Perfect Strangers: The Social Dimension of the Law's Interaction with Religion in Canada

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TABLE OF CONTENTS

ABSTRACT

In this dissertation, I critically examine the way in which the law's interaction with religion is conceptualized and evaluated in the context of legal adjudication in Canada. My analysis unfolds through five chapters that explore different contexts and aspects of the law's encounter with religion. Each chapter addresses cases and draws on secondary literature related to the questions and challenges specific to the context being discussed. Together, the chapters provide a multivalent and rich understanding of the law's interaction with religion, analysing a broad range of philosophical, theoretical and social issues at play in the legal adjudication of religious claims. My analysis shows that there is a social dimension at the heart of the law's interaction with religion. Law and religion participate in common processes of social formation and interaction. Although they are autonomous fields of social life they are also interconnected. I argue that viewing the law's interaction with religion in light of its social dimension enhances our ability to understand and critically evaluate the legal adjudication of religious claims. Accounting for this social dimension in the context of legal analysis enables us to identify and face some of the foundational questions and challenges that arise in the process of adjudicating religious matters in law, many of which often go unnoticed. From here, the differences between law and religion, as well as the tensions arising from their interaction, can be framed in a way that is dialectical and mutually constitutive rather than static and isolating. As a whole, my analysis develops a unique way of thinking and talking about the law's encounter with religion in the context of adjudicating religious claims. I offer in this project a set of terms, concepts and ideas that foster and support an open, reciprocal, and integrative engagement between law and religion. In other words, my project recasts the interaction of law and religion in such a way that these perfect strangers can also be seen as friends.

RÉSUMÉ

Dans cette dissertation, j'examine de façon critique la manière dont l'interaction du droit avec la religion est conceptualisée et évaluée dans le contexte de l'adjudication juridique au Canada. Mon analyse se déroule à travers cinq chapitres qui explorent différents contextes et aspects de la rencontre du droit avec la religion. Chaque chapitre examine des études de cas et s'appuie sur la littérature secondaire liée aux questions et aux défis spécifiques au contexte traité. Ensemble, les chapitres fournissent une compréhension polyvalente et riche de l'interaction du droit avec la religion, analysant une large gamme de questions philosophiques, théoriques et sociales en jeu dans l'adjudication juridique des revendications religieuses. Mon analyse montre qu'il y a une dimension sociale au cœur de l'interaction du droit avec la religion. Le droit et la religion participent aux processus communs de formation et d'interaction sociales. Bien qu'ils soient des domaines autonomes de la vie sociale, ils sont également interconnectés. Je soutiens que l'observation de l'interaction du droit avec la religion à la lumière de sa dimension sociale accroît notre capacité de comprendre et d'évaluer de manière critique l'adjudication juridique des revendications religieuses. L'inclusion de cette dimension sociale dans le contexte d'une analyse juridique nous permet d'identifier et de faire face à plusieurs questions et défis fondamentaux qui arrivent dans le processus de l'adjudication juridique des questions religieuses, dont beaucoup passent souvent inaperçus. D'ici, les différences entre le droit et la religion, ainsi que les tensions qui découlent de cette interaction, peuvent être encadrées d'une manière dialectique et mutuellement constitutive plutôt que statique et isolante. Dans l'ensemble, mon analyse développe une approche unique pour penser et parler de la rencontre du droit avec la religion dans le contexte de l'adjudication des revendications religieuses. J'offre dans ce projet un ensemble de termes, concepts et idées qui favorisent et soutiennent un engagement ouvert, réciproque et intégrant entre le droit et la religion. Autrement dit, mon projet refond l'interaction entre le droit et la religion de telle manière que ces parfaits inconnus puissent aussi être considérés comme des amis.

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When I began working on this dissertation project I had a strong sense of independence and a desire to carve my own path. Along the way I discovered that writing a dissertation is an odd mixture of solitary effort and community support. Looking back now it is obvious that the development of my own ideas, including my reading, thinking and writing, would depend in many ways on those around me. The insights, encouragement and support that I received from others were indispensible to the formation and writing of this dissertation project. I find it difficult now to look back and identify all of the people who participated somehow in the writing process. In what follows I will acknowledge a few that stand out as particularly significant, while recognizing that there are many others who could also have been mentioned as well.

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INTRODUCTION

"We sometimes encounter people, even perfect strangers, who begin to interest us at first sight, somehow suddenly, all at once, before a word has been spoken." [1]

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This project aims to develop our understanding of the interaction between law and religion and to link this understanding into legal analysis and critical discussion of the law. Evaluation of the relationship between religion and law tends to focus on substantive questions of religious accommodation and legal jurisprudence. Deeper questions regarding the foundational elements of the relationship remain relatively untouched. But these questions are extremely important for understanding and critically evaluating the law's encounter with religion.

A close examination of Canadian jurisprudence reveals that the approach taken for adjudicating religious issues and claims is problematic. There is an air of intractability in the way the issues are dealt with, both in the sense of unmanageability as well as inflexibility. Finding within the contemporary laws of the state a 'right', objective and neutral answer to religious issues and claims remains elusive. Reasons are asserted but run out for why the court does what it does when it is dealing with religion. I argue that these problems arise when courts avoid or displace, rather than address, the core and fundamental questions that arise from the law's encounter with religion. This can be seen in the way that religious issues and claims are framed as well as in the way that law's adjudicatory role is framed. An incomplete account of what is at stake is given because ideas necessary to fully engage religion and religious issues in the law are denied a place in the conversation.

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[1] Fyodor Dostoevsy, *Crime and Punishment*, translated by Richard Peaver & Larissa Volokhonsky (New York: Alfred A Knopf Inc., 1992) at 11.

[2] See e.g. Harold Berman, "The Religious Foundations of Western Law" (1975) 24 Cath U L Rev 490; and Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass: Harvard University Press, 1983) (Berman traces the complex history of distinguishing the church and state, and religion and law, as the foundational frame of reference for understanding the Western Legal Tradition). Also see H Patrick
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I argue that our focus in exploring the relationship between law and religion should turn to the *nature of the interaction* between them. In particular, it is necessary to expand the way we think about law's interaction with religion to include its social dimensions. Paying attention to the social dimension shows that the interaction between law and religion is *dialectical*, not linear. The interaction involves a range of communal, institutional, symbolic, relational and discursive elements. I argue that if we turn our focus to the social dimension of the law's interaction with religion then we will better see what is at stake in the legal adjudication of religious matters.

In this project I argue that law and religion participate in common processes of social formation and interaction. Although they are autonomous fields of social life they are also interconnected. Law and religion are commonly seen (and see each other) as 'perfect strangers,' which is to say that they are totally unrelated to each other. But the idea of a perfect stranger can also be used to convey something quite different—that although the two are completely unrelated in one sense they are perfectly matched in another. Sometimes total strangers make the best of friends, not because they are not different but because they share something that reaches beyond their differences. Casting the relationship between law and religion in terms of the social dimension of their interaction emphasizes their connectivity rather than their difference. This does not deny difference and tension between them, but rather steeps the tension in the social dimension that they share through their interaction. This dynamic encounter is the grounding point where the 'perfect strangers' of law and religion can also be friends.

Developing an understanding of the social dimension of the law's interaction with religion helps us to better understand *descriptively* what is going on when the law addresses or deals with religion and religious claims. Beyond description, it also provides a *critical* perspective from which to analyse and respond to the way that the law deals with religious claims and the way that the interaction between law and religion is conceptualized. These descriptive and critical insights are related. Exploring the social dimension of the law's interaction with religion reveals the troubles with precluding or withholding the social dimension from legal analysis. This applies not only to issues pertaining to the nature of religious claims but also to the process of taking up these claims in the context of the law, including the presumptions and particular conceptions about the nature of the legal adjudication of religious matters.

In order to fully understand and evaluate the law's adjudication of a religious matter it is vital to account for the social interactive dimension involved in the encounter. Doing so enables

us to identify and to face the foundational questions and challenges that arise in the process of adjudicating religious matters in law. Placing the social interactive dimension at the heart of legal analysis enriches our understanding of the law's adjudicative role and provides a fresh perspective on the law's relationship with religion.

1 THE CHALLENGE OF DEFINING THE LAW'S ENGAGEMENT WITH RELIGION

The Western Legal Tradition is permeated by a sense that law and religion are separate and distinct.[2] The way in which this separation is understood makes it challenging to think about the law's interaction with religion. The problem is not that law and religion are different, as indeed they are. Rather, difficulties arise from the way that the differences are articulated and the way that these differences are thought to impact the law's encounter with religion.

Common descriptions of law and religion portray them as fundamentally in opposition with each other—there is a wall, two swords, two cities, rival normative systems, contrary comprehensive claims, separate spheres, etc. Framing the differences between law and religion in oppositional terms portrays law and religion as static entities and casts their interaction as a conflict in need of resolution. When this view of the interaction is brought into the context of legal adjudication of religious claims a number of problems arise. Primary among them is the way in which the relationship between religion and law comes to be seen as a matter of legality. In my view, the problem is not that the law has a decision-making role in relation to religious claims, but rather that the legal decision-making role is perceived as the natural and decisive mode for resolving the conflicts between law and religion. This causes a specific type of analytic blindness. The force and effects of the legal perspective and the foundational presumptions that provide the framework for the legal analysis of religious claims escape critical reflection. The result is that the dynamic elements and possibilities of addressing religious matters through legal adjudication are overlooked.

[2] See e.g. Harold Berman, "The Religious Foundations of Western Law" (1975) 24 Cath U L Rev 490; and Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass: Harvard University Press, 1983) (Berman traces the complex history of distinguishing the church and state, and religion and law, as the foundational frame of reference for understanding the Western Legal Tradition). Also see H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 5th ed (Oxford: Oxford University Press, 2014) (reminding us that the Western Legal Tradition is not a monolith but is composed of a variety of traditions).

The Right Honourable Beverley McLachlin, the former Chief Justice of Canada, put her finger on the issue when she described the relationship between the rule of law and religious claims as a "dialectic of normative commitments."[3] She argued that the rule of law and religious commitments both constitute comprehensive worldviews, which make strong claims that affect all areas of life. She argued that their inevitable clash on matters pertaining to justice, morality and social values produces tensions that a liberal state must reconcile.[4] In her view the courts of law have a primary role in doing this.[5] The role of the courts is to help the law in the task of "carving out a space within itself" for religion to flourish.[6] This task, she said, is paradoxical because law and religion are quintessentially distinct things. The rule of law is "itself an all-encompassing authoritative system of cultural understanding" and religion involves "practices and beliefs sourced in a wholly extra-legal authority."[7] Resolving the tensions between them is a matter of "balancing competing cultural values", which means to recognize the dignity of religious individuals and communities bound to a religious worldview and ethos "without compromising the integrity of the rule of law and the values for which it stands."[8]

Chief Justice McLachlin's commentary correctly identified a couple of key features of the law's encounter with religion but ultimately failed to recognize their full implications. She recognized the complexity and dynamism of the law's encounter with religion but struggled to transfer this into the context of the legal adjudication of religion. I do not take Chief Justice McLachlin's view to be exhaustive or directive, but it does exemplify the challenges faced when framing law's encounter with religion within the context of legal adjudication. Looking at her formulation we see significant philosophical and social issues operating in the background, which affect the way that the encounter appears in the legal context. Reflecting briefly on this will help outline the contours of my analysis and argument.

Law and religion are indeed both 'comprehensive' worldviews and their intersection is a dialectic encounter. Law is not just a system of rules, an empty structure for managing conflicts formally, but is also itself some kind of a worldview with its own ethos, aesthetic, epistemology,

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[3] The Right Honourable Beverly McLachlin, PC, "Freedom of Religion and the Rule of Law: A Canadian Perspective" in Douglas Farrow, ed, *Recognizing Religion in a Secular Society: Essays in Pluralism, Religion and Public Policy* (Montreal: McGill-Queen's University Press, 2004) 12 at 21.
[4] *Ibid* at 22.
[5] *Ibid* at 22, 28.
[6] *Ibid* at 16 and 20.
[7] *Ibid* at 28.
[8] *Ibid* at 28.

metaphysic, etc. This has been called the "culture" of the rule of law.[9] Likewise, religion is more than a set of doctrines, norms and rituals but is also, like law, a culture, a way of knowing the world as 'real', and a way of thinking about and addressing the world.[10] The rule of law is not comprehensive in the sense of managing everything through rules and principles.[11] But it *is* comprehensive in terms of the effect that its culture and worldview has on the way that things are perceived and addressed. Religion is comprehensive in the same kind of way as the rule of law. From this view, tensions will indeed arise when law and religion converge on particular issues. They conceptualize disputes and their solutions differently because they have different ways of understanding and responding to the world.

The recognition that law and religion are both comprehensive worldviews identifies a deep similarity between them, which helps frame the nature of their encounter and how to manage the tensions that arise between them. Framing the encounter as a dialectic encounter, as Chief Justice McLachlin did, is a good starting point because it suggests that the resolution of difference requires synthesis rather than choosing one perspective over the other. This is particularly important in the context of the encounter between law and religion because it recognizes that neither perspective is able to capture the fullness of the other. Each worldview has an impact on the way that the other is perceived and their differences approached. Framing the encounter as a dialectic engagement between two cultures or worldviews means that the differences and tensions between them must be resolved by a sophisticated synthesis of mutual recognition and exchange. Synthesis is not simply finding a halfway point between them or combining equal measures of both perspectives. It rather involves some kind of integration.

Dealing with the dialectic encounter of law and religion in the context of legal adjudication is extremely challenging. Addressing the conflicts emerging from the law's encounter with religion requires deep engagement with the historical, philosophical and conceptual foundations of the encounter. In other times and places, resolution of important issues

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[9] See Paul W Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1997) at 6; and Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at 17, 35—61. Also see Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective" in *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) 167 at 173.

[10] See Clifford Geertz, "Religion as a Cultural System" in *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973) 87.

[11] The notion that law and religion are "comprehensive" worldviews was helpfully qualified by Jean Bethke Elshtain, "A Response to Chief Justice McLachlin" in Farrow, *supra* note 3, 35.

like this would involve the participation of the whole of society through a collective dialogue between philosophical, religious and political voices.[12] With more than a hint of irony and scepticism, Alasdair MacIntyre noted the effect of deferring these issues to the courts and the legal systems of western liberal societies:

> What has become clear, however, is that gradually less and less importance has been attached to arriving at substantive conclusions and more and more to continuing the debate for its own sake…. The function of that system is to enforce an order in which conflict resolution takes place without invoking any overall theory of the human good. To achieve this end almost any position taken in the philosophical debates of liberal jurisprudence may on occasion be invoked. And the mark of a liberal order is to refer its conflicts for their resolution, not to those debates, but to the verdicts of its legal system. The lawyers, not the philosophers, are the clergy of liberalism.[13]

The point that I want to draw out here is not a refutation of liberalism, as MacIntyre proposed. Instead, I want to call attention to the negative and constrictive consequences of imagining the law's encounter with religion, and framing the adjudication of religious claims, from the limited perspective of contemporary state law.[14] Deferring to the restricted procedures of legal argument does not avoid the deep philosophical and conceptual issues at stake but transforms them into a particular legal form. The concepts and conclusions emerging from the courts of law shape the social reality in which the law's encounter with religion occurs. That is why MacIntyre called lawyers the "clergy of liberalism." The complex dialectic of the law's encounter with religion appears as a legal conflict subject to legal solutions.

