source of authenticity.

Why Do We Value Authenticity Today?

The primary aim of the history of authenticity that I have just presented was to get us to reflect on the reasons why we value authenticity today. This is, I believe, an important step to formulating a constructive criticism of the handling of religious freedom claims. If, as I argue, authenticity informs the Supreme Court's approach to religion, then being aware of the benefits of authenticity compels us to adopt a more nuanced—and hence more productive—critical stance towards the current approach. In this section, I therefore want

to reflect on the contributions of the ideal authenticity to our life in society, which the historical review above sought to underline.

A prime reason leading us to value authenticity today pertains to the fact that it allows us to reach what Taylor depicts as a "richer mode of existence." [259] In Taylor's words, being authentic "allows us to live … a fuller and more differentiated life, because more fully appropriated as our own."[260] This is made possible under the ethics of authenticity because, in living my own life, I am called upon to realize "a potentiality that is properly my own."[261] Finding and expressing my own potentiality—that is, my own original sense of self—is what makes my live truly worth living.

Such a conception of the human life which attributes worthiness to the expression of one's own way of being human impacts both our relationship with ourselves, on the one hand, and our relationship with the people who surround us, on the other hand. On the personal level, this conception of the human life encourages us to adopt what Taylor views as a more self-responsible form of life.[262] Since I am the only one able to express what it means to be human for me, *I* am responsible for my own fulfilment. This may be a great responsibility for the individual, but with great responsibility also comes great power. In the perspective of authenticity, the worthiness of my own life cannot be taken away from me simply because I do not conform to some of the norms of society or because I live my life in a marginal way. As long as I am expressing what it means to be human for *me* in a

[259] It is interesting to note that, while many ideas introduced in the historical review were drawn from Taylor's *Sources of the Self*, there is no mention of the ideal of authenticity in this monograph. Taylor's account of authenticity comes two years after this book was published, in *The Malaise of Modernity* (1991), and is further discussed in *Multiculturalism and "The Politics of Recognition"* (1992) and in *A Secular Age* (2007). These two latter and much shorter books draw in many ways on Taylor's account of the "modern self" built in *Sources of the Self*. In particular, the impact of Rousseau and Herder on the development of the modern identity as self-defined and unique to each is central to all three volumes. Per my reading, *Sources of the Self* lays the groundwork for a later discussion on the place of the ideal of authenticity in contemporary society. A descriptive account of this is undertaken by Taylor in a chapter entitled "The Age of Authenticity" in *A Secular Age*. A critical account figures in *the Malaise of Modernity*, where Taylor defends a non-self-centered the ideal of authenticity. Finally, an evaluative account of the impact of the ideal of authenticity is given in *Multiculturalism and "The Politics of Recognition*." Taylor there argues that our valuation of this ideal has brought a new type of political tension in contemporary society; that between the politics of universalism, where each individual is considered inherently equal regardless of the differences between them, and the politics of recognition, where each person's unique identity seeks to be acknowledged and celebrated as it is. Among the scholarship that deals with the ideal of authenticity, Taylor is one of the most often cited authors.
[260] Taylor, *Malaise of Modernity*, 74.
[261] Taylor, *Malaise of Modernity*, 29.
[262] Taylor, *Malaise of Modernity*, 74.

sincere way, *I* give my life meaning and *I* make it worth living. Rather than pushing me to change in order to fit the demands of my community in terms of fulfilment and of what it means to live a life worth living, the ideal of authenticity empowers me to live by my own measure of worthiness. My sense of self and fulfilment are things that I am led to learn to love and respect. For many, this process is highly liberating. Authenticity is in this sense a powerful tool of freedom and empowerment for the individual because it promotes self-acceptance and self-respect in a wide range of shapes.

This brings us to another reason why we value authenticity today, which ties in with the way in which authenticity impacts our relationship with those who surround us: authenticity can be a powerful mechanism of peaceful cohabitation. An offshoot of authenticity's call to love and respect our own unique sense of self is to draw attention to the multitude of differences that exist between us. There are differences in the way that you and I experience life since our experience of life is tied to our own interiority, which is unique to us, and which we alone can access. Nonetheless, what is ultimately deemed to matter within the outlook of authenticity is not so much the ways in which our experiences of life differ, but that we each find the way to experience life that is truly ours. What authenticity does, therefore, is ask of us that we respect the multitude of differences that exist between us because these differences are, precisely, at the heart of what makes our life truly worth living. We value authenticity, in this respect, because it gives a solid foundation not only to the toleration of difference, but to the acceptance of its full worth. I may not share or understand your way of being, but I value the fact that you are following a path that makes you feel fulfilled and self-realized. Put differently, I do not need to share your own specific way of being to recognize the worth of allowing and protecting it if I recognize the worth of being authentic.

Viewed in such a way, Taylor points out that authenticity is indispensable to the notions of universal dignity and equality that are essential to our democratic culture.[263] It is impossible, Taylor observes, to envision the maintenance of a democratic society if we do not recognize that the differences between us are legitimate and have each their own

[263] Taylor, *Malaise of Modernity*, 46-47.

worth. Authenticity is important to us because it gives such differences the legitimacy that fosters a smooth functioning of democracy.[264]

These reasons constitute ground to appreciate the status of authenticity as an ideal in our society. While there also exist many critiques of the ideal of authenticity, the abovementioned benefits of the ideal are helpful to contextualize the appeal that authenticity might have had for the resolution of conflicts involving religion at the Supreme Court of Canada.[265]

Contemporary Definitions of Authenticity

But before we can consider the ways in which the ideal of authenticity impacts court rulings in Canada, we must first ensure that we understand what the concept entails. To achieve this, I propose to look at the definitions produced by the main contemporary theorists of authenticity in order to identify the elements central to the ideal.

The clearest and most straightforward definition is formulated by Taylor in *The Malaise of Modernity*, published in the American edition under the title *The Ethics of Authenticity*. According to Taylor, authenticity can be defined as follows:

> Briefly, we can say that authenticity (A) involves (i) creation and construction as well as discovery, (ii) originality, and frequently (iii) opposition to the rules of society and even potentially to what we recognize as morality. But it is also true … that it (B) requires (i) openness to horizons of significance (for otherwise the creation loses the background that can save it from insignificance) and (ii) a self-definition in dialogue.[266]

While the above history has made it clear that being authentic is a process that involves primarily the individual person, Taylor's definition makes it clear that one's sense of

[264] According to Taylor, this is provided that we remain "capable of forming a common purpose and carrying it out." See Taylor, *Malaise of Modernity*, 109-21.
[265] My focus in this dissertation will be restricted to demonstrating that a framework of authenticity guides the Supreme Court in assessing claims pertaining to religion. For this reason, I will not be addressing the criticisms that have been formulated towards the ideal of authenticity in moral philosophy. While I believe that this would constitute a highly constructive angle to criticize the Court's approach to religion, it is not the aim of this dissertation to take such a critical stance. The benefits of authenticity were addressed here not as a means to legitimize the ideal and its use in legal reasoning, but insofar as they contribute to my broader demonstrative argument by providing ground that may justify its appeal.
[266] Taylor, *Malaise of Modernity*, 66.

authentic self cannot be generated independently from one's relationship to society. As Taylor puts it, "[n]o one acquires the languages needed for self definition on their own."[267] We acquire such languages through our learning of what Taylor has termed a "horizon of significance;" that is to say, a background of intelligibility against which we come to know which aspects of ourselves matter for life in society.[268] It is against this background that we find out, for instance, that the number of hair on our head is irrelevant to life in society and, in turn, to our self-definition, whereas being an atheist, a Christian or a Jew, or being hetero-, bi- or homosexual, is relevant. What Taylor's definition of authenticity highlights in this respect is that I alone do not decide which features of my identity are relevant and which ones are not; I learn this through my interactions—either direct or indirect—with others. Thus, the creation, construction, and discovery of my sense of self is given a specific direction by the people who surround me (against which I assess myself) and by the horizons of significance in which I evolve (from which I gather the tools to define myself meaningfully). Taylor's definition is in this sense deeply dialogical, for it stresses the centrality of interactions in the process of defining who we are.

Taylor is probably the author who accords the most consideration to the social context in which we develop and define ourselves. His coining of the term "horizons of significance" indeed testifies of the importance that the collective bears in his account of the ideal of authenticity. But Taylor is not the only author to have drawn attention to the role of society in the development of our sense of self. In his book *In Search of Authenticity: From Kierkegaard to Camus,* Jacob Golomb similarly concludes that life in a society is an inescapable condition of authenticity. He writes:

> [W]hat seems incontrovertible is that authenticity cannot be achieved outside a social context. … Authenticity calls for an ongoing life of significant actions. It is actions that shape our authenticity. … But meaningful activity is only possible in the context of intersubjective interaction, namely, within society. … Society provides the ethical norms and potential sources of self-identity that must freely and consciously be overcome, changed or assimilated into one's life if one is to become what one wants to be.[269]

[267] Taylor, *Malaise of Modernity*, 33.
[268] See Taylor, *Malaise of Modernity*, 31-41.
[269] Golomb, *In Search of Authenticity*, 201.

Like Taylor, Golomb is clear that our sense of self cannot be separated from our knowledge of who we are, and that such knowledge can, in turn, only be produced through our knowledge of and interactions with others and through our awareness of the horizons (encompassed here under the rubric of "ethical norms and potential sources of self-identity") in which we find ourselves.

There is, however, one aspect of Golomb's definition that is perhaps not fully captured or at least not emphasized in Taylor's definition. It is summarized in the sentence "Authenticity calls for an ongoing life of significant actions."[270] Indeed, Taylor's account of authenticity is primarily concerned with the ontological conditions of the authentic being and with the way in which one's self-definition can be generated. Thus, the way in which authenticity can be implemented or is experienced by individuals on a daily basis does not seem to be fully addressed by Taylor despite that, in order to be realized, authenticity also calls on us to *act* in a certain way.

There seems to be, in other words, an *inner sense* and a *performative sense* to authenticity. Both senses presuppose interactions with other beings. In the inner sense, I am called to self-assess within a horizon of significance and against other people. In the performative sense, I am called to express who I am in my interactions with other people. This is how I manage to become authentic; it is through actual implementation, by way of my actions, of the way that I feel about myself. One definition of authenticity that encapsulates well these two dimensions is provided to us by Guignon. In *On Being Authentic*, he defines the authenticity as follows:

> The ideal of authenticity has two components. First, the project of becoming authentic asks us to get in touch with the real self we have within, a task that is achieved primarily through introspection, self-reflection or meditation. Only if we can candidly appraise ourselves and achieve genuine self-knowledge can we begin to realize our capacity for authentic existence. Second, this ideal calls on us to express that unique constellation of inner traits in our actions in the external world—to actually be what we are in our ways of being present in our relationships, careers, and practical activities.[271]

[270] Golomb, *In Search of Authenticity*, 201.
[271] Guignon, *On Being Authentic*, 6.

For Guignon, authenticity is first off generated through an act of introspection. However, authenticity cannot remain at the level of introspection. It must be embodied in some way by the individual in their behaviour, which purposely aligns with their sense of self. In *Authenticity as an Ethical Ideal*, Varga similarly emphasizes the performative sense of authenticity by arguing that it is mainly through our actions that we achieve authenticity. In the general sense, he defines authenticity as

> describing a person who acts in a way that we think of as faithful to herself and her principles. Such a person acts on impulses and ideals that are not only hers (as bearing her authorship), but that are also expressions of who she really is.[272]

As we can see from this definition, one's actions take a central role in Varga's account of authenticity, which resonates with Golomb's affirmation that "[i]t is actions that shape our authenticity."[273] Per Varga's account, authenticity requires an awareness of loyalty towards what he calls "wholehearted commitments"; that is, engagements that are so important to the individual that it is impossible to give up on them without feeling remorse, shame, or guilt.[274] According to Varga, we learn who we truly are when we are made aware of what those commitments are. This awareness, in turn, comes to us most obviously in situations where we must make difficult or existential choices. In such situations, we are led to determine what our most fundamental commitments are, which simultaneously leads us to "articulate who we are, bringing into reality some tacit intuitions that often only take on a gestalt-like formation. In these cases, we both discover who we are "on the inside", and actively constitute ourselves."[275] In this view, one's performance of one's sense of self is a crucial component of an ongoing process of construction, creation, and discovery oneself that occurs throughout one's life.

The emphasis on the role of actions in the development of our sense of authenticity seems to be moving us away from Taylor's depiction of authenticity as formed primarily

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[272] Varga, *Authenticity as an Ethical Ideal*, 2.
[273] Golomb, *In Search of Authenticity*, 201.
[274] One often cited example of such wholehearted commitments is Martin Luther's famous quote at the Diet of Worms "Here I stand; I can do no other" to express his virtual incapacity to recant the religious views he held and taught given how deeply he held them and how important they were to him. See Varga, *Authenticity as an Ethical Ideal*, 61.
[275] Varga and Guignon, "Authenticity." This citation summarizes Varga's particular account of authenticity in the context of a broader descriptive article on the ideal of authenticity in philosophy co-authored by Varga himself.

through our learning of some horizons of significance, which, despite not being under our direct control, give a direction and meaning to our sense of self. Indeed, emphasizing the role of actions in authenticity stresses that being authentic is the product of one's agency or choice, while emphasizing the role of horizons of significance stresses that one's sense of self is partly inherited and, to a certain extent, immutable. Those who gave heed to my argument in Chapter 1 will observe that a very similar tension has been identified by scholars of law and religion in the way that the Supreme Court of Canada has dealt with religion.

Geoffrey Brahm Levey encapsulates this tension among theorists of authenticity by suggesting that authenticity can be divided in three types, each of which "enters multicultural politics … in quite distinct and … complexly interrelated ways."[276] In the first sense, which Levey associates with Taylor's theorization, "value [is] being bestowed directly on individual and group identity."[277] This "authenticity of identity," as Levey calls it, emphasizes that all identities are equally worthy. Thus, the focus of this type of authenticity is placed on acknowledging that different ways of identifying are equally worthy and, consequently, equally deserving of respect in the liberal state.

According to Levey, identity in this first sense refers as much to an identity that is considered to be "received and developed mainly through self-discovery" than to one that is considered to have been "chosen."[278] Conceptualized in this way, "my or our unique identity, *however arrived at*, [warrants] political recognition."[279] Despite focusing on identity, this view of authenticity thus considers autonomy (i.e., one's "chosen identity") to be relevant. What this view makes clear is that it is not totally because one's identity is considered to be inherited and immutable that we believe it is worthy of respect. We also

[276] Geoffrey Brahm Levey, "Authenticity and the Multiculturalism Debates," in *Authenticity, Autonomy and Multiculturalism*, ed. Geoffrey Brahm Levey (New York: Routhledge, 2015), 3. Levey refers to multicultural politics as "a public philosophy and policy for responding to cultural diversity [introduced] in Canada and Australia in 1970s, and subsequently in other liberal democracies." See Brahm Levey, "Authenticity and the Multiculturalism Debates," 1. In chapter 1, I used the term "multiculturalism" to refer to what the Supreme Court sees as a "Canadian value." On the Court's account, multiculturalism seems to imply that citizens of various religious background are included and able to participate in public life. I will develop on the Court's use of this notion in chapter 4.
[277] Brahm Levey, "Authenticity and the Multiculturalism Debates," 3.
[278] Brahm Levey, "Authenticity and the Multiculturalism Debates," 4.
[279] Brahm Levey, "Authenticity and the Multiculturalism Debates," 5 [emphasis in original].

believe that an identity that is *chosen* warrants political recognition. Within the outlook of this type of authenticity, identity and autonomy seem to get intertwined with one another despite remaining whole, distinct notions.

Nevertheless, Levey's view of Taylor's theorization as representative of this approach seems to suggest that, even in the sense that we "choose" our identity, the way in which we make such choices is by large dependent on our society and culture. Under this approach, if choices matter, it is primarily because they are relevant to our mode of being within society.

The relevance of choices for one's sense of self is stressed in Levey's second type of authenticity, which he terms the "authenticity of preference." In this sense, authenticity "arises as a condition of individuals' autonomy that bestows legitimacy on their values, beliefs and preferences as being their own."[280] Authenticity is here correlated to one's agency in determining which of their commitments are the most important to them. Within the outlook of authenticity, however, not all values, beliefs, and preferences have the same weight. As we have already seen, only those that are central to one's sense of self—that is, those that are wholeheartedly endorsed—matter. In fact, it is *because* our wholehearted commitments are viewed as essential to our sense of self that they are granted such high regard. Thus, while the focus here is on autonomy, identity remains an essential component. Only, in this view, we stress our ability to self-determine our own identity rather than an understanding of identity as something that is merely received or inherited.

The third and final sense in which Levey claims that authenticity enters multicultural politics is through culture. In this sense, which is less relevant to my present argument, authenticity "is invoked as a form of cultural pedigree that bestows legitimacy on particular beliefs and practices."[281] This "cultural authenticity," which Levey qualifies as "out of place in the modern world," yet "not without reason,"[282] is considered to encompass the so-called original beliefs and practices that are deemed fundamental to a specific group. According to Levey, this type of authenticity has raised several criticisms.

[280] Brahm Levey, "Authenticity and the Multiculturalism Debates," 3.
[281] Brahm Levey, "Authenticity and the Multiculturalism Debates," 3.
[282] Brahm Levey, "Authenticity and the Multiculturalism Debates," 15.

In particular, it seems to entangle us in a power dynamic where minority cultures risk being depicted in a reductive and essentialist fashion by the dominant culture. Nevertheless, Levey notes that this view has "considerable judicial and administrative convenience,"[283] and hence continues to impact multicultural politics today.

Per my reading, these three senses of authenticity remain very much alike. In both the identity and the preference sense, only those choices that are an integral part of one's sense of self are deemed deserving of special care and attention. Conversely, the features of one's identity that are deemed to be merely "received" are considered to matter only insofar as they impact one's sense of self as a member of society. As for the cultural sense, it seems only to refer to an outsider's view of the practices and preferences of a group as encapsulating the essence of the group. The designated cultural practices and preferences are important, in this outlook, because repudiating them is viewed as damageable to the group's identity. Members' sense of self as part of the group is here conceptualized as dependent upon group members' ability to participate in the maintenance of such practices or preferences.

It seems to me that what makes us focus on identity, preference, or culture is not an inclination for one or the other sense *per se*, but the nature of the issue we are dealing with in a specific context. We tend to focus on preference, for example, when we are dealing with a specific practice that is considered important to an individual's sense of self or we tend to focus on identity when we are dealing with the feature of a person that we consider an immutable or an essential component of that person's way of being in society. We might be tempted to focus on culture, for instance, when we are dealing with a claim that has relevance for the interests of a specific cultural group, such as Indigenous peoples. Per my understanding, it is the issue in question that shifts our focus to identity, preference, or culture rather than a disagreement on the best way to theorize authenticity. Indeed, in all three cases described above, the overarching concern remains one's sense of self.

The tension between the identity/received component of authenticity and the autonomy/chosen component of authenticity is palpable in all theorizations of authenticity.

[283] Brahm Levey, "Authenticity and the Multiculturalism Debates," 16.

For instance, while Taylor's formal definition of authenticity emphasizes the role of horizons of significance (and therefore, of the ways in which one sense of self is received by the individual), the importance of one's freely determined actions in achieving authenticity is not completely absent from it. This is palpable notably in the proposition "A.iii" of his definition of authenticity cited above, where authenticity is said to frequently require opposition to the rules of society. Opposition to the rules of society requires the individual to opt for certain practices that are not mainstream or considered good *a priori*, which in turn suggests that an act of agency is required in order to be able to perform one's true sense of self. The plural form of his concept of "horizons of significance" similarly seems to indicate that agency is relevant to achieve a state of authenticity. While moral goods are hierarchized before me, our modern outlook suggests that there is no objective order of goodness. Consequently, I am called to *choose* between different orders of goodness the one that fits me best. In doing so, I am exercising my own agency as a way of defining what it means to be human for me.

Alessandro Ferrara expresses well the way in which Taylor's emphasis on horizons of significance needs not to be considered as a negation of the individual's autonomy in crafting their own sense of self. In the vein of Taylor's dialogical conception of authenticity, Ferrara defends that authenticity is fundamentally intersubjective. We constitute ourselves and our identity, Ferrara argues, by following certain guidelines that are implicitly laid down regarding what is good (or, in Taylor's words, meaningful) for an identity. While such guidelines "orient our reflective judgment concerning the good for an identity,"[284] they do not for that matter "dictate to us what the best choice is."[285] Here, Ferrara is sure to highlight that "to orient" does not have the same meaning as "to dictate." The fact that my sense of self is given a specific direction by some collectively shared conception of what an identity entails does not mean that I do not have any *choice* to make regarding my own identity. In particular, Ferrara notes the authentic self "does not limit himself or herself to enact an ascribed identity but also develops the *project* of an identity."[286] In tailoring this project of "who I want to become," I am called upon to

[284] Ferrara, *Reflective Authenticity*, 107.
[285] Ferrara, *Reflective Authenticity*, 107 [emphasis in original].
[286] Ferrara, *Reflective Authenticity*, 15 [emphasis in original].

exercise my own agency within the context of possibilities that are presented to me as meaningful or good.

The simultaneously chosen and received components of the authentic identity described by Taylor and Ferrara can perhaps be clarified by reference to Will Kymlicka's notion of "contexts of choice," which he mobilizes in his liberal theory of minority rights as a means to bridge the gap between individual choice and culture. "People make choices about the social practices around them," Kymlicka writes, "based on their beliefs about the value of these practices." However, "to have a belief about the value of a practice is, in the first instance, a matter of understanding the meanings attached to it by our culture."[287] This, I believe, is what Taylor and Ferrara convey when they claim that authenticity is dialogical or intersubjective. One's culture (or one's "horizon of significance" or "formative contexts") provides us with a framework of meaningful options that necessarily impacts our sense of self without completely crushing our capacity for self-determination and self-affirmation. Ferrara's conception of the authentic being is defined along these lines as someone who possesses

> the capacity to express that *uniqueness* [of their identity] which has been socially constituted through the singularity and uniqueness of the formative contexts but which no formative social context as such can enjoin us to express.[288]

All this leads me to believe that, while Levey's classification of authenticity is useful to grasp the differences in the ways that authenticity has been theorized by various authors, it is not helpful to consider the ideal in such a desegregated fashion for the purpose of the present project. Per my reading, there is an inherent tension between autonomy and identity within the ideal of authenticity—and this tension is a fundamental component of the ideal. My suggestion here is to view this tension as a source of information on the nature of authenticity rather than as an unsettled question. What this tension tells us is that, when it comes to feeling authentic and at peace with our sense of self, *both* the features of ourselves that we see as received and permanent *and* our deepest commitments that we freely endorse matter crucially. We consider our wholehearted commitments to be just as

[287] Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (New York: Oxford University Press, 1995), 83.
[288] Ferrara, *Reflective Authenticity*, 15 [emphasis in original].

fundamental to our sense of self, and we refuse to see those commitments associated with anything less than our very sense of self.

My argument here—from which I will pick up in the next chapter—is that this tension between autonomous choice and received identity is an important premiss of our contemporary conception of authenticity. If this tension exists also at the level of the Supreme Court, it is precisely because the Court considers religion to be a source of authenticity.

Authenticity as a Framework

The definitions of authenticity outlined above, as well as the historical review crafted in the first section of this chapter, have helped us to gain a good understanding of the constitutive features of authenticity. In conclusion to this chapter, I want to summarize in a more systematic manner what these features are in order to explicitly articulate what I mean when I claim that the Supreme Court of Canada has adopted an "authenticity framework" to assess claims of religious freedom.

As we have already seen, the specificity of moral ideals is that they can exist without me or anybody else ever being able to reach them. This means that authenticity could theoretically exist as a moral ideal even if the conditions were not there for us to achieve it in our lives. There thus exists certain ontological conditions that are required for authenticity to exist as a moral ideal—some of which are tackled by Taylor. However, insofar as my claim is that authenticity *impacts* legal reasoning—that is, the actual outcome of litigation and the tools that are deployed to proceed to legal analysis—the authenticity framework that I want to craft in this section will not be concerned with the ontological conditions of authenticity. Rather, I want to consider the conditions required for authenticity to exist as a conceivably reachable ideal. Indeed, keeping open the possibility for us to be authentic bounds us to certain principles that are fundamental conditions of a plausibly achievable ideal of authenticity. While we value authenticity for a number of reasons, as outlined above, these reasons alone do not for that matter make authenticity a possible option for us. What, then, are the conditions necessary for us to have the possibility of becoming authentic?

There are, I believe, two main axes through which we should consider this question. The first one is that of the individual. In order to be attained by each one of us, authenticity requires certain things of ourselves.

A first individual requirement of authenticity, which is the first feature of the authenticity framework, is *introspection*. This is the aspect of authenticity that perhaps comes to mind most intuitively to us. In order to be authentic, I must know who I am, and this implies to pay attention to my own feelings and impulses about the world. Obviously, not all of our feelings and impulses matter to our sense of self. In order to lead to authenticity, introspection must be carried so as to allow me to part which of my features, feelings, commitments, principles, and projects are fundamental to my sense of self, and which ones are not. As we have already seen, this introspection cannot be carried out in a monological way. To a large extent, how I feel about myself and the things that matter to my self-definition are socially derived. Nevertheless, the work of introspection requested by authenticity is one that only I can undertake. Ultimately, I am the sole responsible of determining how I feel about myself and the world.

This leads us to another personal requirement of authenticity, which is *integrity*. This is the second feature of the authenticity framework. A large part of the work of becoming authentic involves finding out who we really are. However, authenticity would be incomplete if it were not to be actualized or put into practice. I cannot claim to be authentic if I am unable to express my true sense of self to others. Authenticity therefore requires the ability to perform one's true sense of self in the public sphere so as to act in society not conformally to how one is expected to act, but conformally to how one feels one ought to act.

As opposed to authenticity, integrity is not about finding out who I am. Integrity is about *knowing* who I am—so much so that I lead my life in a way that is consequent with my sense of self. According to Cheshire Calhoun, integrity is usually defined as involving "the integration of "parts" of oneself—desires, evaluations, commitments—into a whole," "fidelity to those projects and principles that are constitutive of one's core identity," or

"[the] maint[enance] [of] the purity of one's own agency."[289] As a social virtue, Calhoun argues that integrity can also be understood to mean "being mindful of the place of affirming one's own best judgment among co-practitioners who aim collectively to get it right."[290] All these definitions of integrity highlight that I already possess the self-knowledge necessary to know which projects and principles are core to my sense of self and that I am willing to *act on them* in order to protect them. Integrity in this sense accounts for the tension, within the ideal of authenticity, between autonomy and identity by conveying that one's autonomy must be used in service of one's identity so that the two counterparts may remain aligned with one another. Conversely, if one's received identity prevents one from exercising one's autonomy, then that person's sense of integrity is harmed. In order to be authentic, I must be able to lead my life with integrity; meaning that I must be able to stick by my wholehearted commitments and that I must not be prevented from doing certain things as a result of my identity.

The second axis through which we should consider authenticity is that of the social. As we have seen, in order to become authentic, there are certain conditions that must be put into place that do not concern me directly but involve those who surround me.

A first such condition, which is the third feature of the authenticity framework, is *dialogue*. In order to know who I am, I must have an idea of other people. Not only is my understanding of those who surround me—the ways in which I resemble them and the ways in which I am different from them—an essential step to discovering who I am; it is also through such interactions that I acquire the language needed for self-definition and am able to make sense of what it means to be me. In this sense, self-centeredness can be viewed as an impediment to one's capacity to know oneself since it discourages, rather than encourages, my being aware of those who surround me which could in turn help me to gain new insights about myself. It is only through my awareness of others that I may discover in a meaningful way my true self.

[289] Cheshire Calhoun, *Moral Aims: Essays on the Importance of Getting It Right and Practicing Morality with Others* (Oxford: Oxford University Press, 2016), 123.
[290] Calhoun, *Moral Aims*, 21.

A second social condition of authenticity, which is the fourth and final feature of the authenticity framework, is *equality*. Authenticity calls on me to find what is unique about myself and empowers me to embrace this uniqueness throughout my life. As such, any society who values authenticity has a duty to ensure that each individual can undertake this process of self-definition and self-acceptance. This puts us in a difficult situation, which highlights one paradoxical yet important consequence of authenticity on our society. That is, although the differences between each one of us—what makes us uniquely ourselves—are considered highly important to the meaning of our life and must, in this sense, be expressed and acknowledged, they also should not matter for life in society, otherwise we hinder fairness.[291] This is why affirming equality today—substantive equality—often involves addressing what we might want to call the "authenticity privilege." That is to say, the ease with which we can be truly ourselves in public without seeing our identity or our wholehearted commitments devalued or depreciated for what they are. This is problematic for us because we see self-fulfilment in terms of being true to oneself, and so the misrecognition, devaluation, or depreciation of specific modes of being become a hindrance to fairness. Why should you feel good about yourself and not me, when we are both merely trying to be ourselves? Equality is required for authenticity to remain a plausibly achievable ideal because one's potential to self-define and lead an authentic life must be equally respected in everyone.[292]

This is, in a nutshell, the framework that I contend informs the Supreme Court when it assesses claims of religious freedom. All these components—introspection, integrity, dialogue, and equality—are interrelated within the framework of authenticity. Introspection cannot be carried on without dialogue, while integrity presupposes introspection and calls for the equal consideration of its demands. My argument in the next two chapters will follow the lines of the two axes identified above, starting with the individual conditions for achieving authenticity, and arguing that it is ultimately such

[291] This tension between the politics of difference/recognition and the politics of universal equality is discussed in length in Taylor and Gutmann, *The Politics of Recognition*.

[292] This is why we accord such value to acknowledging the worth of a wide variety of identities and commitments, a trend that Taylor has called the "politics of recognition." See Taylor and Gutmann, *The Politics of Recognition*, 37-44.

conditions that the Court is trying to safeguard when it adjudicates on the demands of religious claimants.

Chapter 3. Religion as a Source of Authenticity

Authenticity is never explicitly mentioned in the Supreme Court of Canada's decisions pertaining to religion. Yet, I contend that this ideal crucially informs how the Court conceptualizes religion today and, consequently, how it rules on matters involving freedom of religion. In this chapter and the next one, I make the case that the Supreme Court implicitly adopted what I have termed an authenticity framework to evaluate claims pertaining to religion. Under this framework, the Court views religion as one of the many facets through which individuals define and realize their sense of self and legitimizes the protection of religion insofar as the belief or practice at issue in a court case is considered essential to an individual's self-understanding and sense of self-worth. My goal in this chapter is not to criticize the limits imposed on religious freedom by the judges of the Supreme Court, as many scholars have done before me; rather, my objective is to offer an explanation of the way the Court has handled claims of religious freedom. In articulating this explanation, I hope not only to make clear the limits imposed on religion in Canada but also to engage in a discussion of the place of the ideal of authenticity in Canadian law and, especially, in legal discussions pertaining to religion.

This is an important endeavour to ground the purpose of the freedom of religion. As Charles Taylor puts it in his seminal work *Sources of the Self*:

> Moral sources empower. To come closer to them, to have a clearer view of them, to come to grasp what they involve, is for those who recognize them to be moved to love or respect them, and through this love/respect to be better enabled to live up to them. … A formulation has power when it brings the source close, when it makes it plain and evident, in all its inherent force, its capacity to inspire our love, respect, or allegiance.[293]

I believe that the ideal of authenticity drives and inspires the Supreme Court when it adjudicates on matters involving religion. Thus, my goal in articulating this framework is,

[293] Taylor, *Sources of the Self*, 96.

precisely, to bring us to reflect on whether this ideal does indeed possess the capacity to inspire our love, respect, and allegiance to address and resolve conflicts involving religion. Before we can have this discussion, however, we must first be able to discern how the ideal functions—something that we have accomplished in Chapter 2—and how it impacts rulings, which is the object of this chapter and the next one.

My contention is that the part that the ideal of authenticity plays in court rulings on religious freedom has been missing from previous scholarly discussions, thus leaving some questions unanswered or, perhaps, unsettled. Bringing authenticity to the table, I believe, will help us to make sense of these areas of uncertainty. In this chapter, I wish to address three such unsettled matters. The first one concerns the debate, identified in Chapter 1, regarding whether the Court values religion as a source of identity or as an expression of individual autonomy. Per my reading, if both the proponents of the identity argument and the individual choice argument make such a convincing case, it is ultimately because both identity and autonomy are needed to perform one's sense of self. In other words, if this tension exists in Canadian law, it is because of our valuation of religion as a source of authenticity.

The second unsettled matter that I address in this chapter concerns the paradox found within the so-called sincerity test adopted by the Supreme Court to assess whether a religious freedom claim is well-founded. While sincerity has played an important role in Court rulings since the adoption of the *Canadian Charter of Rights and Freedoms* in 1982, its role has been formalized in legal reasoning in the 2004 case *Syndicat Northcrest v. Amselem*, making the assessment of a claimant's sincerity the first step to evaluating all claims founded on freedom of religion. However, given the Court's favoring of a subjective approach to religion in *Amselem*, no "real" or objective "test" can be carried to assess whether an individual's feelings or beliefs about their religion are, in fact, true. This situation has led scholars to question why the Court has made sincerity the baseline to assess claims for religious freedom. What my argument reveals is that, when religion is valued as a source of authenticity, assessing religion becomes a matter of assessing one's sense of self, which can only be carried through an assessment of one's sincerity. Far from

being the "most convenient" way to assess a claim founded on religion, I argue that the sincerity test is in fact the *only* way to proceed under a framework of authenticity.

Finally, the third area of uncertainty that this chapter seeks to illuminate concerns the special status of religion in Canadian law. While both "freedom of conscience and religion" are listed under the rubric "fundamental freedoms" of the *Charter*, it is not clear what differentiates the two types of freedoms. The ability that we have to do so, however, matters greatly for the determination of the scope of the protection. As I observe throughout this chapter, the broader we imagine the scope of religion to be, the more difficult it is to manage in the law, and the less likely we are to see religion granted thorough protection on a regular basis. If religious beliefs and secular conscience are amalgamated into a single freedom, it is, by all appearances, what risks happening. Although the Court has often expressed its commitment to the value of religious freedom, my argument highlights that what the Court specifically values in religion—the fact that it crucially informs our sense of self—is not exclusive to religion. In this respect, I aim to offer an explanation as to why it has become so difficult to carve a special place for religion in the law. I suggest that this situation stems from the erasure of religion's special character, which occurs as a result of the Court's view of both religious and secular beliefs that relate to one's self-understanding as types of beliefs that call the individual to look "inward" to understand themself and make sense of their place in the world. Part of religion's distinctive character, however, precisely lies in its "upward" focus.

By providing what I hope is a coherent answer to each one of these three questions, I aim to bring some clarity to how religion has been handled by the Supreme Court. If, as Taylor puts it, "[a]rticulacy is a crucial condition of reconciliation,"[294] then my attempt in this chapter and the next one, if successful, should lead us to rethink how we criticize and seek to resolve some of the issues that we find at the heart of conflicts involving religious freedom today.

[294] Taylor, *Sources of the Self*, 107.

The Value, Distinctiveness, and Protection of Religion: A Triad

In this first section, I seek to answer the question: What makes religion important to safeguard according to the Supreme Court? This question, contextualized in Chapter 1, remains largely unsettled in the scholarship on law and religion in Canada. Before I address the debate specific to the Supreme Court of Canada which opposes a view of religion as a source of autonomy to a view of religion as a source of identity, I want to briefly contextualize the relevance of this broad question for matters involving religious freedom. The answer with which we respond to this question, as I aim to draw attention to, has a significant impact on the place that we accord to religion in society. It is therefore worth examining the ramifications of different answers in the legal system.

The debate on the value of religion often takes the shape of a debate on the moral grounds which justify treating religion with special consideration in the liberal state. For which reasons should a society consider that religion is deserving of a special treatment, such as an exemption from paying taxes, an exemption from a law of general application, or an accommodation to allow for the practice of religion? Answering this question, however, cannot be done without issuing a postulate on the value of religion. As Brian Bussey puts it, "if we assume that religion has no inherent value to society then it only makes logical sense that society should not protect it. Why protect something that is not beneficial?"[295] Scholars—and admittedly, judges—who believe that religion is of great value, should necessarily agree that it is essential to deploy the big means to protect—perhaps even favour—religion in society.[296]

One example of such a recognition of the role of religion in society is the tax credit or tax deduction that the government gives to individuals or corporations that make donations to religious institutions. Indeed, José Woehrling and Rosalie Jukier explain that the rationale justifying this indirect form of state support for religion is that "[religious-based institutions] provide socially desirable benefits that would otherwise have to be

[295] Barry W. Bussey, "The Legal Revolution Against the Accommodation of Religion: The Secular Age v. The Sexular Age" (Ph.D. Leiden University, 2019), 88.