I believe that the problem arises not from the legal adjudication of religious matters *per se*, but rather when the dialectic encounter of law and religion and the legal adjudication of religious claims are framed in a way that fails to account for the complex cultural and social forces at work in the encounter and the process of adjudication. Legal adjudication operates within the world of law, subject to the cultural forces that shape the way the world (including religion) appears. It is very difficult from this position to press out beyond the unspoken presumptions and invisible forces that guide the conversation about the law's encounter with

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[12] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame: University of Notre Dame Press, 1988) [MacIntyre, *Whose Justice?*].
[13] *Ibid* at 344.
[14] See e.g. Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982) (providing a broad critique of the prevailing Rawlsian conception of liberal justice, where justice is thought to be found in transcending the goods embodied in comprehensive worldviews, as an incoherent account of the nature and role of individual subjects and communities in the pursuit of justice).

religion. But it is crucial to identify and address these presumptions and forces. Failing to do so severely restricts the scope by which the tensions emerging from the law's encounter with religion are understood and resolved.

When Chief Justice McLachlin framed the dialectic encounter as between "normative commitments", the meaning of the dialectic encounter and synthesis of law and religion was rather severely restricted. The dialectic encounter was portrayed as a quintessentially *legal* interaction rather than as a cross-cultural encounter. The dialectic synthesis of law's encounter with religion became a matter of "carving out a space" for religion within the rule of law. Viewed in this way, the encounter appears only through the procedures, values and mechanisms of the constitutional legal process. The integrity of the law, its values and objectives, become primary. Recognition of the dignity of the religious worldview is reduced to a matter of individual normative commitment, which ultimately gives way to the integrity and values of the rule of law.

The complexity of the law's encounter with religion is not easily squared with the *legal* approach to religion and religious claims. The challenge is to resist reducing the complex cultural dimensions of the encounter in order to find a synthesis or a solution that fits neatly within the prevailing legal framework of analysis. Failing to attend to these complexities turns the interaction *between* law and religion into an interaction *within* the culture and worldview of the rule of law. It is crucial to work toward seeing law from a point of view that can account for the full range of forces at work in the law's encounters with religion. The goal, therefore, is to develop an approach within the context of law that fosters an awareness of the cultural dimension of both law and religion *and* recognizes the adjudication of religious claims as a manifestation of the culture of the rule of law.

Viewing the law's dialectic encounter with religion in a more fulsome way requires uncovering the limitations in the way it is approached and finding a way to look beyond these limitations. It is necessary to attend to the *cultural forces* of law and religion in the way that each gives shape to the world—that is, to see them as cultural entities encountering each other. This means that the legal adjudication of religion and religious claims is a point of dialectic encounter between the legal way of seeing the world and the religious way of seeing the world. It is also necessary to view the resolution of conflict in similar terms. Synthesizing the law's encounter with religion is a complex process of interaction that cannot be reduced or simplified into terms

exclusive to either law or religion. Recognizing this when exploring the law's encounter with religion reveals elements, dynamics, or a dimension, in those conflicts that are otherwise difficult (or impossible) to see. Until we can account for it in our analysis of law we will always be looking at the law's encounter with religion and the adjudication of religious claims with one eye closed.

The existing scholarship regarding the cultural dimension of law's encounter with religion helps frame the central concern of my project.[15] When a court is dealing with a religious claim, when there is a moment of encounter in a legal context, how can we see that moment as a reflection of the encounter between comprehensive cultural and social forces? How do we then take the encounter between law and religion, in the richness of its dialectical cultural dimensions, and reflect it into the way we analyse and critique particular cases when a court of law is dealing with a religious claim?

2 APPROACHING THE ENCOUNTER THROUGH ITS SOCIAL INTERACTIVE DIMENSION

I argue that turning to explore the nature of the interaction in the law's encounter with religion expands the way we see these encounters in the legal context. Focusing attention on what I call the social interactive dimension to the law's encounter with religion enables us to re-frame the legal adjudication of religious claims and the way we imagine the relationship between law and religion. This creates an opportunity to more fully integrate the complex dynamics of dialectic encounter between law and religion into the analysis and critique of the legal adjudication of religion.

The issues that arise when the law engages with a religious claim include questions such as the division between public and private, the nature of the legal professional community, the shape and boundary of legal institutions, the nature of religion, religious beliefs, religious actions and religious communities. These questions feed into deeper philosophical and theoretical issues about the nature of community, how institutions are created and interact with other institutions, how institutions intersect with a larger social background. This also opens up questions about

[15] I have already identified above, at pages 4—5 (esp. note 9), Kahn and Berger as the chief voices on the subject of the cultural dimension of law's interaction with religion. This conversation is the context within, or background against, which I propose my own analysis. I detail in the following section how my project takes up and carries forward this conversation in a new direction.

"what is meaning" and how do we produce different forms of meaning. All of these questions come to bear when law deals with questions about religion, religious claims or religious freedoms. Even though they are in the background, and they exercise a varying amount of influence over the particular question that is before a court, all of these things are present and they need to be accounted for.

I take these types of questions and trace the social dimensions in them in order to re-frame the relevance and importance of the background philosophical, theoretical and social issues for the way that law adjudicates religious claims. I use case studies and the ways in which they address these questions to reflect back on how we think about the relationship and interaction between religion and law. The theoretical ideas that I explore and the cases that I examine shed light on the nature of legal discourse, on ideas about legal community, and on the way that religion and religious claims are conceptualized and enter into the law, legal analysis, legal community and legal institutions.

My use of the "social dimension" of the interaction of law and religion is part of a larger theoretical approach to the cultural study of law pioneered by Paul Kahn in his book *The Cultural Study of Law*[16] and developed by Benjamin Berger in his analysis of law and religion in Canada.[17] For Berger, the interaction of law and religion is a boundary that is structured by the cultural horizons of law. This boundary represents the way in which the "fundamental conditions of thought and perception [of law] fashion the framework for the interaction of religion and the constitutional rule of law."[18] The resulting "aesthetic of religious freedom," which guides Berger's analysis, is a cultural formation of the law. It is a story that is necessarily incomplete, incapable of capturing a range of experiences connected to the religious ordering of space and time.

I am drawn to this metaphor of a boundary between law and religion, but I approach it from a different angle than does Berger. Whereas Berger approached the 'boundary' in terms of the cultural forces of law, I focus instead on *the social nature of the interaction* that occurs at the boundary between law and religion. This is not contrary to the projects of Kahn and Berger, but is a complementary way of carrying out a similar task. Awareness of the cultural force of law is crucial for understanding the law's interaction with religion. But understanding the nature of the

[16] Kahn, *supra* note 9.
[17] Berger, *supra* note 9.
[18] *Ibid* at 40.

interaction itself requires a slightly different and more specific analysis. Speaking about "culture" implies focusing on distinct cultural formations. Looking at the "social" and "interactive" dimension of the law's encounter with religion, as I do, focuses attention more on the processes at work *between* law and religion, including the relational, dialectical, symbolic, communal and institutional elements at work.

The result of analysing the social interactive dimension of law's encounter with religion is to move from seeing the encounter as a point of conflict that is closed and exclusionary to seeing it as something shared and mutually constitutive. This shift in re-conceptualizing the "boundary" as a social interaction echoes a similar shift proposed in the field of sociology away from trying to build bridges between cultures to exploring the shared spaces within which different cultures appear. In this spirit Gupta and Ferguson proposed,

> [To move] away from seeing cultural difference as the correlate of a world of "peoples" whose separate histories wait to be bridged by the anthropologist and toward seeing it as a product of a shared process that differentiates the world as it connects it… [I]f we question a pre-given world of separate and discrete "peoples and cultures," and see instead a difference-producing set of relations, we turn from a project of juxtaposing pre-existing differences to one of exploring the construction of differences in historical process.[19]

This theme of the "shared process" that differentiates as it connects is important to my analysis. Framing the interaction between law and religion in this way emphasizes the social *construction* involved in social *interaction*. The processes of social construction of 'law' and 'religion' and the process of social interaction between law and religion are linked. Law and religion both ascribe special meaning to things, which constitutes a socially constructed reality. These meanings and their corresponding realities are grounded in the lives of communities. They both struggle constantly to define the boundaries of community belonging and identity, which are always moving and being pushed and pulled through interaction between law and religion, as differing perspectives.

This shared social interactive process involves engagement among multiple parties and perspectives. The 'communities' connected to the systems of 'law' and 'religion' are not something existing 'out there' on their own, but rather are constructed through the interactions

[19] Akhil Gupta & James Ferguson, "Beyond 'Culture': Space, Identity, and the Politics of Difference" (1992) 7:1 Cultural Anthropology 6 at 16.

and conflicts with each other in regard to specific contexts. As law and religion interact with each other they engage in a process of creating something together. This, I argue, casts the adjudication of religious claims as a social and communal formation. Approaching the law's interaction with religion in this way re-frames the law's decision-making activity regarding religious claims as a "mutually constitutive process of becoming, interpenetrating and interrelating instead of application of principle."[20]

There are normative implications for the stories we tell about the interaction between law and religion, which can be identified in relation to the processes and conditions by which the interaction takes place. The social dimension captures the processes internal to law and religion as well as the processes between them. The social dimension of the interaction also brings into view a range of relational and conceptual elements that affect the outcome of the interaction. These elements allow us to critically consider the character of the community produced by the adjudication of religious claims, which responds to the problems discussed earlier with taking the internal perspective of the law as the basis of analysis. Seeing the law's encounter with religion as a social process of interaction sees the legal understanding of the encounter as a product of the social interaction, not standing separate and apart from it.

The ways that the relationship and interactions between law and religion are conceptualized affect the way that law addresses religious claims. The stories we tell about the interaction between law and religion are central to the analysis of the law's dealings with religion. As Winnifred Fallers Sullivan observed, "How courts talk about religion is critical because the texture of the public discourse about religion creates a culture about religion. Peoples' lives are given meaning in the spaces created by words."[21] The stories we tell, and especially the stories told by courts, are not mere descriptions of the interaction between law and religion. They actually help to shape the way that the interaction takes place. Stories provide the linguistic and conceptual scaffolding by which the interaction is able to occur. These stories reflect a way of making sense of the world around us.

The purpose of my argument is not to propose a particular principle or rule that leads to a desired result (to increase religious freedom, for example). To do so would only perpetuate the problem that my analysis uncovers. Instead, the hope is to re-tell the story of law's interaction

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[20] James MacLean, *Rethinking Law as Process: Creativity, Novelty, Change* (Abingdon: Routledge, 2012) at 5.
[21] WF Sullivan, "A New Discourse and Practice" in Stephen M Feldman, ed, *Law and Religion: A Critical Anthology* (New York: New York University Press, 1999) 35 at 41.

with religion through the adjudication of religious matters in a way that is truly dynamic and not static. I believe that this will increase our critical capacity to evaluate cases where law adjudicates issues and claims grounded in religion and to make these encounters more fruitful.

3 METHOD AND ANALYSIS OF THE PROJECT

There are a number of ways that these complex ideas could be explored. The method of analysis that I have chosen for this project is to look in each chapter at different contexts of the law's encounter with religion in legal adjudication. Each chapter explores the social interactive dimension at work in each context through a discussion of a variety of related cases and secondary literature. The chapters are not a linear progression through an argument, and none of them captures or exhausts the subject. They all do, however, share a common condensation point, exploring the same dynamic at work in the law's interaction with religion as it appears in the various contexts and challenges. Each chapter provides a particular line of sight into the social interactive dimension of the legal adjudication of religious claims. When taken together they offer a robust and multivalent view of the law's encounter with religion.

The method of analysis that I use is a demonstrative, deconstructive and discursive investigation. It highlights aspects of the law's encounter with religion that often go without discussion, either because they simply escape our vision or because they are supressed by other dominant presumptions and ideas about legal adjudication and the adjudication of religious claims. I will not posit at the beginning a specific hypothesis that will be tested and evaluated because "The ground on which [the analysis] rests is the one that it has itself discovered."[22] With this method of analysis the particular rules, principles and outcomes of the cases discussed are less important than the ways in which they illustrate the social interactive dimension of the adjudication of religious claims. The cases and secondary sources discussed are illustrative and demonstrative, not conclusive or exhaustive. They provide an opportunity to reflect on how the relationship and interaction between law and religion is understood and how it might be re-imagined.

[22] Michel Foucault, *The Archaeology of Knowledge*, trans by A M Sheridan Smith (London: Routledge, 2002) at 17.

Tracing the social interactive dimension in the various contexts, cases and literature discussed in the different chapters reveals the importance of background philosophical, theoretical and social issues for the way that law adjudicates religious claims. In doing this the discussion directly confronts the challenges raised by the dialectic encounter between law and religion in the legal context. I argue that approaching these challenges through the social dimension of the law's interaction with religion, how it is accounted for or fails to be accounted for in legal analysis, allows us to imagine more fruitful engagements between law and religion in legal adjudication.

The challenges that the chapters address include: 1) the challenge of accounting for the communal aspect of the interaction of law and religion; 2) the challenge with drawing an institutional boundary marker between law and religion through the principle of justiciability; 3) the challenge faced in the way that law apprehends religion for the purposes of addressing religious claims; 4) the challenge of accounting for the background issues related to balancing religious claims with other rights claims; and 5) the challenge of accounting for the relational dynamics at play when developing the linguistic and communal common ground needed to resolve conflicts involving religious claims.

Although the chapters do not follow a linearly progressing argument, there is an overarching movement between them. The first three chapters consider the social dimension of the interaction in graded steps. In the first chapter I begin with the interaction between law and religion as one occurring in relation to community boundaries. The discussion introduces some of the big themes recurring in the other chapters, such as interactive process, social construction, dialectic encounter, symbolic meaning, community ethos and participation. The second chapter takes a more focused approach to the boundary between law and religion in relation to the idea of determining the justiciability of religious matters. The discussion develops the existential and institutional aspects of the law's interaction with religion. In the third chapter the discussion shifts to consider the conceptual gap between law and religion and what it might look like to bridge that gap. I explore the social-symbolic process of meaning formation as a way re-frame the way we understand and evaluate the law's adjudication of religious matters. The final two chapters apply the same themes found in the first three chapters to the context of the constitutional balancing of religious claims against other rights and social interest. This produces a discussion about how we understand the resolution of religious claims through the process of

legal adjudication. In chapter 4 the philosophical basis of balancing and legal adjudication are put into question in order to consider a new framework for synthesizing religious and other rights. Chapter 5 develops the process for synthesizing religious and other rights by re-framing an example of the legal adjudication of a religious claim into social interactive terms.

There are a few key conversation partners in the dissertation, who have had a significant role in developing the themes and analytic approach of the project. One, who has already been mentioned, is Benjamin Berger. His work on the cultural study of the law and religion in Canada has been instrumental in shaping my analytic focus on the dimensions of the law's interaction with religion that are distinct from the internal mechanics of legal rules and principles.[23] There is a cluster of authors that I engage with to develop the idea of what I refer to as the 'social interactive' dimension of law's encounter with religion. These include primarily Ernst Cassirer, Peter Berger & Thomas Luckmann, and Anthony Cohen.[24] Cassirer appears directly in the text only in chapter 3, but his philosophy, which offers a point of reference for reflecting on the law's social interaction with religion in terms of symbolic forms of meaning, casts its shadow over the entire project. The same could be said for Berger & Luckmann, who provide a general sociological theory of the social construction of meaning through the interaction of social institutions, and Cohen, who very helpfully crystalizes some of these themes in the dynamic intersection between communities.

Two other theorists who have had a particularly significant impact on my analysis are Alasdair MacIntyre and James Boyd White.[25] Through their ideas we get a rich view of the potential of legal decision-making not only as a pragmatic tool but also as a unique form of conversation that connects and navigates between the relative contextual and universal aspirations of the just, right and good. Through my engagement with these two theorists I develop the 'normative', rational, critical and discursive aspect of the analysis of the law's interaction with religion (featured in chapters 4 and 5). I use MacIntyre's theory to identify and

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[23] Berger, *supra* note 9.

[24] See Ernst Cassirer, *An Essay on Man: An Introduction to a Philosophy of Human Culture* (New Haven: Yale University Press, 1944) and *The Philosophy of Symbolic Forms, Vol 1: Language*, trans by Ralph Manheim (New Haven: Yale University Press, 1953); Anthony P Cohen, *The Symbolic Construction of Community* (London: Routledge, 1985); and Peter L Berger & Thomas Luckmann, *The Social Construction of Reality: A Treaties in the Sociology of Knowledge* (New York: Anchor Books, 1967).

[25] Especially Alasdair MacIntyre, *After Virtue, 3d ed* (Notre Dame: University of Notre Dame Press, 2010); MacIntyre, *Whose Justice?*, *supra* note 12; and James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990).

challenge presumptions that affect the way the process of rational decision-making in law is understood, showing that it is possible to develop a unified discourse that holds together radically different perspectives. I use White's idea of law as translation to highlight the relational and participatory features of an integrative view of legal adjudication and its application to the law's encounter with religion. White is particularly useful for re-casting the analysis of specific cases, which I do in chapter 5.

Many of the cases I discuss in the project are the "usual suspects" of the topics of religious freedom and religious institutions in Canada. The choice of cases discussed—both the cases given particular attention as well as those that are left out of the discussion—is a reflection of the method of the analysis and argument of the project. The cases featured in the text were chosen because of the way that they demonstrate and illustrate the social interactive dimension of the law's encounter with religion. It is entirely plausible that different cases could have been selected and a similar argument and analysis conducted. The consequences of case selection would be much different if the purpose of the project was to construct a particular theory or overview of the state of the law in Canada regarding law and religion. But it is not. Rather, the purpose of the project is to explore and to understand the nature of the law's encounter with religion in terms of the legal adjudication of religious matters. It is for this purpose that the cases were selected.

One set of cases that I found particularly relevant and warranting extended attention are those regarding the dispute over the accreditation of Trinity Western University's (TWU's) proposed law school.[26] This is one of the most cogent examples demonstrating and illuminating the social interactive dimension of the law's encounter with religion. The dispute involves a fairly direct conflict between law and religion, which is actually quite rare in the jurisprudence. The lawsuit is between TWU and the law societies that object to accrediting TWU's proposed law program. The conflict engages a broad range of the social interactive elements that my analysis explores. There are institutional, communal and conceptual dimensions, as well as issues related to the discursive and structural dimensions of the process of legal adjudication. I separate these issues into two separate chapters, which I use to open and close the project.

[26] *Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326, aff'd 2016 BCCA 423, 405 DLR (4th) 16; *Trinity Western University v Law Society of Upper Canada*, 2015 ONSC 4250, aff'd 2016 ONCA 518, 131 OR (3d) 113; *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25, aff'd 2016 NSCA 59.

It should be noted that I do not engage with the decisions of the Supreme Court of Canada on the TWU dispute.[27] This is for three reasons. The first reason is pragmatic: the SCC decisions were not available in time for me to include it in a comprehensive way.[28] The second reason is also pragmatic: The SCC judgments, which upheld the decisions of the law societies to refuse to accredit TWU's proposed law school, are long and complex. The majority decision (of five justices) was supplemented by two separate concurring opinions (each employing fairly distinct approaches) and a very strongly worded dissenting opinion that sharply criticized the majority reasoning. Wading through the points of controversy, convergence and divergence within the SCC decisions regarding the meaning and application of the jurisprudence would not advance but distract from the argument of this dissertation. Although the jurisprudential puzzle presented in the SCC decisions would prove fruitful for a more traditional legal analysis, my dissertation project is oriented differently. This leads to the third, and most important, reason for not engaging with the SCC decisions in my discussion: it is the *process* of the law's interaction with religion that is under investigation and *not the results* of particular cases. Although grappling with the SCC decisions would no doubt have been relevant to my argument, it is not actually necessary for the analysis or argument of the project as a whole. Leaving the SCC decisions aside and focusing on the earlier stages of the dispute directs our attention away from trying to decipher the right legal answer to the case and toward understanding the "deeper and more constitutive"[29] social dimensions of the law's encounter with religion.

It is worth emphasizing that although the decisions of the SCC are the final word on the particular facts of the litigation, they are by no means the last or definitive words on TWU's relationship with Canadian *Charter* jurisprudence, its place in Canadian society or its relation to the legal profession.[30] The SCC decisions will profoundly shape the relationship between TWU and the law societies as well as the legal doctrines of religious freedom and administrative law.

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[27] *Law Society of British Columbia v Trinity Western University*, 2016 SCC 32; *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33.

[28] The litigation over the accreditation of TWU's proposed law school was active when I was writing my project. The Supreme Court of Canada heard the appeals from BC and Ontario jointly on November 30 and December 1, 2017. The SCC did not release its decision until June 15, 2018, which is when I was finalizing the project.

[29] Perry Dane, "Master Metaphors and Double-Coding" (2016) 53 San Diego L Rev 53 at 55.

[30] This is evident in the fact that TWU has now appeared before the SCC twice in 20 years to litigate very similar questions regarding the accreditation of one of its programs. The current cases have to do with the accreditation of TWU's proposed law school by the law societies of Ontario and British Columbia. The previous case, *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772, had to do with the accreditation of TWU's teacher training program by the British Columbia College of Teachers.

However, it is crucial to also look beyond what the SCC decisions mean for the future of the TWU law school and the legal doctrines at stake, and to consider how the decisions will affect the ongoing intersections between religious communities and the institutions of state law more generally. The analysis I offer in this dissertation, including the discussion of the early stages of the TWU dispute, provides a starting point for this type of examination and evaluation of the SCC decisions. Stated differently, the SCC's decisions regarding TWU's proposed law school are perhaps best seen as a marker along the road of a long journey. As important a marker as the decisions might be, I believe that it is crucial to turn our attention to the *road* and the *journey*. The way that I analyse the TWU dispute is specifically intended to reveal the nature of the road and the process by which it is being made and re-made through the law's encounter with religion. The various court decisions discussed throughout the project, including the earlier decisions regarding the TWU dispute, provide the raw materials for my analysis but are not the point or endgame of the analysis. Again, this dissertation is about the way in which the law's encounter with religion is conceptualized and approached.

4 MAPPING THE ARGUMENT—A CHAPTER SUMMARY

Community interaction provides a useful point of departure for exploring the law's encounter with religion. The way that we frame the process of community formation and the interaction between communities reflects the way that we imagine the intersection between law and religion. In Chapter 1 I examine the dispute over the accreditation of TWU's proposed law school through the lens of community interaction. Although the case involves questions of balancing religious freedom against other social values and legal rights, I focus on the way that the dispute also involves questions about the process of allowing TWU to join the accredited group of legal educational institutions. I argue that this is ultimately a question of whether and how a religious community can be knit into the community of the law. Framing the interaction in this way reveals a symbolic, discursive and dialectic dimension that shapes the way the legal profession understands its own purpose and identity as a community. It also shapes the way that the TWU community understands its community and identity.

The communal dimension of the TWU dispute can be used to develop our thinking about the nature of the law's interaction with religion. Considering how TWU fits within the

community of the legal profession raises questions about what it means for the law to carve out space within itself for religion. I argue that addressing this type of communal integration is not really a matter of identifying the essential features of the communities involved, as if the boundaries of 'legal' or 'religious' communities can be determined and patrolled as isolated concepts. Rather, community boundaries are social and symbolic things, which are formed and evolve through the interactions and conflicts between communities.

From this view, the boundary separating TWU and the law societies, like the boundary separating law and religion, is not a natural boundary but a product of social-symbolic processes of interaction. This highlights the importance of accounting for the social interactive processes of community interaction in order to understand and evaluate the law's encounter with religion. Approaching the law's encounter with religion involves tracing different forms of life in action as they shape each other through their interaction. The relationship between them cannot be thought of as static or in essentialized terms. It is dynamic and, somehow, mutually constitutive.

In Chapter 2 I look more closely at the interactive process occurring at the 'boundary' between law and religion. I explore this in the context of the process of determining the justiciability of religious matters. I argue that considering whether a civil court has authority to hear a religious claim is not simply a question about the principles of law that are at play. Answering the question of whether and how a religious claim *matters* (or comes to matter) to law reflects the way that law defines its institutional boundary and its institutional purpose. I argue that when law draws its own boundaries in response to a religious claim it also has a transformative effect on religion. A distinctly legal imprint is left on religion when a religious claim is either accepted or rejected as justiciable, which affects how religious individuals and communities see themselves and their own boundaries. The effects on religious individuals, communities and traditions are pronounced. Law co-opts religion and transforms it according to the institutional purposes and designs of the law.

I argue that to focus on the essential distinctions between law and religion to decide justiciability fails to face the dialectic process of exchange that lies at the heart of the encounter between law and religion. Inadequately accounting for this social interactive dimension of the law's encounter with religion in the context of justiciability leaves the power of legal institutions unrestrained in relation to religion. This emphasizes the importance of remaining aware of the way that the law is involved in creating a sense of reality in its encounter with things around it.

In Chapter 3 I look more closely at the way law apprehends the world around it. More specifically, I explore the gap that exists in the way that law apprehends religious claims and the lived experience of religious groups. I argue that this moment of encounter between law and religion can be thought of as a form of fiction, that the law is writing its own story through its encounter with religion. This will always involve distortions and produce dissonance between law's conception of reality and the way things are experienced from a religious perspective. Highlighting this point is not to suggest that the dissonance be resolved or decried. The law creates its own reality out of its experience with other things like religious claims, experiences, communities and traditions. I argue that seeing the law's encounter with religion in fictional terms preserves an awareness of the limitations of the law. This keeps us from pretending as if the law is separate from the process of creating meaning and the shifts and changes that occur when law collides and interacts with religion. It also re-frames the idea of legal sovereignty. The law's apprehension of religion is an expression of the sovereignty of law in the sense that the law interacts with the world through the forms of meaning that it produces about reality. With this in mind, we can see the law's encounters with religion that occur within the system of law as an expression of the reality of the law itself. The sovereignty of law, its relationship to religion and its role in adjudicating religious claims, is a socially constructed reality.

This opens up questions about how to manage or navigate between the competing perspectives of law and religion. If law is one point of view then how is law to make decisions that involve a religious claim, which are situated in a point of view different than the law? Without an account of the limited view of the law our evaluation of the workings of law will not be able to face the gap between law's reality and the reality external to the law. I argue in chapter 3 that focusing on the social-symbolic dimension of the law's apprehension of religion offers a perspective on the law's interaction with religion that is free from the force of law's "fiction". This is not to say that we can attain a 'view from nowhere', but rather that the view from inside the law can be framed in the context of social interactive processes that are not conditioned by the law's perspective. This, I argue, provides a grounding point for reflecting on the adjudicatory rule of law in the law's encounter with religion.

Chapter 4 turns to look at the law's adjudicatory role in the interaction of law and religion in the context of balancing religion against other civil rights and values. A central part of my discussion is about the way law frames its role as decision-maker of claims of religious freedom.

I start by looking at the idea of balancing as a way to synthesize or reconcile a religious claim with other legally recognized rights and values fundamental to constitutional legal order. I argue that balancing is not neutral but draws on a range of ideas and presumptions about the way the world is. Balancing religious rights with other legally recognized rights involves more than the application of legal principles, like 'harm' and 'equality', and engages with a social and cultural background against which the balancing occurs. From this view, I argue that the process of balancing religion against other things in the context of constitutional adjudication is actually a process of creating common ground, or a social environment within which these things can be seen as part of a unified whole. Balancing is a process of establishing a social unity rather than achieving an arithmetic equality. In order to work social community into the legal framework of analysis requires re-imagining decision-making in a way that does not preclude the social communal dimension.

An important aspect of Chapter 4 has to do with the challenge of comparing and weighing drastically different things in the context of legal adjudication. It seems necessary to either deny difference by asserting a common denominator (e.g. balancing harm) or to embrace the tragedy of choosing one perspective over the other. The legal balancing of religious claims against other claims then appears to be either a reductive exercise or the arbitrary assertion of the legal worldview. I argue that such a view of legal decision-making is inadequate because it presumes that rational decision-making is separate from social constructive activity. I argue that the conceptual framework used for legal adjudication must be adjusted to connect the diverse social, historical and philosophical perspectives operating in the background to the process of adjudication. This connection between legal adjudication and the various background ideas is necessary for developing the common ground, both conceptually and socially, for decision-making to occur. In order to understand and critically evaluate the "balancing" of religious claims with other rights and interests, the legal decision-making process must be seen in terms that can account for the social and communal dimension.

Chapter 5 takes up the challenge of re-framing the way we conceptualize the legal adjudication of religious claims. I return to the conflict over the TWU law school proposal to examine the social interactive dimension of the legal arguments and analyses used in the dispute. I look at the way arguments are framed, and the way that the courts balance religious freedom and equality rights, as acts of translating different social perspectives into the common language

of the law. I argue that if we view the process of legal argument and adjudication as translation then we can think more creatively about law's unique role in addressing the conflict surrounding TWU. There is no neutral language into which all other languages can be perfectly represented and that can seamlessly link all linguistic groups together. Rather, translation is a social and relational encounter, whereby those who are different work together to communicate with each other and to build common understanding. Focusing on these relational dynamics opens the possibility of re-framing the role of law in relation to religion as a community of translation, which is built upon respect, reciprocity and mutual commitment. From this view, the legal analysis of the TWU dispute can be cast in a way that fosters the integration of TWU and the legal profession.