[296] While we might argue against Bussey that judges can protect religion for deontic reasons alone, I believe that Bussey is right in pointing out that religion's protection in society is likely to be greater if religion is imagined to possess a beneficial aspect for citizens and society.

provided by governments directly."[297] The financial support that religious-based institutions receive is granted insofar as the state sees these institutions as valuable for the general well-being of society.

Legal scholar Richard Garnett makes a corresponding argument that accommodating religion in society is beneficial to society as a whole since it promotes the idea that each individual should be able to live by their own vision of the good life. By offering a thorough protection to religion, the state reiterates its engagement towards neutrality, and ensures that each individual's human rights are respected. While this right may come at a cost for society at large (e.g., by weakening the purpose of general laws by crafting exemptions to accommodate religion), it is one worth paying since the active protection of religious freedom and the structures that promote religion is a public project that benefits society as a whole.[298]

Another (and perhaps more fundamental) argument underlying the defense of a thorough protection of religion relates to its putative distinctiveness. For many who advocate for a thorough protection of religion, religion is particularly valuable because it is fundamentally unique and thus contributes to the overall good of society in an unparalleled fashion. We can call proponents of this approach "distinctivists" of religion.[299] According to this view, religion should be treated as special because nothing compares to it. Kathleen Brady, for instance, argues that religion is distinctive insofar as it possesses an inherent collective nature (i.e., it ties the individual to a community of believers), it connects the individual to the divine, and it relates to the finality of life. According to

[297] Rosalie Jukier and Jose Woehrling, "Religion and the Secular State in Canada," in *Religion and the Secular State: National Reports*, ed. Javier; Martinez-Torron and W. Cole Durham (International Center for Law and Religious Studies, 2010), 196.
[298] Richard W. Garnett, "Accommodation, Establishment, and Freedom of Religion," *Vand. L. Rev. En Banc* 67, no. 39 (2014).
[299] Other proponents of this type of approach to religion include Richard Moon, "Conscience in the Image of Religion," in *Religious Beliefs and Conscientious Exemptions in a Liberal State*, ed. John Olusegun Adenitire (Cambridge, UK: Hart Publishing, 2019); Barry W. Bussey, "The Legal Revolution against the Place of Religion: The Case of Trinity Western University Law School," *Brigham Young University Law Review* 2016, no. 4 (2016); Robert Audi, "Religious Liberty Conceived as a Human Right," in *Philosophical Foundations of Human Rights* (Oxford: Oxford University Press, 2015); Andrew Koppelman, *Defending American Religious Neutrality* (Cambridge, Mass.: Harvard University Press, 2013); Mike Madden, "Second Among Equals? Understanding the Short Shrift that Freedom of Religion is Receiving in Canadian Jurisprudence," *Journal of Law and Equality* 7, no. 1 (2011), https://ssrn.com/abstract=1745242.

Brady, it is ultimately because religion possesses these distinctive features that it is deserving of a special treatment in law.[300]

But these unique features of religion are not merely the grounds that legitimize religion's special treatment in law. They are also, as Brady observes, what *allow* the law to craft a special place for religion. Indeed, failing to recognize religion's distinctive features risks causing the law to become unable to identify religion altogether. However, if the law does not see or grant value to a set of distinctive features that it believes religion and only religion to possess, these features fade out, and religion starts to look like secular conscience. As a result, religion becomes more difficult to assess and, consequently, more difficult to thoroughly protect in law. When religion is analogized to secular conscience, the law is not only less disposed to protect religion, because it does not see religion as possessing a unique value, it also does not have many tools to evaluate a claim founded on religion. Therefore, Brady argues that any attempt to justify a "robust" right to religious freedom will need to consider beliefs based on religion on a higher plane than beliefs based on one's secular conscience.[301] This, in turn, implies that a thorough protection of religion must also create tools to assess religion in law that take into consideration religion's distinctive features.

Obviously, not all scholars share this view. Among the most prominent scholars to defend the view that religion should not receive a special treatment in the liberal state—which we may refer to as "egalitarians"—, Brian Leiter argues that "[the state's] application [of toleration] to the conscience of only religious believers is not morally defensible."[302] According to him, there exists no moral reason to distinguish religious beliefs and practices from beliefs and practices based on secular conscience. However,

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[300] See Kathleen A. Brady, *The Distinctiveness of Religion in American Law: Rethinking Religion Clause Jurisprudence*, Law and Christianity, (Cambridge, MA: Cambridge University Press, 2015).
[301] See Brady, *The Distinctiveness of Religion*, 300-24.
[302] *Why Tolerate Religion?* (Princeton: Princeton University Press, 2017), 133. Other proponents of this type of approach include Cécile Laborde, *Liberalism's Religion* (Cambridge, MA: Harvard University Press, 2018); Christopher L. Eisgruber and Lawrence G. Sager, *Religious Freedom and the Constitution* (Cambridge, Mass.: Harvard University Press, 2007), https://doi.org/10.4159/9780674034457; Kent Greenawalt, "Moral and Religious Convictions as Categories for Special Treatment: The Exemption Strategy," *William & Mary Law Review* 48, no. 5 (2007); Anthony Ellis, "What Is Special about Religion?," *Law and Philosophy* 25, no. 2 (2006); Tore Lindholm, "Philosophical and Religious Justifications of Freedom of Religion or Belief," in *Facilitating Freedom of Religion or Belief: A Deskbook*, ed. Tore Lindholm and W. Cole Durham (Leiden: Martinus Nijhoff Publishers, 2004).

because granting accommodations to both religious and conscientious beliefs to the same extent would risk compromising the purpose of general laws and regulations, neither should be accommodated unless the accommodation poses no threat whatsoever to the purpose of the law or the regulation. This is so because, as Leiter observes, while claims based on religion can usually easily be assessed by the courts, those based on one's conscience are much more problematic to evaluate. As opposed to what is usually the case with religious beliefs, he writes, sincere conscientious beliefs do not necessarily emerge within the context of a community that shares a similar belief, can be piecemeal rather than part of a comprehensive worldview, and may be idiosyncratic. If both must be considered as occupying the same place in the legal system, as he holds, then it becomes difficult for the courts to adopt a standard of proof to evaluate both types of claims with equal respect all while maintaining the integrity of a law or regulation. No exemption should be granted, therefore, if it means that a burden will be placed on those who do not benefit from the exemption.

Developing his theory of religion in the liberal state, Leiter does not explicitly position himself on the value that he accords to religion. It would, however, feel odd to argue that he accords great value to religion in society. At best, we may claim that he accords as much value to religion as he accords to conscientious beliefs. But the very fact that he amalgamates the two types of beliefs suggests that he does not view religion as possessing any particular feature—or any particular value—that calls for a special type of protection.

My point here is not necessarily to draw attention to the fact that one's preferred scope for religious freedom is dependent upon one's own valuation of religion. We are all surrounded by people with various levels of respect for religion, and we are aware of how this impacts their conception of the treatment that religion ought to receive in society. That these two things are interrelated is something that we intuitively grasp. My intention with contextualizing the debate on the value of religion is, rather, to draw attention to the correlation that exists between the perceived *distinctiveness of religion* and the defense of a *broader scope for religious freedom*. A deep valuation of religion, which warrants a broad protection for religion, usually comes hand in hand with the view that religion possesses a

set of distinctive features that makes it different from other types of beliefs and practices that we encounter in society. These features, in turn, constitute the grounds on which the expansive conception of freedom of religion can be justified. A thorough protection of religion is desired because of religion's perceived value in society, but this protection is justified by an appeal to the features that one believes are distinctive about religion. Without its distinctive features, religion's value is diminished because whatever religion is believed to bring to society is also believed to be accessible through other pathways, and its protection in the legal system becomes unsteady because religion cannot be easily circumscribed by recourse to those distinctive features.

The question that arises is: Where does the Supreme Court of Canada stands within this debate? One way to shed some light on the Court's conception of the value of religion, it seems, is to determine whether it considers religious beliefs to be distinct from or analogous to conscientious beliefs. I shall say more on this topic later in this chapter. For now, let me simply call attention to what the Court claims with respect to religious beliefs in the pivotal case *Amselem*.

On the one hand, *Amselem* provides us with some evidence suggesting that the Supreme Court recognizes that religion has certain features that are unique to it. First, the majority claims that "religion typically involves a particular and comprehensive system of faith and worship."[303] While the Court does not stipulate that this system ties the individual to a collectivity of believers, one might argue that the "comprehensiveness" of the "system of faith and worship" implies this collective dimension. In any case, it is clear from this statement that the majority views religious beliefs as implying something more than having an opinion with respect to one's duties or ethical commitments. Religion is taken to involve something like an overarching worldview through which one sees oneself and makes sense of one's life. Moreover, the majority notes that religion "tends to involve the belief in a divine, superhuman or controlling power" and that the practices tied to religion "allow individuals to foster a connection with the divine or with the subject or object of that

[303] *Amselem*, para. 39.

spiritual faith."[304] Here, the majority's statement is in line with Brady's argument that religion is unique because it "concerns the relationship of persons with the divine."[305]

On the other hand, despite what the Court claims in the abovementioned passages, it has adopted a subjective approach to religion, which, as it turns out, makes it challenging to differentiate a religious belief from a conscientious one. Indeed, in *Amselem*, the majority claims that as long as the believer demonstrates "that he or she sincerely believes that the practice engenders a personal, subjective connection to the divine or to the subject or object of his or her spiritual faith, and as long as that practice has a nexus with religion,"[306] then the claim should trigger the freedom of religion. I have noted in Chapter 1 that the Court has not yet had to deal with this type of claim and that we therefore do not yet know how it would proceed to address such a claim. Nonetheless, this passage in *Amselem* seems to suggest that religion is, ultimately, a matter of personal conscience. Admittedly, the inclusion of the (vague) condition that the belief in question must have a "nexus with religion" to trigger the freedom of religion creates a distinction between beliefs that are tied to religion and those that are not. Yet, the fact that any type of belief and practice that is alleged to have a nexus with religion by the believer would theoretically have to be considered for protection under section 2(a) effectively renders religious beliefs comparable or analogous to conscientious beliefs. The two types of beliefs may not be totally conflated, but they are understood in a corresponding way, that is to say, as deeply personal and intimate beliefs that are highly difficult to evaluate from an "outside" standpoint.

So, while we can see, on the one hand, that the majority did indeed identify a set of distinctive features of religion, we also observe, on the other hand, that it decided not to

[304] *Amselem*, para. 39.
[305] Brady, *The Distinctiveness of Religion*, 314. The dissent of Justice Bastarache adds to that that "a religion is a system of beliefs and practices based on certain religious precepts." These precepts, Bastarache J. continues, "constitute a body of objectively identifiable data." Religious beliefs are here explicitly tied to a community of believers, as personal choices or practices are excluded from the scope of the protection for freedom of religion. This connection with a community of believers is, however, much more tenuous in the majority's reasons. See *Amselem*, para. 135.
[306] *Amselem*, para. 69.

require the religious claimant to draw on these features when formulating a claim based on religion.

If the majority was able to identify some distinctive features of religion, why then not draw on these features to assess claims based on religion? In all likelihood, this would only strengthen the protection that it can offer to religion by allowing the law to circumscribe religious beliefs more clearly. Despite their diverging approaches to religion in law, Leiter and Brady both recognize that expanding the right of exemption to include beliefs based on secular conscience must be combined with a weakening of the right's protection to account for the feasibility problems that follow from the expansion of the right.[307] Drawing on this observation, we can presume that treating religious beliefs analogously to beliefs based on secular conscience—that is to say, as deeply subjective beliefs—similarly renders it more difficult to manage a model of exemptions in law. Under such an approach, evaluating the honesty of a claim for religious freedom can be challenging since, as Robert Charney puts it, "[t]he state does not have a "window into men's souls"."[308] One peril of expanding the definition of religion to include subjective beliefs, then, is to weaken the scope of the protection altogether.

This is indeed what appears to have happened in *Alberta v. Hutterian Brethren of Wilson Colony*. While the majority did not doubt that the Hutterites' request to be exempted from the photo requirement on their drivers' licences stemmed from a sincere religious belief, it still ended up ruling that allowing *any form* of exemption to the regulation would be harmful to its purpose. Writing for the majority, McLachlin C.J. claims:

> requiring that *all* licence holders are represented by a digital photo in the data bank will accomplish … security-related objectives more effectively than would an exemption for an as yet undetermined number of religious objectors. Any exemptions would undermine the certainty with which the government is able to say that a given licence corresponds to an identified individual and that no individual holds more than one licence.[309]

[307] See Brady, *The Distinctiveness of Religion*, 309; Leiter, *Why Tolerate Religion?*
[308] Robert E. Charney, "How Can There Be Any Sin in Sincere? State Inquiries into Sincerity of Religious Belief," *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 51 (2010): 56.
[309] *Wilson Colony*, para. 80 [emphasis in original].

This case illustrates well how difficult it can be to manage a model of exemption when we are not equipped with the tools to properly circumscribe what makes religion distinct from conscientious beliefs. If we cannot differentiate religious from secular beliefs clearly in law, the consequence, as the case of *Wilson Colony* shows, is usually that we cannot afford any special place to religion in the legal system. The problem in *Wilson Colony* was not with granting an exemption to the Hutterites specifically. It was with granting any exemptions. Sara Weinrib explains that, because the subjective framework established in *Amselem* admits such a wide scope of beliefs within the freedom of religion, it fails to provide guidance to answer the question of "what evidence can the state require to assess a claim that is not associated with an identified religion, in a situation where sincerity is at issue, and the harm posed by an insincere claim is significant?"[310] If, as the Court seems to suggest in *Amselem*, no objective evidence can be required by the state to assess a request for an exemption from the photo requirement, then granting any exemptions risks compromising the purpose of the law, which is to limit identity theft and fraud. In order not to contravene to the principles established in *Amselem*, the province of Alberta felt—admittedly with reason—that the only way to protect the integrity of the drivers' licence's system was to offer no exemptions at all. This situation, however, follows directly from the principles established in *Amselem*, which make it virtually impossible to verify that the person asking for an exemption is not ill-intentioned and to ensure that exemptions to purposeful laws of general application will not be granted in iffy circumstances.

To answer the question posed earlier, it seems that religious and conscientious beliefs are analogized in the Canadian legal system. While the Supreme Court acknowledges some special features of religion that make religious beliefs distinct from conscientious ones, its adoption of a subjective approach to religion in *Amselem* suggests that, if there exists such a distinction, it is a tenuous one, which can be summarized in the phrase "having a nexus with religion." All in all, one's personal connection to the divine, when it is considered to lie within the confines of one's own interiority, becomes just as difficult to evaluate as it is to assess beliefs based on individual, secular conscience.

[310] Weinrib, "An Exemption for Sincere Believers," 728.

This situation suggests that whatever the Court finds to be worthy of protection in religion, it may also find it in beliefs and practices based on secular conscience. The fact the religion is rendered similar to secular conscience does not mean that the Court does not value religion. However, the conjecture is that there is a reason for that amalgam, which lies in what exactly the Court values in religion. Per my reading, the fact that religious beliefs are understood to be like conscientious beliefs reveals that the Court values religion for an aspect that it shares with beliefs tied to secular conscience.

My argument is that this source is one's sense of integrity; that is, a person's possibility to act authentically. Within this view, religion is valued insofar as it impacts people's conception of themselves and of their place in the world. Being able to act in accordance with one's religious beliefs is important to protect, in this sense, because it allows the individual to live in accordance with their sense of integrity—an element essential to being authentic. However, because the focus is on integrity as an aspect of authenticity and other types of beliefs, conceptions, and identities can also bind individuals to believe that they must act in a certain way; religion's distinctive features thus become clouded. While I shall say more on this topic in the last section of this chapter, keeping in mind the connection that exists between religion's distinctiveness and allotted place in society will help us to interpret some of the Court's reasons in cases involving religious freedom. For now, however, I must first make the case that it is the ideal of authenticity that guides the Court through its decisions pertaining to religion.

In the remaining of this section, I propose to draw from Cécile Laborde's theory of religion to make sense of the debate surrounding the Supreme Court's specific valuation of religion. Laborde argues that the liberal state should only be bound to protect commitments and liberties that are tied to a person's sense of integrity. According to her, integrity "is primarily a formal relation one has to oneself, or between parts or aspects of one's self; and it has an ethical content, in the broad sense that it relates to normative evaluations of the good, bad, just, and unjust."[311] Because of the centrality of these commitments to our sense of self and well-being—regardless of whether they are religiously-based or not—they warrant a special kind of respect from the state which other

[311] Laborde, *Liberalism's Religion*, 203.

types of commitments do not warrant. The liberal state should, therefore, only be required to accommodate what she calls "integrity-protecting commitments;" i.e., commitments that are "manifested in a practice, ritual, or action (or refusal to act), [and] that [allow] an individual to live in accordance with how she thinks she ought to live."[312] In parallel, Laborde continues, the state should insure not to infringe on "integrity-related liberties" specifically, which are composed of the liberties "that are essential to the exercise of citizens' core moral powers: notably, their capacity to formulate and live by their own ethical commitments and projects."[313]

Laborde's theory of religion is explicitly "liberal egalitarian," meaning that it builds on the idea that religion is not inherently special and thus not deserving of receiving any special kind of protection from the state. "Whatever feature of religion is highlighted as ethically salient (its connection to the sacred, its categorical nature, its centrality to personal identity, its relation to ultimate matters, its comprehensive nature)," she writes, "will also be found in many nonreligious commitments."[314] Her theory takes integrity to be the feature that religion possesses contingently with other salient beliefs, conceptions, and identities which warrants a special type of protection from the liberal state. She makes this claim observing that those who defend the view that religion is special usually do so by highlighting how the various aspects of a believer's religion are essential to their well-being and to the determination of their sense of identity. Agreeing with this premise, Laborde notes that this line of argument "opens the possibility that *not all* religion, and *not only* religion, meets the relevant interpretive value"[315] which warrants a special protection in the liberal state—that value being the source of fulfilment and identity. We can suppose that religion is not always, nor in all aspects, a source of well-being and identity for the believer, as much as we have to acknowledge that individuals find sources of well-being and identity outside of religion. This leads Laborde to conclude that the relevant value which warrants special consideration from the state is not religion *per se,* but integrity.

[312] Laborde, *Liberalism's Religion*, 203-04.
[313] Laborde, *Liberalism's Religion*, 147.
[314] Laborde, *Liberalism's Religion*, 201.
[315] Laborde, *Liberalism's Religion*, 203 [emphasis in original].

Perhaps because Laborde's aim is to defend a theory of religion in the liberal state from a pragmatic perspective within political theory, her proposed model resonates particularly well with the Supreme Court of Canada's approach to religion. In particular, the place that this model accords to integrity—a central feature of the authenticity framework—captures well what I argue the Court thinks is valuable to protect in religion. Thus, her theory provides us with the relevant tools to make sense of the unsettled question concerning the value of religion.

In Chapter 1, I have sketched out the two main hypotheses pertaining to the specific value that is attributed to religion by the Supreme Court of Canada. On the one hand, some scholars argue that the Court values religion as a source of autonomy or individual choice. According to those who adhere to the autonomy argument, this approach is the logical consequence of the Court's strong tendency to consider religion as a personal, subjective, and private phenomenon. Because religion is considered through an individualistic lens, proponents of this argument highlight that the Court readily connects religion to the capacity that individuals have to decide for themselves how they ought to act. In this view, religion is tied to the liberty that each person has to live by their own vision of the good.

On the other hand, scholars have argued that religion appears to be valued by the Court as a source of identity. Proponents of the identity argument contend that, ultimately, what matters the most to the Court is not that free choice remains unconstrained, but rather that believers do not feel excluded or marginalized from society because of their religion. It is with that in mind that those adhering to the identity argument explain why the Court has so passionately defended religion in cases where the accommodation of religion in society was deemed to have only a minor impact on a law, a regulation, or the rights of others. In this view, religion is tightly connected with individual's right to be treated equally regardless of the particular demands of their religion.

My suggestion is to reject both approaches to favour an alternate one, based on authenticity, which ultimately seeks to reconcile the values of autonomy and identity within a coherent ideal. First, I will proceed to deconstruct the two arguments to identify what exactly is dubious about each one. Second, I will argue that the shortcomings of each one can be remedied by recourse to the other. Finally, I will show that the notion of integrity,

as a core component of the authentic being, is a more suitable notion to make sense of the Court's conception of the value of religion. Indeed, the notion of integrity highlights the importance that we accord to being able to exercise our autonomy in service of our sense of self or identity.

The Problem with the Autonomy Argument

We can start with the autonomy or individual-choice argument, which draws attention to the Court's frequent statements, in religious freedom cases, that individuals have the right to hold beliefs freely and should be able to live their life free from coercion. I see two main problems with this line of argument, which I will tackle in turn.

Firstly, if we consider that religion is valuable only inasmuch as it relates to one's capacity to act autonomously, we end up with a particularly weak conception of the value of religion, which, on the face of it, does not seem to match the Supreme Court's. Indeed, considering religion as an expression of autonomy does not provide us with much ground to differentiate religion from other types of beliefs, including beliefs that weakly impact our conception of how we ought to live our life. To put it differently, this conception of religion does not provide us with the relevant tools to differentiate between what Laborde calls "integrity-related liberties," which "concern core areas of intimate, expressive activity, such as religion, sexuality, family, and friendship" and "ordinary freedoms," such as "[t]he freedom to pursue leisure preferences, the freedom to wear this or that form of dress, [and] the freedom to move unimpeded by traffic regulations."[316] In this approach, those two types of freedoms end up conflated because both are tied to our ability to make autonomous choices.

If that were the Court's approach, both types of freedoms would need to be taken equally seriously by the law. Not only is that not the case,[317] but if it were truly a believer's capacity to act autonomously that triggered the freedom of religion, the law would need to be highly restrictive about granting religious accommodations—in particular those that

[316] Laborde, *Liberalism's Religion*, 147. Taylor has similarly sought to differentiate mere preferences from what he calls "strong evaluations," that is, an evaluation "which stands on its own as worthy of being desired and sought, not just desirable given our existing goals and appetites." See Taylor, *Sources of the Self*, 122.
[317] I will argue this in greater detail using the case of *Wilson Colony* when defending my view that the Court values religion as a source of authenticity.

shift the cost of the accommodation on the people who are not benefiting from it. Because this approach admits such a wide scope of claims within the purview of freedom of religion, granting any kind of exemptions to laws of general application would risk endangering the purpose of the law.

If we look at the case law, however, we see that the Court often appears passionate about granting religious accommodations even in cases, such as *Amselem* or *Multani*, where the costs of accommodating the religious claimant burdens those who are not seeking the accommodation. In *Amselem*, the erection of a temporary Succah on the balcony of a condominium was allowed despite aesthetic concerns from co-owners. Similarly, the wearing of the kirpan in a public school was permitted in *Multani* despite security concerns from non-Sikh parents. In both cases, the Court was adamant that religion needed to be protected against the interests of those who did not benefit from the accommodation but who incidentally had to assume its burden. In *Multani*, the importance of protecting religious freedom in Canadian society even constituted a reason to grant the accommodation.[318]

This brings me to the second reason why I think that the individual-choice argument falls short of persuasiveness. This argument is not convincing because it casts the net too wide. While this approach makes a convincing case that the Supreme Court accords importance to the ability that people have to make their own choices, we must note that the importance granted to autonomous choices is not abstractly warranted. It is warranted by virtue of the impact that each of these choices have in the believer's life. The religious practices at issue in *Amselem* and *Multani* are viewed as practices that could not be abandoned, as Laborde puts it, "without feelings of remorse, shame, or guilt,"[319] and this is why special consideration is accorded to them—not because these are practices that were "chosen" by the believer. Erecting a personal succah and wearing a kirpan are found to be

[318] The majority argues, amongst other things, that accommodating religion "demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities." See *Multani*, para. 79.
[319] Laborde, *Liberalism's Religion*, 204.

worthy of respect "because they are connected to people's integrity—to the projects, beliefs, and commitments that people happen to identify with."[320]

The idea that not all choices matter for the law is not absent from the literature. If we look closely at Berger's claim (summarized in Chapter 1) that religion is valued by law because it is an expression of autonomy and choice, we indeed find ourselves led back to identity. This transpires most obviously in Berger's response to his opponents who claim that it is rather as a source of identity that the Court values religion. There, Berger acknowledges that religion is "not merely a choice like any other" and admits that "there is some dimension of religious freedom that has an identity-based component."[321] According to him, however, when the identity-based component of a religious freedom claim is valued, it is usually because the Court understands religion to be "an expression of who the subject wants to be and to become."[322] On this view, Berger argues that "identity … is a function of choice."[323] For him, the focus remains on autonomy and choice; it is merely "expressed from a different angle."[324] Following Berger's logic, however, this angle is that of self-definition: one's autonomy must be exercised in alignment with one's sense of self, and based on one's processes of introspection in order to draw the attention of the law.

Berger's claim that identity is a function of choice is, nonetheless, an interesting one. As I have argued in the previous chapter, our identity is not merely imposed on us by others. In an important way, we choose who we are and who we want to become. We have the agency to make judgements and take decisions based on the things we value. What Berger is claiming, it seems, is that the Court understands religion to constitute a meaningful source for our autonomous self-definition. In this sense, the wrong of limiting a religious practice is that it impedes on a person's capacity to perform their self-determined identity. Approaching religion as a choice, in this sense, does not amount to

[320] Laborde, *Liberalism's Religion*, 219.
[321] Berger, *Law's Religion*, 86.
[322] Berger, *Law's Religion*, 87.
[323] Berger, *Law's Religion*, 87.
[324] Berger, *Law's Religion*, 88.

negating the fact that religion is important for one's identity; simply, it stresses the self-determined dimension of identity.

In this sense, this approach rightly recognizes that believers have agency within their community and within the framework provided by their religion. It makes it clear that, unlike one's skin colour, one's religious beliefs may evolve and change over time—which is something that the Supreme Court acknowledges and supports, as it empowers individual believers to make their own choices against the mainstream interpretations of their religious community.[325] In this sense, if, as Berger claims, religion is not a choice like any other, it is *because* religion is a choice that is fundamentally tied to the believer's sense of self.

The Problem with the Identity Argument

Let's now turn to the identity argument, which, in my opinion, offers a more compelling interpretation of the Court's valuation of religion—perhaps because our modern conception of identity is tightly connected to the ideal of authenticity, and therefore already encompasses some of the notions that are key to my argument. To begin with, this approach responds to the two criticisms addressed to the individual-choice argument. Because the scope of things that we do in order to protect our sense of identity is much more restricted than the scope of things that we do out of free choice, the identity argument provides a criterion that significantly reduces the scope of claims that can trigger freedom of religion in a way that makes it easier to manage the right: only claims that relate to an individual's sense of identity ought to be considered as worthy of a special kind of respect in law. Concomitantly, the identity argument grounds the importance of such claims by providing a reason why these commitments ought to be paid special consideration. According to proponents of the identity argument, religious commitments are important to protect because, since one's religion is core to one's identity, it is not a feature that one can change about oneself or, at least, that one can give up without being harmed in a profound way.

[325] This is most clearly expressed in the already quoted passage from Iacobucci J. in *Amselem* who write, speaking for the majority, that a religious practice should trigger the protection of freedom of religion "regardless of the position taken by religious officials and in religious texts, provided that an individual demonstrates that he or she sincerely believes that a certain practice or belief is experientially religious in nature in that … he or she subjectively believes that it is required by the religion." See *Amselem*, para. 69.

In this respect, the identity argument highlights that a person's religion is much more than a choice. Approaching religion as a trait of one's identity stresses the idea that religion is immutable. This is an idea that can be traced back to the seventeenth century, when John Locke wrote in his *Letter Concerning Toleration* that the state should not be concerned with the domain of religion since "[c]onfiscation of estate, imprisonment, torments, nothing of that nature can have any such efficacy as to make men change the inward judgement that they have framed of things."[326] In other words, because one cannot compel another person's inner beliefs, these beliefs, according to Locke, should be tolerated.

The claim that religion is part of a person's identity in our contemporary understanding brings this idea one step further. By tying religion to individuals' unchangeable features, the identity argument highlights that the Court does not only believe that religion should be tolerated but also that it should be "respected as part of a commitment to human equality."[327] To reiterate Moon's argument summarized in Chapter 1, the idea is that, because religion is so deeply informed by one's family and cultural community, forcing an individual to act against their deeply held beliefs amounts to denying their equal worth and dignity as a member of that community.[328]

For proponents of the identity argument, it is because the Court views religion as an unchangeable feature of the believer that it is willing and able to make space for the practices of religious individuals in Canadian society. Examples in support of this view can be found in a number of cases. Recall for instance the case of *Big M.*, where the Court overturned a law that aimed at securing the public observance of the Christian Sabbath because it imposed a majoritarian view of the good and of the truth upon citizens of diverging views and thus represented a form of "tyranny of the majority."[329] Or, the case of *Multani*, where the Court argued that Quebec's school system needed not only to admit Sikh children wearing a kirpan but also to teach religious tolerance to those children who would consider it unfair that Sikhs are allowed to wear their kirpan at school while "they

[326] John Locke, *A Letter Concerning Toleration*, Third ed. (Raleigh, N.C.: Alex Catalogue, 1743 [1689]), 15.
[327] Moon, "Religious Commitment and Identity," 217.
[328] Moon, "Religious Commitment and Identity," 217.
[329] See *Big M*, para. 96.

are not allowed to have knives in their possession."[330] In both cases, the Court orders society to adapt to the religious practices of religious minorities, not the contrary. What legitimizes this request, proponents of the identity argument claim, is that the Court considers these practices as ones that the believer cannot give up. In other words, they are unchangeable or non-negotiable features of the believer.

As we left things off in Chapter 1, my contention was that the identity approach might be influencing court decisions more than it appears. This is palpable, I argued, in the fact that the Court seems more adamant to consider a claim for religious freedom when this claim is also tied to a call for democratic inclusion. In such cases, the harm done to religion is readily conceived as a failure to provide equal treatment to a person whose identity differs from that of the majority, thus suggesting that religion is viewed as being connected to identity.

Here is the rub—one reason that, in my opinion, justifies that we replace this line of argument with one based on authenticity. Identity is an intrinsically collective phenomenon, and this is not how the Court conceptualizes religion. What is missing from the identity argument, then, is a consideration of how individuals *personally* relate to what they believe their life is fundamentally about and/or the projects they are most deeply committed to. In cases pertaining to religious freedom, this concern for the self transpires particularly strikingly in the fact the Court is less interested in group identity—the usual focus of calls to equality—than it is concerned with how individual believers personally relate to their religion.

An example of what things might look like if the Court were to value religion as a source of (collective) identity can be found in the case law dealing with hate speech. In *Saskatchewan (Human Rights Commission) v. Whatcott*,[331] a case that dealt with religiously motivated hate speech directed at homosexuals, the Court explained that, to charge a person with hate speech, a claimant must show two things: 1) that the hatred targeted an identifiable group (such as homosexuals), and 2) that the speech in question could objectively be considered as exposing those belonging to that group to hatred. The

[330] See *Multani*, para. 76.
[331] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 (CanLII), [2013] 1 SCR 467.

Court is sure to make clear that the "harm flowing from hate speech must be assessed as objectively as possible," meaning that "[t]he feelings of the [author of the hate speech] or victim are not the test."[332]

The Court's primary concern here is explicitly not the subjective feelings of hatred of the perpetrator of the hate speech, nor those of the claimant who is the target of the hatred. The Court's concern is the victim's whole community. Because discrimination is cast as an intrinsically collective phenomenon, it warrants a conception of identity based on identifiable features that tie the individual person to a broader group of people. For this reason, if a claimant fails to show that the hatred they were the target of occurred as a result of their belonging to an identifiable group, their claim cannot come through. In any instances, the community to which the claimant belongs is an integral part of the test to determine if they were the victim of a crime as a result of their identity.

This approach is very different from the Court's way of assessing a claim for religious freedom, which is, conversely, based on subjectivity. A religious claimant is by no means required to demonstrate that their interpretation of their religion matches that of their community in order to beneficiate from the freedom of religion.

My point is that, put in the context of the identity approach, the Court's view of religion as a deeply subjective and personal phenomenon starts to look odd. If, as Moon highlights, religion is tied to one's identity insofar as it is informed by one's family and cultural community, why, then, would the Court place such emphasis on the necessity of protecting believers' subjective interpretation of their religious requirement? A person's subjective interpretation only matters if we consider that an individual's sense of identity can be provided by their *own introspection* with respect to their religion. Their community or family may inform this introspection, but it is by no means the relevant criterion, which is, rather, one's relationship to oneself. Similarly, not requiring a person to provide proof that their religious practice is supported by a doctrine of faith only makes sense if we consider that religion can inform a person's sense of self *regardless* of what their family or community thinks about that religion. Non-mandatory and subjectively mandated

[332] *Whatcott*, para. 82.

religious practices are only considered important because the Court cares first and foremost that the religious commitment at issue in a case is core to that person's *subjective* sense of self—not that it is an essential aspect of that person's identity as a member of a specific religious community.

The identity argument rightly highlights that the way I am is, to a large extent, merely discovered through self-assessment and comparison with others. This is why it is cast in such contradistinction to choice. While being homosexual, for example, changes my relationship to members of society, I do not *choose* to be attracted to same-sex persons, hence I should not suffer the consequences of being this way. When we think of the type of arguments mobilized by activists seeking to raise awareness on fatphobia or transgenderism, for instance, we also encounter this line of argument. Much of these activists' work is devoted to debunking the idea that being fat is a choice that I make by eating a certain way, or that I choose to be a man or a woman despite having been assigned the opposite sex at birth.[333] I do not *choose* anything, the argument goes; this is simply *how I am*.

This is not exactly how the Court sees religion. And indeed, as far as religion goes, we must recognize that it is not a permanent feature in the sense that it is prone to variation, and unlike our skin colour, for example, it can be altered. People convert from one religion to another, endorse religious principles that they will reject years later, and are not necessarily constant in the observance of the precepts of their religion or in their religious practice. As Moon puts it, religious beliefs always remain "open to revision in the face of evidence of another truth."[334]

This vision of religion, as shifting throughout someone's life, transpires in the law. In *Amselem*, Iacobucci J., writing for the majority, made it clear that a religious claimant's sincerity ought not to be questioned on the basis that their beliefs or practices changed or

[333] See for instance Patricia Gherovici, *Please Select Your Gender: From the Invention of Hysteria to the Democratizing of Transgenderism* (New York: Routledge, 2010); Jenny Ellison, *Being Fat: Women, Weight, and Feminist Activism in Canada* (Toronto: University of Toronto Press, 2020).
[334] Moon, "Religious Commitment and Identity," 217.

vacillated in the course of their life.[335] In *R. v. N.S.*,[336] a case involving a Muslim woman seeking to testify in court with the niqab (a full-face coverage) that she had started wearing five years before, the Court reiterated this position through the voice of McLachlin C.J. In this case, it was pointed out to the claimant that she had agreed to remove her niqab for the photo on her driver's license and that she had admitted willingness to remove it again for a security check at a border crossing. According to the preliminary inquiry judge, these admissions, and the relatively recent endorsement of N.S.'s religious practice, indicated that the claimant's belief that she must wear her niqab at all times including to give her testimony in her own trial was not strong enough and could therefore not be considered sincere. The majority refused to endorse this conclusion. Writing for the majority, McLachlin C.J. explained that the claimant could still be considered sincere since "[a] sincere believer may occasionally lapse," "beliefs may change over time," and a person's beliefs "may permit exceptions to the practice in particular situations."[337]

This is where the identity argument would need to draw from the autonomy argument: in an important way, we define who we are and who we want to become. In the course of a lifetime, I can explore different ways of being that I may find do or do not suit me. I can educate myself and discover new things about myself, I can change my perspective on the world and my place in it, I can be convinced by another truth—all these things are dependent on what I do and on my own dispositions. To a large extent, my own feelings about myself are important to my sense of self. What the identity argument conceals by drawing our attention to the community of belonging which informs our identity is highlighted in the individual-choice argument.

Per my reading, it is at this crossroads between the identity and the individual-choice argument that religion is considered by the Court. Inasmuch as religion "[connects the individual] with the divine or with the subject or object of that spiritual faith,"[338] then religion is a fundamental source of self-definition for the person who holds this personal connection. And while this connection may not be observable from a person-independent

[335] *Amselem*, para. 53.
[336] *R. v. N.S.*, 2012 SCC 72 (CanLII), [2012] 3 SCR 726.
[337] *N.S.*, para. 13.
[338] *Amselem*, para. 39.

perspective, it is nonetheless a core component of the believer's sense of identity—whether this person agrees or disagrees with the specific rules or habits within their group. This is why, as long as the individual feels that a religious practice "engenders a personal, subjective connection to the divine,"[339] the Court considers that a claim should trigger the freedom of religion. In this respect, only the individual believer can determine which aspects of their religious practice are truly important to them. To put it simply, what the Court is saying is that religion is a piece of what makes one truly oneself.