By suggesting that law is a community of translation, I do not mean to say that law somehow is a community that encompasses religion. Rather, the idea is to emphasize the way in which law operates in-between different perspectives when adjudicating a conflict like the TWU dispute. I argue that the law's role in adjudicating disputes, such as those involving religion, can be explored and evaluated in terms of the social and relational dynamics of community—specifically, a community of translation. This brings us back to the argument of the dissertation and the direction of the analysis as a whole. I argue that approaching the dialectic between law and religion through the law's reality, bound as we are to do in the Canadian legal context, requires the encounter to be viewed in terms of its social, communal and relational interactive dimension. Without this we remove from our sight a significant range of factors that play into legal decision-making, both in terms of the process of reasoning as well as in terms of its effects. Considering the law's interaction with religion through its social dimension shifts from seeing the encounter as a competition between mutually exclusive worldviews toward seeing it as a constructive relationship built on mutual respect, participation and engagement. In other words, it casts the law's interaction with religion in a way that fosters friendship, even between perfect strangers.

CHAPTER 1

The Boundary and Ethos of the Legal Community

"…[T]he attempt to fix the boundaries between church and state and the project of liberal theory (of finding an archimedean point to the side of, above or below sectarian interest) are one and the same. They stand or fall together, and what would threaten their fall…is a religion that does not respect the line between public and private, but would plant its flag elsewhere. An uncompromising religion is a threat to liberalism because were it to be given full scope, there would be no designated, safe space in which toleration was the rule."[1]

"The boundaries so central to…law are the boundaries that feel desperately necessary to…keep the threatening others at bay—the impossibility of that task only fueling the desperation. When I say the task is impossible, I do not mean to imply that the boundaries do nothing. They do protect people from certain kinds of threats. But equally (or more) important, boundary-setting rights protect people from the seemingly overwhelming responsibility that would flow from a recognition of unity."[2]

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INTRODUCTION

The interaction between law and religion is analysed typically as a competition between legal rights or as an abstract theoretical discussion of 'law' and 'religion.'[3] There is another social dimension to the interaction, however, which can be seen in terms of community. This first chapter aims to understand the legal community better. What are its boundaries? What is its

**An earlier version of this chapter was published as "TWU Law: The Boundary and Ethos of the Legal

[1] Stanley Fish, "Mission Impossible: Settling the Just Bounds Between Church and State" (1997) 97:8 Colum L Rev 2255 at 2272.
[2] Jennifer Nedelsky, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford: Oxford University Press, 2011) at 116.
[3] Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015). Berger observed that the interaction between law and religion begins either with the law or with theory (*ibid* at 23—35). I agree with Berger that both starting points are insufficient.
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ethos? Most importantly, how do the boundaries and ethos of a community relate to the community's interaction with other communities? The dispute over the creation of a law school at Trinity Western University (TWU) is a rich example of this communal dimension of the interaction between law and religion, and opens the door to explore the law's encounter with religion in terms of its social interactive dimension.

TWU is a private Christian university that is closely affiliated with the Evangelical Free Church.[4] Students attending TWU are required to sign a code of conduct, called the TWU Community Covenant Agreement (the TWU Covenant), which is grounded in Christian values and theology.[5] In June 2012, TWU began the process of opening a law school, which has generated a significant amount of attention and conflict throughout the Canadian legal community.

The conflict arising from the encounter between TWU and the legal community was not simply about whether freedom of religion guarantees TWU a space at the table of legal education or whether the principle of non-discrimination requires TWU to shed its Covenant. No doubt this played an important role in the dispute. But I believe that the more pressing questions are about the process involved in integrating TWU, as a religious community, into the institutional network of legal education.

TWU's proposal to open a law school resulted in litigation with three different law societies in Canada that refused to accredit the law school.[6] Even though these law societies were

[4] TWU was founded by the Evangelical Free Church of America [EFCA] in 1962, and continues to be closely connected to both the EFCA and the Evangelical Church of Canada [EFCC]. The EFCA, EFCC and some of their churches provide financial support to TWU. Under TWU's bylaws, the president of the EFCA and the executive director of the EFCC are automatic members of the TWU Board of Governors. TWU follows the statement of faith of the EFCC and EFCA, and broadly shares the religious ethos of theses organizations. See *Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326, 392 DLR (4th) 722 [*LSBC* BCSC] (Affidavit of William (Bill) Taylor, filed December 15, 2014).

[5] Trinity Western University, "Trinity Western University Community Covenant Agreement", online: <http://www.twu.ca/student-handbook> [TWU Covenant].

[6] At the time of writing, trial and appeal decisions have been rendered in British Columbia (*LSBC* BCSC, *supra* note 4, aff'd 2016 BCCA 423, 405 DLR (4th) 16 [*LSBC* BCCA]), Ontario (*Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250, 126 OR (3d) 1 [*LSUC* ONSC], aff'd 2016 ONCA 518, 131 OR (3d) 113 [*LSUC* ONCA]) and Nova Scotia (*Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25, 355 NSR (2d) 124 [*NSBS* NSSC] aff'd 2016 NSCA 59, 376 NSR (2d) 1). The courts in British Columbia and Nova Scotia decided in favour of TWU, while the courts in Ontario decided in favour of the Law Society of Upper Canada. The British Columbia and Ontario cases were appealed to the Supreme Court of Canada (SCC) and heard together on November 30 and December 1, 2017. The concurrent decisions *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33, and *Law Society of British Columbia v Trinity Western University*, 2016 SCC 32, released on June 15, 2018, both upheld the decisions of the law societies to refuse to accredit TWU's proposed law school.

the active parties in the lawsuits, they were not the only ones involved in the dispute. TWU's primary concern was to open a law school, and the litigation with the law societies over accreditation was the means by which TWU sought to have its proposed law school recognized as legitimate throughout Canada. This brought TWU into conflict with the other law schools in Canada as much as with the law societies.[7] Likewise, the practicing members of the legal profession were a significant source of opposition to TWU's proposed law school.[8] It is this broader group of opponents to TWU's proposed law school that I refer to as the "community" that TWU is in conflict with.[9]

The way that this group of law societies, law schools, legal academics and practitioners, with all of their varying perspectives, joined together in and through their opposition to TWU is one of the most fascinating features of the dispute over the TWU proposed law school. It is true that not all those opposed to TWU's proposed law school fully rejected the idea of TWU having a law school. Many would rather have seen the removal of TWU's Covenant, or to have the Covenant made optional for TWU law students. Despite this variability in what a preferred result might look like, there seems to have been a common concern about the implications of accrediting TWU's proposed law school that crystalized a sense of common identity among those who opposed TWU's proposed law school.

The idea of "community" is helpful here because it provides a conceptual framework that is able to make sense of the dispute that TWU was engaged in. As my analysis will show, this dispute was not simply about principles of law. Nor was it a dispute with a particular institution. Although the particular arguments against TWU no doubt reflect certain legal institutional concerns, there is a more basic and abstract sense of the rule of law and justice that was at stake. It engages ideas regarding the nature of law and legal institutions and the way that they relate to TWU. These ideas play an important role in the way that the legal conflict between the law societies and TWU is framed. The idea of community, specifically the notion of community

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[7] Law students and law professors were quite vocal in their opposition to TWU's proposed law school, which can be seen, for example, by perusing the public submissions to the Nova Scotia Barristers' Society, online: <http://nsbs.org/twu-public-submissions>. The Canadian Council of Law Deans (CCLD) also expressed concern regarding TWU's proposed law school, which is discussed in section 2.2 below.

[8] This is most apparent in British Columbia, where the members of the law society voted in a referendum overwhelmingly to refuse to accredit TWU's proposed law school. See Law Society of British Columbia, News Release, "Proposed TWU Law School Not Approved for Law Society's Admission Program" (31 October 2014), online: <www.lawsociety.bc.ca/about-us/news-and-publications/news/2014/proposed-twu-law-school-not-approved-for-law-socie/>.

[9] I refer to this community as the community of the legal profession, of law, or of the law societies.

boundaries and ethos, is able to account for these more abstract issues and their role in the dispute.

In the first section of this chapter I develop a conceptual understanding of communities in relation to their boundaries as a way to frame the conflict between TWU and the legal community. I argue that community, and its boundaries, cannot be thought of as rigid and impermeable 'things' existing on their own. Rather, they appear through the interaction with other communities and the struggle over the boundaries between them. The creation of boundaries, of defining what is 'inside' and 'outside' of a community, is actually a process of stitching together the 'inside' and the 'outside.' It is through the conflict occurring at the point of meeting between TWU and the law societies, when TWU attempts to join in the process of legal education, that the boundary of the community of the legal profession takes shape.

In the second section I discuss the ethos of the legal profession and its relation to the discipline of law school. I argue that they are intricately connected, and that to separate them leads to problems. Those who oppose accrediting TWU tend to see law school and the ethos of the legal profession in terms of objectively defined fundamental values, which leads to the separation between the legal profession and other forms of human experience (like religion). TWU's proposed law school challenges this view, proposing the reconnection of religious and professional life. But in doing so I argue that TWU also challenges the view of community that allows the ethos of the legal profession to be separated from its disciplinary practices. The differences between TWU and its detractors, primarily the law societies, are not so much a matter of alternative 'values' but of alternative ways to conceptualize the life of the legal community as such.

The apparent intractability of the conflict fades away if the communal lives of TWU and the law societies are set within the context of the process of social interaction that gives shape to each community. From this view, the discipline of law school is dialectically related to the values of the legal profession, and the ethos of the legal profession is tied to the boundary interactions that define the shape of the legal community. The process that shapes community links TWU with the legal profession. The two exist as they do because of their interaction with each other, shaping and transforming each other in the process of their interaction. The boundary that exists between them is constantly evolving.

Even though the TWU case is only one point of interaction between law and religion, it is highly informative for how we should think about the relationship between law and religion. Focusing on the process of the development and interaction of legal community in this context shows the dialectic nature of the law's encounter with religion and the role of this encounter in constituting legal and religious communities. It is not possible to separate the essential or fundamental characteristics, values and principles of legal community from the socially embedded processes by which these characteristics, values and principles become and remain central to the community. In this way, the dispute over the accreditation of TWU's proposed law school highlights the importance of the *nature of the social interactive processes* involved when the law addresses religion. The law's interaction with religion is an encounter with existential overtones, which means that legal evaluation of a religious claim, like TWU's proposed law school, does not occur separate and apart from the social dimension of the dispute itself.

1 SOCIAL CONFLICT, BOUNDARIES AND THE FORMATION OF COMMUNITY

Communities are not independent and rigidly defined things. They emerge through the interactions between communities, and are deeply ambiguous and porously structured. The conflict encountered when one community tries to cross the boundary of another community exposes the existential basis of the life of community. The first part of the chapter explores these ideas in relation to TWU's proposed law school.

First, I will look at the way the arguments regarding discrimination gloss over different ideas about the nature of the communities of TWU and the legal profession and their corresponding perceptions of social reality. This shows that the dispute between TWU and the law societies involves more than disagreement over legal principle, that it involves disagreement over the nature of legal and religious communities and what it means for them to interact.

Secondly, I will look at the idea that community boundaries are symbolic constructions. This casts the conflict between TWU and the law societies in a light that sees the bases for establishing the boundaries between them as defying objective description. From this view, the conflict over TWU's proposed law school is part of a process of *creating* community boundaries and identity. The communities cannot be deciphered separately from the conflict and interaction, which calls into question the possibility of resolving the conflict through an appeal to objective

principles (of law or otherwise). The boundaries produced through the interaction are imbued with symbolic meaning, which allows us to see the meaning of the interaction as open and shared between them.

Thirdly, following Mark Salter, I will suggest the process of crossing boundaries is best understood through the metaphor of "suturing" rather than the more commonly used metaphor of line-drawing. This brings to attention the way that interactions at community boundaries expose the foundational assumptions and limitations of community identity and belonging. Communities and their boundaries are not independent and rigidly defined things. They emerge through the interactions between communities, and are deeply ambiguous and porously structured. The conflict encountered when one tries to cross between communities, as TWU is attempting to do by opening a law school, exposes the existential contingency and fragility of both communities. This helps us understand the anxiety caused by TWU's proposed law school. It indicates that both TWU and the law societies are engaged in a common process of forming and maintaining the boundaries of their communities, and that the existence of their communities is interdependent.

1.1 Discrimination, Coercion and the Nature of Community

I will show here how some of the arguments put forward by TWU and the law societies reveal their understanding of the natures of their own and each other's communities. Highlighting this shows that there is a dimension to the conflict beyond the legal principles of equality law and religious freedom. The arguments in the lawsuits, and the decisions of the courts, also say something about the natures of the communities of TWU and the law societies and the way we characterize and make sense of conflicts between different communities. The resulting gap between TWU and the LSBC (and other law societies) reflects fundamentally different views of social reality. Both TWU and the law societies claim 'social reality' *really is* as they perceive it, and look to establish through litigation their own perception of social reality.

At the most basic level, the law societies that oppose TWU's law school proposal argue that TWU is discriminatory against LGBTQ individuals because they do not admit to the school those who are unable to agree to follow traditional Christian sexual ethics, which are outlined in

the Covenant as monogamous heterosexual marriages.[10] The discriminatory effect of this is reinforced by a system of accountability and discipline in place at TWU for students who do not follow the Covenant.[11]

An important piece of historical context, which affects the discrimination argument, is that in 2001 TWU successfully challenged the BC College of Teacher's refusal to allow TWU to carry out all aspects of the education of public school teachers.[12] TWU offered courses but was not able to administer the required practicum aspect of the education program, which meant that TWU students had to complete their training through a public university. When TWU attempted to take up this final portion of teacher training, the College resisted. The College was concerned that the TWU Covenant's conservative position on acceptable sexual behaviour would negatively affect the ability of TWU graduates to deal fairly with people who deviate from the Covenant norms. Basically, the concern was that TWU graduates would be insensitive toward or (possibly) discriminate against their future LGBTQ students. The College felt that this risk was mitigated by requiring TWU graduates to complete their training at a secular institution, which would expose them to a non-conservative attitude toward LGBTQ sexuality. The Supreme Court of Canada (SCC) decided that there was no evidence to substantiate the concern of the College.[13] Graduates from the TWU education program appeared to be just as capable and sensitive as graduates from any other secular institution. The presence of the TWU Covenant did not produce graduates that act in a bigoted manner toward LGBTQ people.