An Alternative Interpretation: The Authenticity Argument

I now want to suggest a third way of considering the value of religion for the Supreme Court, which is based on authenticity, or more specifically, on integrity as a fundamental condition of the authentic self. One of the reasons why I think that the ideal of authenticity is the moral force guiding the Supreme Court in religious freedom cases is because it offers an explanation as to why religion's value sometimes appears to reside in the fact that it informs our choices and other times appears to reside in the fact that it informs our identity. Indeed, viewing religion as a source of authenticity clarifies that the two notions are not, in fact, set in an "unprincipled" tension, as Moon puts it, but are fundamentally—and quite coherently—intertwined.[340]

The Value of Religion Debate

In Chapter 2, I observed that the ideal of authenticity is built on a typically modern consideration for both the features of ourselves that we see as received or discovered and our deepest commitments that we freely endorse (which I have called, following others, our wholehearted commitments). In the perspective of authenticity, I argued, autonomy matters the most when it is used to define or protect our wholehearted commitments. In parallel, my identity is significant not merely as a label that I discover about myself and that categorizes me in society, but as a relevant mode of being that I am called to affirm or perform in order to feel good about myself. Autonomy and identity are intertwined in authenticity in a way that leads us to view autonomy as something that should be used to

[339] *Amselem*, para. 69.
[340] See Moon, "Religious Commitment and Identity," 220.

express our core inner feelings, which are, in turn, seen as an essential component of our true selves.

This is, in a nutshell, how choice and identity are connected within the purview of authenticity. To be authentic is to possess the ability and strength to put the desires and commitments that we deem fundamental to our sense of self above external constraints so that we may feel whole rather than fragmented. This implies putting our genuine feelings about ourselves above social expectations, or our willingness to live by the norms of society, or even, at times, rational reflection. When it comes to religion, being authentic implies keeping in touch with one's genuine feelings about one's faith and its requirements so that one may decide to put one's own interpretation above the mainstream interpretation of one's community or of one's religious leaders if that interpretation feels right.

In this sense, my approach offers an explanation to the problem highlighted above concerning why the Court does not care, for the purposes of religious freedom litigation, that a person's interpretation of their religious practice differs from that of their religious community. In the authenticity framework, an answer is provided by pointing out that what truly matters for the law is that the believer maintains the possibility to live in accordance with how they *personally* feel about their religion at the time they engage the litigation.

I argued above that this is made most striking by the Court's adoption of a subjective approach to religion. However, the Court's valuation of each claimant's specific way of relating to their religious practice also transpires in decisions where the individual/private dimension of religion is stressed. This is the case in *TWU 2001*, the litigation concerning the capacity of a university requiring its students to endorse a code of conduct discriminatory to homosexual sexual practices in order to assume the full responsibility of its teacher education program. In this case, the majority at the Supreme Court took the opportunity to draw a bolder line between belief and conduct by noting that "[t]he freedom to hold beliefs is broader than the freedom to act on them."[341] Religion, in other words, is secured when privatized within the confines of one's own interiority.

[341] *TWU 2001*, para. 36.

Looking closely at the wording of this decision, however, I believe that it is clear that the Court's valuation of religion must always consider collective identity in conjunction with individual choice. Indeed, the university, as an evangelical Christian institution, is taken to play an important role in the definition of students' identity. Through the voice of Justices Iacobucci and Bastarache, the majority observes that "[t]he diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected."[342] Regardless of whether the position of university towards homosexuality is popular in the general society, the Court agrees that it is worthwhile to respect the religious organization who holds it and disseminates it.

Nonetheless, as the two justices make clear, one should not presume that those who associate with the organization do not have the agency to decide that the litigious principle is unimportant to them or to reject it altogether. It is, ultimately, up to each student enrolled in the school to work out for themselves what they find core to their identity within their religion. The majority writes that "[a]bsent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to *certain religious beliefs* while at TWU should be respected."[343] While "certain religious beliefs" can be taken to mean certain *evangelical* beliefs in a general sense, it can also refer to certain beliefs *within the scope* of the beliefs endorsed by the university. This seems to be what the majority means, as it continues, stipulating that "[i]f a teacher in the public school system engages in discriminatory conduct, *that teacher* can be subject to disciplinary proceedings before the BCCT."[344] The Court's contention here is that we cannot presume that evangelical Christian teachers trained at Trinity Western University would *all automatically* find it crucial to condemn homosexuality simply because they are part of a religious community that condemns it. The fact that the university's covenant aims, in part, to impact the way that students define their identity as members of the Canadian society is legitimized by the Court, who rules in favour of the university.

[342] *TWU 2001*, para. 33.
[343] *TWU 2001*, para. 36 [emphasis added].
[344] *TWU 2001*, para. 37 [emphasis added].

However, it does so not without reminding us that each student is ultimately the sole person who can decide for themselves what to do with the principles contained in the covenant.

By focusing on the individual student's capacity to interpret the principles of their religion and their requirements, the decision in *TWU 2001* draws attention to another notion that I believe crucially impacts court rulings, which is that of self-coherence or integrity. Per my reading, integrity, which is a precondition of the authentic being, often plays a determining role in the outcome of a case.

Laborde's theory of religion in the liberal state provides us with useful tools to look at religious freedom cases through the lens of integrity. Developing her model, Laborde argued that integrity should constitute the baseline to determine which claims are deserving of special protection by the state. Only the types of liberties and commitments that are core to the individual's sense of self and ethical commitments ("integrity-related liberties" or "integrity-protecting commitments"), as opposed to those that are only peripheral ("ordinary freedoms"), should be regarded with special consideration. Thus, a dress code preventing people from wearing a head covering, for example, will warrant an accommodation for the Muslim or Sikh woman wearing a headscarf or a turban but not for the woman seeking to wear a hat for style. The accommodation is warranted in the case of religious beliefs since the practice of wearing a head coverage for the Muslim or Sikh woman relate to their conception of how they ought to live their life, while it does not for the areligious woman.

In Laborde's model, these commitments can be experienced as obligations, but they need not be. Just as the Supreme Court argued that a religious practice need not be supported by a mandatory doctrine of faith to trigger the freedom of religion, Laborde argues that integrity-protecting commitments can also be non-obligation-imposing. As long as they relate to the practices that comprehensively regulate the lives of the claimant and are experienced as core to a person's sense of self, departing from integrity-relating commitments will generate feelings of remorse, shame, or guilt. Thus, it is the centrality of the commitment in the person's life and not its mandatory character that warrants the state's special consideration.

I believe that Laborde's approach to religion is, in many respects, similar to the Supreme Court of Canada's. Accordingly, her view of integrity as core to many (yet not all, nor only) religious freedom claims is helpful to make sense of the cases where protecting religious freedom was *not* found to outweigh the benefits of upholding a law or the rights of others. In such cases, I argue that the Court was unable to view the claim founded on religion as tied to an integrity-protecting commitment or an integrity-related liberty, and thus considered the harm of limiting the religious practice as not severe.

A good case-study is *Wilson Colony*, which, I observed in Chapter 1, may be interpreted as illustrative of the autonomy argument as much as of the identity argument. Looking at the reasons provided by the judges in this case through the lens of integrity, however, brings to light a whole new set of considerations, which tie into the harm that the majority perceives the Hutterite community to experience as a result of the law requiring those possessing a driver's licence to be photographed. In her reasons, McLachlin C.J., writing for the majority, explains that not granting the Hutterites an exemption to the law is reasonable insofar as "[t]he law does not compel the taking of a photo," but "merely provides that a person who wishes to obtain a driver's licence must permit a photo to be taken for the photo identification data bank."[345] Viewed in this way, it is clear that the Hutterites' sense of integrity it not directly at stake. The majority concludes that the law simply "[obliges] [the Hutterites] to make alternative arrangements for highway transport"[346] and consequently, that it "does not deprive members of their ability to live in accordance with their beliefs."[347]

When considered in the light of Laborde's approach to religion, this decision can be explained as follows: while it is true that the law impedes on the Hutterites ordinary freedom to drive a vehicle on the public highway, the evidence provided does not allow concluding that members of the community must infringe on one of their integrity-related liberties as a result of the law.

[345] *Wilson Colony*, para. 98.
[346] *Wilson Colony*, para. 99.
[347] *Wilson Colony*, para. 102.

The language of integrity emerges in the dissent of Abella J. as she writes: "[t]o suggest, as the majority does, that the deleterious effects are minor because the Colony members could simply arrange for third party transportation, *fails to appreciate the significance of their self-sufficiency to the autonomous integrity of their religious community*."[348] From this point of view, an integrity-related liberty—that of maintaining a secluded, self-sufficient lifestyle—is found to be infringed by the law. The main difference between Abella J.'s dissent and McLachlin C.J.'s majority reasons, however, seems to lie not in a diverging valuation of religion as a source of authenticity, which warrants protection for one's integrity-related commitments specifically, but in their respective understanding of what is core to the Hutterites religion and way of life. While the majority focuses on the Hutterites' belief that they must not be photographed, Abella J. goes on to consider the meaning of the Hutterites self-sufficiency as an integral element of their way of life. Quoting an older ruling involving a property conflict in a Hutterite community, she highlights that "[t]o a Hutterian the whole life is the Church … . The tangible evidence of this spiritual community is the secondary or material community around them. They are not farming just to be farming — it is the type of livelihood that allows the greatest assurance of independence from the surrounding world."[349] In the final analysis, it is this detour that allows her to claim that the law breaches the members of the Hutterite community's integrity-related commitment because their lifestyle is so deeply tied to self-sufficiency.

The way that I read the *Wilson Colony* decision, the exemption was not deemed to be warranted because the law was not perceived as preventing the Hutterites to live with integrity with respect to their religion. While Berger argues that this case illustrates the Court's valuation of religion as a source of autonomy, it seems to me that it is clear from the majority reasons that the freedom to choose how to live one's life must be tightly connected to the choices that one makes with respect to their deepest ethical commitments in order to warrant respect. If the Hutterites' argument failed, it is because the Court was unable to see how the photo requirement infringed on members' sense of integrity. Reading through the majority decision, we get a sense that this would only have been the case if the

[348] *Wilson Colony*, para. 167 [emphasis added].
[349] *Hofer v. Hofer*, 1970 CanLII 161 (SCC), [1970] S.C.R. 958 quoted in *Wilson Colony*, para. 165.

law forced members of the community to be photographed against their will. However, since that was not the case, the infringement to the Hutterites' freedom of religion was found to be only moderate.

This conception of religion as tied to one's sense of integrity is well encapsulated, in the *Wilson Colony* ruling, in the quote that the majority borrows from the Supreme Court of the United States to ground their refusal to grant the exemption, which highlights that "liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." These beliefs are important to protect, in turn, because "[they] could not define the attributes of personhood were they formed under compulsion of the State."[350] If the majority concluded that the law reasonably limited the Hutterites' freedom of religion, it is because it did not perceive it as precluding the community from acting in conformity with the beliefs that define the attributes of their personhood. The choice of this particular quote decidedly ties the harm of impeding on a religious practice to the believer's sense of integrity and makes it clear that such harm will be considered mild or moderate if the choice of the believer with respect to their religion is restricted without, for that matter, really affecting their capacity to define their sense of self in coherence with their core religious beliefs.

The Court's conception of harm as being most severe when it is tied to a believer's sense of integrity also shows in cases involving parents who claim the right to transmit their religion to their children. While parents may make the case that they have an integrity-related duty to pass down their religion to their children, it is particularly difficult to demonstrate that this duty will be impeded if measures are not taken to assist the parents in that process. Parents in the liberal state will always be left with at least some means to transmit their religion to their children, thus their integrity-related commitment is, concomitantly, at least partially safeguarded. As a result, these claims turn out to be particularly difficult to defend.

[350] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), quoted in *Wilson Colony*, para. 91.

An example can be found in the case of *Adler v. Ontario*,[351] a litigation concerning the application of section 93 of the *Constitution Act, 1867*.[352] This section, which is reiterated in section 29 of the *Constitution Act, 1982*,[353] guarantees full public funding for Roman Catholic separate schools, including private Roman Catholic schools, in the province of Ontario. As the majority in *Adler* explains through the voice of Justice Iacobucci, this provision was adopted in the *Constitution Act, 1867* with the view of alleviating conflicts based on religion that may have created obstacles to the birth of the Confederation following the union between Ontario and Canada. By ensuring a form of financial support to both Catholic minorities in Ontario and Protestant minorities in Quebec,[354] section 93 has been "recognized as the expression of a desire for political compromise"[355] on which the Confederation was founded.

In *Adler*, five Jewish parents and four Reformed Christian parents contested the application of this provision by the province of Ontario, arguing that since it offered funding to the Catholic minority only, the law infringed their religious freedom and was discriminatory. For religious reasons, these parents believed that they could not send their children to the publicly funded secular or Roman Catholic schools. Therefore, they enrolled their children in an independent private religious school and assumed the costs of the tuition fees for a private education. Their request was for the government of Ontario to enlarge its interpretation of the section 93 so as to provide public funds for the private religious schools of other non-Catholic minorities.

None of the judges from the Supreme Court found that the freedom of religion of the parents was infringed by Ontario's application of section 93, albeit for different reasons. One set of arguments explains that, since "[p]arents whose beliefs do not permit them to educate their children in the secular or Roman Catholic school systems are free to educate their children in other schools or at home," parents cannot claim that their religious freedom

[351] *Adler v. Ontario*, 1996 CanLII 148 (SCC), [1996] 3 SCR 609.
[352] *The Constitution Act, 1867*.
[353] *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11.
[354] The provision does not apply to Quebec since 1997, when a constitutional amendment was voted by the legislature. This amendment aimed to secularize the school system replaced the Protestant and Catholic school boards with French and English school boards. See *The Constitution Act, 1867*, 93A.
[355] *Adler*, para. 29.

was violated. What this line of reasoning implies is a view of harm similar to that which we find in *Wilson Colony*. Under this view, parents would only be prevented from acting in conformity with their integrity-related commitment that their children must receive an education conforming to their religious beliefs if, as Justice McLachlin writes, "all children [were required] to go to either secular or Roman Catholic schools."[356] This is not the case here, and as such, no violation to the parents' freedom of religion is found to occur as a result of the province application of section 93.

Another set of reasons provided by Justice L'Heureux-Dubé similarly points out that the "burden complained of by the appellants, viz. the cost of sending their children to private schools, [is] not a prohibition of a religious practice but rather the absence of funding for one."[357] According to L'Heureux-Dubé J., parents cannot claim that their right to religious freedom is violated since they remain able to—and, in fact, do—send their children to a school that aligns with their religious beliefs. Viewed in this way, it is difficult to see the parents' claim as one which is tied to their sense of integrity as religious parents since they are able to find legitimate alternative pathways to achieving what their integrity-related commitment bounds them to do.

The same logic permeates the ruling in *S.L. v. Commission scolaire des Chênes*,[358] a case concerning the right of Catholic parents in Quebec to exempt their young children from the mandatory Ethics and Religious Culture (ERC) course, in which various religions are taught from a "neural and objective standpoint." According to the parents, this constituted an infringement of their freedom of religion since it prevented them from transmitting their faith to their children by exposing them to a form of relativism. The parents concomitantly argued that the course infringed on their children's freedom of religion since it would "disrupt" their education by exposing them to different religious facts.

The Court claimed, once again, that there was no infringement to religious freedom. While the majority noted that early exposure of children to realities that differ from those

[356] *Adler*, para. 196.
[357] *Adler*, para. 58.
[358] *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 (CanLII), [2012] 1 SCR 235.

in their immediate family environment "can be a source of friction," it observed that this situation was "a fact of life in society," and therefore "[did] not in itself constitute an infringement of s. 2(a) of the *Canadian Charter*."[359] While the majority, through the voice of Justice Deschamps justifies its conclusion by noting that parents remain "free to pass their personal beliefs on to their children if they so wish,"[360] the concurring reasons of Justice LeBel highlights that the evidence provided regarding the ERC course makes it impossible to conclude that "any exposure of children to realities that differ from those in their family environment is unacceptable in light of the constitutional or quasi-constitutional protection conferred on freedom of religion."[361] Considered in the light of integrity, it is difficult to see how the parents' claim could have succeeded. Parents will indeed always possess *some* means to pass their religion on to their children, even in contexts where they believe it is made more difficult. This renders it particularly difficult to frame obstacles to the transmission of religious beliefs to children as limiting the capacity that a person has to act with integrity, which, I argued, is a step essential to making a successful claim.

Perhaps one counter-example is *Loyola High School v. Quebec (Attorney General)*, another case concerning the mandatory ERC program. As a Catholic educational institution, Loyola High School requested permission to teach the Catholic component of the ERC program from a Catholic perspective instead of in a neutral way, as required by the Ministry of Education. The Ministry of Education refused, arguing that teaching the course from a neutral and objective standpoint constituted "a necessary strategy to ensure that students are knowledgeable about and respectful of the differences of others."[362]

In this case, the Court ruled in favour of Loyola. "The Minister's decision," Justice Abella writes for the majority, "interferes with the manner in which the members of an institution formed for the very purpose of transmitting Catholicism, can teach and learn about the Catholic faith."[363] While it is clear from the majority's conclusion that the

[359] *S.L.*, para. 40.
[360] *S.L.*, para. 40.
[361] *S.L.*, para. 57.
[362] *Loyola*, para. 2.
[363] *Loyola*, para. 61.

transmission of beliefs was deemed important enough to tilt the balance in favour of Loyola, I would argue that this was the case because the elements at stake in this case make it crucially different from the cases of *Adler* and *S.L.*

Indeed, while *Loyola* also deals with religious education, the case is not about the right of religious parents. The matter in *Loyola* specifically concerns the right to religious freedom of a religious institution, whose very purpose is, as the Court puts it, "to support the collective practice of Catholicism and the transmission of the Catholic faith."[364] This setup already puts Loyola in a position of strength within a framework of authenticity: rather than having to demonstrate that teaching the ERC program from a neutral and objective perspective hinders the transmission of Catholicism to students, Loyola needs only to show that the way the program is intended is incompatible with its mission. In this respect, it is possible to consider the harm done to the institution by requiring it to teach Catholicism from a neutral perspective as tied to its integrity as a Catholic institution. Ordering that a lawful Catholic school teaches about Catholicism in a neutral and objective way would indeed force the school to act in an inherently contradictory way by depriving it of its religious character. At the end of the day, *Loyola* was really about preserving the authentic character of a religious institution whose very existence is built on the transmission of the Catholic faith.[365] As it turns out, Loyola's claim was readily recognized by the majority and adamantly granted by the concurrence of McLachlin C.J. and Moldaver J., who would have gone one step further to recognize Loyola's right to teach the ethics component of the course, too, from a Catholic perspective.[366]

The Court's valuation of religion as a source of authenticity emerges in the Court's discomfort with religion when the health of children is concerned. In such cases, the subtext is that, while parents can play a role in the development of their child's sense of self, it is

[364] *Loyola*, para. 61.
[365] The irony of the issue at bar is highlighted in the title of Janet Epp Buckingham's case comment, "Catholic Schools Can Be Catholic." See Janet Epp Buckingham, "Catholic Schools Can Be Catholic," *Oxford Journal of Law and Religion* (2015), https://doi.org/10.1093/ojlr/rwv025.
[366] McLachlin C.J. and Moldaver J. write: "it would be insufficient to merely grant an exemption for Loyola to teach Catholicism from a Catholic perspective, while requiring an unmodified curriculum and a neutral posture in all other aspects of the program. Binding Loyola to a secular perspective at all times, other than during their discussion of the Catholic religion, offers scant protection to Loyola's freedom of religion, and would be unworkable in practice." See *Loyola*, para. 154.

ultimately up to each child as they grow up to define who they truly are, including how they relate to the religion that was passed on to them by their parents. Insofar as one's sense of self is dependent upon a process of introspection which can only be carried by the individual person, these cases rightly highlight the autonomously defined dimension of one's identity.

A good example is the case of *A.C. v. Manitoba (Director of Child and Family Services),*[367] a litigation about the objection to a potentially life-saving blood transfusion of an almost fifteen-year-old member of the Jehovah's Witnesses. In this case, *A.C.*, a so-called "mature minor," argued that the Manitoba *Child and Family Services Act* was violative of her freedom of religion since it prevented all minors under sixteen years old to object to a medical treatment considered essential, regardless the minor's maturity.

The Supreme Court approaches this case as one that concerns mature minors' capacity to make autonomous choices concerning their own life. As Berger points out, "[the] majority judgement was … pregnant with discussion of volitional capacity and respect for choice—so much so, in fact, that the religious dimensions of the case recede from view in favour of a debate about choice and capacity."[368] Indeed, the question in *A.C.* primarily revolved around whether a "mature minor" can make an important medical decision despite still being a child in the eyes of the law. Nonetheless, I would argue *contra* Berger that the Court's concern for the maturity of the minor is of such central importance not because it is tied to autonomy in general and, as Berger claims, in order to have "force in the eyes of the law," religion must be "aligned with autonomy and choice."[369] According to me, *A.C.*'s maturity is found to be of interest because it is the relevant criteria to assess her capacity for serious introspection with respect to her identity. Obviously, introspection is tied to autonomy. This is so because introspection can only be carried out by the individual person, and thus introspection cannot but be an autonomous process. But introspection differs from autonomy in the sense that it does not require action but merely self-knowledge. Thus, when mature minors are involved, what must be asked is first and foremost whether the mature minor's decision is founded on a sufficient level of self-

[367] *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 (CanLII), [2009] 2 SCR 181.
[368] Berger, *Law's Religion*, 90.
[369] Berger, *Law's Religion*, 91.

knowledge. This is what, in turn, will then warrant the respect or denial of their own will. This approach would explain why the autonomy of children is, as observed by Abella J., more readily put in question when it is exercised in a way that contradicts medial advice. Quoting legal scholar Joan Gilmour, Justice Abella notes that

> [w]hile a mature minor can consent to medically recommended treatment, the extent to which he or she has the power to consent to a treatment that is not beneficial or therapeutic remains unclear. The argument that a minor can only consent to care that would be of benefit (or refuse that which is of little or no benefit) is sometimes referred to as "the welfare principle". It suggests that a mature minor can only make those decisions about medical care that others would consider to be in his or her interests; as such, it challenges the extent of the commitment in law to mature minors' interests in self-determination and autonomy.[370]

If autonomy was truly the relevant value, however, then it should be fully considered even when (and perhaps even especially when) it is exercised to object to a treatment known to be beneficial. This was precisely Justice Binnie's argument in his dissent. Writing for himself only, Binnie J. makes the following reasoning:

> Individuals who do not subscribe to the beliefs of Jehovah's Witnesses find it difficult to understand their objection to the potentially lifesaving effects of a blood transfusion. It is entirely understandable that judges, as in this case, would instinctively give priority to the sanctity of life. Religious convictions may change. Death is irreversible. Even where death is avoided, damage to internal organs caused by loss of blood may have serious and long lasting effects. Yet strong as is society's belief in the sanctity of life, it is equally fundamental that every competent individual is entitled to autonomy to choose or not to choose medical treatment except as that autonomy may be limited or prescribed within the framework of the Constitution.[371]

Reading through his motives, it is clear that *A.C.*'s autonomy with respect to her religion is the crucial concern: "[*A.C.*] had no desire to die," Justice Binnie writes, "but she wished to live in accordance with her religious beliefs."[372] This, he concludes, should be reason enough to respect her decision not to receive a blood transfusion.

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[370] Joan M. Gilmour quoted in *A.C.*, para. 83.
[371] *A.C.*, para. 191-92.
[372] *A.C.*, para. 169. He continues, quoting the following reports from the hospital's psychiatrists: "[Patient] is aware of medical concern for blood loss, [decreased hemoglobin] and that if blood loss is severe, a transfusion is the recommended [treatment]. She is aware of alternatives to transfusion — [erythropoietin] and iron. States that even if she will die, she will refuse blood based on scripture "to maintain a clean standing

While this approach testifies to the Court's valuation of religion as a fundamental and important source of autonomy for the believer, it is that of only one judge—the same judge whom, I argued in Chapter 1, adopted an autonomy approach to religion in *Amselem*. For the majority, the *Child and Family Services Act* was not found to be inherently violative of religious freedom because it limited a mature minor's possibility of making a decision concerning their medical treatment. As long as the minor's best interests are assessed "in a way that takes into increasingly serious account the young person's views in accordance with his or her maturity in a given treatment case,"[373] then it cannot be said that the *Act* is contrary to that person's religious freedom. According to the majority, then, "[t]he more serious the nature of the decision, and the more severe its potential impact on the life or health of the child, the greater the degree of scrutiny that will be required."[374]

If religion was valued as a source of autonomy, the maturity of the minor should be assessed independently from the severity of the impact on their life or health, as Binnie J. defended. If, however, we view religion as a source of authenticity, then doubting a minor's claim that goes against medical advice—especially if that claim mirrors the opinion of the minor's parents—makes more sense. The severity of the impact on the minors' health is relevant in this perspective because children's identity is not fully developed. Children may feel like their parents' way of thinking is true and right because it is the only way of thinking that they really know or because they haven't yet encountered other ways of thinking that might better fit their personality. The severity of the impact on the life or health of the child is relevant in this sense because it risks preventing them from developing their true sense of self later in life.

The concern for a child's capacity to self-define as an adult emerges particularly clearly in the case of *B. (R.) v. Children's Aid Society of Metropolitan Toronto*,[375] which

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with God." She was voluntarily baptized 2 years ago and believes that "this is the absolute truth." … The patient appears to understand the nature of her Crohn's illness (and GI bleeding) and reason for admission. She also appears to understand the nature of her treatments, and that should her current medical status worsen, the treating MD's may suggest a blood transfusion. The patient understands the reason why a transfusion may be recommended, and the consequences of refusing to have a transfusion. At the time of our assessment, patient demonstrated a normal [mental status examination with] intact cognition (30/30 [Mini-Mental State Examination]). See *A.C.*, para. 181 [emphasis in original].

[373] *A.C.*, para. 98.

[374] *A.C.*, para. 22.

[375] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 SCR 315.

concerned the right of Jehovah's Witness parents to refuse a blood transfusion for their infant daughter. While the majority simply explained that the "security of the child" justifiably limited the parents' freedom of religion, Iacobucci and Major JJ., in dissent, express a discomfort with the parents' claim, which relies on more than a mere concern for the child's security. In their joint reasons, they write that the parents "proceed on the assumption that [their daughter] is of the same religion as they, and hence cannot submit to a blood transfusion."[376] This, they argue, should not be taken for granted. Infants have "the right to live long enough to make [their] own reasoned choice about the religion one wishes to follow as well as the right not to hold a religious belief."[377] On this view, Iacobucci and Major JJ. argued that the wrongs of allowing the parents to use their religious freedom to object to a blood transfusion for their daughter include the fact that "due to parental beliefs, [the child] may not live long enough to make choices about the ideas she should like to express, the religion she should like to profess, or the associations she should like to join."[378]

While it is true, as Berger notes, that the two justices do not recognize the legitimacy of the parents' claim to freedom of religion because in this case, "the individual whose autonomy is in question is now not able to exercise choice,"[379] it seems to me that the particular type of autonomy at stake here is that of the self-defining person. The question is not merely about the autonomy that children may or may not lack, but also about how they may want to use their autonomy in the future in order to live an authentic life as they—and not their parents—truly intend it. Not recognizing the minor's autonomy in the present is, in other words, the only way to protect their capacity to live with integrity in the future. In the balance of interests, this is ultimately why the "sanctity of life"[380] often end up weighting more than the parents or the mature minor's autonomy with respect to their religious beliefs.

[376] *Children's Aid Society*, p. 437.
[377] *Children's Aid Society*, p. 437.
[378] *Children's Aid Society*, p. 437.
[379] Berger, *Law's Religion*, 90.
[380] See *A.C.*, para. 16.

Those who argue for the logic of choice, like Berger, have often pointed out that the Court has been explicit in its connection of religion to autonomy and choice. While this is admittedly true, if we take the path of what has explicitly been formulated by the Court, it seems that something might have escaped us. Indeed, while there are no explicit mention of authenticity in rulings on religious freedom by the Supreme Court, I do believe that it is possible to find a number of passages in the case law that quite clearly tie religion to authenticity, starting with the mention in the Court's definition of religion in *Amselem* that religion is "integrally linked to one's self-definition and spiritual fulfilment."[381] I noted in Chapter 1 that although the definition of religion provided in *Amselem* has been thoroughly discussed in the literature, nothing has been said on this specific passage. My hypothesis is that this passage and its impact in the case law has been overlooked because it draws on intuitions so familiar to the modern Western conscience that we have easily accepted them as true. We grasp the notion that our self-definition and fulfilment are tied to our capacity to live in coherence with our worldview so intuitively that we do not require an explanation to accompany it.

Besides this mention in *Amselem*, two early quotes are worth paying attention to. One can be found in the unwinding of a recurring issue in early post-*Charter* cases involving section 2(a). At the time, the Court was called to distinguish the "freedoms" guaranteed under section 2 from the "liberty" guaranteed under section 7 of the *Charter*, in the sentence "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[382] This situation led the Court to specify the meaning of each section so as to more clearly circumscribe what each right entailed. Thus, writing only for himself in *Children's Aid Society of Metropolitan Toronto*, Chief Justice Lamer explains that "[the heading] "Fundamental Freedoms" … refer[s] specifically to "freedom" in the sense of the ability of every individual to choose, act or *"be" as he or she sees fit*, free of any constraints."[383]

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[381] *Amselem*, para. 39.
[382] Aside from freedom of conscience and religion, the *Charter* also guarantees the following fundamental freedoms: "(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association." See *Canadian Charter of Rights and Freedoms*.
[383] *Children's Aid Society*, p. 342 [emphasis added].

While Lamer C.J. did not provide more information on what he meant by the right to "be" as one sees fit, the quote seems to point quite directly to authenticity.

Another mention that I find particularly explicit can be found in *Edwards Books*. Clarifying the meaning of the freedom of religion in the early post-*Charter* era, Dickson C.J., writing for the majority, explains that "[t]he purpose of s. 2(a) is to ensure that society does not interfere with *profoundly personal beliefs that govern one's perception of oneself*, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one's conduct and practices."[384] Far from being a singular occurrence, this paragraph is quoted in the later cases of *Amselem*,[385] *Lafontaine*,[386] *Wilson Colony*,[387] and *Ktunaxa*.[388] Moreover, it is in *Edwards Books* that the Court began to lay out two-pronged test to assess whether a claim triggers the protection for the freedom of religion was sketch, namely the sincerity of the believer and the infringement of the claimant's belief or practice, which must be more than trivial or insubstantial.[389]

Per my reading, each of these two steps are core components of authenticity. On the one hand, one's "profoundly personal beliefs that govern one's perception of oneself" can only be accessed through introspection; including introspection with respect to how one relates to one's religion. On the other hand, the assessment of whether a religious belief or practiced is infringed in a more than trivial of insubstantial way is, in the end, always a question of integrity. What the Court is saying is that an infringement to profoundly personal beliefs that govern one's perception of oneself is only deserving of constitutional protection insofar as it leads a person to experience discontinuity with respect to their self-determined sense of identity.

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[384] *Edwards Books*, para. 97 [emphasis added].
[385] See *Amselem*, para. 41.
[386] See *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 (CanLII), [2004] 2 SCR 650, para. 68.
[387] See *Wilson Colony*, para. 32.
[388] See *Ktunaxa*, para. 121.
[389] In *R. v. Jones*, the notion of "sincerity" is mentioned for the first time in a religious freedom case in the post-*Charter* era. The notion of "more than trivial and insubstantial burden on religion" figures on its part in the dissent of Wilson J. and is endorsed by the majority in the Court's subsequent ruling on religious freedom, *Edwards Books*. See *Jones*, para. 20-21; 67.

The reading of the Supreme Court of Canada cases that I offered in this section aimed to highlight how autonomy and identity are intertwined into a single value in legal decisions pertaining to religion. I argued that the Court values religion as a source of authenticity or of self-determined identity, which, in turn, is protected because it orients a person's most important decisions through life. From the look of the picture that I painted in this section, it becomes clear that while religion is cast by the Court as a source which may inform my choices in life, these choices are perceived as meaningful only insofar as they allow me to define myself as an individual. The logic of authenticity makes it obvious that my identity is not merely imposed on me by others: I choose who I am and who I want to become. I have the agency to make judgements and decisions based on my personal values and feelings about the world. In this sense, limiting religious practice is wrong because it impedes individuals' capacity for self-defining.

Nonetheless, while the self-defined dimension of identity is important to acknowledge, it would be difficult to argue that identity is entirely a matter of self-definition. Identity is also, at times, a matter of discernment; one that we make through our interactions with others. In this sense, the logic of identity rightly stresses that identity is not just a matter of self-definition; it is also discovered or realized when I assess myself against others. What the concept of authenticity reveals or makes obvious in this respect is that my discovered identity does not merely concern the visible or objective permanent characteristics that I bear. It also encompasses the invisible and subjective *feelings* that I have about myself. In the next section, I turn to this aspect of the authenticity argument, arguing that it is on this ground that the Court adopted a sincerity test to assess the legitimacy of a claim founded on religion in the context of a subjective approach to religion.

The Subjective Approach to the Sincerity Test

I now turn to the second "unsettled question" that I claim the authenticity framework allows us to answer. This question concerns the adoption of the so-called "sincerity test" to assess religious freedom claims. What is "unsettled" about this test is why it was adopted. As many scholars have noted, while judges may be equipped to evaluate the credibility of a claimant, their capacity to determine whether a religious claimant has a sincerely held

belief is limited.[390] This is particularly true if we consider that the Court includes subjective interpretations of religious commitments within the scope of legitimate claims for religious freedom. Since such interpretations cannot be evaluated against the backdrop of what a community of believers does; it opens the door to having to assess the sincerity of beliefs that are particularly difficult to verify from the perspective of an "outsider" such as the judge.

The difficulty of assessing a believer's sincerity is highlighted by the fact that practically no claim has failed the sincerity test.[391] One exception is perhaps the case of *Bothwell v. Ontario (Minister of Transportation)*,[392] where the Ontario Superior Court did not recognize the sincerity of a claimant requesting a religious exemption from a photograph on his driver's licence. However, in this case, the claim was dismissed not on the basis of a lack of evidence—the claimant was indeed unable to provide proof of membership in a community of faith— but because he was caught in a lie, i.e., he had been knowingly photographed in the context of a press conference related to his trial. As Robert Charney observes, "[h]ad Mr. Bothwell not voluntarily participated in the press conference, it is unlikely that the cumulative evidence in his case would have been sufficient to undermine his claim of a sincere religious belief on a strict application of the principles established in *Amselem*."[393] In other words, had he not been caught in a lie, it is unlikely that Mr. Bothwell's ill-founded claim would have failed the sincerity test.

At the level of the Supreme Court, other cases also illustrate the challenges of the current sincerity test. In *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, a sudden and drastic change of attitude from the Ktunaxa Nation seems to have left the judges wondering whether the claim was truly formulated in good

[390] See for instance Su, "Judging Religious Sincerity."; Weinstock, "Beyond Objective and Subjective."; Weinrib, "An Exemption for Sincere Believers."; Charney, "How Can There Be Any Sin in Sincere?."; Ogilvie, "The Incredible Shrinking Concept."

[391] According to Kent Greenawalt, this may be explicable, in the American context at least, by the fact that "[o]nly a small percentage of actual claims about religion raise a serious question of whether something is religious or not." See Greenawalt, *Religion and the Constitution, Volume 1*, 125.

[392] *Bothwell v. Ontario (Minister of Transportation)*, 2005 CanLII 1066 (ON SCDC).

[393] Charney, "How Can There Be Any Sin in Sincere?," 59. A related situation occurred in *Edwards Books*. In this case, the majority considered as sincere the claim of only one out of three claimants seeking to open their shop on Sunday since their claim did not appear to be founded on religion at all. Indeed, these two claimants simply argued that they should be able to work on Sunday while also not respecting any other day of Sabbath. See *Edwards Books*, 11-25.

faith. Indeed, after over a decade of negotiations with the developer seeking to establish a ski resort on the Qat'muk mountain, an elder from the community revealed that the project in question would permanently and irrevocably chase the Grizzly Bear Spirit from the mountain. In the summary of facts of the majority reasons in *Ktunaxa*, the Court highlights each occasion where this information could have been disclosed but was not. Nevertheless, despite the existence of what Kislowicz and Lux qualify as subtext questioning the sincerity of the Ktunaxa Nation,[394] the claim passed the sincerity test.