Despite obvious similarities, there is one significant difference in the conflict regarding TWU's proposed law school.[14] That is, the law societies who are resisting accreditation of

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[10] TWU Covenant, *supra* note 5 at 2—4.
[11] Trinity Western University, "Trinity Western University Student Handbook 2016-2017", online: <www.twu.ca/sites/default/files/student-handbook-2016-2017.pdf> at 40—48.
[12] *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772 [*TWU v BCCT*].
[13] *Ibid* at para 38.
[14] It should also be noted that the landscape of judicial review has changed since 2001. The key shift has been in the standard applied in judicially reviewing an administrative body's decision when human rights are at stake. In *TWU v BCCT*, *ibid*, the Supreme Court applied the standard of correctness in reviewing the College's decision (that is, according no deference) on the basis that the College did not have any expertise in considering and balancing questions of human rights. *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, signalled a sea change in administrative law, streamlining the analysis for determining the standard of review, establishing a standard of reasonableness, and hence deference, for administrative bodies when interpreting and applying their empowering legislation. The way that human rights are treated also changed under *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395, where the Supreme Court said that administrative bodies must take into account and balance *Charter* rights that are at stake in making an administrative decision. The application of these new administrative law principles has been a central point of disagreement and argument throughout the litigation.

TWU's proposed law school do not suggest that graduates from TWU will discriminate against LGBTQ people.[15] Rather, the concern is that TWU, as an institution, discriminates against LGBTQ persons, and that a legal education program in such an institution cannot be accredited. The problem is with allowing an accredited law school to use sexual orientation as a basis for denying admission to the school or taking disciplinary action against them during their time at the school.

There is a key point made in the *TWU v BCCT* decision that speaks to this question of institutional discrimination. The Court held that the voluntary adoption of a code of conduct by individuals based on religious beliefs while attending a private institution is not sufficient to establish a breach of s 15 of the *Charter*.[16] What this means is that TWU is not for everyone, and that individuals are free to agree to attend TWU and bind themselves to the Covenant that regulates the behaviour of the members of that community. Even though the Covenant has a negative effect on LGBTQ people who might consider attending TWU, to apply the principle of non-discrimination would undermine the principle of religious freedom.

The law societies have argued that the TWU Covenant is not "voluntary" in the way described in the *TWU v BCCT* decision. The Law Society of British Columbia (LSBC), for example, characterized the TWU Covenant as a way of imposing the religious beliefs of the institution on individuals.[17] It is seen as not merely a statement of belief but rather a way of regulating individual conduct—in the words of the LSBC, it is not an "aspirational" document but a "command."[18] The TWU Covenant is structured specifically to push people to conform to a Christian worldview and uses various forms of institutional power to ensure conformity and socialization.

TWU, unsurprisingly, argues that its Covenant *is* voluntary, that the specific groups it affects and the mechanisms of enforcement attached to it do not make it less so. The 'coercive' elements decried by the law societies[19]—both the substance of the Covenant and its enforceability—are embraced by TWU as tools necessary for constructing a community that is

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[15] See e.g. *LSUC* ONCA, *supra* note 6 at para 58.
[16] Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; *TWU v BCCT*, *supra* note 12 at para 25.
[17] *LSBC* BCSC, *supra* note 4 (Written Argument of the Respondent at paras 399—407, 516—520), online: <www.lawsociety.bc.ca/Website/media/Shared/docs/newsroom/TWU-argument-LSBC.pdf> [LSBC Written Argument].
[18] *Ibid* at paras 111—118.
[19] *Ibid* at para 464.

capable of realizing spiritual growth.[20] The Covenant is understood by TWU to be central to its mission as an institution, fostering purposeful relationships between students, faculty and staff within the context of a common commitment to a shared understanding of the goals of spiritual and intellectual formation.[21] It is intended to establish a community with a common focus, strengthening the religious commitment and self-identity of its members. Its purpose is precisely to socialize the members of its community into a thoroughly Christian perspective.[22]

The key for the law societies, which turns the TWU Covenant from a 'voluntary' agreement into something coercive and illegal, is its application within the context of legal education. The argument is that membership in the legal profession is a valuable social commodity, which should be equally accessible to everyone determined only on the basis of merit.[23] Just as membership in the legal profession is valuable, so too are the spaces available in law school—the pathway to the profession. The limited space in Canadian law schools makes it quite competitive for prospective students to secure a spot.[24] Because of TWU's Covenant, persons who (for whatever reason) cannot agree to the TWU Covenant will not have access to those spots.[25] Some people, who are driven to attain membership in the legal profession, will be forced to bend their own personal beliefs and practices to conform to TWU's Covenant in order to access a spot in law school. In particular, LGBTQ persons will be forced to abandon their identities in order to attend the school.[26]

TWU maintains that the competitiveness of law school admission does not negate the legitimate interest they have in shaping their institution in a specifically Christian form. The legal profession is no different than the profession of education (dealt with in the *TWU v BCCT* decision). TWU also argues that the creation of a TWU law school will not negatively affect the

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[20] In support of this view, TWU points to social scientific research indicating that stronger forms of community commitment, such as strict codes of conduct, tend to produce communities with stronger buy-in from their members. See *LSBC* BCSC, *supra* note 4 (Written Argument of the Petitioners at paras 384, 412), online: <https://www.lawsociety.bc.ca/website/media/Shared/docs/newsroom/TWU-argument/pdf>. [TWU Written Argument].

[21] TWU Written Argument, *ibid* at paras 28—35.

[22] *Ibid* at paras 384 and 412.

[23] See e.g. *Loke v British Columbia (Minister of Advanced Education)*, 2015 BCSC 413, 332 CRR (2d) 237 [*Loke*] (Amended Petition, filed 3 June 2014 at para 70). The case was dismissed as moot because the BC Ministry withdrew its approval of TWU's law school after the LSBC decided to not accredit it. *Loke*, *ibid* at paras 50—66.

[24] LSBC Written Argument, *supra* note 17 at paras 83—89.

[25] Producing 'two tiers' of access to legal education. *Ibid* at para 534.

[26] *Ibid* at paras 103, 459—464 and 470.

opportunities available to people who are unable to agree to the TWU Covenant.[27] In fact, creating more law school spaces at TWU will make it easier for LGBTQ persons to get into law school. Even though the TWU spots will not be available to LGBTQ people, the creation of these spots will relieve some of the competitive pressure from the other available spots.[28] In addition, TWU's law school spots represent a very small portion of the total spots available, which means that the restrictions over TWU's spots will not have any significant impact on the experience of most students applying for law school or seeking membership in the legal profession.[29]

For the law societies, the precise size of the effect that the TWU Covenant will have on LGBTQ students is not important. What is important is that TWU's law school creates *some* difference between those who can and cannot agree to the terms of the TWU Covenant, reserving TWU's law school spots just for those who can.[30] The differentiating effect of TWU's Covenant, no matter how small, is problematic. *Any* advantage or disadvantage, or any difference in the process of getting and keeping a spot in law school, for LGBTQ persons taints the entire process of coming to the legal profession.[31]

Here is where the social nature of the dispute comes quite clearly into view. Why is it that the seemingly minor effect of TWU's Covenant on the experience of LGBTQ people pursuing a legal career is so important to the law societies? It is because the threat is not simply about LGBTQ people, but about what allowing TWU to become part of the process of coming to the practice of law says about legal education and the role of the legal profession in society.

The fact that the conflict is in relation to legal education is unique because law school acts as a gateway to the legal profession.[32] Who gets 'in' and how they get 'in' is vital to the constitution of the community and the service that it provides to society. This is reflected in a

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[27] TWU Written Argument, *supra* note 20 at paras 40—43.
[28] *Ibid* at paras 307 and 363. See also Special Advisory Committee on Trinity Western University's Proposed School of Law, *Final Report* (Ottawa: Federation of Law Societies of Canada, 2013), at paras 52—53 online: <http://docs.flsc.ca/SpecialAdvisoryReportFinal.pdf> [FLSC, *Final Report*].
[29] See *NSBS* NSSC, *supra* note 6 at para 247.
[30] See LSBC Written Argument, *supra* note 17: "The clear effect of the Covenant is to serve as a barrier to access to TWU's proposed law school for LGBTQ persons, women, common law couples, and those of other faiths or no faith at all. This would have the effect of impeding equal access to law school in the province, and would therefore impede equal access to the legal profession. This self-evidently imposes a discriminatory impact and directly harms those deprived of that equal access." *Ibid* at para 493.
[31] See e.g. Law Society of Upper Canada, "Transcript: Convocation, Public Session" (April 10, 2014) at 96—98 (Janet E Minor), online: < www.lsuc.on.ca/uploadedFiles/ConvocationTranscriptApr102014TWU.pdf> [LSUC, "Convocation Transcript"].
[32] This also is described as also broadly affecting the function of the judicial system. See e.g. LSBC Written Argument, *supra* note 17 at paras 72—82, 518.

much-quoted observation of Justice Brian Dickson, "…the ethos of the profession is determined by the selection process at the law schools."[33] To allow TWU to become part of the gateway to the legal profession threatens to change the nature of legal education and the legal profession as such. The decision to refuse to accredit TWU protects what the law societies perceive to be the ideal vision of the legal profession (and legal professionals) and the function of the legal profession in society. I will have much more to say about the nature of legal education in the second half of this paper. For now I simply want to draw attention to two points. First, the context of legal education heightens the *social* and *communal* stakes of the situation. Secondly, the law societies do not offer a clear idea of what the ideal vision of the legal profession is that they seek to preserve, except for in vague ideas put forward in response to TWU regarding upholding the rule of law and fundamental democratic values,[34] and equal access to justice and the legal profession.[35]

Social and communal considerations are used fairly consistently by both the law societies and TWU. This can be seen in the way that they justify the constitution of their respective communities. TWU claims that the formulation and enforcement of its Covenant are grounded in the religious character of the institution and used with the intention of furthering its religious mission.[36] TWU claims that this communal self-definition cannot be censured as 'coercive' because it is an aspect of religious freedom protected by law.[37] Similarly, the law societies claim that their opposition to the TWU law school proposal is grounded in the protection of the integrity of the legal profession and the administration of justice.[38] They argue that the discriminatory effect of the TWU Covenant would be exacerbated by the law societies accrediting TWU's law school because that would endorse inequality in coming to the legal profession, and inequality, no matter how small, is totally unacceptable.[39] Deciding to not accredit TWU is not unfair towards TWU (and therefore not 'coercive') because it protects the public interest by ensuring that membership in the legal profession is equally accessible to everyone.

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[33] Brian Dickson, CJC, "Legal Education" (1986) 64:2 Can Bar Rev 374 at 378. Quoted in, for example, the LSBC Written Argument, *supra* note 17 at para 519, and *LSUC* ONCA, *supra* note 6 at para 131.
[34] LSBC Written Argument, *supra* note 17 at para 57.
[35] See e.g. *ibid* at paras 59, 74, 77 and 81.
[36] See TWU Written Argument, *supra* note 20 at paras 32—35, 361, 384, 391 and 412.
[37] See *ibid* at paras 357—362.
[38] LSBC Written Argument, *supra* note 17 at para 511.
[39] *Ibid* at paras 508, 511—514, 520, 535—537.

Social and communal considerations are also used by both TWU and the law societies in attempt to circumscribe the scope of each other's community, calling into question those considerations that are supposed to justify the actions of the other. TWU argues that law societies are only mandated to regulate the conduct of practicing lawyers, and that they have no role in determining what is permissible in the internal affairs of a university (or a religious institution).[40] As such, the refusal to accredit TWU's law school on the basis of the TWU Covenant is tantamount to pushing a non-discriminatory agenda in the context of a private, religiously based university administration. This is an abuse of governmental administrative power, which jeopardizes religious freedom and the rule of law.[41]

The law societies argue that the TWU Covenant is not really a matter of religion, and that there is no religious impetus driving the formation of the law school.[42] Moreover, TWU is not really a religious institution because it is engaged in the primarily secular endeavour of university education and granting university degrees—and TWU's aspiration to engage in legal education is supremely public and secular.[43] As such, TWU cannot structure its law school in the same way as more overtly religious organizations (like churches or seminaries). For the law societies, TWU's attempt to push its Covenant into the realm of legal education steps beyond the bounds created for it in the sphere of public education (namely, its exceptional status under BC legislation)—"In short, effectively prohibiting LGBTQ persons and others from attending TWU law school transforms religious belief into discriminatory conduct."[44]

The arguments put forward by TWU and the law societies are grounded in different ideas about themselves as communities. The central point of disagreement is over the way in which the communities—both TWU and the law societies—keep their boundaries. The challenge that we face is how to account for this communal dimension of the dispute when navigating between the two different legal positions put forward? What makes the challenge particularly intriguing is that a core part of the disagreement is over the communal nature *of the law itself*. The point of contest between TWU and the law societies is the boundary of the law's community. But, as I

[40] See TWU Written Argument, *supra* note 20 at paras 254—258 and 293—297. See also *LSUC* ONSC, *supra* note 6 at paras 53—55; *NSBS* NSSC, *supra* note 6 at paras 166—181.
[41] TWU Written Argument, *supra* note 20 at paras 187—198, 373—379, 391 and 454—455.
[42] LSBC Written Argument, *supra* note 17 at paras 574—580.
[43] *Ibid* at para 587.
[44] *Ibid* at para 446.

will show, the boundary of the legal community has an inescapably interactive dimension, which must be accounted for.

1.2 Constructing Community—Boundaries as Symbolic Meaning

The study of boundaries and borders is used in a broad range of academic fields (e.g. geography, politics, sociology, anthropology and economics), in relation to various social phenomena (e.g. national territories, political ideologies, ethnic and cultural identities), and through a range of evolving theoretical approaches.[45] The focus here will be on looking at the notion of a boundary in terms of symbolic meaning. This provides a way of understanding the interaction between communities as a means by which a community develops its own identity and perception of reality. From this point of view, the conflict over the accreditation of TWU's proposed law school can be seen as formative for the community of TWU as well as for the legal community—their respective identities and perceptions of social reality develop through the interaction with each other *because* of the fact that they are pressed to define their communities in response to each other.

Anthony Cohen, in his book *The Symbolic Construction of Community*,[46] shows that communities are formed through the construction of boundaries, and how this is tied to the idea of symbolic meaning.[47] For Cohen, communities are relational entities. They imply a distinction between 'us' and 'them,' of being inside or outside. 'Us' and 'them' are intricately related. We are 'us' because we are not 'them;' and they are 'them' because they are not 'us.' This relation is symbolically represented through the boundaries that define community.[48]

Cohen draws out of the relation between 'us' and 'them' a dual function of boundaries. The boundary that stands between two communities functions *both* to distinguish between

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[45] See Vladimir Kolossov, "Border Studies: Changing Perspectives and Theoretical Approaches" (2005) 10:4 Geopolitics 606.
[46] Anthony P Cohen, *The Symbolic Construction of Community* (London, UK: Routledge, 2001).
[47] Cohen's book participates in a rich and diverse theoretical discussion of community, symbolic meaning and boundaries. See e.g. Peter L Berger & Thomas Luckmann, *The Social Construction of Reality: A Treaties in the Sociology of Knowledge* (New York: Anchor Books, 1967); John R Searle, *The Construction of Social Reality* (New York: Free Press, 1995); Alfred Schutz, *Collected Papers,* vol 1, ed by Maurice Natanson (The Hague: Martinus Nijhoff, 1962).
[48] Cohen, *supra* note 46 at 12. There is notable overlap between Cohen's argument and a phenomenological analysis of identity formation. For more on how a phenomenological approach relates to community formation, see H Peter Steeves, *Founding Community: A Phenomenological-Ethical Inquiry* (Dordrecht: Springer, 1998).

communities as well as establish unity within a community. Boundaries are able to fulfil this dual function of dividing and unifying because they are symbolic in nature. Symbols do not directly represent what they signify, and they do not provide their own meaning. Symbols are tools by which meaning can be made.[49]

The creation of community is, for Cohen, primarily a task of gathering diverse individuals together under a common banner. The symbolic meaning of a boundary allows this to occur because the meaning of a symbol is naturally ambiguous.[50] The ambiguity of symbols allows individuals to give meaning to them in a way consistent with their own personal experiences. Different people are able to gather together and identify themselves as 'us' under the banner of a common symbol. It is not necessary for everyone to understand the symbol as having the same *meaning*, only that they are all committed to *using* it as a part of their own lives and a marker of their own identities. This, for Cohen, is how community comes into being. Its triumph is that it is able to hold together diverse individuals under a single symbolic boundary.[51] Community boundaries *aggregate* social differences.[52]

The ambiguity of meaning inherent in boundaries complicates the way we conceptualize the identity of a community. Although the boundary makes the community appear as a coherent whole it does not have a single meaning even for those within the community.[53] The boundary masks the diverse views of the nature of the community that coexist internal to the community itself. Even the self-understanding of a community defies an objective grounding point. Since boundaries are central to the way that a community understands itself, there is a necessary element of openness to community. A community is not defined entirely internal to itself, but reflects the encounters with 'other' communities as well as the larger set of social relations of which the members of a community are a part.

In the previous section I suggested that the conflict between TWU and the law societies seems to take the shape of a competition between two conceptions of social reality seeking to

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[49] Cohen, *supra* note 46 at 12, 15 and 19.
[50] *Ibid* at 21.
[51] *Ibid* at 20. See also Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford: Clarendon Press, 1995) (Cotterrell argues that employing the notion of community within the context of law implies a concern for social diversity, for the primacy of the local, and for moral pluralism, at 322—325).
[52] See Cohen, *supra* note 45 at 20—21. Cohen proposes aggregation rather than integration as a way to distinguish his theory from other theories of social organization derived from Émile Durkheim. Aggregation is preferable to integration because the former allows for difference and diversity to persist within social formations of community whereas the latter tends toward homogenization.
[53] *Ibid* at 58.

establish the 'truth' of the situation. Cohen's argument regarding the symbolic meaning of community boundaries focuses on the *process* of community development. In light of Cohen's argument, the encounter between TWU and the law societies should not be conceptualized as between two rigidly defined communities with fully formed ideas about their nature. The images of the communities that we can see represented in the legal arguments are the "boundaries" that emerge through the interaction between TWU and the law societies.

However, we cannot forget that these boundaries operate symbolically, which means that although they are shaping the communities they do not actually have a clear and distinct meaning on their own. What I mean is that the conflict helps give shape to the communities and the way they understand themselves. To see each community as fully formed fails to recognize the symbolic nature of their boundaries, and leads to the view that the conflict can only be resolved by choosing between them. Cohen's point of view would suggest, to the contrary, that the encounter between TWU and the law societies helps *produce* their boundaries. It is in meeting each other, in conflict and interaction, that the self-perception of each community and of social reality takes shape. As TWU and the law societies engage with each other about issues of the nature of religious freedom, the extent of the administrative powers of the law societies and the character of TWU's community, their self-understanding is sharpened.

At the same time, the self-understandings of TWU and the law societies are not only tied to each other but also to the many other social relationships that each community understands itself to be part of. For example, when TWU argued that the Covenant is central to its character as a Christian university, it drew on its relationship with the larger (global) Evangelical Christian community.[54] Similarly, the law societies have described themselves to be intricately related to legal education, the realization of the rule of law, the administration of justice, the integrity of the legal profession and the institutions of the legal system (including the judicial branch), and the advancement of individual dignity.[55]

Several points flow from this. If community forms through the aggregation of difference within symbolic boundaries then it is important to keep in mind that *both* TWU and the law societies, as communities, house a diverse array of opinions on the nature and meaning of the conflict, despite what is represented by the 'official voices' of each community. We should

[54] TWU Written Argument, *supra* note 20 at paras 15—19.
[55] See e.g. LSBC Written Argument, *supra* note 17 at paras 32, 56, 77, 88—89, 302, 444, 510 and 520—521.

therefore be very cautious about trying to resolve the conflict by deciphering the 'true' nature of the communities or of the boundaries of the communities. Likewise, we should be very suspicious about aligning the views of TWU or the law societies with the legal community in its general sense. The precise boundary of the legal community defies objective description—it has no specific 'essence', which is why it has symbolic and communifying power.

The identity of a community should not be mistaken for the appearances of its boundary. Even though the boundary is a key part of how the community understands itself, and in a way, is the basis on which the community exists, it is nevertheless a thoroughly symbolic creation and therefore subject to change. The boundary of a community, its idealised self-conceptions, and indeed the community itself are permeable. In the TWU situation, this refers to the ideal conceptions of each community. To understand the nature of each community it is necessary to see each in relation to the other. TWU and the law societies need to be seen as mutually constituting each other through their interactions. Without their interactions with each other neither community would appear as it does. In this way, the 'us' and the 'them' are interdependent.[56] This does not dissolve the differences between TWU and the law societies or negate that they are distinct communities. Rather, it complicates the way that we understand the interaction between them and the community formations that emerge from their interaction. There is an element of openness to community that is grounded in the way different meanings can be given to boundaries.

1.3 The Foundations of Community—Boundary Crossing as "Suture"

There is a risk in emphasizing the ambiguity of symbols and the resulting openness of community boundaries: doing so might render innocuous the conflict that occurs between communities. Cohen is certainly right to say that the symbols that shape communal identity can be shared and altered by different individuals and different communities. It is therefore important to emphasize that the presence of common symbols between communities does not lead to the homogenization of meaning, but enables the coexistence of diversity.[57] Community is constituted

[56] Anastassia Tsoukala, "Boundary-creating Processes and the Social Construction of Threat" (2008) 33:2 Alternatives 137 at 140—142.
[57] Cohen, *supra* note 46 at 44.

by boundaries that work to hold together a diverse group of people through the flexibility of their meanings.

However, the interaction between communities show that boundaries, despite their ambiguity, *operate as though they have* a definitive meaning. This can be seen in the TWU situation. The boundary drawn by the law societies that oppose TWU's law school, even though imbued with symbolic meaning, does not appear to be amenable to the adaptation, digestion and reassignment of meaning that Cohen's analysis implies.[58] It seems that the potential for diversity to coexist has a limit.

How then are we to make sense of the concomitance of ambiguity and firmness in community boundaries? An important first step is to move away from seeing boundaries as lines of separation. The metaphor of a line draws a hard distinction between what it means to be 'inside' and 'outside' of a community, which restricts the view of a conflict to exploring the points of view of each community.[59] Not that the experiences of people belonging to the different communities are unimportant, but it is not possible to identify a coherent single experience or point of view that represents a community. Focusing on boundaries as lines leaves us not only with an inaccurate perception of the communities in question (as argued in the previous section) but also hampers our ability to grasp the way that boundaries relate to the interaction between communities, and the way in which the self-understanding emerging from this interaction operates as a *process*.[60]

Mark Salter has proposed the metaphor of "suture" for making sense of the process of crossing community boundaries.[61] Salter set out to explore the '/' that lies between inside/outside. In other words, what happens when someone on the outside comes to the boundary of a community and tries to come in? Not satisfied with descriptions of a boundary as a point or line of division, he sought to articulate the '/' in terms of process of inclusion *and* exclusion.[62] Using the metaphor of "suture" he argued that the process occurring at the boundary

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[58] See *ibid* at 46, where Cohen uses the metaphor of digestion.
[59] Mark B Salter, "Theory of the / : The Suture and Critical Border Studies" (2012) 17:4 Geopolitics 734 at 737.
[60] There are other ways to imagine boundaries, such as in terms of "lines" and "spaces." See e.g. Zenon Bańkowski & Maksymilian Del Mar, "Images of Borders and the Politics and Legality of Identity" in Richard Nobles & David Schiff, eds, *Law, Society and Community: Socio-Legal Essays in Honour of Roger Cotterrell* (Farnham: Ashgate, 2014) 61. For more on the shift to thinking of law in terms of 'process,' see James MacLean, *Rethinking Law as Process: Creativity, Novelty, Change* (Abingdon: Routledge, 2012).
[61] Salter, *supra* note 59. Although Salter's discussion focused on individuals crossing state borders, his insights are relevant for understanding the process of crossing boundaries more generally.
[62] *Ibid* at 737—38.

is a cut, or a rupture, and then a stitching together. From this view, boundaries are not points of separation between communities, but dynamic points of opening and closing that join together the inside and the outside. They provide the conditions of possibility for communal existence.[63]

Salter used the example of an individual crossing a state border. When crossing a border an individual must show her credentials of identity from her original community. The person's right to belong and come into the new state is not guaranteed but depends on the sovereign decision of a community to accept them. The relationship between an individual and her community is ruptured and exposed as neither natural nor permanent, but rather constructed and contingent. This rupture, or cut, threatens the existence of the community because community depends upon individuals who see themselves and their identities as constituted, at least in part, by belonging to the community.[64]

The reason that the cut does not destroy the community is because the cut is portrayed as an exception to the otherwise smooth continuity of identity in the community and the strength of the community's borders.[65] This narrative conceptualizes the community as a coherent entity that has the power to exclude and include individuals. In order for the individual crossing the boundary to enter the community, she must internalize the narrative of community existence and power. It is through the individual internalizing the narrative that the community really comes to life. The community appears as 'real' and 'powerful' because the individual accepts that it is so. Ironically, it is through the individual internalizing the community that the cut in the community's boundary is pulled closed.[66]

There are two things exposed by this process. First, that the integration of an individual into a community—the act of suturing the boundary closed, of actually creating the community—depends on the individual internalizing the narrative of the community's authority to determine individual belonging. Secondly, the authority and power of the community is limited. Belonging to one community does not guarantee that an individual can also belong to another community. Belonging to a community is only ever a temporary thing.

Salter argues that while inside of a community it is easy not to see this process of creating and affirming boundaries. But when someone crosses a border then the foundations of the

[63] *Ibid* at 738—40.
[64] *Ibid* at 739—40.
[65] *Ibid* at 740.
[66] *Ibid* at 739.

community come into view. Opening and closing the question of identity in a community exposes the foundation of the very existence of the community.[67] Communities need to exclude (externalizing the individual and other communities) because the power of the community depends on individuals who are 'outside' to accept and internalize the narrative establishing the existence, power and authority of the community as they move 'inside.' The inside and outside of a community are simultaneously "…made strange and knit together…"[68] Crossing boundaries is a way of stitching together the outside and inside.[69] The disruption caused by a border crossing is part of the process by which the community expresses its power and constitutes itself. By exposing its own limits, a community exposes the power by which it holds itself together.[70]

In a similar way, the interaction in the TWU situation should not be seen only in terms of disagreement or conflict about some value or principle. Rather, TWU is trying to cross over the boundary and integrate itself into the community of the law societies. The interaction occurring at the boundary-crossing point between TWU and the law societies exposes a process by which both TWU and the law societies constitute themselves as communities. In theoretical terms,

> The suture connects the two spheres of possibility in part by making visible the dividing line between the spaces, but also insisting on its own presence and character as an exception… The suture is pregnant with meaning – not only by what it creates and separates, but also in the way that it connects and distinguishes. It renders visible the raw power that must be exerted to hold the two together and apart.[71]

The LGBTQ person who seeks to enter the TWU community has to internalize the TWU community as a community with integrity, and to conform him or herself to the narrative of TWU's institutional existence. But this is no different than any other individual coming to join the community. Integration into the community requires leaving behind that which does not fit, and conforming oneself to the perspective embodied by the community. For TWU, this includes the norms of the community as well as the discourse on which those norms are based.

The very same process can be seen in the law societies. In order for TWU to enter the 'community' of the law (to open a law school) it must internalize the norms and the narrative

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[67] *Ibid* at 739.
[68] *Ibid* at 735.
[69] *Ibid* ("The border is at once a division and a knitting together of legal spheres, sovereignties, and authorities" at 750).
[70] *Ibid* at 739—740.
[71] *Ibid* at 740 [footnote omitted].

that sustains the community. According to those opposed to accrediting TWU's proposed law school, the community of the legal profession is grounded in the fundamental norm (or value) of equality. The process of coming to the legal profession protects the legal profession and enables it to fulfil its social role, which is to sustain the integrity of Canada's legal institutions.

The claims of both TWU and the law societies are grounded in idealized conceptions of the integrity of their communities. Both are also sustained by a common process—both depend on the 'other,' who is outside, to internalize the narrative that holds their communities together. By claiming the same power to exclude people from belonging to their communities they show that belonging to either community is at best an incomplete and temporary thing. Calling into question each other's power of integration and exclusion exposes the limitations of the powers of each community in relation to those on the outside. The communities are proven to be, on their own, somehow emptier than we might expect. Their existence depends on the interaction with other communities and the process of integrating individuals into their communities.

The interaction between TWU and the law societies puts into question the ideal forms of community imagined by them. If we take seriously the complex social and symbolic interactive processes described by Cohen and Salter then we cannot allow the conflict between TWU and the law societies to be determined solely in terms of the "integrity" of the communities. Even though the idealized vision of community operates as a key part of the foundation of community, these community ideals must be seen within the context of the interactive process of community formation.

The question in the dispute surrounding TWU's proposed law school deals specifically with the law societies and an ideal view of the legal profession. But the point (warning against over reliance on integrity and overlooking the interactive process of community formation) also relates to the way that law, as a social and communal force, is conceptualized. This is especially so because the threat felt by the law societies and the legal profession at the TWU proposal relates to the integrity of the rule of law and the community of law more generally.

It is difficult to know what it would look like to integrate TWU into the legal community because of the complexity of the process involved in defining, transforming, challenging and accepting the boundaries of both communities. The flexible and fungible nature of boundaries affords a measure of dissonance to be present in TWU's participation in the legal community.