Another illustration is the case of *Bruker v. Marcovitz*, where the Court questioned whether a man sincerely believed that granting a *get* or a Jewish divorce was truly "an act to which he objected as a matter of religious belief."[395] Per the majority's avowal, the man's "refusal to provide the *get* was based less on religious conviction than on the fact that he was angry at Ms. Bruker."[396] Yet, this did not seem to constitute reason enough to dismiss his claim, as the majority proceeded to the balance of his religious freedom against competing interests. The challenge inherent to the sincerity test is all the more emphasized by the dissent's reasons, which appear to suggest that it is rather the woman in this case who was acting in bad faith. Stressing the "unconventional" behaviour of Ms. Bruker, the dissent seemed to call into question her motivation to sue her ex-husband for damages.[397] While Ms. Bruker's sincerity was not under review since only the Mr. Markovitz's freedom of religion was concerned in this case, this situation nevertheless highlights the potential pitfalls of assessing the sincerity of a claim that cannot be objectively verified. One's appreciation of a claimant's sincerity can vary significantly depending on how each person

[394] Kislowicz and Luk, "Recontextualizing Ktunaxa Nation v. British Columbia," 218.
[395] *Bruker*, para. 69.
[396] *Bruker*, para. 69.
[397] Deschamps J. writes: "Shortly after the [civil divorce] agreement was signed, the parties' relationship deteriorated and became stormy. In October 1980, the divorce decree was granted, but the respondent did not appear for the purpose of the *get*. The appellant worked as an interior decorator and led an active life marked by unconventional behaviour. A judicial saga then began. The dispute related mainly to varying the corollary relief. A first judgment was rendered in 1983, and it was followed by many others. In 1989, the appellant brought an action claiming $500,000 for having been restrained from going on with her life, remarrying in accordance with the Jewish faith and having children (the two children of the marriage were adopted), all because the respondent had not fulfilled his undertaking to appear before the rabbinical authorities for the purpose of the get. She moved to New York, also in 1989, to start a new life. She went there with the couple's two children. Her relationship with her daughters was as difficult as her relationship with the respondent. In 1992, a placement order was made in respect of one of them; when this daughter came of age, she asked to continue living with her foster family. The other daughter lived with her mother only from time to time, as she went from one boarding school to another." See *Bruker*, para. 108-09.

perceives the religious claimant and/or the type of claim that they are making. Moreover, the case of *Bruker* illustrates that it is possible for judges to have disagreements on the sincerity of a claimant even when they are presented with the same evidence.[398]

These situations are in sharp contrast with cases where the Court knows about the existence of an objective religious precept. While, following *Amselem*, the Court may not request an objective proof of belief, sincerity is granted much more readily when the claimants take the initiative of presenting this type of proof. In *Wilson Colony*, for instance, there is virtually no discussion on the sincerity of the belief, which is recognized from the start. After having explained that "[m]embers of the Wilson Colony, like many other Hutterites, believe that the Second Commandment prohibits them from having their photograph willingly taken," the Court concludes in a five-word sentence: "This belief is sincerely held."[399]

Yet, despite the fact that providing an objective proof of belief greatly facilitates the determination of a claimant's sincerity, the Supreme Court never appeared comfortable with making this type of evidence a requirement for religious freedom. Even in decisions rendered prior to *Amselem* where the sincerity of the belief constituted an implicit standard, the Court displays the same uneasiness with objective proofs of belief. In *Edwards Books*, the 1986 ruling on the constitutionality of the *Retail Business Holidays Act* providing a common day of rest to retailers on Sunday, Dickson C.J. essentially depicts inquiries into a religious belief as a necessary evil to protect one's freedom of religion. Writing for the majority, he explains that judicial inquiries into the sincerity of religious beliefs are constitutional only insofar as they are "unavoidable if the constitutional freedoms guaranteed by s. 2(a) are to be asserted before the courts." Thus, while noting that inquiries into the sincerity of a belief "expose an individual's most personal and private beliefs to

[398] Commenting on a case involving the possibility of seeing a witness' face when testifying, Natasha Bakht notes that studies show that, in sexual assault cases, "complainants' credibility is strongly influenced by stereotypes regarding appropriate emotional expressions when testifying." See Natasha Bakht, "In Your Face: Piercing the Veil of Ignorance About Niqab-Wearing Women," *Social & Legal Studies* 24, no. 3 (2015): 428, https://doi.org/10.1177/0964663914552214. While Bakht's analysis is concerned with the demeanor evidence, it clearly highlights some of the pitfalls of evaluating the credibility of a claimant which may also apply to the evaluation of a claimant's sincerity in the context of a case on freedom of religion.
[399] *Wilson Colony*, para. 7.

public airing and testing in a judicial or quasi-judicial setting,"[400] he concludes that "[w]e must live with the reality that such an inquiry is [sometimes] necessary."[401] Dickson C.J. is nonetheless quick to clarify that whenever this type of inquiry is not necessary, it ought to be avoided.

Reading through *Edwards Books* and posterior cases, we get the sense that sincerity was deemed the appropriate test to assess a religious freedom claim because it is the least invasive way to assess such claims. Sincerity allows the judges some leeway to determine whether a claim is valid or not that does not require them to explicitly draw from any objective sources, or to have long discussions on the plausibility of a contested interpretation of a religious belief. The Court's desire to avoid getting into a discussion on a claimant's religion reaches a peak in *Amselem*, where the religious practice at issue—i.e, the requirement to dwell in a *personal* succah during Succoth—was disputed between two rabbis. Refusing to position itself on whether the practice was actually prescribed by Mr. Amselem's religion, the majority accepted Mr. Amselem's own perception of his religious obligation, specifying that "[a]n inquiry into the mandatory nature of an alleged religious practice" would be "inappropriate."[402] Despite the blurriness surrounding Mr. Amselem's interpretation of his religion, the Court went on to formalize a sincerity test that recognized the legitimacy of subjective interpretations of one's religion as eligible to receive the protection of freedom of religion.

By all accounts, the Court considers it a desirable thing not to look too deep into a religious belief—even a litigious one. The question that emerges from this situation is: What exactly makes an inquiry into a religious belief so unwarranted? By endorsing a subjective view of religion and establishing a sincerity test that does not require the claimant to demonstrate that their religious practice is based on an objectively identifiable, mandatory precept of their religion, the Supreme Court undoubtedly sacrificed some judicial security regarding the type of claim that can be considered to trigger the freedom of religion. In theory at least, more people can lie about their belief or exaggerate their belief's importance in their life to obtain an exemption to a measure if the Court does not

[400] *Edwards Books*, para. 142.
[401] *Edwards Books*, para. 143.
[402] *Amselem*, para. 47.

require individuals to submit any objective proof with respect to that belief. While this does not mean that a greater number of ill-intended people will indeed try to make claims founded on religion to obtain exemptions to laws and regulations, the fact that the Court endorsed this fragile approach reveals a great deal about what the Court values in religious freedom. To put it differently: there must be some gain to this approach, otherwise the Court would certainly have opted for another, more strenuous one to assess claims founded on religion.

My argument in this section is that this situation can be explained if we consider that the Court is not preoccupied with religion *per se* but with religion as a source of authenticity. I argue that the Court finds inquiries into religious beliefs to be inappropriate because it is not concerned with the religious belief at all; what the Court is really interested in is the believer's sense of integrity or their capacity to act in accordance with their true sense of self, which can be assessed independently from the religious belief at issue in a case. Developing on the notion of integrity as it relates to religious practice, I aim to explain why and how the sincerity test was found to be so appropriate to assess religious freedom claims despite its pitfalls.

Integrity and the Practice of Religion

I have suggested in the beginning of this chapter that Laborde's theory of religion in the liberal state is useful to make sense of the Supreme Court of Canada's conception of the value of religion. In particular, Laborde's theory draws strongly on the notion of integrity, which she views as a legitimate basis to ground both religious and conscientious exemptions. Because of integrity's crucial role in the ideal of authenticity, her account sheds a particularly heuristic light on the Supreme Court's rulings, which, I claim, also connect religion to integrity.

We can draw three main principles from Laborde's account of integrity that are useful to our inquiry. First, integrity involves what Laborde calls a "*coherentist principle*."[403] That is to say, integrity is concerned with the correspondence between individual's wholehearted commitments and their actions. This principle ties integrity to

[403] Laborde, *Liberalism's Religion*, 203.

self-fulfillment by stressing that acting in a way that fits the demands of our conscience is desirable to achieve a sense of fullness or, as Taylor puts it following Rousseau, to achieve "the intimate contact with oneself, more fundamental than any moral view, that is a source of joy and contentment: "le sentiment de l'existence.""[404]

A second principle that we can draw from Laborde's account is that integrity is *person-dependent*. This principle relates to the way that we understand the demands of integrity. Indeed, according to Laborde, "the content of integrity—the particular commitments and actions that it commands—cannot be drawn from any objective, person-independent conception of the good: it can only be defined by the individual whose integrity is at stake."[405] This means that being in touch with my feelings is particularly important since it provides me with crucial information on the commitments and actions that I must abide by. Integrity is person-dependent, in this way, because my sense of integrity can only be derived from my own introspection.

Finally, the notion of integrity is based on what I want to call *discretional accuracy*. What matters for a person to act with integrity is that their actions fit what *they*—and not anybody else—consider good and true. Therefore, as Laborde notes, "individuals acting in accordance with the demands of their conscience possess integrity even if they are mistaken about what moral duties they have."[406] On the integrity view, the focus on one's wholehearted commitments empowers the individual person to find their own truth and to stand by it. Validity is discretional, in this sense, because it is dependent on each individual's conscience and feelings about the world and not (or at least not necessarily) on objective facts or calculations that can be accepted by the rational observer. In the previous chapter, I used the example of *Rameau's Nephew* to illustrate how the ideal of authenticity compels the modern person to follow their impulses rather than to abide by the demands of society, of their community, or of their family. Within a framework of authenticity, integrity thus calls the individual to validate their own feelings about the world above all else. An individual is in the wrong, then, not when that person is mistaken

[404] Taylor, *Malaise of Modernity*, 27.
[405] Laborde, *Liberalism's Religion*, 204.
[406] Laborde, *Liberalism's Religion*, 204.

about the moral duties that they have, but when that person dismisses how they feel in order to comply to exterior demands that do not match how they feel they ought to act.

To Laborde's account, I would like to add one more principle that I find allows us to safeguard the notion of integrity and its related ideal of authenticity from falling into what Taylor has called a self-immuring type of individualism.[407] I argued in Chapter 2 that while authenticity is a personal ideal, one's authentic sense of self cannot be generated independently from one's relationship to society. Becoming one's true self implies knowledge of the characteristics that matter for life in society, on the one hand, and a performance of the core elements that one finds within oneself in public, on the other hand. In this sense, I agued that integrity and dialogue with others are interrelated within the ideal of authenticity: I discover who I am by being part of a large-scale discussion on ethics and identity, and I actively partake in that discussion by establishing my identity and core principles and sticking with them even through challenges.

In this respect, integrity also implies what I want to call a *deliberative principle*. The idea that integrity possesses a deliberative dimension is defended chiefly by Cheshire Calhoun, who argues that integrity is not merely a personal virtue, but also a social virtue. Viewed as both a personal and social virtue, acting with integrity—or, as Calhoun puts it, "standing for something"—is an important act of "viewing oneself as a member of an evaluating community and … caring about what that community endorses."[408] When a person uses their own judgement to stand their ground on what they think they ought to do, they are simultaneously partaking in a discussion of what is worth doing, which may be of interest to co-deliberators.

As it relates to religion, integrity calls for making one's own choices with respect to what one deems ethical within the outlook provided by one's religion. Acting with integrity in this context may mean to refrain from eating certain foods that one deems sacred or, on the contrary, that one deems improper for consumption. It can also imply maintaining certain sexual ethics, executing certain rituals at certain key moments in life or certain prayers at certain times during the day, wearing certain clothing items, and so

[407] See Taylor, *Malaise of Modernity*, 40.
[408] Calhoun, *Moral Aims*, 146.

on. All these actions fall within the purview of integrity insofar as religious individuals feel bounded by them as devout members of their religion. These practices are important to their sense of integrity because they relate to what they believe their life is fundamentally about.

However, while it is clear that some religious principles stem from well-established codes of conduct within a religious tradition, taken in the context of one's sense of integrity, one's *perception* of one's duties are just as important. In this sense, focusing on integrity in the context of religion draws our attention to the bridge that connects introspection to action: the way that I personally feel about my religion matters for me to determine how *I* think *I* ought to live. Whether my coreligionists think that I am wrong in my interpretation is inconsequential in this respect since the relevant criterion is found within myself. While my community can inform my introspection process, what truly matters is that I practice my religion in a way that allows me to feel coherent and whole with myself. In this perspective, the practice of my religion need not to be informed by a source lying outside of myself.

In what follows, I make the case that the Court's adoption of a subjectively based sincerity test to assess claims founded on religion can be explained by considering religious practices as core to a person's sense of integrity. Within the authenticity framework, religion is viewed as a powerful source informing the believer's sense of self, which, in turn, compels them to act in a certain way.

Religion and Subjectivity: The Inward Turn

One thing that is clear from the Court's endorsement of a subjective approach to religion in *Amselem* is that religion is viewed as person-dependent. Per the majority ruling of Justice Iacobucci, the assessment of a claimant's sincerity can and should be conducted independently from any objective facts with respect to one's religious community. In his reasons, he explains that "[t]o require a person to prove that his or her religious practices are supported by a mandatory doctrine of faith, leaving it for judges to determine what

those mandatory doctrines of faith are, would require courts to interfere with profoundly personal beliefs."[409]

This statement unambiguously defends the view that it is not the judge's place to determine what the claimant's mandatory doctrines of faith are. To be sure, the Court could have opted for a different approach. I observed in Chapter 1 that the dissent of Bastarache J. pointed out that "[b]y identifying with a religion, an individual makes it known that he or she shares a number of precepts with other followers of the religion."[410] Given this association with a religious community, Justice Bastarache argues that "the claimant must establish that he or she has a sincere belief and that this belief is *objectively connected* to a religious precept that follows from a text or another article of faith."[411] Here, religion is considered to be assessable from a person-independent perspective: judges will ultimately have to position themselves on the claimant's doctrines of faith in the context of the evidence provided by the claimant. While this approach does not negate that a religious practice may be important to a believer's integrity, the believer's sense of integrity is not the dissent's prime concern. In this view, what warrants the protection of the freedom of religion seems to be the collective aspect of religion; that which ties the believer to a broader community of faith. Per Justice Bastarache, the communal takes precedence over the believer's individual feelings and perception of their religious obligation as he requests an objective proof that the claimant's belief follows from their association with a religious group.

The majority considers things otherwise. According to Justice Iacobucci, a claimant can formulate a legitimate, sincere claim for freedom of religion "regardless of the position taken by religious officials and in religious texts."[412] By taking this step, the majority pushes the view that judges are not the "arbiters of religious dogma"[413] one step further to contend that *only* the individual claimant is in the position to determine the content of their doctrines of faith.

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[409] *Amselem*, para. 49.
[410] *Amselem*, para. 135.
[411] *Amselem*, para. 141 [emphasis added].
[412] *Amselem*, para. 69.
[413] *Amselem*, para. 50.

This approach makes sense, however, only if we consider that the believer *cannot* be wrong about their religious duty. Considered in a person-dependent perspective, an individual's religion must not tie that person to a community, at least not in matters of religious interpretation. As Justice Iacobucci puts it, "the focus of the inquiry is not on what others view the claimant's religious obligations as being, but rather what the claimant views these personal religious "obligations" to be."[414] As this statement and the brackets on "obligation" indicate, there need not be a consensus (or even a weak agreement) on whether the practice at issue is, in fact, an obligation in the claimant's religion since only the claimant's personal interpretation and subjective feelings about their religion and its requirements matter. Even if, as it was the case in *Amselem*, a rabbi argues that a Jewish claimant is mistaken about his religious obligation, not recognizing the validity of the believer's claim is considered by the majority as a wrong. Regardless of whether the claimant is wrong or not, the majority here highlights that preventing Mr. Amselem from acting in conformity with his perceived religious obligation will lead him to suffer insofar as *he* believes that this *is*, in fact, his religious obligation. What matters, at last, is that the believer's sense of self-coherence is protected; not the religious practice in itself, as it relates to the believer's religion.

The *Multani* decision is another illustrative example of the Court's tendency to value the individual believer's perception of their own religious requirement and dismiss all person-independent interpretations as irrelevant. This transpires in the majority's statement, expressed by Justice Charron, that "to demonstrate an infringement of his freedom of religion, Gurbaj Singh does not have to establish that the kirpan is not a weapon," but only that "his personal and subjective belief in the religious significance of the kirpan is sincere."[415] Despite the objective fact that the kirpan, as the Court puts it, "could be used wrongly to wound or even kill someone," the question of whether Gurbaj Singh's claim triggers the freedom of religion is one that the Court argues "cannot be answered definitively by considering only the physical characteristics of the kirpan."[416] What the Court needs to determine if the claim triggers religious freedom is an account of

[414] *Amselem*, para. 54.
[415] *Multani*, para. 37.
[416] *Multani*, para. 37.

how the claimant *relates to his* kirpan.[417] Charron J. further explains that the fact that some Sikhs accept, in certain circumstances, to wear a symbolic kirpan (e.g., as a pendent) or else to wear a kirpan made of wood or plastic instead of metal is also irrelevant to resolve the case at issue. Quoting the ruling from the Quebec Court of Appeal, she observes that "people who profess the same religion may adhere to the dogma and practices of that religion to varying degrees of rigour."[418] While it may be accepted within Sikhism to adapt one's religious practice, the relevant criterion in *Multani* remains the claimant's personal interpretation of his religious obligation.

In *Multani*, the Court's concern for the believer's own interpretation of their religious practice is obvious in the majority's categorical response to the Marguerite-Bourgeoys School Board and the school's psychoeducator, who argue that, regardless of claims made by Sikhs, the kirpan ought to be considered as a weapon since it was "designed to kill, intimidate or threaten others."[419] Dismissing this argument, Justice Charron writes that this view is merely a "personal opinion" that "strip[s] the kirpan of any religious significance."[420] In doing so, Charron J.'s reasons make it clear that an outsider's feelings or "personal opinion" on a religious symbol are not welcome. Not only is this opinion inconsequential for the resolution of the case but, because it ignores the claimant's own interpretation of their religious practice, it is also disrespectful. The CSMB's argument must fail, in this sense, since it ignores the only source of information that is relevant to decide whether the claim triggers religious freedom: that is, one's own interpretation of one's religion.

Ultimately, this position regarding the claimant's personal and subjective interpretation of their religious practice appears have served to ground the Court's refusal to impose internal limits to the freedom of religion. One of the arguments of the Marguerite-Bourgeoys School Board was that Gurbaj Singh's religious freedom was not infringed since the freedom of religion has internal limits, such as public order, safety, and

[417] The concurring reasons of Deschamps and Abella JJ. highlight the same problem in the CSMB argument, without taking any detours: "No student is allowed to carry a "knife". The young Sikh is authorized to wear his kirpan, which, while a kind of "knife", is above all a religious object … ." See *Multani*, para. 98.
[418] Lemelin J. quoted in *Multani*, para. 39.
[419] *Multani*, para. 74.
[420] *Multani*, para. 73-74.

health, and the rights and freedoms of others. According to this view, however, considering only the physical characteristics of the kirpan to determine whether the case triggers the freedom of religion is essential. In *Multani*, the Court opted instead to preserve the application of the *Oakes* test, which requires balancing the conflicting interests of each individual case. In doing so, the Court shielded freedom of religion from outside interpretations of one's religious practice.

What emerges as being of particular importance to the Court is that each individual remains their own arbiter of religious dogma. Admittedly, the Court recognizes that the believer's position can be, and often is, influenced by the prevailing beliefs in their community and the position of their religious leaders. However, irrespectively of whether a claimant's interpretation of their religious practice is widely shared by the members of one's community or is endorsed by one's religious leaders, the majority's ruling in *Amselem* makes it clear that the claimant is harmed if they are made to practice their religion in a way that they subjectively feel is improper. Protecting the believer's subjective interpretation of their religion matters in the end because it allows the believer to feel a sense of self-coherence by being able to act in conformity with how they truly feel they ought to act within the purview of their religion. At the end of the day, it is this perception that matters to one's sense of integrity.

Assessing a Believer's Sense of Self: How to Proceed?

Conceiving religious practice as thus tied to integrity allows us to shed light on the subjectively based sincerity test that was formalized by the Court in *Amselem*. I argued above that integrity is person-dependent. Only the individual person knows what is truly core to their sense of self and is in the position to defend it. To that extent, then, sincerity is a prerequisite to integrity. The person who wants to act with integrity *cannot do otherwise* than be sincere if they want to abide by the particular commitments that their conscience commands. As Laborde puts it, "sincerity is a standard internal to integrity, in the sense that it remains normatively bounded by the individual's own subjective ethical standards."[421] The only thing that I must do—and, in fact, that I *can* do—to protect my

[421] Laborde, *Liberalism's Religion*, 207.

sense of integrity is to present my ethical standards to the world as they truly are and stick to them. To put it differently, being sincere is important since it is the only way for me to remain true to myself.

I observed in Chapter 2 that the meaning of sincerity was transformed with the rise of the ideal of authenticity in modern Western societies. From designating an ideal of person who is faithful to their given position in society and abides by external expectations, sincerity has evolved to refer to a state of congruence between avowal and actual feeling essential to being authentic. Thus, within the modern ethics of authenticity, to be insincere, or, as Ferrara puts it, to be "in bad faith" implies not acting unfaithfully with regard to social expectations but "*pretend[ing]* that the suppression or containment of a given feeling will affect negatively one's self-cohesion, when in fact only peripherical aspects of our identity will be affected."[422] With its sincerity test and its endorsement of a subjective approach to religion, this is, all things considered, all that the Court can (and is in fact seeking to) evaluate: Will the suppression or containment of a given religious practice truly affect negatively the claimant's sense of self-cohesion?

Viewing the Court as concerned primarily with a person's self-cohesion provides an explanation to at least three interrogations one might have with respect to the sincerity test. First, it explains the Court's discomfort with objective proofs of belief despite their benefits to judicial security. Viewed in the light of integrity, the Court's focus on the sole subjectivity of the believer to determine their sincerity highlights the idea that "right" or "correct" behavior is not that which is deemed correct by others but that which is deemed correct by the person whose sense of integrity is dependent on it. Requiring a claimant to submit an objective proof of belief is deemed to be inappropriate, in this sense, because even one's subjective religious commitments—one's "profoundly personal beliefs"—are considered worthy of protection and, since those commitments simply cannot be assessed by providing this type of proof, requiring it would be inconsequential. To put it differently, the Court does not require an objective proof of belief because the type of religion that it

[422] Ferrara, *Modernity and Authenticity*, 105 [emphasis in original].

values—that which informs a believer's sense of self—would not be able to get protection from the law if it did.

Second, the Court's concern for self-coherence in religious freedom cases explains why the Court considers extensive inquiries into a religious belief as "inappropriate" in a more general sense. Endorsing inquiries into religious beliefs would imply that the law is competent to determine what ought to truly matter for the individual in a given context. However, insofar as integrity is person-dependent and its validity cannot be determined from an outside perspective, this type of examination in nonsensical as it would allow the Court to invalidate a believer's feelings and perceptions about their religion.

Finally, the Court's concern for integrity may offer a partial explanation as to why so few claims did not pass the sincerity test. The very act of having recourse to the law to fight for one's religious practice can be interpreted as testimony, in the believer's favour, that the believer is fighting for something that is truly important to them. On this particular aspect of integrity—the one which I have called the deliberative principle—, I would argue that there is an important collective dimension to the Court's approach to religion that has perhaps escaped scholars who have criticized the Court for adopting an individualistic view of the religious phenomenon. Per my reading, by stipulating that each individual should be free to determine for themselves what the requirements of their religion are, the majority in *Amselem* is not merely suggesting that a believer's sense of integrity is important for that person in particular insofar as they are individually seeking to answer existential questions about the meaning of their life. What the Court is suggesting, it seems, is also that it is not its place to "kill" a marginal interpretation of a person's religion by way of its normative power. If we consider that integrity is also a social virtue, then it is possible to view the Court as implying that as long as an interpretation matters to one believer, it also ought to matter to their fellow deliberators who seek to answer the same existential questions. Thus, the sincerity test makes sense in the context of a subjective view of religion in the following way: it recognizes that there is worth in leaving open the discussion of the relevant interpretation of one's religion to those who deliberate within the context of that worldview. This is not the context of the law, and the law is therefore not a relevant ruler in this discussion.

If the subjectively based sincerity test is so revealing of the Court's valuation of religion, it is partly because it comprises so many shortcomings. When considered in the light of integrity, however, we can see that the sincerity test's pitfalls can be excused or, at least, permitted to exist, because a broader, more important goal is being pursued: that of protecting the possibility for individuals to lead authentic lives. This, in turn, makes it obvious that the Supreme Court does not value religion *per se*. What the Court values, first and foremost, is authenticity. Religion is, in this sense, considered important to safeguard insofar as it represents an essential source for one's self-understanding. In the next section, I turn to what I have identified as the third unsettled issue in the scholarship on law and religion in Canada, which relates to the distinctiveness of religion in Canadian law.

The Special Character of Religion

I want to conclude this chapter by circling back to the discussion of the value of religion with which we began; specifically, to my observation that there exists a crucial connection between the value that is bestowed to religion, the perceived distinctiveness of religion and the allotted scope of the freedom of religion. A thorough protection of religion, I noted, is afforded in the legal system when and only when religion is understood to possess a set of distinctive features that are found to be of unique value in society. For those who defend this view, which I have called the distinctivists, the characteristics of religion that are unique to it constitute the grounds on which a robust right to religious freedom can be justified. As a distinctive category, religion is more easily circumscribed, which ensures that fewer "whimsical" or ill-founded claims will be formulated. While beliefs based on secular conscience and subjective religious beliefs may not be able to succeed in this approach, the forms of religion that do possess distinctive characteristics are sure to benefit from a great level of protection and respect. As Brady puts it, "[a] robust right of exemption with clear and narrow limits that resist judicial manipulation will give legislators and administrators strong incentives to work with believers to reach mutually acceptable compromises."[423]

[423] Brady, *The Distinctiveness of Religion*, 252.

My claim in this chapter has been that religion is valued by the Supreme Court of Canada because it is an important source of authenticity for the believer. According to the Court, by being able to live in coherence with their religious beliefs, individuals can express their authentic selves in their lives, which, in turn, allows them to experience fulfilment. In that respect, viewing religion as a source of authenticity means that religion is, and will most certainly remain, a prime candidate for legal protection. Because religion relates to fundamental questions about human existence and purpose, it is unlikely to become detached from the ideal of authenticity, which has proven to have great force in Western societies in general and in Canadian law in particular. It is indeed difficult to imagine that religion could ever be considered as irrelevant to one's self-understanding, and, to that extent, religion's place in the legal system seems to be tightly secured by religion's connection to authenticity.

On the other hand, considering religion as a source of authenticity seems simultaneously likely to diminish religion's strength in the legal system insofar as it draws our attention away from the characteristics that make religion specifically distinct and towards those that make certain types of beliefs important to human beings in a much more general sense. This shift happens because religion is, obviously, not the only plausible source from which individuals draw their sense of authentic self. There are numerous other ways to meaningfully self-define that are not tied to religion at all.

What the authenticity framework makes clear, in this sense, is that a valuation of religion as a source of authenticity dims some of the features of religion that can be used as a basis to establish a thorough protection for freedom of religion. Religion is still valued under this framework, but not because it possesses a unique value. Religious beliefs and practices are valued, rather, because like other types of beliefs founded on secular conscience, they are fundamental to a person's self-definition. Religion, in other words, *shares* something in common with other beliefs founded on secular conscience: i.e., the fact that it guides our behaviour and decisions through life in a way that is meaningful to our sense of self. The reading of the Supreme Court's valuation of religion that I offered in this chapter highlighted that it is that aspect of religion specifically that makes it worthy of protection in the eyes of the law. My claim is that, as a result, the Court has (perhaps

implicitly) endorsed an egalitarian approach to religion, where religious beliefs are considered analogously to beliefs based on secular conscience.[424]

Inwardness and Religion: Analogizing Religious Beliefs and Secular Conscience

Besides what has already been said earlier in this chapter on the Court's subjective understanding of religion, the Court's tendency to value aspects of religion that relate to one's sense of self and are, therefore, also found in secular conscience stands out in the way that the Court has circumscribed the category of freedom of religion. Because the ideal of authenticity involves first and foremost introspection, it stresses the importance of turning "*inwards*" towards our feelings about ourselves, which are deemed to capture the essence of our "true selves." When religion is understood to be a source of authenticity, then, it becomes cast as inward point of supply for the subject, whose sense of self is informed by it. Religion then takes the shape of force tightly secured within the individual's inner self, which they consult when they must make decisions about how to live their life.

This way of describing religion is probably meaningful and accurate for a number of believers. Yet, for others, we can suppose that this conception fails to capture one fundamental aspect of religion—one feature of religion that precisely allows us to differentiate religious beliefs from other types of beliefs—which is that religion requires the person to turn "*upwards*" towards God or an overarching conception of the Good. One's religion may require one to live by a set of received principles. For the believer, this can mean accepting some principles even if they do not make much sense in the moment. This can imply working to perfect oneself so as to fit the ideals found within one's religion. To put it differently, abiding by one's religion may mean *changing* how one feels about oneself and the world to become a "better" version of oneself. Saba Mahmood drew attention to this tension in her study of Muslim women's agency within their religion in the context of their endorsement of patriarchal forms of life. Reflecting on the virtue of shyness and on

[424] In this section, I primarily reflect on some of the shortcomings of the egalitarian approach insofar as it is the one that I believe prevails in Canadian law. Thus, I will not be addressing the challenges that relate to the distinctivist approach to religion. This does not mean that I would favor this approach, nor that I think it to better one. There are, too, significant shortcomings to the distinctivist approach. In particular, by reducing religion to a set of "distinctive" features, the distinctivist view of religion risks limiting religious freedom to a form of religion that mimics that of the dominant group, against which the "distinctive" features of religion are drawn. See for instance Sullivan, *The Impossibility of Religious Freedom*.

the wearing of the hijab, she notes that her participants displayed a view of their religion as primarily a matter of principles, which only later came to impact their sense of self. Analyzing the way that some of these women implemented the principles of their religion in their lives, she observed that "instead of innate human desires eliciting outward forms of conduct, it is the sequence of practices and actions one is engaged in that determines one's desires and emotions. In other words, action does not issue forth from natural feelings but *creates* them."[425] Understood in this way, the religious practice is not tied to the believer's inward feelings from the onset but is rather the force that only subsequently leads the believer to change their perspective about themselves and their place in the world. One's feelings are transformed in the process of compelling oneself to act in a certain way despite feeling "hypocritical" or "insincere" about this line of conduct.[426] This, in turn, is what makes the religious practice become core to the believer's sense of self. All of this is accomplished in the name of an "upward," overarching or pre-existing conception of what is good, which has to be accepted despite not necessarily being in total alignment with one's emotions.

When our attention is brought to what is found within ourselves, however, forms and expressions of religion that compel a person to act according to pre-existing notions of the Good, or to follow established, at times stringent, codes of conduct, may end up devalued, while forms and expressions of religion that lead the believer to act according to how they feel inside are found to be deserving of more consideration. By bringing the focus on the believer's individual feelings and subjective interpretation of their religious obligations, the Court highlights the ways in which one's religious beliefs inform one's religious practice—not the contrary. This explains why, for instance, in the jurisprudence involving children discussed above, the Court displays a level of discomfort with the situations that risk preventing children from becoming their authentic selves. As a source

[425] Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton, N.J.: Princeton University Press, 2012), 157 [emphasis in original].
[426] Quoting one of her participants, Mahmood illustrates this situation with the following example: "It's just like the veil [hijab]. In the beginning when you wear it, you're embarrassed [*maksufa*] and don't want to wear it because people say that you look older and unattractive, that you won't get married, and will never find a husband. But you must wear the veil, first because it is God's command [*hukm allah*], and then, with time, because your inside learns to feel shy without the veil, and if you take it off, your entire being feels uncomfortable [*mish radi*] about it." See Mahmood, *Politics of Piety*, 157.

of authenticity, one's religion must be generated inward. It must not, therefore, simply be inherited from one's parents or learned through the habit of another person's practice. One's religion should above all else resonate with one's own personal feelings about the world. Children, however, will only be able to figure out and make sense of these feelings as they mature, making it crucial to limit their parents and their own autonomy in the present in cases where the exercise of their autonomy stands in conflict with the protection of the child's life or quality of life in the future.

The Court's conception of religious beliefs as tightly connected to one's capacity for introspection stands out in an interesting way in *Ktunaxa*. In this case, depicted in Chapter 1, the Ktunaxa Nation sought to safeguard a mountain they called Qat'muk from human development because that territory was home to the Grizzly Bear Spirit. As they explained to the Court, installing permanent structures on the mountain would "drive Grizzly Bear Spirit from Qat'muk and irrevocably impair their religious beliefs and practices."[427] Writing for the majority, McLachlin C.J. and Rowe J. argued that this claim could not go through since the freedom of religion does not include protection for the "object of beliefs" or the "spiritual focal point of worship,"[428] but only safeguards "individuals' liberty to hold a belief and to manifest that belief."[429] Because neither the Ktunaxa's freedom to hold nor to manifest a belief was found to have been infringed by the decision to approve the development project, the Court ruled that there was no infringement of the Ktunaxa Nation's freedom of religion.

Many scholars have argued that the Court's refusal to consider the "spiritual focal point of worship" within the scope of religious freedom suggests that this right may not be particularly well suited to the needs of Indigenous peoples.[430] This perhaps stems from the

[427] *Ktunaxa*, para. 6.
[428] *Ktunaxa*, para. 71.
[429] *Ktunaxa*, para. 71.
[430] See for instance Dwight G. Newman, "Arguing Indigenous Rights Outside Section 35: Can Religious Freedom Ground Indigenous Land Rights, and What Else Lies Ahead?," in *Key Developments in Aboriginal Law*, ed. Tom Isaac (Toronto: ThomsonReuters Canada, 2018); Kislowicz and Luk, "Recontextualizing Ktunaxa Nation v. British Columbia."; Nicholas Shrubsole, *What Has No Place, Remains: The Challenges for Indigenous Religious Freedom in Canada Today* (Toronto: University of Toronto Press, 2019); Richard Moon, "Ktunaxa and the Shape of Religious Freedom," *Social Science Research Network* (2020), https://doi.org/http://dx.doi.org/10.2139/ssrn.3502988; Sarah Morales, "Qat'muk: Ktunaxa and the Religious Freedom of Indigenous Canadians," in *Religious Freedom and Communities*, ed. Dwight G. Newman (Toronto, Ontario: LexisNexis, 2016); Natasha Bakht and Lynda Collins, ""The Earth is Our Mother":

fact, as Dwight Newman argues, that "[t]he structure of legal protections like that for religious freedom … has arguably been developed around certain assumptions of what "religion" looks like that do not sit easily with the characteristics of Indigenous religion and spirituality."[431] To that, I would add that the Court's difficulty in considering the object of beliefs within the realm of freedom of religion testifies to the Court's conception of religion as occurring primarily inward, specifically. While I do not wish to contest that the Court's conception of religion may not sit well with the characteristics of Indigenous religion and spirituality in particular, I must point out that, when it comes to religion, there is always an "object" to one's religious beliefs. In Abrahamic faiths, for instance, "God" can be considered as the object of belief towards which the practice of one's religion is oriented. The crucial difference is that the "God" of Abrahamic faiths does not in itself necessitate protection from the courts.[432]

Undoubtedly, the object of one's beliefs is an important component of religion, which often draws the individual to look "upward." The Court in fact recognizes the centrality of this aspect of religion in *Amselem* by stating that religion "[engenders] a personal connection with the divine or with the subject or object of an individual's spiritual faith."[433] Yet, the object of beliefs is explicitly disqualified as a beneficiary of religious freedom in *Ktunaxa*. My point here is that, viewed as a source of authenticity, the Court's focus will always remain primarily on the subject and that subject's inner realm. Whatever is found to be exterior to the subject, such as the object of belief, will have a difficult time being factored in the equation that results in a successful claim for religious freedom. If the religious practice matters, it is because it is essential to the believer's sense of integrity. If the religious belief matters, it is because it is intrinsically linked to the believer's conception of themselves and of how they think they ought to live their life. These aspects of religion connect one's religion to one's interiority. The object of belief, on the other hand, especially when considered on its own, is isolated from the self; it stands outside the self and exists independently from it. Furthermore, this object compels the believer to act

Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada," *McGill Law Journal* 62, no. 3 (2017), https://doi.org/10.7202/1042774ar.

[431] Newman, "Arguing Indigenous Rights Outside Section 35," 11.

[432] See Kislowicz and Luk, "Recontextualizing Ktunaxa Nation v. British Columbia."