Allowing TWU to participate in the legal community would undoubtedly change the legal community and the TWU community.

It may well be that the changes to the legal community brought about by TWU's proposed law school threatens certain conceptualizations of the legal community (e.g. those championed by the law societies). However, this threat points to the existential limitations of the legal community and to the challenges of referring to it in the context of a legal dispute. That is to say, the legal community does not exist 'out there' with integrity to be protected and kept intact. In fact, the discomfort felt in the struggle to determine how to stitch TWU into the legal community is part of the very foundation of the legal community itself. The legal community only exists insofar as communities like TWU are external to it and can internalize it. The same could be said for TWU. The threat felt over the prospect of giving up the TWU Covenant is a reflection of the existential limitations of the TWU community. The threat felt by TWU and the legal community is the visceral experience of the social process by which each of these communities is formed and evolves.

Evaluating the process of integrating TWU's proposed law school into the community of the legal profession in order to make a judgment about accrediting the school is deeply affected by the way that the legal community is conceptualized. In what follows I will look at the current conceptualization of the community of the legal profession by those who oppose accreditation of TWU's proposed law school. I argue that this conception of the legal profession is bound by abstract values, which restricts the way we think about its interaction with TWU. I propose that we open up the way that we think about community (of the legal profession, of TWU or of the law more generally) to a broader range of social, historical, discursive factors than what has been engaged so far.

2 ETHOS AND DISCIPLINE

I noted previously the way that the legal profession has been tied to the process of law school admission, with the two portrayed as joined by a shared 'ethos' grounded in the value of equality. Those who oppose TWU argue that to accredit a law school at TWU would corrode the 'ethos' of the legal profession because the Covenant is incompatible with the value of equality. Viewing TWU's proposed law school as a threat to the ethos of the legal profession in this way

presumes not only that the legal profession and legal education are a single community with a shared 'ethos,' but also that this ethos persists in a particularly abstract form.

I will show below that one of the difficulties with defining the ethos of the legal community in this way is that it tends to separate community ethos from its institutionalized practices and the lived experience of its individual members. This causes problems in the context of the TWU dispute. To determine the compatibility of the TWU Covenant with the 'ethos' of the legal profession requires either identifying the values of the TWU Covenant and weighing them against the values of the ethos or deciding whether the practice of the Covenant is inconsistent with practices acceptable to the ethos. In either case it is necessary to answer why and how certain values come to be fundamental to the ethos of the legal profession and how these values relate to particular practices.

Severing the connection between the fundamental values and the practices of the legal profession makes it difficult to justify why the ethos of the profession aligns with certain values—the value of equality—and not others. It is crucial to be able to articulate the way in which values connect to the practices of community as occurring in its social, historical, political and discursive evolution. Without this, it is impossible to know how and why values become authoritative for a community and how these values shape the practices of a community. Losing a sense of how the ethos of the community emerges through the practices of the community (social, discursive, or otherwise) leaves us with the assertions made by the already established community about the nature of its ethos. The community simply is what it is, and to be part of the community depends upon simply accepting it as it has been presented.

This raw assertion of the essence or 'ethos' of the legal community, which is expressed in the legal profession, is not acceptable for a number of reasons. Primarily, it misrepresents the nature of the legal community, failing to account for the complex social interactive process by which it takes shape. As was argued in the first half of the paper, communities are not things that simply exist 'out there,' but rather are inextricably tied to rather complex social interactive processes that involve the dynamic interplay between communities and individuals. Alienating the meaning of the ethos of the legal profession from the institutional practices of the professional community by defining the ethos solely in terms of fundamental legal values provides an impoverished view of the community of the legal profession and of the law more generally. It disregards the way that community boundaries are shaped through social interaction,

it does not account for the influence of communities on each other, and it does not consider the role of the individual in constituting the community as such. The ethos of a community, ultimately, is the product of these processes.

In what follows I will look at how the notion of the 'ethos' is employed by the law societies and the Ontario courts, drawing particular attention to the way that 'fundamental values' are given a central place in defining the ethos. I will then look at the disciplinary practice of law school, which sheds light on why the ethos of the legal profession is conceptualized in terms of fundamental values. I argue that the separation between values and practice is part of the institutional practice, or the 'discipline', of law school. From this angle, the challenge posed by TWU's proposed law school appears in an entirely different light. Shifting away from seeing the conflict as a competition between different values means that the challenge is not to choose and justify the priority of one set of values. Rather, the challenge is to reconnect the values at stake to the practices of the communities, and to bring this into the evaluation of TWU's proposed law school.

As we saw in the first half of this chapter, there is a dynamic tension between the open and closed aspects of community. My argument here seeks to affirm, not deny, this tension. The discipline of law school, and the ethos of the legal profession, is not to be abandoned, but must be put into the context of its underlying dynamic social interactive processes.

2.1 "…the ethos of the legal profession…"—Value or Virtue?

The Oxford English Dictionary defines "ethos" in one sense as, "The characteristic spirit of a people, community, culture, or era as manifested in its attitudes and aspirations; the prevailing character of an institution or system."[72] Ethos is that which most deeply permeates a community. There is no question that the ethos of the legal profession is relevant for thinking about legal education and, specifically, TWU's proposed law school. The difficulty, though, is the way in which ethos is conceptualized and used.

How then should the 'ethos' of the legal profession be understood in relation to legal education, and how is it related to the dispute over the accreditation of TWU's proposed law

[72] *The Oxford English Dictionary*, 3rd ed, *sub verbo* "ethos" [*OED*, "ethos"].

school? The idea of 'ethos' was brought to bear on TWU's proposed law school through reference to a speech given years ago by Brian Dickson, the former Chief Justice of the Supreme Court of Canada, on legal education. It is worth reproducing the context surrounding Dickson's reference to the 'ethos' of the legal profession:

> …I want to say a few words about the gatekeepers to legal education, namely those involved in the admissions process. Those who fulfil this role are, in a real sense, the gatekeepers of the legal profession. *Ultimately, the ethos of the profession is determined by the selection process at the law schools.* In order to ensure that our legal system continues to fulfil its important role in Canadian society, it is necessary that the best candidates be chosen for admission to law schools. By "best" I mean more than just the most academically qualified. I also mean young people who exhibit other qualities such as compassion, unselfish service to their community and idealism.
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> Furthermore, it is incumbent upon those involved in the admission process to ensure equality of admissions. For a long time, law, like other professions, was a male profession. In the last decade great strides have been taken to overcome this problem. A large number of women have been admitted to Canadian law schools, have performed superbly there, and are now embarking upon successful legal careers which will, inevitably, lead them to the pinnacles of the practicing and judicial branches of the profession. Now, it seems to me, we must devote our energies to ensuring that there is a high degree of sensitivity in our admissions programs to those from different ethnic and economic backgrounds. Canada is a country which prides itself on adherence to the ideal of equality of opportunity. If that ideal is to be realized in our profession then law schools, and ultimately the legal profession, must be alert to the need to encourage people from minority groups and people from difficult economic circumstances to join our profession.[73]

The connection Chief Justice Dickson drew between legal education and legal practice is not original. The debate about the nature of legal education, and how it connects to the professional practice of the law, is ongoing.[74] For Chief Justice Dickson, those involved in

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[73] Dickson, *supra* note 33 at 377 [emphasis added to indicate what has received the most airtime].

[74] See e.g. Terrance Sandalow, "The Moral Responsibility of Law Schools" (1984) 34:2 J Leg Educ 163. Some scholars think that the legal academy is primarily a professional discipline, and that it should conform to the needs, ideals and values of the profession: see e.g. Harry T Edwards, "The Growing Disjunction Between Legal Education and the Legal Profession" (1992) 91:1 Mich L Rev 34. Others argue that legal education is a unique academic discipline with its own ideals, values and ambitions: see e.g. Stephen M Feldman, "The Transformation of an Academic Discipline: Law Professors in the Past and Future (or Toy Story Too)" (2004) 54:4 J Leg Educ 471; Mary Ann Glendon, "Why Cross Boundaries?" (1996) 53:3 Wash & Lee L Rev 971; Cass R Sunstein, "In Defense of Liberal Education" (1993) 43:1 J Leg Educ 22; J Peter Byrne, "Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education" (1993) 43:3 J Leg Educ 315; and Sherman J Clark, "Law School as Liberal Education" (2013) 63:2 J Leg Educ 235. In either case, the connection between the academic and the professional aspects of legal education is irrevocable, and the tension that this union produces

determining the selection process at law school are the "gatekeepers" of the legal profession, and the significance of their task should not be taken lightly. What happens in law school, including the process by which people are admitted to law school, affects the body of practicing lawyers and the other institutions of law. By invoking the notion of 'ethos' to establish the connection between legal education and the legal profession, Chief Justice Dickson brings to our attention that legal education does more than simply deliver legal information. It has an important social role, participating in constituting the culture of the legal profession.

Those opposed to accrediting TWU gravitate to Chief Justice Dickson's reference to equality.[75] Equality is particularly important because many of the law societies are charged in their enabling statutes to uphold the rights and freedoms of everyone, which implies the duty to uphold the principle of legal equality in some measure.[76] It is argued that the inconsistency between the TWU Covenant and the evolving principles of law in Canada regarding the non-discrimination of sexual minorities makes TWU's proposed law school inconsistent with the 'ethos' of the legal profession, and, on that basis, not fit for accreditation—the gatekeeping role of the law school should be exercised in a way that reflects Canadian law, and specifically the laws of equality and non-discrimination.[77]

Linking law school and the legal profession through an ethos of equality magnifies the potential effect that accrediting TWU's proposed law school might have on the legal profession. The concern is that by making the beliefs and practices of students, including those regarding sexuality, relevant to law school admission, TWU's Covenant would undermine merit as the primary basis for judging student admission.[78] Aligning the ethos of the profession with equality means that the change represented by the TWU Covenant will reverberate throughout the entire legal profession. Accrediting TWU's law program would be hypocritical for the law societies

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gives legal education a particular (and resilient) shape: see e.g. Edward L Rubin, "The Practice and Discourse of Legal Scholarship" (1988) 86:8 Mich L Rev 1835.

[75] See e.g. LSBC Written Argument, *supra* note 17 at para 81.

[76] See Nova Scotia's *Legal Profession Act*, SNS 2004, c 28, s 4(1); Ontario's *Law Society Act*, RSO 1990, c L.8, s 4.2; and British Columbia's *Legal Profession Act*, SBC 1998, c 9, s 3.

[77] The LSBC relied on this argument in its litigation with TWU (LSBC Written Argument, *supra* note 17 at paras 72—82). The Ontario Court of Appeal also relied on the same idea in finding against TWU (*LSUC* ONCA, *supra* note 6 at para 132).

[78] The presumed connection between equality and the primacy of merit in law school admission has been relied on in opposition to the accreditation of TWU's proposed law school. See e.g. *LSUC* ONSC, *supra* note 6 at para 97; *LSUC* ONCA, *supra* note 6 at paras 109 and 112; LSUC, "Convocation Transcript", *supra* note 31 at 95—96 (Janet E Minor).

and inconsistent with the character of the profession.[79] Accreditation would "undermine the integrity of our legal system and hence public confidence in the administration of justice."[80]

Linking the ethos of the legal profession to equality in this way misses a key component of Brian Dickson's argument. It is true that Chief Justice Dickson encouraged equality in law school admissions, and believed that legal education should be made more available to people that are marginalized. But equality, for Chief Justice Dickson, did not mean that nothing is relevant to admissions other than merit. Rather, he argued that choosing the "best" candidates for law school means to choose applicants with character traits "…such as compassion, unselfish service to their community and idealism."[81] This is necessary for law school to achieve its primary purpose, which Chief Justice Dickson described as "…to train for the legal profession people who are, first, honest; second, compassionate; third, knowledgeable about the law; and fourth, committed to the role of law and justice in our democratic society."[82] Increasing access to legal education on the basis of non-discrimination is ancillary to his primary concern, which is to foster a *virtuous* profession, using legal education to develop virtuous character in its future professionals.

It is telling that Chief Justice Dickson's reference to virtuous character was excluded from the quotations of him used in both the trial and appellate decisions of the Ontario courts (both which found against TWU's argument).[83] Similarly, the Law Society of British Columbia (LSBC) mischaracterized his idea of the primary purpose of legal education as "…ensur[ing] a commitment to the fundamental values of our society."[84] The LSBC used the "fundamental values of society" to say that the role of the gatekeeping function of law school admissions is to protect against discrimination.[85]

Chief Justice Dickson's description of legal education and its relation to the ethos of the legal profession did not look to "fundamental values of society." Looking instead to character and virtue, with the hope that law school admissions can be used to transform the legal profession into a virtuous profession, he provided a different view of the priorities of admissions to law school. The primary focus of law school admissions should be on stocking the law schools

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[79] See *LSUC* ONSC, *supra* note 6 at para 118.
[80] LSBC Written Argument, *supra* note 17 at para 89.
[81] Dickson, *supra* note 33 at 377.
[82] *Ibid* at 376.
[83] See *LSUC* ONSC, *supra* note 6 at para 98; *LSUC* ONCA, *supra* note 6 at para 131.
[84] LSBC Written Argument, *supra* note 17 at para 78.
[85] *Ibid* at para 82.

with good people and on making sure that law schools produce good lawyers of high character. Equality is not irrelevant here, but is put into context. Focusing on the virtues and character formation of individual professionals is presumptively open to the use of moral and behavioural standards in the process of determining admissions to law school. This is not to say that an approach based on virtue would support TWU's Covenant and its view of human sexuality. But things like sexual practice and religious beliefs could not be disregarded out of hand as irrelevant to shaping a virtuous professional and, therefore, a virtuous profession. Instead, from this perspective TWU's Covenant should be evaluated in terms related to the development of character and virtue, on what makes an individual virtuous in the ways that lawyers should be virtuous—which Chief Justice Dickson identified at honesty, compassion, and an attitude of community service.[86] Rather than 'fundamental values,' the discussion would be about the purposes and ends of the legal profession, and how these purposes and ends are embodied in the lives of legal professionals.[87]

It is precisely on the point of what types of people TWU's proposed law school will graduate that the argument against accrediting TWU's proposed law school finds its limit. Following the finding in *TWU v BCCT*, there is no evidence that the discriminatory nature of TWU's Covenant will shape one's character in a way disposed toward discrimination. The law societies who oppose accrediting TWU's proposed law school recognize this, and consistently say that their decision to not accredit is not grounded in the actions of prospective graduates from TWU.[88] Non-accreditation is focused on the *institution* of TWU—specifically the TWU Covenant. In other words, refusing to accredit TWU's proposed law school is decidedly *not* about the formation of virtuous character through legal education. It is about defining and reinforcing values that persist on an institutional level separate from the individual lives of the members of the institution.