[433] *Amselem*, para. 56.

not according to how they feel inside but according to the demands of this "outward" object. Within a framework of authenticity, these demands are not the ones that are prized. This is not to say that the object of belief is unimportant to the Court. However, as far as this object is not cast in a light that immediately reconnects it to the believer's sense of self, the Court might not be interested in offering it protection. In *Ktunaxa*, the Nation's claim was primarily that the development project would harm *the object* of the Nation's beliefs. While the Ktunaxa's emphasis on the fact that the development project would permanently and irrevocably chase away the Grizzly Bear Spirit from the Qat'muk mountain stressed the damaging effect of the measure on their system of beliefs, it may not have succeeded in calling attention to the measure's impact on the self-perception of members of the Nation. Thus, it seems to me that the problem with the Grizzly Bear Spirit or the object of beliefs is not so much, as the majority puts it, that it constitutes a "novel claim" that "invites [the] Court to extend s. 2(a) beyond the scope recognized in [Canadian] law."[434] The issue is rather that it brings the Court to view religion as extending beyond the self. However, as I argued, the Court does not find religion to be meaningful for its "upward" orientation towards an external object, but only insofar as it informs the believer's self-understanding.

The incongruity of the Court's claim that the freedom of religion protects exclusively the liberty to hold a belief and to manifest that belief in *Ktunaxa* is highlighted when we look at the Court's ruling, rendered only one year later, in *Law Society of British Columbia v. Trinity Western University*. In this case, Trinity Western University defended its mandatory covenant prohibiting "sexual intimacy that violates the sacredness of marriage between a man and a woman"[435] in front of accusations from the Law Society of British Columbia that it was discriminatory of members of the LGBTQ community. In its reasons, the majority explained that religious freedom is essential to protect religiously founded practices that allow "community members to enhance their spiritual development through studying law in an environment defined by their religious beliefs in which members follow certain religious rules of conduct."[436] Although not a practice or a belief, the students' "spiritual development" or "spiritual growth" are the Court's central concerns

[434] *Ktunaxa*, para. 70.
[435] *TWU 2018*, para. 1.
[436] *TWU 2018*, para. 75.

in this case, which are instantaneously accepted as a legitimate bases for the university's claim to freedom of religion.

Per my reading, the discrepancy between *Ktunaxa* and *TWU 2018* is explained by the fact that one's spiritual development is an essential aspect of one's autonomous self-definition. In this sense, the case at issue in *TWU 2018* draws attention to the subject's capacity to become the person they want to be by selecting a place of study that will assist them in this endeavour. As opposed to the demand of the Ktunaxa which brought us away from the religious subject, Trinity Western University's demand, despite bringing us away from the mere liberty to hold and manifest beliefs, does not require us to consider anything other than the religious subject, i.e., the student patronizing the school. Contrary to the demand of the Ktunaxa, this latter request is almost automatically granted.

While, in the end, neither of these two claims succeeded in Court,[437] the reasons provided in each case draw attention to what I believe is the node of the problem with carving out a special place for religion in the law: valuing religion as a source of authenticity flattens a fundamental distinctive feature of religion by drawing our attention away from religion's "upward" orientation and towards religion's "inward" orientation. This, in turn, renders religious beliefs analogous to conscientious beliefs in a way that makes it more difficult to carve out a special place for religion in law.

Proponents of the distinctivist approach to religion have pointed out that one of the reasons why it has become so difficult to include special protections for religion in the legal system pertains to the fact that a growing number of people—especially non-religious individuals—find it difficult to relate to religion when the "upward" dimension of religion is stressed. Theological justifications for freedom of religion, such as that of Michael Paulsen who argues that that we ought to protect freedom of religion "because knowledge and worship of God, and obedience to God's will, are of the first importance,"[438] have, as

[437] Trinity Western University's claim failed at the balancing stage. In the next chapter, I argue that viewing religion as a source of authenticity implies that religion is placed on the same level as other sources of authenticity, such as one's sexual orientation or gender identity. In such instances, a religious freedom claim will not be considered inherently stronger than a claim for equality for the simple reason that it is based on religion.
[438] Michael Paulsen quoted in Brady, *The Distinctiveness of Religion*, 72.

Brady puts it, "little appeal for the increasing number of Americans who do not recognize a divine authority or reality."[439] To put it differently, for the person who does not find knowledge, worship, and obedience to God to be of the first importance, it can be challenging to grasp that for those who do the divine may well "[take] precedence over other human concerns,"[440] such as doing the things I want to do in the moment or living in accordance to my feelings rather than in respect of outward principles.

In order to ground the legitimacy of the freedom of religion, Brady explains that judges and legislators have often opted to resort to broader, more universally accessible reasons. This is where I see the ideal of authenticity as fitting in Canadian law: authenticity came as a response to a concern for a universally understandable reason for the protection of freedom of religion in a society that is not only highly diversified but also comprises an increasing number of people not identifying with any religion. Authenticity fits in, then, as the value that most universally expresses why there ought to be protections for religion in society. The rub is that, while broad and universal justifications may be useful to ground the legitimacy of a right for a large number of people, far-reaching explanations may also miss the point of what is really at stake for those who are claiming the right for themselves. In the case of authenticity, I have argued that the risk is to gloss over religion's upward orientation, thus resulting in an erasure of religion's distinctiveness vis-à-vis conscientious beliefs and contributing to diminish the scope of the protection that can be afforded to religion in Canadian law. I will say more on that in the next chapter, as I turn to the impact of the Court's valuation of religion as source of authenticity on its conception of the limits that can be imposed to the freedom of religion.

[439] Brady, *The Distinctiveness of Religion*, 72.
[440] Brady, *The Distinctiveness of Religion*, 72.

Chapter 4. The Gatekeeping Role of Religious Freedom

I began the previous chapter by stating that authenticity is never explicitly mentioned in rulings from the Supreme Court of Canada. While the term has never been employed by the judges, the ideal was, however, brought up on one occasion. Citing a passage from an application submitted to the British Columbia College of Teachers in 1995 by the private Christian university Trinity Western, the notion of authenticity appears in what might be deemed—after all that has been said thus far on the ideal—a peculiar context. The extract quoted by the Court goes as follows:

> Trinity Western is a relatively unique Canadian university in that it offers academically responsible education within a distinctive Christian context. Its mission is to equip Christians to serve God and people throughout society. TWU's educational program, like those in public universities, is based on a particular worldview perspective. At TWU, that worldview is a Christian one. It includes (but is not limited to) *a deep respect for integrity and authenticity*, responsible stewardship of resources, the sanctity of human life, compassion for the disadvantaged, and justice for all.[441]

As I have defined it, authenticity conveys the idea of limitlessness. Whatever I find to be core to my sense of self matters for my life in society insofar as it serves as a guide to establish how *I* want to live my life. The feelings that I have about myself lead me to determine what being human is for *me*, which, as Charles Taylor puts it, is "something we have to attain if we are to be true and full human beings"[442] in modern Western culture. This vision of authenticity ties into the idea of limitlessness first because it implies that each individual embodies a unique identity. Yet, as we have seen in Chapter 2, the formation of identity is inseparable from the horizons of significance (or the backgrounds of meaning) in which we evolve. That is to say, the traits of myself that I discover and deem important to my identity do not emerge in a vacuum. They become meaningful as I become aware of the categories of identification that are meaningful in the eyes of others.

[441] *TWU 2001*, para. 3 [emphasis added].
[442] Taylor and Gutmann, *The Politics of Recognition*, 28.

In this sense, the ideal of authenticity conveys the idea of limitlessness by suggesting that the categories of identification that are relevant to us today are always open to change. We may be called to reconsider, for instance, the biological sexual binary of "woman" and "man" to account for those who do not feel they correspond to the category that was assigned to them at birth or even to either category. When our innermost feelings are considered an important aspect for the determination of our authentic identity, a contestation of the prevailing categories of identification is to be expected through time as our feelings are much more elastic and subject to change than the objective characteristics that we bear.

For the drafters of Trinity Western University's application to the British Columbia College of Teachers, however, authenticity is mobilized within the very specific bounds of the Christian worldview, which, as the application is sure to make clear, assumes a distinct vision of the human being and its place in society. Trinity Western does not, for instance, condone same-sex relationships and explicitly requests members of its community (i.e., staff and students) to refrain from "homosexual behaviour"[443] while employed by or enrolled at the university. For the university, this approach to sexual ethics is justified by its specifically Christian view of marriage as constituting a sacred union between one man and one woman.[444] If the use of the term "authenticity" comes off as peculiar when employed to described Trinity Western's vision of the human being, it is because the space that Trinity Western's "authentic being" is called to occupy in the world is very much *de*limited. In this respect, Trinity Western's students do not truly seem to be called to become authentic—at least not in the sense that we mean it here.

This chapter takes up the argument, introduced in Chapter 3, concerning the value of religion for the Supreme Court, to—ironically—shed light on the limits that the Court imposes on freedom of religion. My claim is that an offshoot of viewing religion as a source of authenticity is to have transformed the freedom of religion into a gatekeeper for the ideal of authenticity. When religion is cast as promoting the possibility for people to become authentic, it may be permitted; however, when religion is cast as an obstacle that prevents

[443] *TWU 2001*, para. 4.
[444] See *TWU 2018*, para. 6.

people from living in accordance with their sense of self, it is restricted. This vision of religious freedom impacts the process of assessing a claim based on religion, which then takes the shape of determining whether the claim promotes or restricts the conditions needed for authenticity to be a plausible ideal; namely, *dialogue* and *equality*. When dialogue and/or equality is found to be negated or obliviated by a claim for freedom of religion, the Court will draw on the importance of these principles for life in society to legitimize the infringement to religious freedom or even at times to exclude the religious freedom claim from the scope of the protection offered by section 2(a) altogether.

Drawing attention to the role of the social conditions of authenticity in court rulings will allow us to reconsider the meaning of two claims, identified in Chapter 1, regarding the power that equality and inclusion—a corollary of dialogue—have in decisions concerning religious freedom. To recall, I observed in the beginning of this dissertation that two schools, partly in agreement and partly in disagreement, have drawn from the notion of equality to problematize the Supreme Court's interpretation of section 2(a). On the one hand, scholars that I have associated with the deep diversity school have defended the view that freedom of religion is currently threatened by the enlargement of equality rights, which are taking increasing precedence over the right of religious groups to establish their own norms in alignment with their distinctive worldview. These scholars are critical of the Court's appeal to the value of equality in the jurisprudence, which they view as a partial principle that serves to impose the dominant view on increasingly marginal religious groups. On the other hand, scholars that I have identified with the deep equality school have drawn *from* the notion of equality to uncover the ways in which the Court itself failed to exemplify this principle. Rather than to problematize the principle of equality in the case law, scholars of this school seem to suggest that we view freedom of religion as including a principle of equality, which, although not always realized, legitimately guides the Court in the handling religious freedom claims. One important observation that has emerged from this school is that demands for religious freedom that can be viewed as requests for inclusion have had particularly great success in court.

This chapter does not aim to debunk either perspective, which I find quite compatible in their observations even though they are founded on what appears to be

diverging agendas. I agree with scholars of the deep equality school that the Supreme Court often displays a concern for the inclusion of people of different backgrounds in the various spheres of the country's public life. I also agree with scholars of the deep diversity school when they observe that equality takes great space in Supreme Court rulings, such that religious freedom claims tend to be unsuccessful when they are cast in opposition to an equality claim. Moreover, I defended in the previous chapter that scholars of this school are right in noting that the Supreme Court does not seem to handle freedom of religion as a right deserving of a robust protection in law despite the fact that it is qualified as a "fundamental" freedom in the *Canadian Charter*.

Like in the previous chapter, what I propose is an interpretative argument; an explanation for why equality and inclusion play such a decisive role in court rulings. As I see it, this is not a task that has been accomplished yet, thus leaving some questions unanswered. While scholars have duly drawn attention to the existence of these dynamics in the law, they have done so without hypothesizing why equality and inclusion hold such importance. Scholars of the deep diversity school, for instance, seem to be more interested in advocating against what they see as a weakening of the right to religious freedom than in understanding the sources of this weakening. A consequence of the critical stance of the scholars of the deep diversity school towards the Supreme Court is that, while the risks associated with the erosion of the right to religious freedom are clear, the underlying reasons that serve to legitimize recourses to equality as a relevant limit to that right are, on their part, still obscure. As for scholars of the deep equality school, their work has been principally dedicated to uncovering the ways in which the Court has failed to exemplify the values that it itself claims to protect and promote, and thus likewise only seldom address the processes through which these principles are legitimized.[445]

[445] One notable and important exception is Benjamin Berger's *Law's Religion*, in which Berger argues that the law's cultural commitment to political liberalism, in particular, informs Court rulings. According to Berger, religious freedom is possible when one's religious practice can be cast in "fidelity to the commitments, values, and overarching objectives of the rule of law." Thus, when religion can be viewed by the Court to be primarily—per Berger's argument—individual, private, and tied to the expression of one's autonomy, the Court will find reasons to justify its tolerance. The law justifies this tolerance, however, not because it is tolerant, but because the religious practice in question already corresponds to what the Court can tolerate. While this approach makes us aware of the broad context in which religious freedom claims are assessed, my argument seeks to point to the role of two specific values in court rulings. See Berger, *Law's Religion*, 119.

This chapter aims to fill the gap mentioned above. As such, I defend that the particular attention paid by the Court to equality and inclusion in the section 2(a) jurisprudence testifies of the Court's conception of religious freedom as a right that ought to protect the social conditions of authenticity, among which religion figures.

Two arguments will be provided in support of this claim. The first one relates to the education of children. Through an analysis of five decisions on child education, I will show that the Court demonstrates great concern for the ability of education to instill in children the view that people's worth does not depend on their moral viewpoint or worldview. As a result, inclusion and equality are mobilized in Court rulings as compelling the exposure of children to a broad scope of worldviews that must be introduced as equal. While the Court depicts this outlook as favouring the learning of respect, the promotion of differing worldviews as equal conflicts with religious perspectives that postulate their own truth. In light of the fact that the Court displays little interest in supporting conditions that ensuring the successful transmission of religion from parent to child, this highlights one way in which the Court is more concerned with using religious freedom to protect the conditions of authenticity than religion itself.

Second, I tackle the deep diversity school's remark that religious freedom claims fare particularly poorly when cast in opposition to an equality claim. My argument is that this situation follows from the Court's valuation of religion as *one* source of authenticity *among others*. Since religion is not the only pathway through which individuals define and realize their sense of self, other sources of authenticity, such as sexual orientation or gender identity, may be considered as valid limits to freedom of religion. The result is a devaluation and an exclusion of types of claims that delegitimize some individuals' sense of self from the scope of religious freedom. Although it may not be uncommon for religious individuals and communities to postulate a definite place for the human being in the world, such conceptions are likely to be found problematic within a framework of authenticity if they are cast as negating the value of lawful sources of authenticity—including those of people who do not belong to the religious community in question.

Providing these explanations for the way that the scope of religious freedom is traced should ultimately allow us to shed light on some of the divergences that appear to

be dividing scholars from the deep diversity and the deep equality school. In particular, I will postulate in conclusion to this chapter that the node of the tension between demands for equality and calls for liberty in religious freedom cases lies not principally in the Court's conception of religion or of the limits of religious freedom, but rather in the Court's conception of the human being as a being with the potential for subjective self-definition. Before I turn to these matters, however, I shall delineate the function of dialogue and equality within the context of authenticity and situate the notion of inclusion referred to by the scholars of the deep equality school within this framework.

The Social Conditions of Authenticity

I argued in Chapter 2 that the possibility of becoming authentic is ensured most crucially by dialogue and equality. These two principles are, in my account of the authenticity framework, the social conditions of authenticity. For one, dialogue is required to have an idea of who we are, since it is only through my knowledge of the others that I can discern what is distinctive or salient about myself. The function of dialogue in this respect is twofold. First, dialogue is necessary for my self-understanding because it provides me with a context of meaning through which I can make sense of the traits that are important to my identity. In this sense, "dialogue" refers to something akin to "a *language*." In order to define myself authentically, I need a language for my identity, which implies knowledge of collectively shared meaning. The way in which I self-define is not, and could not be, the one and only product of my individual agency, even in the more subjective sense that my identity is defined by my sticking to my wholeheartedly endorsed commitments. If that were the case, nothing in particular would matter, and the ideal of authenticity as being true to our own singularity would be destroyed. At the level of self-definition, authenticity therefore requires a shared language—what Taylor calls a "horizon of significance"—which orients my self-definition so as to make it meaningful to me and to others.[446]

As a language for identity, dialogue also means that we are engaged in something akin to "a *conversation*" with those who surround me. Indeed, dialogue is important also to provide us with a point of comparison against which we can make sense of ourselves

[446] See Taylor, *Malaise of Modernity*, 31-41.

and determine our own identity. That is to say, as I acquire the language for self-definition, I concomitantly articulate my sense of self, which, in turn, is possible only if I have an idea of how other people are. Understanding those who surround me and the ways in which I resemble or contrast with them is an essential part of the process of self-defining. Being authentic involves a continual process of self-assessment, which implies that we keep in touch with ourselves and also that we remain engaged in a conversation with the people who surround us.

Within a framework of authenticity, ensuring the conditions for dialogue is important since it opens up possibilities of being for the self. As I become aware of the broad scope of legitimate modes of being in the world, I am better equipped to define who I am and who I want to become. I can expand my knowledge of the language of identity and discover new ways to make sense of how I feel about myself and my identity. Dialogue in this sense can be viewed as a tool that has the potential to liberate me from restrictions that I might impose upon myself or that might be imposed on me by my community.

Alongside dialogue, I have identified equality as another condition that allows authenticity to remain a realizable ideal. Equality plays an important role in the culture of authenticity for two main reasons. First, it ensures that we do not refrain from expressing our true sense of self out of fear of judgement. If practicing my religion or expressing my sexual orientation, for example, is forbidden by the laws of my country, I am, quite clearly, prevented from acting in a way that aligns with how I feel about myself. But, as I observed in Chapter 2, the principle of equality as it relates to the ideal of authenticity demands more than the mere removal of the barriers that prevent people from expressing their true sense of self. Fostering equality with the view to ensure authenticity also implies bolstering the conditions for recognition; that is to say, for the acknowledgement that all identities are equally deserving of esteem. The logic is that, since, as Taylor puts it, "[n]onrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being,"[447] failing to foster recognition also risks leading individuals to act in a way that does not match how they really feel about themselves. If expressing my religious beliefs or sexual orientation will expose me to

[447] Taylor and Gutmann, *The Politics of Recognition*, 25.

discrimination or make me a target of hatred, my possibility of becoming authentic is significantly reduced. I may try to conceal who I really am, or even internalize the demeaning image of myself that is projected to me, leading me to feel inferior and oppressed. In this second sense, equality is required to ensure that we collectively respect the human potential that we possess to define our own identity, and to ensure that this potential does not become a privilege reserved only to some.

Looking at equality through this lens, we can see now why Trinity Western's use of the term "authenticity" cited in the introduction to this chapter seemed so oddly employed: in the same breath as the university affirms to have a deep respect for authenticity, it excludes homosexuality as a legitimate mode of being at the university. While we can reasonably expect that university students today are aware of the fact that homosexuality exists as a legitimate mode of being in Canada and may not feel comprehensively depreciated for being homosexual just by being subject to the Covenant, the university's Covenant nonetheless refutes the idea that homosexuality deserves the same consideration as heterosexuality. In this sense, Trinity Western seems to be promoting the idea that, as opposed to heterosexuality, homosexuality ought to be addressed as a condition to be worked on rather than simply assumed and embraced as a component of one's identity. For those who view authenticity as a pathway to a self-determined form of self-respect and self-love, this conception of authenticity is inherently contradictory, and the reason underlying this contradiction is that it is premised on the idea that those whose identity is informed by their attraction to same-sex people are not equally deserving of respect as those whose identity is not so informed.[448]

This contradiction is revealing of a central paradox embedded in the notion of equality, which also transpires in Canadian jurisprudence on freedom of religion.[449] The paradox stems from the fact that, by stressing that we are all deserving of the same respect despite our differences, equality as it relates to authenticity emphasizes at once

[448] It must be noted that in its 2001 case, Trinity Western was successful at the Supreme Court and not required to change its covenant. In the section of this chapter on identity-based claims, I provide an explanation for this, which takes as a starting point the specific framing of this case.
[449] This tension constitutes the node of the disagreement between the majority and the dissenting opinion in the cases of *TWU 2018* and *Bruker*. This tension was described at length in chapter 1.

universalism or the sameness of all human beings at core, and diversity or the uniqueness of our identities. The result is that the notion of equality ends up being pulled in opposite directions, sometimes in support of non-discrimination, other times in support of particularity. Taylor encapsulates this tension between what he calls the "politics of universal dignity" and the "politics of difference" in the following way:

> For one [mode of politics], the principle of equal respect requires that we treat people in a difference-blind fashion. The fundamental intuition that humans command this respect focuses on what is the same in all. For the other, we have to recognize and even foster particularity. The reproach the first makes to the second is just that it violates the principle of nondiscrimination. The reproach the second makes to the first is that it negates identity by forcing people into a homogeneous mold that is untrue to them. This would be bad enough if the mold were itself neutral—nobody's mold in particular. But the complaint generally goes further. The claim is that the supposedly neutral set of difference-blind principles of the politics of equal dignity is in fact a reflection of one hegemonic culture. As it turns out, then, only the minority or suppressed cultures are being forced to take alien form. Consequently, the supposedly fair and difference-blind society is not only inhuman (because suppressing identities) but also, in a subtle and unconscious way, itself highly discriminatory.[450]

Taylor's depiction of the tension in the principle of equality mirrors accurately the tension observed in Chapter 1 between the deep diversity school and the deep equality school. In the case of Trinity Western, for instance, those opposing the university drew on the principle of equality to highlight the harm caused to homosexuals by prohibiting homosexual behaviour. Those supporting the university, on the other hand, stressed that prohibiting the Covenant required the university to—in Taylor's words—"[negate] [its] identity by forcing [it] into a homogeneous mold that is untrue to [it]."[451] Just like in the passage cited above, both parties were formulating a type of claim for equality: one side called for the recognition of the universal dignity of all human beings, including those who

[450] Taylor and Gutmann, *The Politics of Recognition*, 43.

[451] Taylor and Gutmann, *The Politics of Recognition*, 43. My argument here is not that those opposing Trinity Western are all necessarily proponents of the deep equality school. Many scholars that I have associated with the deep equality school have a nuanced perspective on this case which escapes the simplistic binary of "equality" and "diversity" that I am depicting here. However, it remains true that many arguments underlying the criticisms formulated by each side in the two Trinity Western cases often echo the tensions identified between the two schools.

self-identify as homosexuals, while the other demanded recognition of its distinctively religious worldview.

Considered on its own, the notion of equality thus seems to lead us to an impasse within the framework of authenticity, rendering it highly challenging to determine which side of equality—sameness or difference—ought to be favoured. As Taylor observes, "[w]e can pay lip service to equal recognition, but we won't really share an understanding of equality unless we share something more."[452]

This "something more" that Taylor refers to leads us back to the notion of dialogue developed earlier. In order to safeguard the conditions for authenticity, dialogue is not only essential for crafting and cultivating our self-knowledge; it is crucial also for developing a language in which our diverse identities *check out as equal*. What Taylor is suggesting is that, to support the ideal of authenticity, we need dialogue to create and maintain a language for identity where equality is recognized across ways of being. The underlying idea is that, if being true to ourselves matters to us, then we need to "learn to find normal a range of identity-related differences."[453]

This is where the notion of inclusion pinned down by the scholars of the deep equality school takes on particular salience. To create a language for identity where our differences are mutually recognized implies, as Taylor himself puts it, that "developing and nursing the commonalities of value between us become important."[454] According to Taylor, "one of the crucial ways we do this is sharing a participatory political life."[455] Inclusion ties into the principle of dialogue by investing in it an aspect of equality. If inclusion is such a fundamental aspect of dialogue within a framework of authenticity it is because, without inclusion, dialogue runs afoul of the development of a mutual recognition of difference. Being excluded from the spaces where discussions between different others occur is not only harmful to those excluded who may experience this situation as a denial of their equal worth or as unequal treatment affecting their dignity; it is also harmful to the

[452] Taylor, *Malaise of Modernity*, 52.
[453] Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Cambridge, Mass.: Harvard University Press, 2011), 47, https://doi.org/10.4159/harvard.9780674062955.
[454] Taylor, *Malaise of Modernity*, 52.
[455] Taylor, *Malaise of Modernity*, 52.

development of a mutual recognition of difference since it sends the message to all that the excluded are not worthy of contributing because of some aspect of their identity. In the field of political theory, Iris Marion Young tied inclusion to justice, arguing that "[i]nclusive democratic practice is likely to promote the most just results because people aim to persuade one another of the justice and wisdom of their claims, and are open to having their own opinions and understandings of their interests change in the process."[456] As it relates to authenticity, we may argue that inclusive conversations on moral viewpoints and modes of being promote the "most just results" for the same reason. By providing people with the opportunity to have their viewpoint heard and by demanding that people be exposed to understandings that differ from their own, inclusive dialogue fosters the development of a language for identity where the differences between us do not matter. Inclusion alone might pay lip service to the principle of equality; however, considered alongside the principle of dialogue, its meaning finds itself better contextualized. Inclusion is required for dialogue to lead to the mutual recognition of difference called for within the framework of authenticity.

According to Taylor, dialogue is a relevant mean to achieve a mutual recognition of difference mainly because it possesses a transformative role with respect to our self-understanding. Drawing on the philosophy of Hans-Georg Gadamer, Taylor explains that, as we engage in a conversation with others (and, especially, with different others), the horizon of meaning through which we understand ourselves becomes broadened in a way that cannot leave us the same. In the process of discovering the other's viewpoint, Taylor explains that we are called to reconsider our initial presumption about ourselves or the value of the other "on the basis of an understanding of what constitutes worth that we couldn't possibly have had at the beginning."[457] In reaching a judgement about the other through dialogue with them, we have partly transformed our standards as we were called to "[develop] new vocabularies of comparison."[458] The result is what Gadamer terms a "fusion of horizons," where part of the other's background of meaning has entered into our own, thus impacting our own self-understanding.

[456] Iris Marion Young, *Inclusion and Democracy* (Oxford: Oxford University Press, 2002), 6.
[457] Taylor and Gutmann, *The Politics of Recognition*, 67.
[458] Taylor and Gutmann, *The Politics of Recognition*, 67.

Looking further at Gadamer's conception of dialogue, we find that the principle of equality emerges not only as a desired outcome (i.e., as a shared language for identity), but also, to some extent, as a premise to dialogue. For Gadamer, "[t]o conduct a conversation means to allow oneself to be conducted by the subject matter to which the partners in the dialogue are oriented. It requires that one does not try to argue the other person down but that one really considers the weight of the other's opinion."[459] While Gadamer's depiction of dialogue must be understood in relationship to the search for truth, his reasoning is particularly relevant to the context of authenticity where dialogue is required in the search for who I really am. Considered in the context of discovering my authentic identity, Gadamer's depiction of the required posture to conduct a conversation seems to imply that, while we may not consider the other's perspective as equally good or true to ours to begin with, we must keep this possibility open if we are really interested in discovering the truth about ourselves. Although the other's perspective about their sense of self may not resonate with us and may, in this sense, confirm our initial presumption about our own identity, the underlying idea is that my self-understanding and my horizon of meaning is never harmed but only ever enriched by a conversation where I am introduced to diverging viewpoints.

To sum up and tie this theoretical discussion to the main topic of this chapter, dialogue and equality advance the ideal of authenticity in the following way. First, dialogue is required to know who we are. In this sense, dialogue requires interactions with people (similar and dissimilar), through which we learn the language for identity enabling us to become aware of and define the characteristics of ourselves that are meaningful for our life in society. Here, dialogue is tightly connected with introspection, as it provides us with the tools to make sense of our subjective sense of self; however, because authenticity implies not only that we discover our unique identity but also that we embrace it in public, protecting the ideal of authenticity requires that we treat different identities equally. In this sense, equality relates to integrity, for the misrecognition or refusal to recognize one's authentic identity is taken as a denial of one's equal worth or dignity. In order to value difference, we therefore need a criterion of equality whereby our different identities check

[459] Hans-Georg Gadamer, Joel Weinsheimer, and Donald G. Marshall, *Truth and Method*, 2nd, revised edition ed., Continuum Impacts, (London: Continuum, 2004), 361-62.

out as equal. Protecting the ideal of authenticity in this sense implies that we foster the creation of a language for identity according to which our differences do not matter.

Before I turn to an assessment of the role of dialogue and equality thus defined in court rulings, I must first make one clarification regarding the role that I attribute to dialogue in freedom of religion cases. In his book *Law's Religion*, Benjamin Berger draws on Fred Dallmayr's monograph *Beyond Orientalism* to argue that the law engages with religion with a "conversionary" impulse. In this mode of engagement, those defending their religion in court are never truly tolerated for their religious difference, but only insofar as their difference can be recast as already coherent with the law's cultural understanding of religion. As a result, Berger explains that those who formulate a religious freedom claim that the law is incapable of reconciliating with its own cultural commitments end up being "required to conform [their] way of life to the symbols, values, and meanings of the constitutional culture."[460] These claimants are, in short, asked to convert to the law's own culture.

As Berger rightly observes, this relationship between the law and religion is intrinsically unequal. An equal relationship between the law and religion would not expect such a "conversion," but would, rather, be premised on what Berger calls a form of "dialogical engagement." Under this dialogical approach, each party involved in a cross-cultural encounter—in this case, the law and religion—does not presuppose that its own view is the best nor postulates its own superiority, but instead "actively encourages pluralism and diversity, and does so expecting to have one's own way of being changed through the influence of the other."[461] According to Berger, this approach is much more respectful of religious difference than the conversionary approach. What Berger highlights in this respect is that, although the law regularly speaks as if dialogical engagement were its preferred mode of engagement with religious difference, its default mode of engagement is to request conversion to its own worldview.

My argument in this chapter does not refute Berger's claim that the law considers religious freedom claims under a conversion approach. Indeed, by drawing attention to the

[460] Berger, *Law's Religion*, 120.
[461] Berger, *Law's Religion*, 111.

role of dialogue in court rulings, I am not claiming that the law engages with religion under a dialogical engagement approach. Rather, my claim is that dialogical engagement is a posture that the law *demands* of the religious claimant. The law does not endorse this mode of engagement for itself; it expects it of those who come before the court.

This assertion is fully compatible with Berger's argument regarding law's conversionary force insofar as it also postulates a normative role for the law. Where I depart from Berger is in what specifically the law seeks to convert religion *to*. For Berger, the law engages with religion based on its own image of law's nature (individual), value (autonomy), and place in society (the private sphere), pointing out that religious practices that do not conform to the law's imagining of religion are likely to be found unacceptable. However, because I argued *contra* Berger that the law values religion as a source of authenticity rather than as a source of autonomy, I cannot fully agree with his depiction of the shape that the law expects religion to take before it deems it tolerable. In the remainder of this chapter, I aim to draw attention to the law's expectation that religion be mindful of the fact that it represents only *one* legitimate viewpoint among other equally legitimate ones—a position that may be difficult to hold in the context of religion. I now turn to assess how this plays out in Supreme Court rulings, beginning with the hotly debated topic of child education.

Child Education: Creating an Egalitarian Language for Identity

The education of children raises many issues in the field of law and religion. One central and important question pertains to the vested interest that the liberal state has in ensuring that its citizens are engaged, autonomous, and respectful members of society. Considered in this light, child education raises the question of the legitimacy that the state has to use education as a mean to shape children by instilling a particular vision of the society—one that corresponds to the state's interests and not necessarily to the parents' interests.[462]

[462] See for instance Walter Feinberg, *For Goodness Sake: Religious Schools and Education for Democratic Citizenry* (New York: Routledge, 2006); Ian MacMullen, *Faith in Schools? Autonomy, Citizenship, and Religious Education in the Liberal State* (Princeton, N.J.: Princeton University Press, 2007); Berger, "Religious Diversity, Education, and the "Crisis" in State Neutrality."; Daniel Weinstock, "A Freedom of Religion-Based Argument for the Regulation of Religious Schools," in *Religion and the Exercise of Public Authority*, ed. Benjamin L. Berger and Richard Moon (Oxford: Hart Publishing, 2016); Janet Epp

While this way of framing the debate draws attention to the state's objectives with education, authors such as Richard Moon have pointed out that viewing this matter simply in terms of the interest of the state "is to confuse the actor with the reason for action."[463] A second aspect of the debate, therefore, concerns the interest that children themselves have in developing their capacity for reasoned judgement, including in matters of spirituality and religion. According to this view, education represents way to equip children for the exercise of their own freedom.[464] Ian MacMullen for instance argues that while religious schools should to be recognized as legitimate and allowed to put forward their religious *ethos*, it is important that these schools also ensure to introduce children to a variety of religious viewpoints in a positive light so that, in developing their sense of autonomy, children may find them more satisfying than the religion that was transmitted to them by their parents.[465] For some religious parents, however, this view may be perceived as threatening the very foundation of their right to religious freedom. As Daniel Weinstock observes, "[i]f tradition, and the values associated with it, constitute the grounds of the right to religious freedom, it follows that many of the obligations that will be protected by the right will be intergenerational in nature."[466] While Weinstock argues that it is crucial that children develop their sense of autonomy, he also notes that the vitality and survival of a religious community is, to a great extent, dependent upon the members' ability to pass down their faith to the next generations, in keeping with the faith of past generations.

Keeping in mind these two governing issues, my aim in this section is to expose the Supreme Court's conception of the role that education within schools ought to play in a child's life. I argue that schools are viewed as a terrain to foster the learning of an egalitarian language for identity, which is necessary for the culture of authenticity. As such, the Court conceptualizes dialogue and equality as requirements that cannot be forsaken in the school system, not even on the basis of religious freedom. As such, the Court repudiates adverse depictions of lawful viewpoints and modes of being in both secular (public) and

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Buckingham, "Religious Education and Identity," in *Religious Freedom and Communities*, ed. Dwight G. Newman (Toronto: LexisNexis, 2016).

[463] Richard Moon, *Freedom of Conscience and Religion*, Essentials of Canadian Law, (Toronto: Irwin Law, 2014), 177 (note 2).

[464] See Berger, "Religious Diversity, Education, and the "Crisis" in State Neutrality," 107-08.

[465] See MacMullen, *Faith in Schools?*, 171.

[466] Weinstock, "A Freedom of Religion-Based Argument for the Regulation of Religious Schools," 170.

religious (private) schools—more specifically, in the field of education, only objective or positive depictions are considered legitimate, regardless of whether this type of depiction conflicts with the religious views of some children's parents—while also casting cognitive dissonance among children as an asset. Rather than try to foster the conditions for parents to inculcate their own religiously founded viewpoint to their children, the Court consistently rejects demands to exclude oneself or other people's viewpoints from the classroom and expects schools to work to broaden children's knowledge and understanding of different moral viewpoints. In what follows, I will highlight these dynamics by proceeding to an analysis of the role that dialogue and equality play in the rationale justifying the decision in cases concerning education.

Learning about Equality through Inclusion

A heuristic way to assess the role of dialogue and equality in Court rulings is by comparing decisions with opposite results. In this respect, the cases of *Multani* and *S.L.* are particularly eloquent since the Court adopted an adamant position either in favour of (*Multani*) or against (*S.L.*) the religious freedom claim and rendered a decision with no dissent on the main question. There are also numerous similarities between these two cases which make them good candidates for a comparison, starting with the fact that they both represent an attempt from parents of children of primary school age to obtain a religious accommodation for their child(ren) so that they could practice their religion in school in the way that they believed they were required to. As such, the religious claimants in both contexts did not contest the essence of the policy they disputed but petitioned to be relieved from it in order to comply with their religion. In *Multani*, the demand was made to allow a Sikh boy, Gurbaj Singh, to wear his kirpan to school despite the school's "no weapon" policy. In the case of *S.L.*, the parents sought to exempt their two children from the mandatory Ethics and Religious Culture (ERC) course requiring students to learn about various religious traditions in a neutral and objective way.

Where these two cases differ is in the nature of their demand. While the religious claimants in *Multani* were asking that the "no weapon" policy be interpreted in a way that excluded the kirpan so that a Sikh boy could be *included* in public schools, the religious

claimants in *S.L.* were aiming to have it recognized that the ERC course was not in fact neutral and objective so that they could *exclude* their children from these courses.

The Court's conclusion in each case is strikingly different. In *Multani*, where the forecasted effect of the demand was the inclusion of *amritdhari* Sikhs in the school system, the eight judges who took part in the decision rejected the argument of the School Board that the kirpan should be prohibited in schools because it will poison the school environment by "[sending] the message that the use of force is the way to assert rights and resolve conflicts."[467] According to the majority opinion expressed by Justice Charron,[468] considering the kirpan as a symbol of violence is not only "disrespectful to believers in the Sikh religion", but also does not "take into account Canadian values based on multiculturalism."[469] Rather, it "stifle[s] the promotion of values such as multiculturalism, diversity, and the development of an educational culture respectful of the rights of others."[470] Elaborating on the ways in which a prohibition of the kirpan stands in contradiction with these values, Charron J. explains that such a policy "undermines the value of this religious symbol and sends students the message that some religious practices do not merit the same protection as others."[471] Thus, in keeping with the Canadian value of religious tolerance, Justice Charron declares that "[i]f some students consider it unfair that Gurbaj Singh may wear his kirpan to school while they are not allowed to have knives in their possession, it is incumbent on the schools to discharge their obligation to instil in their students this value."[472]

There is a lot to unpack from the passages quoted above (which constitute the crux of the majority's reasons), starting with the Court's reliance on the value of multiculturalism. As the majority presents it, multiculturalism, far from being a simple fact of life, entails something like a requirement that children learn to tolerate the diversity of beliefs of individuals in society. As it is implied in the ruling, acquiring this tolerance

[467] *Multani*, para. 55.
[468] The main disagreement of the two sets of concurring reasons in *Multani* did not concern the outcome of the case but rather "the relationship between administrative law and constitutional law in the context of human rights litigation." See *Multani*, para. 84.
[469] *Multani*, para. 71.
[470] *Multani*, para. 78.
[471] *Multani*, para. 79.
[472] *Multani*, para. 76.

requires knowledge about the diversity of religious worldviews that make up Canadian society. In particular, the majority's overt discomfort with a depiction of the kirpan as a weapon and its casting of this vision as being contrary to multiculturalism suggests that those holding this view ought to be in contact with and listen to what Sikhs have to say about their religious symbol. Indeed, the subtext in *Multani* is that the fact that Gurbaj Singh is part of the classroom is an asset since he, as a member of the Sikh community, will be able to explain his religious practice to his classmates, while his classmates will be presented with the opportunity to learn about the meaning of the kirpan from a person for whom the kirpan actually has meaning. While Justice Charron mentions the values of religious tolerance, multiculturalism, diversity, and the development of an educational culture respectful of the rights of others, what is implied in her ruling is that these values are fostered—perhaps even created—through dialogue with others. As it turns out, this was precisely the essence of Gurbaj Singh's claim: by requesting an exemption to wear his kirpan to school, Gurbaj Singh testified of his willingness to mix up with students who do not share his religious background despite the fact that in doing so, he exposes himself to being misunderstood or marginalized for being different. Yet, his claim is one for engagement and connection with other children regardless of his or their difference.

Conversely, the Marguerite-Bourgeoys School Board's disregard of the meaning of the kirpan for Sikhs suggests that shunning Sikhs from the conversation on the wearing of the kirpan in schools is the appropriate solution. For the majority, this is problematic in two respects. First, it allows the School Board to adopt a strict, one-sided interpretation of the "no weapon" policy that has the effect of depriving Gurbaj Singh specifically, and *amritdhari* Sikhs in general, from attending public school. [473] In this sense, Sikhs are not only excluded from the discussion on their own religious symbol in schools, but they are also excluded from the public schools which, by definition, are intended for all, thus putting into question their equality in society. This harms Sikhs by sending them the message that they are not equal.

Second, and more implicitly, the School Board's position is cast as problematic because it prevents schools from fulfilling its role with respect to the formation of children

[473] See *Multani*, para. 40.

to citizenship by suggesting to exclude *amritdhari* Sikhs from schools. Indeed, according to the Court, the solution favoured by the School Borad has harmful ramifications not *only* for Sikhs but *throughout Canadian society* because it "sends *students* [in general] the message that some religious practices do not merit the same protection as others."[474] The harm here is not considered to concern solely Sikhs but society as a whole as their education would fail to teach them that Sikhs are equal. The problem with the School Board's position is not merely that exclusion hinders the achievement of equality for the concerned group; it is also that it frustrates the development of an egalitarian language for identity.

A similar reasoning is evident in *S.L.*, only this time it comes into play against the religious freedom claim. In this case, Catholic parents had mobilized their right to religious freedom to argue that the ERC program was disruptive of their children's religious education since it required them to learn about different religious facts. Furthermore, they claimed that since the program "presented different beliefs on an equal footing,"[475] it exposed them to a form a relativism contrary to their faith, which, in turn, risked preventing them from passing on their faith to their children.

The Court, including the concurring reasons of Justices LeBel and Fish, took issue with virtually every aspect of the parents' claim, starting with their allegation that being exposed to different religious facts violated their religious freedom. Casting such an exposition as "a fact of life in society,"[476] Justice Deschamps, writing for the majority, asserts that this contention "amounts to a rejection of the multicultural reality of Canadian society and ignores the Quebec government's obligations with regard to public education."[477] With respect to the parents' assertion that the course was not neutral, Justice Deschamps highlights that the program's primary aim with respect to instruction in religious culture is merely, as indicated in the preamble of the official document introducing the course, to "[foster] an understanding of several religious traditions whose influence has been felt and is still felt in [Quebec's] society today."[478] All while admitting

[474] *Multani*, para. 79 [emphasis added].
[475] *S.L.*, para. 38 [reworded].
[476] *S.L.*, para. 40.
[477] *S.L.*, para. 40.
[478] Preamble of the ERC program, cited in *S.L.*, para. 34.

that "from a philosophical standpoint, absolute neutrality does not exist,"[479] Deschamps J. concludes that "[t]he Ministère's formal purpose … does not appear to have been to transmit a philosophy based on relativism or to influence young people's specific beliefs."[480] As a result, the program is not found to infringe upon the parents' freedom of religion as it does not, as the Court claims, aim to guide or regulate students' beliefs.

Yet, by refusing to exempt the children from the ERC course, the Court does have at least one objective in mind with respect to shaping the children's beliefs. In particular, just like in *Multani*, the Court's view of education seems to imply the development of multicultural-friendly attitudes premised on the recognition of individuals' equal worth. In *Multani*, the Court's conception of multiculturalism was connected to the view that, as children learn about the diversity of beliefs of individuals in Canadian society, they will come to realize that people who hold beliefs that are different from their own are not less worthy and are deserving of equal respect. In that case, the reasoning was that dialogue across difference encourages the creation of a more egalitarian society. As such, prohibiting the kirpan is wrong because it sends the message that Sikhs are not deserving of the same opportunities as others because of their beliefs and also because it limits children's opportunities to be confronted to diversity.

The Court's reasoning in *S.L.* is the same. By allowing children to be removed from the ERC courses, the Court is concerned that children's opportunities to be confronted to diversity and difference would be limited. In his concurring reasons, Justice LeBel's explains that "[Supreme Court's] decisions have recognized that the very nature of a public education system implies the creation of opportunities for students of different origins and religions to learn about the diversity of opinions and cultures existing in our society, even in religious matters."[481] From this perspective, if the demand for self-exclusion from a discussion on religious diversity "ignores the Quebec government's obligations with regard to public education,"[482] as the majority puts it, it is because it ignores the role of dialogue in the development of a multicultural culture that is respectful of the value of individuals

[479] *S.L.*, para. 31.
[480] *S.L.*, para. 35.
[481] *S.L.*, para. 54.
[482] *S.L.*, para. 40.

with different worldviews. Here again, dialogue is cast in the educational context as a pathway towards a greater recognition of individuals' equal worth.

Besides emphasizing the role of dialogue in the development of an egalitarian culture, the ruling in *S.L.* also reveals a view of neutrality as connected to equality. Indeed, both the majority and concurrence accord little importance to whether the ERC program is, in fact, neutral and objective—a concern nonetheless raised by the parents. Rather, the majority simply recalls that state neutrality is legitimate so long as it "neither favours nor hinders any particular religious belief"[483] and "shows respect for all postures towards religion, including that of having no religious beliefs whatsoever."[484] Though this self-justifying response, the Court is asserting that it does not intend to find a way to address the parents' claim that the program is not neutral for the very reason that it presents different religious facts on an equal footing since the ERC program's posture is even-handed enough. As Berger analyzes, "[i]n effect, the Court's response is to affirm that the case is about state neutrality, to endorse that concept and its centrality, and to simply deny that a breach of this controlling principle has occurred."[485] Those who hold the view that one particular vision is better than the others may not be required to change their view; however, the Court in *S.L.* makes it clear that endorsing such a vision cannot serve as grounds to shield oneself from a discussion where different worldviews are presented on an equal footing.

The case of *S.L.* is all the more interesting if we contrast it with the Court's decision in *Loyola*, where an accommodation with respect to the ERC program was also sought, namely the possibility to teach Catholicism and the ethics of other religions from a Catholic perspective. In the previous chapter, I argued that the way the issue was framed in *Loyola*—i.e., placing the capacity of a Catholic educational institution to talk about Catholicism at the centre of the litigation—favoured a positive outcome for Loyola High School. In particular, I maintained that this framing highlighted the harm of requiring teachers to teach Catholicism from a neutral and objective perspective on the school's integrity as a Catholic institution. Yet, I do not think that this framing alone justified the success of Loyola's

[483] *S.L.*, para. 32.
[484] *S.L.*, para. 32.
[485] Berger, "Religious Diversity, Education, and the "Crisis" in State Neutrality," 118.

claim. Indeed, the way that Loyola framed its case also managed to play up how dialogue and equality could be achieved even through a partisan discussion on religion.

When considered through the prism of the social conditions of authenticity, Loyola's position in front of the Supreme Court seems unfavourable to begin with. Indeed, the ERC program's aims are particularly well aligned with the conditions identified as core to the safeguarding of the ideal of authenticity. Through the pen of Justice Abella, the majority describes the program's objective as follows:

> The ERC Program has two key stated objectives: the "recognition of others" and the "pursuit of the common good". The first objective is based on the principle that all people possess equal value and dignity. The second seeks to foster shared values of human rights and democracy. By imposing this program in its schools, Quebec seeks to inculcate in all students openness to diversity and respect for others.[486]

It is clear from this quote that the ERC program's objectives sit comfortably with the safekeeping of the conditions for authenticity. While the program's first objective seeks to bolster the recognition of the equal value of our identities, the second supports dialogue across difference, implying that people from diverse backgrounds need to learn to come together to participate to the development of a society respectful of human rights and democracy. As such, one of three competencies that the program seeks to advance is "the ability to engage in dialogue."[487] As the majority explains it, developing this competency should "help students develop the skills to interact respectfully with people of different beliefs in a diverse society, and to understand the impact of their behaviour on the broader community."[488] Considering my claim that authenticity is a value fundamental to the Court, which the Court seeks to safeguard and foster through religious freedom, we may think that contesting the ERC program in court would prove to be a particularly difficult endeavour.

Yet, Loyola came out successful—and, per my reading, its success is attributable to the fact that it managed to demonstrate that, despite opposing a program that strongly

[486] *Loyola*, para. 11.
[487] The two others are the knowledge of world religions and the ability to reflect on ethical questions. See *Loyola*, para. 12.
[488] *Loyola*, para. 15.

drew from the principles of dialogue and equality necessary to support the ideal of authenticity, it was duly committed to advancing these same principles.

To begin with, Loyola did not ask to be exempt from or replace altogether the ERC program but requested to be allowed to teach an equivalent program where only Catholicism and the ethics of other religions would be taught from a Catholic perspective. Other religious facts would still be taught, and they would be addressed from a neutral and objective standpoint as the ERC program required. Loyola's demand, in this sense, although it stressed that the program was "incompatible with [the school's] Catholic mission and convictions,"[489] neither dismissed the values embedded in the ERC program, nor contested the importance of engaging in a conversation on diversity. On the contrary, Loyola's equivalency program proposed to focus on the Catholic doctrine and ethics to "frame the discussion of other religions and ethical approaches"[490] and to address "the interaction between the Catholic Church and the various other religions [covered in the program]."[491]

Circumscribed in this way, the case needed not to pitch the legitimacy of Loyola's partisan viewpoint against the Minister of Education's requirement to teach the whole program from a "neutral and objective" perspective. The main issue could be framed more narrowly around the question of whether the transmission of Catholic beliefs and convictions in itself contravened to the ERC program's objectives of promoting respect for others and fostering openness to diversity, and therefore ought to be prevented. While the former question of the legitimacy of Loyola's partisan viewpoint might have led to a discussion on the most appropriate posture to produce a just society, thus leading the Court to focus on Loyola's *de*limited worldview, the latter merely provided Loyola with the opportunity to show that, regardless of its distinct identity, it effectively embraced the values embedded in the ERC program.

The discussion resulting from this framing of the issue is an interesting one. Starting by recognizing that "forcing a religious school to teach its own religion from a non-

[489] *Loyola*, para. 24.
[490] *Loyola*, para. 25.
[491] *Loyola*, para. 25.

religious perspective does not assist in realizing the ERC Program's basic curricular goals of encouraging among students respect for others and openness to others,"[492] the majority concludes that Loyola may teach Catholicism from a Catholic perspective but may not, for the same reason, teach the ethics of other religions from a Catholic perspective. To ground this assertion, Justice Abella explains that "in a religious high school, where students are learning about the precepts of one particular faith throughout their education, it is arguably *even more important* that they learn, in as objective a way as possible, about other belief systems and the reasons underlying those beliefs."[493] According to her, studying other ethical frameworks in relation to Catholicism does not permit to achieve the ERC program's objectives in particular since it comprises the "risk … that other religions would necessarily be seen not as differently legitimate belief systems, but as worthy of respect only to the extent that they aligned with the tenets of Catholicism."[494] Developing on the best way to discuss the diversity of beliefs in society so as to foster respect for others and openness to diversity, Abella J. explains

> The key is in how the discussion is framed. An emphasis on objective instruction insofar as possible, and on teaching other ethical positions in their own right, does not mean stifling debate or denying Loyola's Catholic identity. On the contrary, *the framework of the discussions would be wider because they are not based solely on a particular religion's perspective*. That religion's own ethical framework would necessarily be part of the discussion, but the role will be one of *significant participant rather than hegemonic tutor*.[495]

What emerges from the majority reasons in *Loyola* is a view of education as conductive to respect and openness to others when the conditions for authenticity are put forward. First, the majority considers it essential to expose children to a broad scope of viewpoints—*particularly* in the context of private, religious education. The underlying assumption here

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[492] *Loyola*, para. 69.
[493] *Loyola*, para. 72 [emphasis added].
[494] *Loyola*, para. 75. The conjoint use of the terms "risk" and "necessarily" in this sentence suggests that the Court's finding that other religions would be cast as worthy of respect only to the extent that they aligned with Catholicism is based more on suspicion than on actual knowledge. While it may not be possible to postulate any specific result from one type of education given the multiple factors that can impact a child's development outside of their school, the use of the term "necessarily" to formulate a postulate on the outcome of one type of education—which was admittedly the task that the Court was entrusted with in *Loyola*—seem to act more as a rhetorical tool to reinforce the Court's own impression than as a word chosen to depict a reality.
[495] *Loyola*, para. 76 [emphasis added].

seems to be that, in a context where children are likely to be immersed in a culture that is, at least to some extent, homogeneous, being placed in a position where one must enter in conversation with different others is highly desirable. While it is not possible to know from the wording of the ruling if the majority considers this situation to be desirable primarily for the student, the broader society, or both, what is clear is that the majority views dialogue as better off if "wider." Considering the Catholic perspective alongside other ethical perspectives is desirable in this sense because it *expands* the possibilities for discussions with different others. Just like in *S.L.*, the majority in *Loyola* displays a discomfort with self-seclusion from dialogue with different others, even if, in contrast to *S.L.*, *Loyola* is set in the context of a lawful Catholic school whose mission to transmit the Catholic faith to students has been recognized to fall within the bounds of the institution's right to religious freedom.

But there is more. What emerges from the ruling in *Loyola* is a conception of dialogue with different others as *not* interfering with freedom of religion.[496] According to the majority, Loyola's Catholic identity is indeed *not* threatened by the requirement to expand the scope of dialogue, since the requirement is only to *add* to the existing framework. As such, the demand is cast not as one that seeks to erase difference, but simply encourages students to engage with it.

This leads us to a second indicator that education is conceived as fostering respect and openness to others when the conditions for authenticity are safeguarded, which pertains to the Court's reliance on a principle of universal recognition to ground its conception of the proper use of religious freedom. Indeed, although "neutrality" and "objectivity" are cited as the appropriate modes of engagement with different ethical frameworks, what the majority truly seems to expect is that this posture will lead students to recognize these perspectives as equally worthy. In particular, the majority's discomfort with the perspective of the "hegemonic tutor"[497] and its demand that other ethical perspectives be addressed "in

[496] This conclusion emerges implicitly in the paragraph cited above, where the Court explains that requiring Loyola to teach objectively about other ethical framework does not amount to denying the school its Catholic identity. This opinion is made explicit later in the ruling, as the majority concludes that "[t]o ask a religious school's teachers to discuss other religions and their ethical beliefs as objectively as possible does not seriously harm the values underlying religious freedom." See *Loyola*, para. 80.
[497] *Loyola*, para. 76.

their own right"[498] as "differently legitimate,"[499] is not so much a request for objectivity towards these perspectives, but more a demand for the recognition of their equal worth.

This is perhaps not surprising if we consider that, for the drafters of the ERC program, one overarching aim of the course was precisely to bring students to recognize the others' worth through dialogue. Reflecting on the utility of the program, philosopher Georges Leroux, who contributed to the crafting of the ERC course, explains that "[e]ach person arrives in society as a subject in the making, and if dialogue is to have any meaning, it is above all and in the most fundamental way as an exercise in recognition: to approach the other, in order to get to know them, is to give oneself the conditions for respect, and to make possible a real mutuality."[500]

For theologian Douglas Farrow, this objective is one that seeks to bring students not merely to discern diversity but to *value* it. As such, it is, in his view, all but neutral. In particular, by demanding that religious schools bring students to value a plurality of moral viewpoints, the ERC program risks conflicting with many religious views, including Catholicism, which postulate their own truth. Viewed in the context of religion, Farrow argues that the demand for the valuation of diverse moral and religious perspectives—a philosophy that he refers to as "normative pluralism"—works to destroy the very conditions necessary for pluralism to exist by prescribing uniformity in education.[501]

The conundrum identified by Farrow is one that we have already seen, pitching a politics of difference against a politics of universal dignity: on the one hand, Loyola demands respect for its unique Catholic identity, while, on the other hand, the Ministry of Education demands that all schools acknowledge the equal worth of the different identities comprised in Quebec's society, among which Catholicism is only one. Within a culture of

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[498] *Loyola*, para. 76.
[499] *Loyola*, para. 75.
[500] Georges Leroux, *Éthique, culture religieuse, dialogue : arguments pour un programme*, Les grandes conférences, (Montréal: Fides, 2007), 108 [my translation].
[501] Farrow expresses his discomfort with the notion of normative pluralism in the following way: "[I]f pluralism—as a political philosophy or educational strategy, not as a cultural landscape—is to guarantee the engagement that creates a common society, and if indeed it is to do so by policing the engagement in an attempt to see that no one principle or ideal dominates, what then are we to make of pluralism itself? Is its very normativity not in fact its self-contradiction?" See the Appendix in Douglas Farrow, *Desiring a Better Country: Forays in Political Theology* (Montreal: McGill-Queen's University Press, 2015), 108.

authenticity where the uniqueness of our identities and the equality of our worth as human beings are valued together, what is particularly important, however, is that we come to acknowledge that we are equally worthy, across our differences. As I highlighted above, this does not imply that we must all be the same—there is space for difference. But what cannot be forsaken is the maintenance of a language for identity where the inherent equality of human beings across identities is recognized.

When we look at the ruling in *Loyola*, we are brought back to this conception difference. While the majority accepts that Loyola's freedom of religion guarantees its right to use the ERC courses to pass on the Catholic faith to its students and, in this sense, protects its difference as a religious institution, it quickly circumscribes the exercise of this right around Catholicism, explaining that Loyola's difference does not exempt the school from discussing other religions in a manner conductive to the recognition of the value of these other frameworks. If the Court allows the religious freedom claim, in this sense, it is because, circumscribed in this way, it poses no threat to principle of equality.

The same conception of the limits of the expression of one's religious difference is palpable in the minority ruling of McLachlin C.J. and Moldaver J. (writing also for Rothstein J.), where the justices maintain that greater space should be afforded to Loyola teachers for the expression of their difference. According to McLachlin C.J. and Moldaver J., it would be undesirable to require that teachers at Loyola teach the ethics of other religions in a neutral and objective way since that would prevent them from participating "honestly and actively in the classroom conversation."[502] "For Catholic teachers at a Catholic school," the minority writes, "the forced neutral posture poses an unenviable choice: they can express a neutral (and therefore insincere) viewpoint on an ethical question that touches on a precept of the Catholic faith, or they can simply remain silent. Neither insincerity nor silence is conducive to the ERC Program's objectives of promoting individual deliberation and the exchange of ideas."[503]

By the look of the concurring justices' statement, teachers at Loyola must be granted greater freedom in their ability to communicate their values with their students than

[502] *Loyola*, para. 159 [emphasis added].
[503] *Loyola*, para. 159 [emphasis added].

the majority admits. In particular, what emerges from the abovementioned passage is a view of religious freedom as affording Catholic teachers in a Catholic school the possibility to express themselves sincerely in their instruction. In this respect, the concurring reasons seem to emphasize the individual conditions for authenticity, focusing on the position of the teacher rather than on the broader question of the role of education in the development of the child. Nonetheless, the conversation quickly moves back to the collective as the minority considers the teacher's role in developing the competencies—in particular, dialogue—of the ERC program. Reflecting on what a discussion on premarital sex at Loyola might look like, McLachlin C.J. and Moldaver J. contend that "teachers would be free to answer and defend [the Catholic] position [on premarital sex],"[504] as long as they did so "in the context of an open-minded and respectful conversation."[505]

This precision offers very little guidance as to where the limit of respectful dialogue might lie. As Kislowicz observes, one is left to wonder "what the minority's view would be where a religious position is more at odds with other *Charter* provisions or with the value of non-exclusionary dialogue," such as "same-sex relationships or marriage."[506] While Kislowicz himself offers no answer, his question reads as a rhetorical one, and the implicit suggestion is that the Court would likely not have forsaken equality in the name of freedom of religion.

A good example that supports Kislowicz's hypothesis is the Court's unanimous ruling in *Ross*, a case concerning the reassignment of a primary school teacher to a non-teaching position after he was reported to have publicly professed anti-Semitic views rooted in his religious belief in his off-duty time. Ruling that the School Board acted in a reasonable manner by removing Mr. Ross from his teaching position, the Court makes it clear that teachers must work so as to favour equality in the exercise of their functions. According to the Court, "ensuring an equal and discrimination free educational environment, and the perception of fairness and tolerance in the classroom are paramount in the education of young children."[507] The Court continues, describing this type of

[504] *Loyola*, para. 158.
[505] *Loyola*, para. 158.
[506] Kislowicz, "Loyola High School v. Attorney General of Quebec," 348-49.
[507] *Ross*, para. 82.

educational environment as one that "helps foster self-respect and acceptance by others."[508] Accordingly, while the Court alleges being committed to "valuing all divergent views equally,"[509] it specifies that, "any religious belief that denigrates and defames the religious beliefs of others erodes the very basis of the guarantee in s. 2(a)."[510] Thus, since Mr. Ross' religious views "serve to deny Jews respect for dignity and equality,"[511] they are legitimately restricted.

Ross differs from *Loyola* to the extent that it concerns the role of teachers in public schools, in their capacity to provide an education to children on secular topics. *Loyola*, on the other hand, dealt with the capacity of teachers in a religious school to teach specific ethical and religious content. In the context of public education, the ruling in *Ross* is clear: schools "must … be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate."[512] Equality in this case is cast as an obvious, legitimate limit to religious freedom, which is warranted to support students' self-respect, acceptance of others, and ultimately, their ability to partake in the conversation in school. Thus, if the teacher formulating the religious freedom claim in *Ross* was unsuccessful, it is, in this sense, because his religious views hampered the acknowledgement of the equality of Jewish students and concomitantly discouraged them from participating in the classroom. This situation sharply contrasts with *Loyola*, where the school rather argued that its objective to transmit the Catholic faith was *compatible with* the ERC program's objectives of fostering the recognition of others and the pursuit of the common good. In this sense, Loyola managed to demonstrate that it was sufficiently committed to the principle of equality to obtain some support from the Court to teach an equivalent ERC program.

Going back to my interpretation of the concurring reasons in *Loyola*, my point is that, despite the minority's claim that greater latitude should be afforded to teachers to discuss the ethics of other religions from a Catholic standpoint, the concurring justices are,

[508] *Ross*, para. 82.
[509] *Ross*, para. 91.
[510] *Ross*, para. 94.
[511] *Ross*, para. 94.
[512] *Ross*, para. 42.

in my understanding, not defending a view of dialogue that is very different from the majority's. Given the Court's strong commitment to equality in public education in *Ross*, but also, as we have seen, in *Multani*, it seems reasonable to assume that the minority's support of Loyola's demand to teach the ethics of other religions from a Catholic perspective is premised on the idea that the school will, all things considered, be able to foster equality in these discussions. In particular, the minority's emphasis on open-minded and respectful conversation could be read as a call not to cast different ethical frameworks as "inferior." If that is the case, we end up with is a conception of dialogue that begins to look very similar to that upheld by the majority, whereby it assumed possible to speak of the Catholic perspective as "superior" only as long as other viewpoints are not presented as "inferior." Ultimately, the minority may be advancing that the best way to dialogue may necessitate the adoption of a neutral and objective standpoint to depict different moral viewpoints. For the minority, however, it is Loyola, rather than the Minister of Education, that ought to determine whether and when that perspective is called for.

In the end, Loyola was successful in that it obtained permission to teach Catholicism from a Catholic perspective. Nonetheless, the Court's requirement to teach other ethical frameworks from a neutral perspective casts a shadow on the school's ability to teach children in a way that is not, at least to some extent, foreign to its own worldview. In particular, the right to use religious educational institutions to transmit one's faith seems to be premised on the expectation that the institution will concomitantly foster the development of a language for identity that recognizes the inherent equality between different identities; an endeavour that may not sit comfortably with the worldview of certain individuals and institutions.

This discrepancy between the law and some religious individuals' or institutions' aims in matters that pertain to the transmission of a particular worldview is captured particularly well in *Chamberlain*, a case concerning the use of books depicting same-sex parented families as supplementary learning resources for kindergarten and grade one children (i.e., K-1 level). In this case, the Surrey School Board had determined that the books should not be approved since addressing the topic of same-sex relationships with young children would raise sensitive issues for some religious parents of the school district,

as the books "might teach values to children divergent to those taught at home, confusing the children with inconsistent values."[513]

The majority at the Supreme Court ruled against the School Board, claiming that its decision not to approve the books contravened the *School Act*'s requirement that schools must be conducted on strictly secular and non-sectarian principles. Through the voice of Chief Justice McLachlin, the majority explains that the School Board "proceeded on an exclusionary philosophy"[514] when it acted on the concern of certain religious parents to deny the use of the supplementary learning resources. According to McLachlin C.J., secularism and tolerance in the school system implies that all types of family are given equal consideration, and, concomitantly, that the views of some parents, even if founded on religion, cannot be given preference, especially if they "deny the equal validity of the lawful lifestyles of some in the school community."[515]

This conception of secularism operates on a principle of equality similar to that which we see at play in *Ross*, whereby the same level of respect must be paid to all views and modes of being. In this case, homosexuality is considered on a similar basis to Judaism in *Ross*, namely as part of one's identity and sense of self.[516] But what the *Chamberlain* ruling reveals is a view of the principle of equality embedded in secularism as *compelling* schools to teach the equal validity of a variety of lawful lifestyles to students. According to McLachlin C.J., this is necessary chiefly to ensure that children learn "that other people's entitlement to respect from us does not depend on whether their views accord with our own."[517] This cannot be achieved, McLachlin C.J. continues, "unless [children] are exposed to views that differ from those they are taught at home."[518] For the majority, schools are, in other words, required to work to expand children's horizon of significance in a way that fosters the recognition of the equal worth of different identities.

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[513] *Chamberlain*, para. 52.
[514] *Chamberlain*, para. 25.
[515] *Chamberlain*, para. 25.
[516] I will say more on the Court's conception of sexual orientation and one's subjectively defined identity below as I tackle the topic of identity claims.
[517] *Chamberlain*, para. 66.
[518] *Chamberlain*, para. 66.

This expectation from the Court that schools will instill in children a language for identity that recognizes different individuals' equal worth is one that is beginning to look familiar to us, as it permeates the reasons of the other cases analyzed in this section. Yet, there is still one aspect of the Court's understanding of religious freedom that the ruling in *Chamberlain* allows us to uncover. This aspect relates to the way that the Court conceives of the effect of being exposed to views that diverge from the ones that children, as opposed to adults, hold true.

In order to highlight what I believe is a discrepancy between the Court's conception of state bodies' duty of neutrality when children or adults are concerned, I must draw attention to the case of *Saguenay*—a case that does not concern the education of children. In *Saguenay*, the Court rendered an almost unanimous rulings against the recitation of a prayer by the Catholic mayor of the City of Saguenay at the start of the municipal council's public meetings.[519] Mr. Simoneau, a resident of the City of Saguenay, brought the case to court since, as an atheist who regularly took part in the council's meetings, he "felt uncomfortable with this display, which he considered religious."[520] Joined by the *Mouvement laïque Québécois*, Mr. Simoneau argued before the Supreme Court that this display interfered in a discriminatory manner with his right to dignity and information, as well as with his right to freedom of conscience and religion as an atheist.[521]

The Court ruled in Mr. Simoneau's favour, stating through the voice of Justice Gascon that "[s]ponsorship of one religious tradition by the state in breach of its duty of neutrality amounts to discrimination against all other such traditions."[522] According to Gascon J., by reciting a theistic prayer before the municipal council, the mayor of Saguenay created a "distinction, exclusion and preference based on religion"[523] which "turned the meetings into a preferential space for people with theistic beliefs."[524] As a result, while those with theistic beliefs "could participate in municipal democracy in an environment

[519] Justice Abella rendered reasons concurring in part, in her own name.
[520] *Saguenay*, para. 8.
[521] *Saguenay*, para. 11.
[522] *Saguenay*, para. 64.
[523] *Saguenay*, para. 120.
[524] *Saguenay*, para. 120.

favourable to the expression of their beliefs,"[525] non-believers could only participate at "the price [of] … isolation, exclusion and stigmatization.[526] Furthermore, the Court explained that the solution proposed by the mayor to invite citizens to leave the chamber for the duration of the prayer and come back once its recitation is over could not be accepted since it only accentuated the exclusive effect of the practice.[527] Similarly, the mayor's attempt to make the prayer more "inclusive" by removing the wording strongly associated with Catholicism was not satisfactory. Per Gascon J., "[e]ven if a religious practice engaged in by the state is "inclusive", it may nevertheless exclude non-believers."[528] In this respect, the Court adds that the state's abstention in matters of religion should not be interpreted as state support for unbelief since "[n]o … inference can be drawn from the state's silence [regarding religion]."[529] Quoting legal scholar Richard Moon, the Court maintains that the state's abstention from religion merely reflects a concern for the inclusion of people from diverse views and backgrounds.[530]

To some extent, the presumption on which the *Saguenay* decision is based is coherent with the abovementioned rulings on child education: in the Court's view, participation is hindered by the impression of inequality or preferential treatment to this extent that it risks harming those excluded. In this sense, inequality is viewed as hindering dialogue by giving one party the impression that it has more power, or more legitimacy than the other.

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[525] *Saguenay*, para. 120.
[526] *Saguenay*, para. 120.
[527] *Saguenay*, para. 101.
[528] *Saguenay*, para. 137.
[529] *Saguenay*, para. 134.
[530] See *Saguenay*, para. 73-74. While this ruling was the first of the sort to be rendered by the Supreme Court, older decisions rendered by the Court of Appeal for Ontario such as *Freitag v. Penetanguishene (Town)* (concerning the prayer before municipal council meetings) and *Zylberberg v. Sudbury Board of Education* (concerning the prayer before the school day in public schools), as well as the Ontario Superior Court ruling in *Allen v. Renfrew (Corp. of the County)* (concerning a non-denominational, theistic prayer before county council meetings) apply the same reasoning. See *Freitag v. Penetanguishene (Town)*, 1999 CanLII 3786 (ON CA); *Zylberberg v. Sudbury Board of Education*, 1988 CanLII 189 (ON CA); *Allen v. Renfrew (Corp. of the County)*, 2004 CanLII 13978 (ON SC). Some scholars such as Mary Anne Waldron have argued that the logic underlying these rulings is flawed since the prayer does not, in fact, constitute an obstacle to the full participation of all citizens to the democratic process. Waldron furthermore argues that the state has no way of guaranteeing that all citizens will indeed feel more included by the removal of the prayer. See Waldron, *Free to Believe*, ch. 2.

Yet, there is a crucial difference between *Saguenay* and *Chamberlain* which concerns the way that the Court understands the harm done to the person targeted by the neutrality requirement. While the Court displays great concern for the adult citizens who might feel excluded by the state's endorsement of a religious practice that they do not personally support, the fact that children might experience a "cognitive dissonance"[531]—as the Court puts it—if they are exposed to values that conflict with those of their parents is the least of the Court's concern.

In *Saguenay*, Justice Gascon noted that while Mr. Simoneau was not, in practice, excluded from the municipal council meetings on account of the prayer, being exposed to the prayer or asked to leave the chamber for the duration of the prayer caused him to experience feelings of "isolation, exclusion and stigmatization."[532] Not only is experiencing these feelings cast as harmful in itself, but the harm is, according to Gascon J., exacerbated by the fact that it creates a distinction between those, like Mr. Simoneau, who feel excluded, and those who share the mayor's beliefs.

The Court's attentive consideration to the difficult feelings that might be provoked by exposure to different views seems to fade completely, however, when children are concerned. In the educational context, "cognitive dissonance" is presented as an asset. In *Chamberlain*, the majority explains that, when children are concerned, being placed in a position where opposing views are discussed—including views that challenge those transmitted to children by their parents—is "neither avoidable nor noxious,"[533] "simply a part of living in a diverse society … [and] of growing up,"[534] and, ultimately, "necessary if children are to be taught what tolerance itself involves."[535] In *S.L.*, the Court reiterates and reaffirms its commitment to this passage of *Chamberlain* to ground its conclusion that children cannot be exempt from the ERC courses.[536]

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[531] See *Chamberlain*, para. 64-66. This passage from *Chamberlain* is reiterated in *S.L.*, para. 39.
[532] *Saguenay*, para. 120.
[533] *Chamberlain*, para. 65.
[534] *Chamberlain*, para. 65.
[535] *Chamberlain*, para. 66.
[536] See *S.L.*, para. 39.

My aim here is not to argue that the Court was right in one case and wrong in the other. Simply, I want to draw attention to the discrepancy in the Court's perception and handling of the discomfort that children and adults may experience by beings placed in a position where their beliefs, or those of their parents, do not appear to be endorsed by the state or, in the case of education, by the teacher in position of authority. Indeed, the Court's readiness to accept Mr. Simoneau's claim in *Saguenay* that he "had experienced a strong feeling of isolation and exclusion"[537] by being asked to leave the chamber for the recital of the prayer clashes with the Court's position in *Chamberlain* (but also in *S.L.*) that it is through encounters with different others that "children come to realize that not all of their values are shared by others"[538] and learn to develop their tolerance and respect. On the one hand, the Court concludes that adults would experience the endorsement of one view at the exclusion of all others in a negative way; on the other hand, it does not see cognitive dissonance among children in a similarly negative light. Quite the contrary, the difficult feelings that we may presume follow from cognitive dissonance in children are cast in a positive light, being associated with the development of children's sense of respect—perhaps even valuation—of others' difference.

If this discrepancy is worth noting, it is because it is revealing a view of the neutral space that varies depending on whether adults or children are concerned. In *Saguenay*, neutrality is conceived as requiring the absence of all religion. Here, neutrality is cast as implying a principle of *equal exclusion*: because the state abstains from endorsing one view, the state can be confident that individuals of different views will feel equally included and welcome to participate. In *Chamberlain*, however, the *School Act*'s requirement that schools be conducted on secular principles is interpreted as requiring not exclusion but the

[537] *Saguenay*, para. 121. I do not mean to insinuate that Mr. Simoneau was exaggerating his claim or that he was wrong in formulating it. Indeed, as Beaman notes, Mr. Simoneau had "a long history of and commitment to atheism, including submitting a declaration of apostasy to the Montréal diocese, persuading his partner not to baptise their daughter, asking that his daughter be exempted from the religion course at school, and so on." See Lori G. Beaman, "Freedom of and Freedom from Religion: Atheist Involvement in Legal Cases," in *Atheist Identities - Spaces and Social Contexts*, ed. Lori G. Beaman and Steven Tomlins (Cham: Springer International Publishing, 2015), 46. It should be noted that the "religion course" referred to by Beaman here is not the ERC course, but the previous "Religious Education" course that the ERC program came to replace in 2008. Since this class was designated to teach Catholicism in the French-language School Boards, a secular "Moral Education" course was offered to all students who did not wish to enroll in the religion course. See Boudreau, "From Confessional to Cultural: Religious Education in the Schools of Québec."

[538] *Chamberlain*, para. 65.

inclusion of all the different lifestyles that are considered "valid" and "lawful" in Canadian society. Moreover, the implicit demand is—per my reading at least—that these different lifestyles be introduced to children in a positive light. Indeed, the majority stresses that, regardless of whether there are children with same-sex parents in the classroom or not, the principle of secularism included in the *School Act* implies that the School Board "cannot prefer the religious views of some people in its district to the views of other segments of the community"[539] and "must act in a way that promotes respect and tolerance for all the diverse groups that it represents and serves."[540] The implication for the School Board is that the books depicting same-sex parents must be admitted for K-1 level students regardless of the fact that some parents might question the morality of these types of families. Not unlike in *Loyola*, the Court displays a concern for broadening the scope of the discussion by introducing children to views that they might not have realized existed before, or that their parents might have presented to them as immoral.

Looking at cases on child education, what perhaps stands out as most striking is what is repeatedly *not* considered to be deserving of protection under section 2(a). In particular, claims that run afoul of the principles of equality and dialogue do not fare well at the level of the Supreme Court. In terms of the principle of equality, the Court refuses to consider claims for religious freedom that are premised on the projection of a demeaning image of others. In *Ross*, freedom of religion is clearly delimited by the Court so as not to warrant the employment of a teacher who professes anti-Semitic views in his off-duty time. In *Multani*, it is rather the School Broad's request to ban the kirpan in schools that is cast as demeaning of Sikhs. In this case, the claim based on religious freedom, which was granted, was understood as a demand for equal recognition. In *Loyola,* the majority circumscribes the religious freedom granted to the Catholic institution by ensuring that the school will not give students the impression that other faiths and ethical frameworks are less worthy of esteem. *Chamberlain* displays a similar worry that children who are only exposed to their parents' understanding of homosexuality as morally questionable would

[539] *Chamberlain*, para. 25.
[540] *Chamberlain*, para. 25.

not be afforded the opportunity to consider this orientation as worthy of respect if they did not learn in school that this mode of being is legitimate.

As for the principle of dialogue, demands to exclude oneself or others' perspectives from schools also fail. Most strikingly, the argument, used in *S.L.* and *Chamberlain*, concerning the wrongs of creating cognitive dissonance in children raised in religious households is not considered a valid reason to ground a religious freedom claim aimed at shielding one's children from others' views, or alternately, at excluding another perspective from discussions in which one's children partake. In *Multani* and *Ross*, the incorrect and demeaning image of Sikhs and Jews that was being projected was considered harmful to the extent that it restricted the ability of children who were members of these groups to participate in discussions and activities in their school. In *Loyola*, the Court's will to foster inclusive dialogue takes the shape of a concern that students in a private Catholic school expand their knowledge of different ethical frameworks and not remain anchored strictly in the Catholic perspective.[541]

[541] Another—albeit less central—characteristic that relates to dialogue and that the two successful religious freedom claims studied in this section have in common concerns the willingness of the religious claimants to discuss with their opponent and seriously consider their demands. In *Loyola*, Abella J. observes that "Loyola had previously asserted that the entire orientation of the ERC Program represented an impairment of religious freedom on the basis that discussing any religion through a neutral lens would be incompatible with Catholic beliefs." However, she continues, the school had since the beginning of the litigation in court, Loyola had revised its position and was now "not object[ing] to teaching other world religions objectively in the first component which focuses on 'understanding religious culture'." This attitude is immediately contrasted with that of the Minister of Education, which the majority observes "remained the same as it had been in the prior proceedings." Indeed, as Abella J. points out, despite offering the possibility to submit an equivalency program to replace the ERC program, the Minister's repeated rejection of Loyola's proposed equivalency program refuses to consider "a program that departs in any way from the ERC Program's posture of strict neutrality, even partially," as one able to "achieve the state's objectives of promoting respect for others and openness to diversity." As a result, the Court frames the issue at bar in the following way: "The question … is whether the *Minister's* unchanged position, as reflected in her decision concerning the equivalency of Loyola's proposed program, interferes with the relevant *Charter* protections no more than is necessary." See *Loyola*, para. 31; para. 57. In *Multani*, the stern position of the School Board is similarly contrasted with Gurbaj Singh's recognition that "ensure[ing] an environment conducive to the development and learning of the students" is a "laudable objective" which must be protected, as well as with his readiness to comply with a series of conditions imposed on him and aimed at ensuring that his wearing of the kirpan will not interfere with this objective. Justice Charron highlights this attitude by observing that "[i]t is important to note that Gurbaj Singh has never claimed a right to wear his kirpan to school without restrictions. Rather, he says that he is prepared to wear his kirpan under the … conditions imposed by … the Superior Court." While Gurbaj Singh's willingness to adapt to the School Board's concerns and Loyola's conciliation of its own objectives with the requests formulated by the Minister of Education constituted peripheral matters in the Court's rulings, the judges' inclination to point these elements out indicates that they are not totally neutral towards this attitude. See *Multani*, para. 44; para. 54. Perhaps this conclusion is not surprising in the context of a legal litigation; however, considered in the context of the freedom of religion—a provision specifically adopted to

Per my reading, the way that the principles of dialogue and equality are mobilized in cases concerning child education is quite telling. Above all, it reveals how deeply tied to the ideal of authenticity religious freedom is. In the remainder of this section, I make the case that the Court's concern for dialogue and equality reflect a vision of religious freedom as a right that must advance the conditions for authenticity.

Education as a Means to Create the Conditions for Authenticity

I began this section by identifying two key questions that are driving debates in the field of law, religion, and education. On the one hand, scholars have debated the legitimacy of the liberal state to use education as a means to instill in children a particular vision of society that is thought to be at the state's advantage, while not necessarily being aligned with the parent's view of education or the role the state should play in children's education. On the other hand, scholars have disputed the responsibility that the state has in ensuring that the education children receive equips them to fully exercise their own freedom as adults. On this topic, discussions often revolve around how the state can best develop children's critical thinking, autonomy, or ability to exercise their independent judgement, and whether these skills can be adequately developed through a religious education.

Considered against the backdrop of these two governing questions, my analysis above suggests two things. First, the Court appears unconcerned with the development of children's own freedom. The rulings very rarely raise the question of the conditions that best foster a child's autonomy or ability to think critically.[542] In contrast, however, they frequently revolve around the issue of how education can serve broader society.

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protect individuals from infringements to their deeply held and at times strict views—the Court's appreciation of trade-offs on one's view seems particularly noteworthy.

[542] One exception is perhaps the majority's (somewhat vague) claim in *Loyola* that it is "even more important" that students in a religious school learn about other belief systems in an objective way. See *Loyola*, para. 72. However, as I noted, it is not possible to determine whether the Court meant that to be of importance primarily for the students themselves or for life in society. In lower courts, notably at the Ontario Court of Appeal, the question of the type of education that can best serve children's own interests has nonetheless been addressed. Leo Van Arragon notably observes that "education about religion" types of courses (such as the ERC program in Quebec) were cast against religious education courses as more likely to develop students' ability to think critically. See Leo Van Arragon, "Religion and Education in Ontario Public Education: Contested Borders and Uneasy Truces," in *Issues in Religion and Education: Whose Religion?*, ed. Lori G. Beaman and Leo Van Arragon (Leiden: Koninklijke Brill, 2015). I will say more on this topic below.

This leads me to the second finding of my analysis, which is that the Court answers the question of whether the state may make use of education to instill in students a particular vision of society in the affirmative. Specifically, what my review of child education rulings shows is that the Court supports the use of education to transmit to students what I have termed an egalitarian language for identity; that is to say, a horizon of significance where different identities check out as equal. This can be achieved, according to the Court, by exposing children to a broad spectrum of views that are introduced to them in a way that I would describe as "not negatively." Indeed, the perspective that the Court supports stresses that lawful viewpoints must be presented at least in a neutral and objective way, but also often implies that it is desirable to cast them positively, such that students may learn that these different perspectives—despite being different from the one preferred by their parents—are also worthy of respect. Thus, by bolstering dialogue with different others through daily interactions or through reflection, the Court considers that children will learn about other's equality and will develop their ability to interact respectfully with people who do not share their views, which is essential to the good functioning of a multicultural society.

These findings are interesting to consider in the light of the debate on the value of religion tackled in Chapter 3, as they highlight how the Court's valuation of religion as a source of authenticity impacts the delineation of the scope of religious freedom. On the one hand, if we think of the Court as valuing religion as a source of *autonomy*—a perspective that I criticized in Chapter 3—we could expect that at least *some* space would have been dedicated in the rulings on education to contextualize the advantage of sustaining or dismissing a religious freedom claim for the development of children's own freedom. I observed in the previous chapter that the Court displayed such a concern in two cases, namely *Children's Aid Society* and *A.C.*, where parents claimed their right to religious freedom to prevent their child from receiving medical assistance. In each case, the Court discussed the parents' religious freedom in relation to their child's interests in making independent choices, only to conclude that granting the former right would unduly impede the latter.

In the education cases discussed here, however, there is no such discussion. All the space is taken up by a debate on how to best foster the child's respect and tolerance. It is possible that this situation merely follows from the way that each case was framed in front of the Supreme Court. Yet, judging by the look of lower courts rulings, it seems like *Loyola* in particular would have been a prime candidate for a discussion on critical thinking and the development of children's independent judgement. In the Ontario Court of Appeal case *Canadian Civil Liberties Assn. v. Ontario (Minister of Education) (Ont. C.A.)*[543] (hereafter "*Elgin County*"), Leo Van Arragon observed that the idea of a "scholarly and objective" approach to the study of religion was cast in opposition to "religious coercion and indoctrination."[544] As a result, the latter was delegitimized at the expense of the former, which was said to be "consistent with a more general educational stance in Ontario public education linking individual ability to think 'critically' with 'freedom' as a marker of a modern society."[545] None of this discussion, however, made its way to *Loyola*. Although *Elgin County* and *Loyola* are different to the extent that the former concerned the public school system in Ontario, the fact that the Supreme Court did not address the issue of religious freedom in the context of the development of children's autonomy at any point in either of the cases analyzed in this section but merely addressed the question of the advancement of "good citizenship" suggests that the Court's priority in education is *not* the development of children's own freedom. What the Court is interested in, rather, is how education can best enjoin children to use their freedom in a way that will serve, and not disturb, the culture of authenticity.[546]

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[543] *Canadian Civil Liberties Assn. v. Ontario (Minister of Education) (Ont. C.A.)*, 1990 CanLII 6881 (ON CA).

[544] See Van Arragon, "Religion and Education in Ontario Public Education."

[545] Van Arragon, "Religion and Education in Ontario Public Education," 41.

[546] We could perhaps furthermore argue that the Court's conception of dialogue as a means to expand children's knowledge and understanding of other worldviews is coherent with a conception of the development of children's autonomy and freedom. Following Ian MacMullen, we could say that the Supreme Court's requirement that other perspectives be presented to children "not negatively" (even in the context of a religious school) advances children's autonomy by providing them with the opportunity to find other's perspectives more satisfying than the one transmitted to them by their parents. See MacMullen, *Faith in Schools?* This conjecture would be coherent with a view of religion as a source of authenticity, where religion is understood to be primarily inwardly generated rather than simply inherited from one's parents. However, there is no evidence that the Court is concerned with this possibility in the rulings studied, as nothing is said pertaining to the development of children's autonomy through education.

On the other hand, if we think of the Court as valuing religion as a source of *cultural identity*—another perspective that I criticized in Chapter 3—we find ourselves led back to a contradiction. Indeed, one thing the cases of *Chamberlain* and *S.L.* discussed in this chapter (but also the case of *Adler* discussed in Chapter 3) have in common is that they do not recognize that children suffer any harm by being taught a perspective that does not reflect their parents' beliefs. Yet if, as some argue, the Court views religion as a source of cultural identity, we could expect that what some parents have termed a "cognitive dissonance" resulting from the exposure to a vision of the world that does not match that of their family environment would have been given more serious consideration.

An illustration of what things might look like in this scenario can be found in the *Indian Child Welfare Act*, a federal law in the United States which aims "to protect the best interest of Indian children" by favoring the "placement of such children in homes which will reflect the unique values of Indian culture."[547] This law protects the transmission of Native American identity by ensuring that children born in Indigenous families will not be estranged from their culture by being raised in non-Indigenous families. The underlying assumption is that children would suffer if they were estranged from their culture, thus their best interest is to be raised within their native culture. In this scenario, the harm of failing to recognize this interest is exacerbated by the fact that the transmission of Indigenous identity has been disrupted by settlers for centuries.

In cases like *Chamberlain*, *S.L.*, and *Adler*, however, the Court appears unconcerned with whether the parents effectively manage to transmit their religion to their children or not. In *Adler*, this concern emerges implicitly in the Court's decision not to enjoin the province of Ontario to fund dissentient religion-based schools for the reason that the province already funds common schools which are, as the Court puts it, "designed for children of all beliefs and all races."[548] Reading between the lines, we get the sense that the Court does not want to encourage the proliferation of dissentient religion-based schools

[547] *Indian Child Welfare Act*, 25 USC §§ 1901-23. A similar law was implemented in Canada in 2019 with the view to "affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services." See *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24.
[548] *Adler*, para. 45.

that would bolster the transmission of religion to children in a context where the dominant culture is other. The concern emerges more directly in both *Chamberlain* and *S.L.* as the Court refuses to consider that the exposure of children to a variety of moral viewpoints or religious facts constitutes an infringement of the religious freedom of the parents.

Even in a case like *Loyola* where the Court explicitly acknowledges that "an essential ingredient of the vitality of a religious community is the ability of its members to pass on their beliefs to their children,"[549] the majority rejects the claim that the schools' freedom of religion is infringed if its teachers are required to teach other ethical frameworks in a neutral and objective fashion. For those defending Loyola, it is clear that this perspective conflicts with Loyola's Catholic worldview—the worldview it attempts to transmit to its students. Farrow highlights how this conflict takes shape by opposing Loyola's view of the human being to that which emerges from the ERC program:

> the Catholic school does not adhere to individualism, either philosophically or pedagogically. It seeks the formation of human beings, … only it does not understand humans as individuals but as persons in community, because it understands God as triune and personal. Which is to say, it is not stuck in some modern or postmodern paradigm that presents "each student as a unique, autonomous individual" who must … be taught … how to be properly open to "diverse values, beliefs, and cultures." It is free rather to see itself as "a community whose values are communicated through the interpersonal and sincere relationships of its members," and as a place where students learn "to form their own judgments in the light of the truth"—a truth that, to be taught, must be lived.[550]

If this passage resonates so well with our discussion on the role of education in supporting the conditions for authenticity, it is precisely because it illuminates the ways in which the culture of authenticity can conflict with the religious culture that some parents are aiming to transmit to their children. For the Catholic school, as described here by Farrow, it is clear that the human being is not understood as limitless and unique, as the culture of authenticity would suggest, but must be seen as part of a wider whole, one that provides the individual with a specific orientation for self-understanding. In this sense, the demand to teach other ethical frameworks from a neutral perspective might be experienced by the school as a requirement to adopt a relativist language for ethical discussions that it not only considers

[549] *Loyola*, para.64.
[550] Farrow, *Desiring a Better Country: Forays in Political Theology*, 113.

to be false but also as outcompeting its own vision of the truth. Although the case of *Loyola* makes it clear that the Court is not completely blind to the parents' interests in transmitting their religion to their children, it also concomitantly underscores its relative indifference regarding situations where children might not be fully disposed to "receive" their parents' religion or would be led to confront the beliefs that were transmitted to them by their parents.

The underlying assumption at play in the cases surveyed above is clearly very different than the logic legitimizing the U.S. *Indian Child Welfare Act*. Rather than being concerned that children feel estranged from their parents as a result of their education in schools where the religion of their parents is introduced in a way foreign to their parents' own understanding and experience of their religion, the Court's preoccupation is to ensure that children are exposed to a variety of viewpoints and have the possibility to mix up with children of different religious and non-religious background. This preoccupation is in turn justified, according to the Court, by the fact that it fosters the development of respectful and tolerant citizens. Even when religious parents are not defending that other viewpoints or modes of being are fundamentally unworthy of respect, the mere fact that they would teach their children that some lawful modes of being are morally questionable poses a problem for the Court, which suggests that schools ought to remedy or, at least, palliate this situation by ensuring that children evolve in an environment that best favours the development of a view that all identities are equal.

This does not mean the Court considers that parents cannot be partial in the way they raise their children and present their own worldview and way of being as superior to the others. In *Chamberlain*, for instance, the majority explains that to create a tolerant and respectful school environment, "[p]arents need not abandon their own commitments, or their view that the practices of others are undesirable."[551] Nonetheless, what emerges from cases concerning child education is a view of childhood as a time where the language for identity that must be acquired is that which allows for the full recognition of difference later in life; that is, the language of equality. As such, by the same impulse the majority in *Chamberlain* acknowledges that parents have the right to disapprove of the practices of

[551] *Chamberlain*, para. 20.

others, it adds that "a secular school system cannot exclude certain lawful family models simply on the ground that one group of parents finds them morally questionable."[552] The Court's tolerance of religious difference, it seems, quickly reaches a limit when religious parents attempt to take means to ensure that their children will not be exposed to a language that negates or contradicts the superiority of their own worldview in the schools of the country.

If religion was valued as a source of identity, it would be reasonable to expect that the Court would pay attention to the factors that may disturb the transmission of religion. This approach, it seems, would warrant a view of religious freedom as safeguarding the ability for the members of a religious community to influence their own members and maintain their difference from other groups. Yet, the portrait that I have painted here reveals that the Court is mostly concerned with avoiding restricting children's opportunities to learn about the beliefs of others and ensuring that they acquire an egalitarian language for identity. The cognitive dissonance that may result from being exposed to worldviews that do not match that of a child's parents and the exposure to an egalitarian worldview that may make it more difficult for parents to transmit their religion to their children are not, on the other hand, among the Court's worries.

What we arrive at, rather, is a view of religious freedom as delineated around the conditions of authenticity. Viewed as a source of authenticity, religion compels, primarily, respect for the possibility to self-determine and act in conformity with this self-definition. These prospects are ensured and fostered, as we have seen, through contact with others and the recognition of the worth of one's self-definition. Considered in this light, it makes sense to view the expansion of the possibilities for dialogue across difference and the instilling

[552] *Chamberlain*, para. 20. In another passage, the McLachlin C.J. similarly notes that the requirement of secularism in the *School Act* "does not prevent religious concerns from being among … matters of local and parental concern that influence educational policy," only to later shut the door to any religious view that "exclude from consideration the values of other members of the community." See *Chamberlain*, para. 3; para. 19. This logic is not restricted to religion and applies also to state bodies. In *Multani*, the Court's rationale similarly highlights, as we have already seen, that those for whom the kirpan has no meaning or value cannot exclude the kirpan from schools simply because it has the appearance of a weapon, and ought to be taught the meaning of the kirpan for Sikhs. If the Court deems kirpans to be acceptable in public schools, it is, in the end, for the same reason the Court finds the supplementary learning resources depicting same-sex parents to be warranted in K-1 level classes: children must learn that those modes of being are legitimate and deserving of equal respect, despite that they might seem unusual or wrong to some children or their parents at first sight.

of a shared egalitarian language for identity as not interfering with the right to religious freedom, since both aims support, rather than hinder, the possibility for individuals to realize the ideal of authenticity in their life. Religious freedom, in order words, takes the shape of a gatekeeper for the ideal of authenticity. In the next section, I turn to one other consequence of viewing religion as a source of authenticity on the delineation of the scope of religious freedom.

Identity-Based Claims: Fostering Recognition through Inclusion

Despite the distinction that I made above between the identity and the authenticity approach to freedom of religion, there exist several connections between authenticity and our modern conception of identity, which I want to highlight in this section. I already observed in Chapter 3 that, just like identity, authenticity is employed to refer to some characteristics of ourselves that have significance for life in society and that we do not believe we can change about ourselves. What we find, through introspection, to be core to our sense of self is considered to be so deeply important to us that being required to change that aspect of ourselves would harm us in a profound way, making us feel shattered and disintegrated.

Unlike a number of human characteristics that are commonly tied to identity, however, I observed that our authentic sense of self is not always fixed. For instance, aside for religion, section 15 the *Canadian Charter of Rights and Freedoms* guarantees equal protection and benefit of the law without discrimination based on race, national or ethnic origin, colour, sex, age, or mental or physical disability.[553] All these identity-based traits are characteristics that can be objectively assessed by an outside observer. While these traits play a role in our authentic self-definition, they do not encompass the full scope of the sources that inform our sense of self. In particular, many identity-based traits that we consider important to our sense of self, notably sexual orientation and gender identity, find their roots within our own subjective feelings about ourselves.

Casting religion as a source of authenticity stresses the difference between religion and the other objective identity traits enumerated above. In Chapter 3, I noted that this view of religion emphasizes that, just like our self-understanding in matters of sexual orientation

[553] *Canadian Charter of Rights and Freedoms*, section 15.

or gender identity, for instance, our religious beliefs can evolve and shift as we make our way through life. What is core to my sense of self today might not be so latter in my life. Yet, regardless of that, we still believe that what is core to our sense of integrity in the present should be handled like any other unchangeable identity markers. So is the Court's conception of religion.

At the level of religious freedom, however, this conception of religion as deserving of protection for the important role that it plays in one's self-understanding has the effect of extending the reason for the protection of religion to other types of beliefs relating to one's self-understanding, including beliefs not founded in religion. This occurs because religion cannot be conceived as the *only* plausible source of authenticity available to individuals. To put it differently, what we find to be valuable in religion is not exclusive to religion.

In this section, I argue that the Court's valuation of religion as a source of authenticity has naturally bound it to a politics of recognition when determining the legitimacy of a religious freedom claim. As such, the acknowledgement of the equal worth of different identities—understood here as based on either objective characteristics or subjective self-understanding—has taken on central importance. In what follows, I demonstrate how this concern plays out in four cases where religion was cast as or in opposition to an identity-based claim. Specifically, I show that the Court displays a discomfort with religious freedom claims demanding it to endorse a restriction of the possibilities of being of an individual either philosophically—through the sending of the message that one mode of being is less deserving of esteem than others—or in practice—by denying the right of those who identify with a certain group to be treated equally. As a corollary, however, I also highlight that the Court is sympathetic to claims that mobilize religious freedom to demand esteem for one's mode of being or to participate in some aspect of society regardless of one's difference.

Ensuring the Conditions for Dialogue Across Difference

The most notable Supreme Court rulings dealing with a conflict related to an identity-based claim are unquestionably the two cases involving Trinity Western University. In these

cases, the Court had to decide how to conciliate the religious freedom claim of the university to uphold a mandatory Covenant prohibiting homosexual behaviour with the right of LGBTQ students to equality. If these two decisions are so thought-provoking, it is partly because, though the context leading up to these two cases was very similar, the Court ruled differently in each instance.

Among those who have hypothesized as to the reasons underlying the discrepancy between the two Supreme Court rulings, some have argued that a "paradigm shift" in the Court's conception of identity-based claims could explain what appears to be a change of attitude in the Court's conception of the limits of religious freedom. According to Barry Bussey, while religion used to be treated as special and deserving of a robust protection in law, this view is currently being overthrown by one amalgamating religion to other identity traits, such that religion becomes weakened when cast against a claim for equality based on an aspect of one's identity.[554] Janet Epp Buckingham seems to be of a similar view as she expresses bewilderment that the Court did not support Trinity Western in 2018 after having ruled in its favour in 2001.[555]

While I do not mean to argue against this view, I want to draw attention to the fact that if such a paradigm shift has indeed occurred, it is not captured by the discrepancy between the two Trinity Western decisions. Per my reading, looking at the Court's rationale in the two cases through the lens of authenticity reveals that the Court's attitude towards religious freedom in each case is quite coherent; what varies is the way that the issue is framed. This variation is crucial, however, because it requires the Court to consider the role of dialogue and equality under a whole new light. What I propose here is to review each decision without focusing on the Court's rationale to support or dismiss the religious freedom claim, but rather focusing on the way that the case was presented to the Court—

[554] See Bussey, "The Legal Revolution Against the Accommodation of Religion: The Secular Age v. The Sexular Age."; Bussey, "The Legal Revolution against the Place of Religion: The Case of Trinity Western University Law School."
[555] See Janet Epp Buckingham, "Trinity Western University's Law School: Reconciling Rights," in *Research Handbook on Law and Religion*, ed. Rex J. Ahdar (Cheltenham, UK: Edward Elgar Publishing Limited, 2018).

or at least, on the way that the Court describes the situation in each case—and the impact of this framing on the Court's subsequent discussion and ruling.

We can begin with Trinity Western's first (successful) litigation, where the university sought to defend its right to assume full responsibility for its teacher education program. Prior to this ruling, students enrolled in the teacher education program were required to complete the last year of their degree at Simon Fraser University, a public university located in city near Trinity Western University. Trinity Western, however, desired "to have the full program reflect the Christian world view of TWU,"[556] and therefore made a request to the British Columbia College of Teachers (BCCT) to allow its graduates to complete the last year of the program at Trinity Western.

The BCCT rejected that request due to the university's stance on homosexuality. As the Court summarizes the issue, the BCCT believed it could not condone the program since the university "follow[ed] discriminatory practices … contrary to the public interest and public policy,"[557] and maintained that students enrolled in the teacher education program who, necessarily, had signed the university's Covenant were "more likely to foster a welcoming classroom environment [in the exercise of their profession] after participating in [Simon Fraser University's] program for one year."[558] The BCCT's presumption was that completing the final year of their degree with students who did not share the beliefs of students enrolled at Trinity Western would assist in "correcting any intolerant attitudes" that might have been acquired in their years at the Christian university.[559]

This framing of the issue in *TWU 2001* brought the Court to reflect on whether teachers trained at Trinity Western were more likely than those trained in other universities to adopt discriminatory behaviours in their employment. As such, while the university's Covenant was described by the BCCT as "[having] the effect of excluding persons whose sexual orientation is gay or lesbian,"[560] the Court's primary focus throughout the ruling was not the university's discriminatory admission policy, but, more generally, their

[556] *TWU 2001*, para. 2.
[557] *TWU 2001*, para. 5.
[558] *TWU 2001*, para. 91.
[559] See *TWU 2001*, para. 38.
[560] *TWU 2001*, para. 6.

teaching practice. As such, the way that the case was presented brought the Court to reflect on the type of teachers that Trinity Western graduates would become once they had completed their degree and started teaching in the schools of British-Columbia. At the level of dialogue and equality, this framing of the issue emphasized the possibility of students—who, we may assume, hold a particular religious worldview—partaking in the public sphere as teachers despite their religious difference.[561]

As the Court's ruling reveals, ensuring that teachers holding orthodox evangelical beliefs could partake in the public sphere was crucial, as eight out of nine judges ruled in the university's favour. Writing for the majority, Justices Iacobucci and Bastarache reject the argument that Trinity Western graduates are more likely to discriminate against homosexual students in their employment. Instead, the two justices maintain that, insofar as private institutions have the right to prefer adherents of its religious constituency, then "[i]t cannot be reasonably concluded that … their graduates are *de facto* considered unworthy of fully participating in public activities."[562] As a result, the majority concludes that the freedom of religion of students who attend Trinity Western "is not accommodated if the consequence of its exercise is the denial of the right of full participation in society."[563]

With respect to the university's admission policies, while the majority recognizes that "homosexuals may be discouraged from attending TWU,"[564] it quickly relativizes this assertion by pointing out that, in the event where homosexual students did enroll in the school,[565] these students "will not be prevented from becoming teachers."[566] Instead of bringing attention to the harm that these students might experience while enrolled at the university, the Court's focus on the teaching profession leads it to conclude that, with

[561] As the Court notes, however, "there is evidence that not all students admitted to TWU adhere to the Christian world view." See *TWU 2001*, para. 22.
[562] *TWU 2001*, para. 35.
[563] *TWU 2001*, para. 35.
[564] *TWU 2001*, para. 35.
[565] Trinity Western's policies indeed condone homosexual *behaviour* and do not prevent individuals who identify as homosexual from patronizing the school. This was highlighted by Trinity Western, who pointed out that its enrollment documents "make no reference to homosexuals or to sexual orientation, but only to practices that the particular student is asked to give up himself, or herself, while at TWU." The Court furthermore noted that that there was "evidence that not all students admitted to TWU adhere to the Christian world view," and "no evidence … that anyone ha[d] been denied admission because of refusal to sign the document or was expelled because of non-adherence to it." See *TWU 2001*, para. 22.
[566] *TWU 2001*, para. 35.

respect to the Covenant's aims, homosexual students at Trinity Western are not placed at a disadvantage since they can still become teachers. In the end, the Court's decision in *TWU 2001* simply affirms that members of an evangelical Christian community of faith can exercise the teaching profession and should not be excluded from this profession on the exclusive basis of their faith.

The framing of the issue in *TWU 2018*—the second (and unsuccessful) Supreme Court case involving Trinity Western's Covenant—is quite contrasting. In this similar litigation, the Law Society of British Columbia (LSBC) had taken the resolution not to approve the university's proposed law school for the same reason that the university required its students to sign a Covenant prohibiting homosexual behaviour. In this instance, however, the case presented to the Court brought attention to the Covenant's impact not primarily on the legal profession or on students enrolled at the university who endorsed the school's worldview and were committed to respecting the university's Covenant as part of their religion, but rather on individuals—including individuals not adhering to the university's worldview—who might feel like they had "no choice but to attend [Trinity Western University's] proposed law school."[567]

As the majority describes this case, the LSBC's arguments revolved around the fact that requiring students to sign the Covenant "effectively imposes inequitable barriers on entry to the school," which, in turn, risks "decreasing diversity within the bar."[568] The LSBC furthermore drew attention to the fact that, since the Covenant prohibited homosexual behaviour, approving the law school would "harm LGBTQ individuals"[569] and ultimately "undermine the public interest in the administration of justice."[570]

The majority ruling, delivered conjointly by Justices Abella, Moldaver, Karakatsanis, Wagner, and Gascon, sustains those arguments entirely. Focusing primarily on the impact of the Covenant on those who might feel they have no choice but to attend Trinity Western's law school, the majority concludes that "[t]he LSBC's decision ensures

[567] *TWU 2018*, para. 103.
[568] *TWU 2018*, para. 39.
[569] *TWU 2018*, para. 39.
[570] *TWU 2018*, para. 39.

that equal access to the legal profession is not undermined and prevents the risk of significant harm to LGBTQ people."[571] According to the majority, the equal access to the legal profession is not maintained if the LSBC approves a law school in which "most LGBTQ people will be deterred from applying … because of the Covenant's prohibition on sexual activity outside marriage between a man and a woman."[572] The majority continues to explain that the risk of harm to LGBTQ people would follow from a decision "to approve a law school that forces LGBTQ people to *deny who they are* for three years to receive a legal education."[573] Besides harming those patronizing the university who are prevented from expressing their true self, the majority retains the LSBC's argument that endorsing Trinity Western's law school would erode public confidence in the legal profession altogether.[574]

What this comparison of *TWU 2001* and *TWU 2018* reveals is that Trinity Western University's choice to uphold a Covenant restricting homosexual relationships is not an issue in itself. Indeed, when the Covenant is introduced as a reflection of the institution's religious beliefs, as in *TWU 2001*, it can be successfully cast as *one* source upon which students at the school may draw from to make sense of their life and their relation to others. Here, the Covenant is not considered to be illegitimate simply because it is prohibitive of homosexual behaviour. Rather, it is considered to be an integral part of evangelical Christians' right to religious freedom in Canada. Cast in this light, the Court's conclusion stresses that members of this religious community may not be *a priori* excluded from participating in society simply because they hold a particular religious view of the world;

[571] *TWU 2018*, para. 103.
[572] *TWU 2018*, para. 93.
[573] *TWU 2018*, para. 103 [emphasis added].
[574] The majority also takes note that the university did not appear ready to dialogue with the LSBC to consider its concerns regarding the Covenant. "[W]hen the LSBC asked TWU whether it would "consider" amendments to its Covenant," the majority writes, "TWU *expressed no willingness to compromise* on the mandatory nature of the Covenant." On the other hand, the majority continues, should the university had been willing to make the signing of the Covenant discretionary rather than mandatory, the LSBC, on its part, would have been open to reconsider its position. Part of the reason justifying the Court's ruling against Trinity Western seems to be anchored in the university's refusal to engage in a discussion regarding how it may preserve its own integrity as a religious institution all while respecting that of others. See *TWU 2018*, para. 85 [emphasis added]. Once again, the Court's highlighting of the two parties (un)willingness to dialogue suggests that the judges are peeved by inflexible positions even when religion is concerned.

members of Trinity Western's religious constituency should be equally allowed to integrate into the public sphere as others.

The Covenant only becomes an issue when it is introduced as universal in scope; that is, when it is cast as applying to any potential student, including non-Christians and members of the LGBTQ community. Then, the Covenant goes from being seen as one legitimate source of authenticity among others to the *only* legitimate source of authenticity available to students at the school. As the Court puts it, "[t]he Covenant is a commitment to *enforcing* a religiously based code of conduct, not just in respect of one's own behaviour, but also in respect of other members of the TWU community. The effect of the mandatory Covenant is to restrict the conduct of others. … Being required by someone else's religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful."[575]

If the Covenant is problematic in this case, it is because the rationale is no longer that I, the student, select this university because it corresponds to how I feel about the world; instead, the rationale is that the university is telling me how I should feel about myself. Thus, as opposed to the 2001 decision where dialogue and equality were embedded in Trinity Western's demand that those sharing its worldview be able to partake to society by becoming teachers, the focus on the Covenant as one of the school's requirements in the 2018 ruling casts dialogue through inclusive participation as something that the university is trying to avoid. In this latter case, Trinity Western appears to be trying to shun the discussion on identity by imposing its own view on others. On this view, LGBTQ students who will avoid Trinity Western for its Covenant are harmed because they have one less possibility of becoming lawyers. Alternatively, LGBTQ students who will enroll at Trinity Western despite the Covenant will also be harmed because they will not be able to act in conformity to their authentic sense of self while at the university.

Moreover, at the level of equality, the Covenant creates a distinction between LGBTQ and heterosexual people which implies that the former's preferred mode of being is less deserving than the latter. While this preference is intrinsically linked to Trinity Western's religious worldview and conception of the family, it is difficult to reconcile with

[575] *TWU 2018*, para. 99-101 [emphasis in original].

the view, supported in the culture of authenticity, that we are all deserving of equal respect regardless of the way we subjectively identify.

In this respect, it is interesting to hypothesize on why the majority in *TWU 2018* readily understands the university's provision against "sexual intimacy that violates the sacredness of marriage between a man and a woman"[576] as an attack on LGBTQ people (i.e., one that forces them to "deny who they are"[577]), but not on unmarried heterosexual couples.[578] Pe my reading, we can find an answer to that question within the demands of the politics of recognition. For the Court, the assumption seems to be that prohibiting sexual intercourse before marriage among heterosexual people their *conduct*, while forbidding sexual intercourses among same-sex people both within and outside of marriage is a *rejection of LGBTQ people's worth*.

Indeed, heterosexual practices are supported by the university, only not outside of marriage. Their acceptation is, in this sense, conditional to marriage: as long as they are within the bounds of marriage, heterosexual people are authorized to have intimate relationships. This is not the case with homosexual relationships, which the same Covenant implies simply to be wrong. The logic in this case is that nothing makes same-sex relationships acceptable. Those who identify as LGBTQ are therefore depicted as needing to repress or change their sexual orientation. However, just like religion is viewed as a source of authenticity that cannot be changed in the present, so too is sexual orientation seen as a subjective characteristic that informs one's identity. Even to the extent that Trinity Western's Covenant aims primarily to regulate a type of behaviour, it is difficult to detach the Covenant's provision on sexuality from identity in the case of LGBTQ relationships since the underlying assumption is that *any* type of same-sex relationship at *any* point in one's life is morally wrong. In this sense, this unconditional rejection of homosexual practices, especially when cast against the conditional acceptance of heterosexual

[576] *TWU 2018*, para. 1.
[577] *TWU 2018*, para. 103.
[578] It might be argued that the Court did not consider heterosexual relationships outside of marriage because the LSBC did not raise this issue; however, the dissent of Justices Côté and Brown did call attention to the fact that "[the] exclusion … is not directed to LGBTQ persons; no one group is singled out, and many others (notably unmarried heterosexual persons)," yet that assertion was not picked up by the majority, nor by the concurring opinions of McLachlin C.J. or Rowe J. See *TWU 2018*, para. 335.

practices, is harmful for the Court because sends the message that those whose identity is informed by their attraction to same-sex people are less worthy than others. For the Court, this runs contrary to a politics of recognition seeking to foster the acknowledgement of individuals' equal worth.

The two Trinity Western cases are without a doubt the most telling illustrations of the Court's concern for the recognition of the equal worth of various subjectively defined identities, including but not limited to religion. Yet other cases also highlight the dynamics observed in these litigations. The cases of *Amselem* and *Bruker*, in particular, are also revealing. While I already drew on those two cases in Chapter 1 to illustrate the claim of scholars from the deep diversity school that freedom of religion often ends up limited when it is opposed to an equality claim, I now want to consider the two cases in a comparative fashion to bring attention to how freedom of religion can alternately be empowered and wedged by the Court's concern for the equal recognition of various identities.

Amselem is a prime example of how religion can be empowered by being tied to a subjective source of identity. In this case, the Court concluded that the syndicate of co-ownership of Mr. Amselem's condominium building needed to make space to accommodate Mr. Amselem's religious practice. To recall, the religious claimants in *Amselem* were defending their right to install a succah on the balcony of their condominium units despite the existence of a by-law, included in the declaration of co-ownership that they had signed when they purchased their units, prohibiting altercations to the balconies. In court, the claimants maintained that they were not aware of the by-law since they had not read the declaration of co-ownership. The syndicate of co-ownership on its part argued that by signing the declaration, the owners had waived their right to religious freedom regarding the use of their balcony for the erection of a succah.

In the majority ruling, Justice Iacobucci appears disturbed by this assertion from the syndicate, writing that "[i]t would be both insensitive and morally repugnant to intimate that the appellants simply move elsewhere if they took issue with a clause restricting their rights to freedom of religion."[579] All while recognizing the validity of the clause stipulating

[579] *Amselem*, para. 98.

that "[n]o owner may enclose or block off any balcony, porch or patio in any manner whatsoever or erect thereon constructions of any kind whatsoever,"[580] the majority points out that the clause did not altogether forbid constructions on the units' balconies, but only requested the owners to "[solicit] the consent of the co-owners to enclose one's balcony."[581] As such, Iacobucci J. suggests that, given the connection between the claimants' request to install a succah on their balcony for nine days and their religious beliefs, it would have been reasonable for them to expect a positive decision from the syndicate even if they had read the declaration of co-ownership before signing it. On the other hand, the syndicate's suggestion that it could include a clause in the declaration of co-ownership whereby one's right to religious freedom would be waived, thus shutting down any possibility for an open discussion, was dismissed.

What seems to be the majority's conclusion in *Amselem* is that, should a truly open and respectful conversation have taken place between the religious claimants and the syndicate of co-ownership, Mr. Amselem and the syndicate could have easily conciliated their interests. The syndicate could have expressed its will to preserve the aesthetics and security of the building. On their part, the claimants could have committed to remove the succah as soon as the festival was over to limit the impact on the building's aesthetics and agreed to install the succah in a way that avoided blocking the security exits. A situation would have resulted from that conversation in which the concerns of the syndicate of co-ownership were voiced and heard, while the claimants—but also other Orthodox Jews—would have been able to celebrate Succot in the way that they deemed most proper.

Reading through the *Amselem* decision, we get a sense that the majority was irritated by the syndicate's reading of the declaration of co-ownership as a document allowing it to avoid dialogue on the basis of religious difference. Besides hindering equality by sending the message that Orthodox Jews who, like Mr. Amselem, believe they ought to dwell in a personal succah during Succot are not entitled to live in the same buildings as others, avoiding dialogue in this way suggests that it is only facultative to recognize the differences between us. If we consider religion to be a subjective source that informs one's

[580] Article 2.6.3 b) of the declaration of co-ownership cited in *Amselem*, para. 9.
[581] *Amselem*, para. 95.

identity, a decision allowing the inclusion of contractual clauses waiving some individuals' right to religious freedom would have amounted to the Court saying that it is possible to use a contract to inhibit an aspect of a person's identity without prior discussion or without needing to try to find a way to accommodate that person.

This is clearly not something that the Court supports, as demonstrated by the majority ruling in *Bruker* rendered only three years after *Amselem*. To recall the facts of that case, freedom of religion in *Bruker* was mobilized by Mr. Marcovitz, a Jewish man, as a justification for having failed to appear before the rabbinical court to grant a *get* (i.e., a religious divorce) to his then civilly divorced wife, Ms. Bruker, despite having committed to do so during the civil divorce procedures fifteen years earlier. Ms. Bruker demanded damages for breach of contract as Mr. Marcovitz had failed to comply with their civil divorce agreement. Ms. Bruker explained that, as a Jewish woman, Mr. Marcovitz's withholding of the *get* made her an *agunah* or "chained wife" in her community, restraining her, as the Court puts it, "from going on with her life, remarrying in accordance with the Jewish faith and having children."[582] According to Mr. Marcovitz, however, Ms. Bruker was not entitled to damages since it was within his right to religious freedom as a Jewish man to decide whether and when to grant the *get*.

Freedom of religion is brought up here in a very different way than in *Amselem*. In *Amselem*, freedom of religion served to demand the possibility to be included all while acting in conformity with one's subjective interpretation of one's religious requirement. In *Bruker*, the religious freedom claim takes the shape of an entitlement based on religion, which permits denying women full recognition within their religious community. In this latter case, the religious freedom claim appears to lose much, if not all, of its legitimacy for the Court. Indeed, instead of ruling, as in *Amselem*, that the connection between Mr. Marcovitz's refusal to grant the *get* and his religious allegiance could have reasonably led him to expect that he was not required to perform the religious act included in his civil contract, the majority concludes that Mr. Marcovitz's religious freedom is legitimately limited by "[t]he public interest in protecting equality rights" and "the dignity of Jewish

[582] *Bruker*, para. 109. As an *agunah*, Ms. Bruker's children with a new husband would not be considered legitimate under Jewish law. See *Bruker*, para. 4.

women in their independent ability to divorce and remarry,"[583] and therefore, Mr. Marcovitz's must pay damages to Ms. Bruker for having failed to abide by their contract. To ground this assertion, the majority explains that while "the right to integrate into Canada's mainstream based on and notwithstanding [our] differences has become a defining part of [Canada's] national character," it cannot follow that "all differences are compatible with Canada's fundamental values and, accordingly, [that] all barriers to their expression are arbitrary."[584] In this case, the Court's conclusion is that religious difference must to be limited to safeguard the equality and dignity of Jewish women, who, by not being granted the *get*, end up being considered an *agunah* and thus have less ability to self-determine their life than other members of their religious community.

The logic in *Bruker* is similar to that which we find in *TWU 2018*. For the Court, the possibility that Jewish men will withhold the *get* on the basis of their right to religious freedom is harmful and must be limited because it sends the message to Jewish women that they are less worthy than others, including other members of their own community because of their sex. In ruling in favour of Ms. Bruker, Pascale Fournier observes that the Court had to consider the "unofficial" religious norms that govern religious communities. Despite having meaning only for the members of these religious communities, these norms nonetheless impact the daily lives of these individuals in Canadian society.[585] Unlike in *TWU 2018*, however, the ruling in *Bruker* highlights that, even when it is clear that the religious norms of a community are not meant to extend beyond the religious community itself and only apply so long as members of that community subjectively give them meaning (i.e., Ms. Bruker was not considered "illegitimate" in her ability to have children or remarry outside of her community), one's membership in Canadian society binds oneself to act in conformity with the view that all identities are deserving of equal consideration and esteem. While the Court does not instruct each community as to how it ought to implement this principle, its conclusion in *Bruker* and *TWU 2018* seems to be meant to compel religious communities to discuss how they can arrange their beliefs and practices

[583] *Bruker*, para. 92.
[584] *Bruker*, para. 1-2.
[585] See Pascale Fournier, "Halacha, The 'Jewish State' and The Canadian Agunah: Comparative Law at the Intersection of Religious and Secular Orders," *Journal of legal pluralism and unofficial law* 44, no. 65 (2012).

so as to better recognize the inherent equality of Jewish women and LGBTQ people respectively. In these two instances, it is clear that equality is not merely a principle that the Court seeks to promote in the abstract, but one that impacts the shape of religious freedom. In particular, what stands out is that, while the Court may not consider it appropriate to straightforwardly intervene in religious communities to tell them how to conduct their affairs, it does not shy away from using religious freedom as a tool to bolster a politics of recognition within the very fabric of religious communities.

What emerges from the analysis above is a view of religious freedom as protecting equal recognition above religion. Religious freedom claims can be successful, in this sense, when they take the shape of a demand to be included and participate to society despite one's religious difference. However, focusing on equal recognition makes it difficult for religious practices founded on what may be deemed an inequal view of certain identity groups to succeed.[586]

This approach to religious freedom is quite coherent with a view of religion as worthy of protection primarily because it is a source of authenticity. Viewed in this light, religion can only be cast as one source of authenticity among other equally legitimate ones. Thus, protecting demands for religious freedom that deny or demean the identity of others poses a problem insofar as it makes the purpose of religious freedom inherently contradictory. The Court cannot, on the one hand, commit to protect religion on the basis that religion is core to an individual's sense of integrity and self-understanding as a human being while, on the other hand, accept that this protection be used to deny the value of other traits that inform individuals' sense of self. If that were the case, the Court would at least need to provide another reason as to why religion matters and ought to be protected since a ruling allowing the unequal treatment of one identity group on the basis of religion would concomitantly risk invalidating the very reason the Court provides protection to religion in the first place.

[586] While I have not assessed this case again in this section, *Chamberlain* is another relevant illustration of the central role that recognition plays in rulings on religious freedom. In this case, religious freedom is cast as an argument that cannot serve to exclude books depicting same-sex parented families on the basis that it may hinder the development of children's ability to recognize the equal worth of all identities. See in particular *Chamberlain*, para. 65-66.

In the conclusion to this chapter, I develop on the Court's perception of the role of religious freedom as a gatekeeper to the ideal of authenticity to consider how the Court has opted to balance equality and liberty in an age of diversity. Drawing on what I believe is an inconsistency in the deep diversity school's argument, I argue that viewing religion as a source of authenticity has allowed the Court to apprehend equality as compatible with liberty, such that appeals to reinforce freedom of religion at the expense of equality appear inherently paradoxical and deficient.

Equality, Liberty, and the Limitless Human Being

Reading through the literature from scholars of the deep diversity school, one recurring argument in support of a robust protection of religion against, in particular, claims based on sexual identity pertains to the fact that sexual orientation should not be treated as a category of identity. In contrast to the Court's view in *TWU 2018*, some authors cast homosexuality as a preferred type of conduct. Iain Benson, for instance, differentiates sexual orientation from race, claiming that "sexual views are not [equivalent to racism], since race is not a choice but sexual conduct (heterosexual or homosexual) is."[587] According to this view, those who exclude the members of a racial group could be seen as acting in a discriminatory manner, while those who reject homosexuality would be seen as merely orienting behaviour towards what they deem most proper. Barry Bussey shares a similar view, arguing that "to make race and sexual identity analogous is to assert that sexuality is an unassailable or involuntary biological reality, like skin colour."[588] This characterization is erroneous according to him, since sexual identity "is disputed by proponents of non-binary or gender fluidity" themselves, as attested by "the proliferation of identities represented by variations of the LGBTQ acronym."[589] What Bussey implies is that, not only is one's sexual identity not necessarily fixed throughout one's life, the categories of identity that we have to designate our sexuality are themselves likely to

[587] Iain T. Benson, "The Attack on Western Religions by Western Law: Re-Framing Pluralism, Liberalism and Diversity," (2013): 8, https://doi.org/http://dx.doi.org/10.2139/ssrn.2328825.
[588] Barry W. Bussey, "Making Registered Charitable Status of Religious Organizations Subject to 'Charter Values'," in *The Status of Religion and the Public Benefit in Charity Law*, ed. Barry W. Bussey (London: Anthem Press, 2020), 170.
[589] Bussey, "Making Registered Charitable Status of Religious Organizations Subject to 'Charter Values'," 170.

evolve with time, thus emphasizing the "indefinite" character of sexual identity. Janet Epp Buckingham observes that Canadian courts treat sexual identity as a "deeply personal characteristic,"[590] noting in passing the difference between personal and objective characteristics. "Race is an inherent characteristic," she writes, which "you cannot change."[591] Similarly, she adds that, "[w]ith rare exceptions, people are also born either male or female,"[592] suggesting that gender identity would also fall in the category of deeply personal characteristics.

What seems to underlie these claims is a discomfort with an understanding of identity as something that does not need to be fixed and can be subjectively defined by the individual person based on an assessment of how they feel about themself in the present. I already observed in Chapter 1 that scholars of the deep diversity school take issue with the fact that claims based on objective aspects of one's identity, such as sex (as in *Bruker*), may at times take precedence over religious freedom. As a fundamental freedom, proponents of this school argue that religious freedom and, especially, the freedom of religious associations to determine their own internal rules should take precedence on equality rights, not the contrary.

Against this backdrop, it is clear that if identity-based claims are also deemed to include invisible, subjectively defined characteristics of the self, such as sexual orientation and gender identity, the threat to religious freedom is likely to expand. More categories of identity can indeed come to conflict with religious freedom, even potentially unforeseen ones. This may offer a partial explanation as to why scholars of the deep diversity school appear engaged in a quest to delegitimize the value of sexual orientation and gender identity as legitimate candidates for identity-based claims—yet, as I argue shortly, the bulk of the disagreement is likely to lie in a more fundamental issue, namely a diverging conception of the human being.

The attempt of scholars of the deep diversity school to delegitimize subjectively defined characteristics of identity as valid identity-based claims has resulted an awkward

[590] Buckingham, "Trinity Western University's Law School," 436.
[591] Buckingham, "Trinity Western University's Law School," 436.
[592] Buckingham, "Trinity Western University's Law School," 436.

argument that seems to rest on a rhetoric parallel to that which the Court itself adopts. While the argument implicitly acknowledges the power that the ideal of authenticity has in court rulings by stressing that one's subjective sense of self currently matters greatly for the law, it concomitantly proposes to dismiss the ideal without having a discussion about why we should replace it or with what. The assertion is simply that one's subjective sense of self should not be an admissible candidate for an equality claim since, as Bussey puts it, "personal feelings, whether cloaked in the phrase '*Charter* value' or in the notion of dignitary harm, … inevitably creates inconsistency in the law and leads to 'concept creep' or 'interest creep.'"[593] According to Bussey, the inconsistency created in the law through the admission of "personal feelings" as a legitimate ground for identity-based claims follows from the fact that it is too difficult, perhaps even impossible, to call into question "the reasonableness (let alone the sincerity) of someone's emotional state, particularly if those emotions are linked to one's group identity."[594] According to this view, identity-based claims that are rooted in one's subjective sense of self or emotions with respect to oneself ought not to become limits to religious freedom since they are too unstable and elusive.

This depiction of subjective identity-based claims brings my next point forward. The argument that casts subjective categories of identity as potentially less deserving of protection than objective categories of identity is particularly awkward if we consider that religion itself is conceptualized by the Court in a subjective light. Admittedly, many scholars of the deep diversity school who support a robust protection for religion would probably reject the Court's subjective conception of religion and argue that religion should be addressed in courts based on more objective characteristics. But even if that were the case, the problem persists. Religion is not, to use the expression quoted above, an "inherent characteristic" which "cannot be changed." Perhaps to members of a religious group, it is, but from an external standpoint, it is not possible to say that one's religious views are objectively unchangeable. In this sense, religion seems to share something with sexual

[593] Bussey, "Making Registered Charitable Status of Religious Organizations Subject to 'Charter Values'," 184.
[594] Greg Lukianoff and Jonathan Haidt quoted in Bussey, "Making Registered Charitable Status of Religious Organizations Subject to 'Charter Values'," 183.

identity. Judging by the portrait that I have sketched in this dissertation, sexual identity and religion, for the Supreme Court, look a lot alike.

This is why pointing out that sexual identity is a less worthy category of identity for legal protection than religion, as scholars of the deep diversity school have done, does not resonate. Scholars who bring this point forward cannot do so without providing an explanation as to why religion—which is currently valued in law as a source of authenticity—is more deserving of protection than sexual identity—another source of authenticity—if not for the fact that both are core to one's sense of authentic self. If we argue against the protection of subjectively defined identity, we are not just arguing against the protection of sexual identity, we are also arguing against the protection of religion—at least in its current shape.

Viewed in the light of authenticity, scholars like Benson who argue that "[p]eople who [depict religious viewpoints as homophobic or abhorrent] have no respect for others who hold different viewpoints and would seek to force the alternative viewpoints on sexual morality"[595] seem to be missing the point of what precisely the Court *values* in religion and in the ability to self-define and live out one's sexuality. As Dwight Newman rightly observes, at the level of their objective, the two types of claims are of a similar nature: "[t]he claim to the manifestation of a sexual identity by members of a sexual minority, like the claim to manifestation of a religious identity by members of a religious minority, seeks a right to manifest an identity even in the face of disagreement by others in the society with the manifesting conduct."[596] The demand in both cases is one for the recognition of one's right to live coherently to one's "invisible" sense of self.

The analysis that I have provided above shows that, if sexual identity at times takes precedence over religious freedom, it is not because, as Buckingham suggests, religious adherents and institutions display "unpopular or countercultural"[597] religious practices. *Amselem* and *Multani* are notable examples of cases where what may be deemed an

[595] Benson, "The Attack on Western Religions by Western Law," 8.
[596] Dwight G. Newman, "The Challenging Parallelism of Rights Claims Based on Religious Identity and on Sexual Identity," in *Religious Liberty and the Law: Theistic and Non-Theistic Perspectives*, ed. Angus J. L. Menuge (Abingdon, Oxon: Routledge, 2017), 126.
[597] Buckingham, "Trinity Western University's Law School," 422.

"unpopular" religious practice from the perspective of the majority culture was recognized as protected by the Court. Per my analysis, *either* religion *or* sexual identity can take precedence. The relevant criterion is whether the claim seeks, or is perceived to seek, to put obstacles in the way of another group's own claim to manifest their identity—even in its subjectively defined form. This interpretation provides a coherent explanation as to why Trinity Western successfully defended itself against the British Columbia College of Teachers in 2001 despite its Covenant prohibiting homosexual behaviour. Because the university's claim to religious freedom was cast as a demand for the respect of the religious views of its students and was not in itself considered to interfere with the right of sexual minorities to be themselves, it was supported by the Court.

Perhaps we can then narrow down Buckingham's claim around the notion of authenticity. Religious adherents and institutions risk conflicting with the state or with other citizens not, as Buckingham suggests, when their practices are unpopular or countercultural in general, but more specifically when their practices disrupt the conditions for authenticity to be a reachable ideal for all. This is what the analysis produced above reveals: the Court *does* care about protecting religious practices—it even protects the practices that are unpopular within one's own religious community, as seen in *Amselem*. What the Court *does not* care to protect, are views—founded on religion or not—that project a demeaning image of another group or seek to exclude members of a group on the basis of their subjectively defined or objectively apparent identity. For scholars of the deep diversity school, the rub is that the Court cares *more* about fostering a climate favourable to the emergence of the recognition across groups than about protecting religion in the absolute.

What the authenticity framework highlights in this respect is that, while we may suppose that the deep equality school embraces, at least to some extent, the culture of authenticity since it tends to emphasize the role of equality, the deep diversity school calls for caution before immersing ourselves too deeply in it. In this sense, the deep diversity school appears to position itself as an outsider to the culture of authenticity or, at least, as not fully submersed in it. And when we try to find the node of the problem for scholars of

the latter school, we are, I believe, led back to the inward/upward orientation of the self addressed in Chapter 3.

From the perspective of authenticity, the call to turn inward brings out the idea that the sources of the self are limitless. In this outlook, we can expect that the voices—including religious voices—that emerge to contest the validity or the goodness of a claim based on one's expression of their true sense of self will have a hard time prevailing since the fact that a claim about one's sense of self conflicts with another person's own sense of self does not invalidate either claim. In this sense, authenticity impacts our political society because it shifts our concern from the identity claim itself to society. Our concern is not to assess the veracity or legitimacy of a claim based on a subjective characteristic that finds resonance across a number of people, since this assessment can only be done by the self; rather, our responsibility becomes finding ways to ensure that the two types of claim can cohabitate without one squishing the full legitimacy of the other.

This is, in a nutshell, how the Court has handled religious freedom claims when they conflict with identity-based claims. Viewing religion in the light of authenticity has, in this sense, presented the Court with a way out of the conundrum opposing equality to liberty by suggesting that, as long as equality protects the possibility for individuals to exercise their freedom in a way that allows them to self-define and live out their life in alignment with their autonomous self-definition, it is ultimately compatible with one fundamental way in which the human being makes use of its freedom.

Conclusion

Throughout this dissertation, I have offered an account of what I believe is the normative framework that informs the Supreme Court of Canada when it deals with claims for freedom of religion. In proposing my interpretation, I have drawn attention to the central role that the ideal of authenticity plays in the Supreme Court's reasoning regarding why religion is important to protect. My claim in calling attention to this ideal has been that, although authenticity already plays a significant part in rulings on religious freedom, the fact that we do not have a clear idea of how it impacts legal reasoning has led us to misinterpret and miscontextualize some of the most central issues in the field, leaving us with only a partial understanding of the Supreme Court's view of the place and role of religion in Canadian society. Specifically, I showed that it is possible to make sense of a number of areas of uncertainty in the literature on law and religion in Canada by considering the role that the individual conditions—introspection and integrity—and social conditions—dialogue and equality—of authenticity—play in Court rulings. This conceptual framework, which I have termed the authenticity framework, provides a coherent and meaningful lens to account for the way that the Court has decided to handle the right to freedom of religion since the adoption of the *Canadian Charter of Rights and Freedoms*, thus allowing us to grasp new and important nuances regarding the treatment of religion in Canadian law and to envision how future claims might be resolved.

One of the most consequential issues that the authenticity framework has allowed us to reconsider is the lack of distinctiveness of religion *vis-à-vis* identity-based claims. In Chapters 3 and 4, I highlighted that valuing religion as a source of authenticity for the believer has had the effect of concealing the features of religion that can be deemed unique to it, which in turn makes it more difficult to grant a robust protection to religion in law. Because the ethical value associated with religion lies not in what might be deemed particular to religion but rather in what religion *shares* with other characteristics that inform

our sense of self, religious freedom claims end up being considered analogously to equality or identity-based claims, regardless of religious freedom's status as a "fundamental freedom" in the *Charter*. This contextualization of the Supreme Court's particular valuation of religion underscores that the Court does not value *religious pluralism* specifically but values a much more general idea of *pluralism*; one which confers relevance to the manifold ways by which we individually identify, of which religion is *but one*. This conception of pluralism impacts the treatment of religion in Canadian law by stressing the importance not of protecting religion *per se* but of protecting primarily *equal access to authenticity*, which may imply limiting certain forms of religious expression.

There is certainly a strong case that can be made either for or against such a casting of religion in the liberal state, as the distinctivist and liberal egalitarian approaches covered in Chapter 3 illustrate. However, in order to formulate such a case, we need to be aware of the power of the ideal of authenticity in religious freedom jurisprudence. By building the authenticity framework and pinning down its impact on the Supreme Court's reasoning about religion, one of my goals has been to lead us to reflect on authenticity's potential for the future. In conclusion to this dissertation, I would therefore like to reflect on some of the assets and challenges of the authenticity framework for resolving future conflicts involving religion.

Let us begin with what I believe is a great strength of the authenticity framework. As I see it, authenticity provides a strong, accessible reason to protect religion—an asset which we ought not to neglect in an increasingly areligious society. I do not think that people need to be religious to empathetically grasp the importance of religion for believers' sense of integrity. In this sense, it seems to me that the authenticity framework holds much potential to safekeep the relevance of offering a solid protection to religion in Canada, even in the context of a shifting religious landscape. Obviously, judges do not base their decisions on whether a religious practice is socially accepted by a majority of Canadians, nor I am suggesting that they should do so. My point is perhaps more accurately put in the following way: the fact that the Supreme Court has associated religion to a value that possesses so much weight and significance in today's Western societies suggests that, for the Court, religion *is* deeply important to protect. As I see it, the Court's connection of

religion to authenticity can thus be read as signaling its will to renew its commitment to protecting religion in a highly diversified and increasingly areligious society. In this sense, the ideal of authenticity seems to have a lot to offer for the future of religious freedom.

Yet, as I demonstrated in the previous pages, there are practical repercussions of valuing religion as a source of authenticity on the legal acceptance of religion. One shortcoming of the authenticity framework for the resolution of conflicts involving religious freedom is that the Supreme Court's particular valuation of religion may not always sit comfortably with some believers' own experience of religion. While this situation is perhaps unavoidable in a religiously diverse society, the specificity of the Canadian legal context means that it will likely be more challenging for believers to receive protection for a religious practice that is difficult to reconcile with the constitutive elements of the authenticity framework. In what follows, I draw attention to three types of practices covered in this dissertation that may be placed at a disadvantage in the authenticity framework and reflect on the challenge that they pose for the coherence of this framework.

The "Upwards" Experience of Religion: Does it Still Count?

In Chapter 3, I identified one discrepancy between the Supreme Court's valuation of religion and believers' own experience of religion using the image of upwardness and inwardness. I pointed out that, while the ideal of authenticity requires individuals to turn "inwards" within the confines of their own mind, religion may at times be experienced by believers as a call to turn "upwards" towards a predefined image of the good. One example that I provided to illustrate this discrepancy was Saba Mahmood's study of Muslim women, whose understanding of their religious practice of wearing the hijab was explained as a matter of principles in the first instance and only secondly as a matter of integrity and sense of self. This type of religious practice, which accords importance to taking actions that are not necessarily relevant for the believer in the present with the view that they will become significant in the future, is not new or exclusive to Islam. For instance, early modern Catholic thinker Blaise Pascal suggested in his *Pensées* that acting "as if" you believed by "taking holy water, having masses said, and so on"[598] could naturally and mechanically

[598] Blaise Pascal, *Pensées*, trans. Jonathan Bennett (1660), Frag. Br. 233. https://www.earlymoderntexts.com/assets/pdfs/pascal1660.pdf.

make a person believe. In this scenario, people are invited to practice religion in order for religion to become meaningful to them at a later point in time. Highly ritualistic practices carried out of habit because they have profound meaning for the believer's self-understanding are other illustrations of how some may practice religion in a way that is somewhat detached from their sense of self.

These examples showcase how some believers' experiences of religion may fall in a category that is not relevant to authenticity and is, in this sense, difficult to reconcile with the framework guiding Canadian law. However, I think it is safe to assume that those who have recourse to the law to defend a religious practice that I would classify as a "primarily mechanical practice" could easily be viewed as testifying to the relevance of their religious practice to their sense of self simply by virtue of seeking legal protection for it. In this sense, while these types of practices may be overlooked by the authenticity framework, I do not believe that they represent a significant challenge for the authenticity framework despite its focus on introspection.

Per my reading, a real challenge lies with those whose religious practice leads them to favour abidance to a rigid "upwards" vision of the good rejecting the moral value of certain identities, in particular LGBTQ+ identities. I will call this type "prohibitive practices" to designate practices founded on the moral view that certain behaviours, specifically those that are tied to identities (e.g., gay, lesbian, transgender), are inherently objectionable or less valuable. This expression of religion is problematic in the authenticity framework because it works—directly or indirectly—to restrict people's ability to self-define based on their own subjective feelings. Instead of encouraging individuals to live in accordance with their subjectively defined sense of self, prohibitive practices encourage people to live in accordance with an "upwards" vision of the good that may require a person to change their relationship to their subjective emotions and to withhold certain feelings that they have about themselves, such as attraction to same-sex persons. Charles Guignon captures this tension between religion and authenticity quite well by explaining that authenticity idealizes self-possession and endowment while religion—at least in some forms—idealizes self-loss and releasement. In the logic of authenticity, he writes, "each individual already contains resources and potentialities that are worth expressing in his or

her activities in the world."[599] Religion, on the other hand, may at times "urg[e] you to look away from your own personal feelings and needs and to give your life over to something greater than yourself."[600] The two cases involving Trinity Western University's Covenant provide a good example of how a religious community may want to take active measure to encourage individuals to adopt behaviours—in this case, regarding sexuality—that align with its own "upwards" vision of the good and may therefore cast as inadmissible some behaviours, including behaviours that are tied to identity.

One asset of the authenticity framework is to provide us with some tools to respond to cases that frame religious liberty in opposition to equality by clarifying that one's right to religious freedom should not be exercised so as to deny other people's equal access to authenticity. This is admittedly not an "asset" for all insofar as many undoubtedly take issue with this aspect of the authenticity framework. What I mean by "asset," however, is "clarification": the authenticity framework provides us with some much-needed context around the use of what has been deemed amorphous and unsourced "*Charter* values" in religious freedom cases. It clarifies why and how *Charter* values can be mobilized against religious freedom claims, notably by spelling out that dialogue and equality, in particular, can and should be mobilized against religious freedom claims not because they are more important than religious freedom, but because they support—like religious freedom sometimes does—equal access to authenticity.

While this is an important clarification, it nonetheless leaves us in a predicament. The issue with this handling of prohibitive practices is that, by denying the right of religious communities to maintain norms or behave in a manner deemed discriminatory and wrong by others, we are concomitantly restricting their ability to self-define as a community and making it less and less easy for the members of these communities to exist in a space where they feel that they can be their authentic selves. In this sense, it is even possible to hypothesize that the fear of having no or too few spaces to exist as their authentic selves underlies much of the criticism formulated by scholars—especially Christian scholars—who defend a robust protection of religion against equality.

[599] Guignon, *On Being Authentic*, 7.
[600] Guignon, *On Being Authentic*, 7.

To be sure, my claim here is not that members of communities subscribing to norms that can be deemed discriminatory necessarily *experience* the difficulty to defend their prohibitive practices as an impediment to their sense of authenticity. As I argued above, this experience of religion precisely seems to be rooted in a logic different than that of authenticity, where the believer is led to look upwards rather than inwards to contemplate what is good. Yet the fact that this upwards experience of religion can coherently be *explained* in relationship to the realization of the ideal of authenticity represents a challenge for the authenticity framework. If those who endorse and wish to implement prohibitive practices are only able to operate within the bounds of their own tightly delimited community of faith, then perhaps their equal access to authenticity is unduly restricted.

My goal here is not to find a way around this situation, which I will have to leave aside for future work. Nonetheless, I think that it is important to acknowledge that while the authenticity framework clarifies the role that *Charter* values can play in Court rulings, it does not resolve the question of whether, and to which extent, those who do not recognize aspects of others' sense of self should themselves be free to self-define as a community.

The Discomfort with Self-Exclusion: What About Indigenous Peoples' Claims?

There is a third type of practices covered in this dissertation that does not sit well with the authenticity framework and which represents a challenge for the equal access to authenticity—this time for Indigenous peoples. This third type can be referred to as "self-exclusionary practices." In Chapter 4, I considered the unsuccessful case of Catholic parents wishing to exempt their children from a course presenting all religions on an equal footing on the basis that it would expose them to a form a relativism contrary to their faith. Through my analysis this case and other child education cases, I drew attention to the deep importance that the Court accords to dialogue and the possibility for children to mix with individuals of different faiths in order to become respectful citizens. I suggested that, if this possibility is considered unproblematic for the Court, despite parents' claims that it conflicts with their ability to transmit their religion to their children, it is because egalitarian dialogue is not considered a threat to the development of children's own sense of authenticity. On the contrary, being in contact with different others and various worldviews is naturally framed as positively enriching children's own self-awareness.

While the Court's emphasis on egalitarian dialogue and exposure to different others can be problematic for a number of religious parents of different faiths, I believe that it poses a unique problem when dealing with Indigenous peoples.[601] The specificity of the situation in this case is crucially linked to the broader context of forced assimilation suffered by Indigenous peoples throughout Canada since the arrival of European settlers. When thinking about authenticity and indigeneity in contemporary Canada against this backdrop, Indigenous peoples' ability to develop their sense of authentic self as members of their respective communities seems to me to be intrinsically liked to their ability to maintain their distinctiveness from general society. This makes self-exclusion not only a good tool to access a sense of Indigenous authenticity, but also an important one if we consider the continued impact of white colonization on Indigenous populations. Scholars of Indigenous Studies have argued in this sense, supporting the development and recognition of forms of self-governance for Indigenous peoples in Canada—a strategy that I would classify in the category of self-exclusion practices.[602]

Considering the importance of the land in Indigenous religions and spiritualities, and considering the fact that Indigenous peoples in Canada do not possess the vast majority of the land that they deem sacred,[603] it seems likely that the demands of Indigenous people to "be excluded" take the shape of claims to preclude land from consideration for human development or non-Indigenous access. However, these types of claims to "set aside" land from the general norms governing Canadian society are likely to be difficult to reconcile with the authenticity framework's demand to share the public sphere.

One illustration of this is *Ktunaxa*, the lost case of the Ktunaxa Nation against a development project on land that they believed was home to the Grizzly Bear Spirit.

[601] It should be noted that I have only considered how the requirement for dialogue impacts cases involving children and child education. I, therefore, did not produce an analysis of the Court's way of operating when adults are concerned. My hypothesis is that the role of dialogue is merely emphasized in child education cases. My claim on Indigenous people's right to religious freedom is based on this assumption that the Court would similarly be reticent—albeit perhaps less adamantly than in child education cases—to grant protection to a religious practice premised on the possibility of self-exclusion in cases dealing primarily with adults.
[602] See for instance Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2015); John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010).
[603] Bakht and Collins, ""The Earth is Our Mother": Freedom of Religion and the Preservation of Indigenous Sacred Sites in Canada."; Morales, "Ktunaxa and the Religious Freedom of Indigenous Canadians."; Michael Lee Ross, *First Nations Sacred Sites in Canada's Courts* (Vancouver: UBC Press, 2005).

Although the dissent in this case adversely depicted the Ktunaxa's claim as a request to be granted the "power to exclude others [from the land],"[604] the connection between the Ktunaxa Nation's religious beliefs and the land makes their claim a claim for self-exclusion: what the Ktunaxa were demanding was not really that people be excluded from the land, but that the land, as an integral part of their distinctive religion and spirituality, be excluded from consideration for human development. In this case, the Ktunaxa's distinctive relationship to the land and the Grizzly Bear Spirit can be cast as an essential element of their sense of self as members of their Nation. Their demand to exclude the Qat'muk mountain's territory from development projects, although it brought the focus away from themselves as religious claimants, can therefore be read as a demand to be excluded.

Viewed in this way, it becomes evident that allowing the land to be shared with others, in particular others who are not be willing to respect the Ktunaxa's beliefs regarding how the land may and may not be used, would harm members of the Ktunaxa Nation by depriving them of a meaningful source of distinctiveness. Indeed, the Court's unfavourable ruling in this case risked rendering rituals in honour of the Grizzly Bear Spirit meaningless and, by the same token, risked imping the Ktunaxa's ability to transmit these rituals and associated beliefs to future generations. Against the backdrop of the impoverishment of Indigenous cultures resulting from centuries of attempts at assimilation by white settlers, the Court's commitment to fostering dialogue through the sharing of the space in which we live poses a serious challenge for the equal access to authenticity of Indigenous peoples by denying them a crucial strategy to maintain a sense of distinctiveness. In order to live up to its own promise of ensuring equal access to authenticity, the Court would need to adjust or revisit how it applies the authenticity framework's requirement for dialogue in the context of Indigenous claims for religious freedom to ensure the continuity of an Indigenous difference.

The three types of religious practices covered above—which I have termed "primarily mechanic," "prohibitive," and "self-exclusion" practices—are among those that

[604] *Ktunaxa*, para. 150. The majority did not address this issue since it ruled that the claim was not admittable under section 2(a) and therefore did not procced to the balancing of interests.

I argued the Supreme Court of Canada is likely to believe are less crucial to protect in Canadian society. This does not make those practices less important to believers in Canada. What this review showcases is that the specific value that is attributed to religion in law impacts how the contours of the legal acceptance of religion in society are defined. As I aimed to show throughout this work, naming the value that is attributed to religion and situating the ramifications of this valuation on the handling of religious freedom claims is an essential step not only to fully grasping and making sense of the current issues in the field of law and religion but also to rethink how we criticize and want to address those predicaments. My hope is that this dissertation will serve to initiate a reflection on the role that the ideal of authenticity plays in religious freedom cases, as well as on whether this ideal possesses the capacity "to inspire our love, respect, and allegiance,"[605] as Charles Taylor puts it, with respect to the determination of the place and role of religion in contemporary Canada.

[605] Taylor, *Sources of the Self*, 96.

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