One of the difficulties with characterizing the ethos of the legal profession in this way is the abstract nature of fundamental values. This is especially so in relation to the value of equality. The *Charter*, which protects against discrimination, has been referred to as a source of

[86] For another account of the important role of virtue in guiding legal education, see Roderick A Macdonald & Thomas B McMorrow, "Decolonizing Law School" (2014) 51:4 Alta L Rev 717.
[87] See e.g. Anthony Kronman, "Living in the Law" (1987) 54:3 U Chicago L Rev 835. For more in-depth discussion of what is involved in relating virtue and character to different practices, see Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 3rd ed (Notre Dame: University of Notre Dame Press, 2010) [MacIntyre, *After Virtue*], especially ch 14.
[88] See e.g. LSBC Written Argument, *supra* note 17 at para 417. See also *LSUC* ONSC, *supra* note 6 at para 115.

the fundamental values of Canadian society.[89] But the *Charter*, of course, protects both equality and religious freedom.[90] It is not possible to rely on the *Charter* to ground the ethos of the legal profession in the value of equality, especially when equality is being marshalled to restrict a religious practice (the TWU Covenant). The various rights and values embedded in the *Charter* have consistently been interpreted as ordered non-hierarchically and in balance with each other.[91] From this perspective, the truly 'fundamental value' that informs the community of the legal profession, vis-à-vis the *Charter*, is some form of the balancing of rights, not equality (or religious freedom).

Outside of the context of the *Charter*, Canadian 'fundamental values' have been described as the principles of equality, human rights and democracy.[92] But the abstract sense of 'equality' listed here lacks the specific content required to succeed in claiming a right to equal treatment in a concrete situation, such as in admission to law school. Equality in its abstract sense is distinct from equality as a legal claim. In its abstract sense, equality is a principle of the Rule of Law that all are equal before and under the law—that the law should be applied equally to everyone.[93] As a legal claim, equality relates to the differential application of a specific rule or right to a certain group of people in a particular context.[94] To say that the TWU Covenant is contrary to the ethos of the legal profession because equality is a 'fundamental value' of the legal

[89] *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 ("[t]he Charter represents a restatement of the fundamental values which guide and shape our democratic society and our legal system" at para 92).
[90] *Supra* note 16. Freedom of religion is protected in s 2(a) as one of the "fundamental freedoms." Religion is an enumerated ground of discrimination in section 15(1). Sexual orientation was read into s 15 of the *Charter* by the Supreme Court of Canada in *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609. See also *Vriend v Alberta*, [1998] 1 SCR 493, 165 DLR (4th) 385.
[91] *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at para 72 (there is no hierarchy of *Charter* rights, but when rights are in conflict they must be balanced); *R v NS*, 2012 SCC 72, [2012] 3 SCR 726 at paras 30—31 (competing *Charter* rights must be balanced in order to preserve them both); and *Dunsmuir*, *supra* note 14.
[92] *Loyola High School v Quebec (AG)*, 2015 SCC 12, [2015] 1 SCR 613 ("[t]hese shared values—equality, human rights and democracy—are values that the state always has a legitimate interest in promoting and protecting" at para 47). This passage was quoted in *LSUC* ONSC, *supra* note 6 at para 119.
[93] Tom Bingham, *The Rule of Law* (London: Penguin Books, 2010), ch 5.
[94] There is quite a bit of controversy over the meaning of "equality" and its use in law. Much of the recent discussion has focused on whether equality as a category is superfluous and confusing in law. See Peter Westin, "The Empty Idea of Equality" (1982) 95:3 Harv L Rev 537; Peter Westin, *Speaking of Equality: An Analysis of the Rhetorical Force of 'Equality' in Moral and Legal Discourse* (Princeton: Princeton University Press, 1990); Kent Greenawalt, "How Empty is the Idea of Equality?" (1983) 83:5 Colum L Rev 1167; Jonnette Watson Hamilton & Daniel Shea, "The Value of Equality in the Supreme Court of Canada: End, Means or Something Else?" (2010) 29:1 Windsor Rev Leg Soc Issues 125; Rex Ahdar, "The Empty Idea of Equality Meets the Unbearable Fullness of Religion" (2016) 4:2 J L Religion & State 146. It is important to note that there are multiple ways to conceptualize the idea of equality in law: see e.g. Ron Levy, "Expressive Harms and the Strands of *Charter* Equality: Drawing out Parallel Coherent Approaches to Discrimination" (2002) 40:2 Alta L Rev 393. My point here is simply to distinguish between the abstract idea of equality as an aspirational social ideal and the idea of equality as a right to be claimed in certain circumstances.

profession elides the distinction between the two senses of equality and evades the arguments and judgments on which such an assertion rests.[95] The abstract, or aspirational, idea of equality provides a starting point, not an answer, for addressing the question of whether to accredit TWU's proposed law school.

Regardless of how one might balance the values of equality and religion in relation to the ethos of the legal profession, the point I want to emphasize is that to ground the ethos of the legal profession in an abstract set of 'fundamental values' profoundly shapes the way that the community of the legal profession is conceptualized. Whereas 'virtues' focus on the lives of those who compose the profession, 'values' focus on the nature of the profession itself separately and apart from the lives and actions of professionals. The legal profession is then divided between an abstract sense of 'the profession' and its particular lived experiences.

This can be seen in the way that values are understood to become fundamental to the ethos of the legal profession. The Ontario courts describe the Law Society of Upper Canada (LSUC) as historically engaged in promoting equality.[96] Equality is also located within the empowering statute of the LSUC, as part of the general obligation to protect peoples' rights.[97] But what is missing from this restatement of the history of the law society and recitation of its legislative duties is *how* equality came to be the "characteristic spirit" of the legal profession, its "…culture… its attitudes and aspirations; [its] prevailing character…."[98] The value of equality is simply presented as always there, as the essence of the legal profession that always was. In this sense it is rather like a creed that can be accepted or rejected but not negotiated. Individuals (or institutions, like TWU) either conform to the ethos and become professionals, or, if they cannot conform, remain outside of the professional community. There is no sense that the ethos of the legal profession emerges through or is shaped by the participation, deliberation and action of its individual members.

In light of the discussion in the first half of this chapter the portrayal of the ethos of the legal profession as an abstract set of fundamental values is deficient. Communal identity (its 'ethos') is formed and evolves through a complex process of social interactions, between different communities and through the active engagement of individuals. Appealing to virtues to

[95] Ahdar, *supra* note 94. This point foreshadows the discussion of Chapter 4.
[96] *LSUC* ONSC, *supra* note 6 at paras 21—25 and 95—96.
[97] *Ibid* at paras 94, 97 and 100; *LSUC* ONCA, *supra* note 6 at paras 108—11.
[98] *OED*, "ethos", *supra* note 72.

define the ethos of the legal profession captures much more of this process than an appeal to values. Professional life, from the virtue perspective, is not characterized by passively conforming to an abstractly defined norm. Instead, the guiding principles of a community emerge out of the lived experiences of individuals within community, in the common pursuit of some common good or purpose.[99] As Macdonald and McMorrow observed,

> [V]irtues are relational practices: dimensions of "who-we-are-in-being-with-others." It is orientation to the public good, not just each individual's private benefit, that characterizes the aspiration to lead virtuous lives. Each community member has the potential to find meaning in his or her participation to the extent one believes one can make a mark on the life of the institution and be shaped by the experience for the better.[100]

The ethos of the legal profession, from this perspective, is dynamically related to the lives of legal professionals and law students rather than statically related to fundamental values inherent to the profession.

2.2 The Discipline of Law School—the Divided Self

The 'fundamental values' of the ethos of the legal profession do not operate entirely separate from the lives of individuals in the legal community. They are reproduced through social interaction, like any other aspect of communal life. This is particularly evident in law school. As JM Balkin observed, "Disciplines reproduce themselves through education; they construct the cultural software of new members in order to perpetuate themselves."[101] Since the first step in coming to law in Canada is through a university education in law, the initial site of disciplinary formation of the legal profession is in law school. Legal education is where the community of the legal profession reproduces itself, shaping individuals into a form that comports with the values and ideals of the community.

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[99] See e.g. Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame: University of Notre Dame Press, 1988), ch 3; MacIntyre, *After Virtue*, *supra* note 87, ch 15.
[100] Macdonald & McMorrow, *supra* note 86 at 730—31 [footnotes omitted].
[101] JM Balkin, "Interdisciplinarity as Colonization" (1996) 53:3 Wash & Lee L Rev 949 at 956.

The notion of 'discipline' described here is distinct from what we mean when talking about a university discipline, although there are some overlaps between them.[102] By 'discipline' I refer broadly to the cluster of practices (formal and informal) that shape individuals in the journey of coming to the legal profession. In this sense, the discipline of legal education is not an object but a process. The process of discipline affects a vastly complex and multifaceted set of habits of thought, self-perceptions and relationships. Disciplines transform individuals by engaging with multiple layers of human experience.[103]

Legal education accomplishes more than the disclosure of the values and ideals that students/professionals of the legal profession are to follow; it shapes people, and imparts to them a set of habits that reflect the purposes and ends to which the community is oriented. The abstract notion of values and ideals, which ground the community of the legal profession, must be connected to the disciplinary practice of law school. As we will see there is a deep resonance between the value-based conception of the ethos of the legal profession identified earlier and the discipline of legal education, which is also mirrored in the position taken by the Canadian Council of Law Deans regarding the accreditation of TWU's proposed law school. This disciplinary practice connects students (and professionals) to the community of the legal profession as its passive dependents.

Philip Kissam described legal education as resting upon a "subterranean" and pervasive system of highly structured practices, including routines, habits and a tacit knowledge that make law school itself a form of discipline.[104] These disciplinary practices form certain intellectual attitudes within its students, which are considered to be the marks of a true professional.[105] Included here are dispositions toward precision, scepticism, confidence, toughness, and conservatism. The emerging image of the ideal lawyer is as a quick, productive, error-free,

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[102] See e.g. Helge Dedek, "Stating Boundaries: The Law, Disciplined" in Helge Dedek and Shauna Van Praagh, eds, *Stateless Law: Evolving Boundaries of a Discipline* (Farnham: Ashgate, 2015) 9.

[103] In this way, disciplinary formation might be similar to the process of religious conversion, which involves a complex "crystalline" structure of the entire human self. See e.g. Matthew Scherer, *Beyond Church and State: Democracy, Secularism, and Conversion* (Cambridge: Cambridge University Press, 2013), which explored the connection between religious conversion and the secularization of the state.

[104] Philip Kissam, *The Discipline of Law Schools: The Making of Modern Lawyers* (Durham, NC: Carolina Academic Press, 2003) at 4. The practices that Kissam is particular interested in examining are the tacit norms emerging from "the *unintended actions, and unintended effects* of [these] actions" of law school (*ibid* at 11—12 [emphasis in original]). Macdonald & McMorrow, *supra* note 86, offered a similar critique of law school as Kissam, except that they focused on the way in which law school is dominated by the influence of external "colonizing forces" (*ibid* at 719) rather than on the tacit forces internal to law school.

[105] For an overview of these arguments, see Kissam, *supra* note 104 at 6—11.

combative warrior that avoids open-ended, risk-taking deliberations about ethical, moral and political issues.[106]

But there is another side to the lawyer produced by the discipline of law school, which reflects the broader modern social phenomenon of the "divided self."[107] According to Kissam, law school converges within the individual both the strong enlightenment notions of rationality, individuality and universality as well as the romantic ideals of emotion, language, aesthetics, history and relationships. The convergence of these conflicting ideals is achieved by partitioning the self into professional (public, rational, individual autonomous) and personal (private, emotional, aesthetic, relational) spheres of life.[108] The line that divides the professional and private is sufficiently vague to bend and move in such a way as to support the ideals of the legal professional mentioned earlier. A similar bifurcation is reflected in the modern legal context as a common conception of law as a matter of technical definitions and distinctions,[109] to the fracturing of legal knowledge from other forms of knowledge[110] and to the disposition toward coherence within the law.[111] The modern conception of law and the disciplinary norms of legal education help make law students (and legal professionals) vulnerable to being co-opted by the ideals of the legal profession and formed into divided selves.[112]

The formation of the 'divided self' in the discipline of law school is, according to Kissam, also accomplished through a profound sense of ambiguity about the meaning of the law taught in law school. On the one hand, the law is presented as systematic and rational, but on the other it is presented as fragmented and decontextualized. Through the methods of reading, teaching and evaluation used in law school, students are constantly exposed to tensions and

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[106] *Ibid* at 229—30.
[107] Kissam takes the idea of the 'divided self' from Charles Taylor, *Sources of the Self: the Making of Modern Identity* (Cambridge, Mass: Harvard University Press, 1989). See Kissam, *supra* note 104 at 231—36.
[108] *Ibid* at 235.
[109] See e.g. Roderick Macdonald, "Metaphors of Multiplicity: Civil Society, Regimes and Legal Pluralism" (1998) 15:1 Ariz J Intl & Comp L 69; and Martha Minow, *Making All the Difference: Inclusion, Exclusion and American Law* (Ithica: Cornell University Press, 1990).
[110] See e.g. Gerald Postema, "Law's Autonomy and Public Practical Reason" in Robert P George, ed, *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996) 79.
[111] See e.g. Desmond Manderson, "Beyond the Provincial: Space, Aesthetics and Modernist Legal Theory" (1996) 20:4 Melbourne UL Rev 1048.
[112] See e.g. JM Balkin, "Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence" (1993) 103:1 Yale LJ 105; also see Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field" (1987) 38:5 Hastings LJ 805 (especially the introductory notes of the translator, Richard Terdiman). For a similar argument that uses an alternative metaphor of "boundary" for structuring the conception of the "self," see Nedelsky, *supra* note 2, especially ch 2.

inconsistencies between legal authorities.[113] The result is the appearance that "there is no law there" to bind judges, lawyers or anyone else.[114] There is no right answer, and everything can be argued from various perspectives. The 'ideal lawyer' emerges as the master of ambiguity, able to represent multiple perspectives with conviction, unbound by the restrictions of one particular view.

The ambiguity of the law strengthens the socialization of individuals into the legal profession and their fidelity to the law. As students are exposed simultaneously to experiences of powerlessness and empowerment—overwhelmed with the plethora and fragmentation of material, and then instructed in appropriating the tools needed to master the ability to make compelling arguments out of this material—they become 'engulfed' by the law, and come to accept the authority and values of the legal profession.[115] The profession mediates our dealings with the law, making accessible that which on our own is unmanageable. The relational bonds formed through the process of legal education create a sense of belonging to this legal community, which is collectively working to confront uncertainty and to make sense of the law, reinforces the sense of dependence on the community of the legal profession.[116] This communal experience is important to the full indoctrination of the discipline. Ambiguity and the divided self enable the transformation of students into full disciples, indoctrinated—as future jurists—with this sense of ambiguity and dependence on the legal professional community.[117]

Some of these elements of the discipline of legal education can be seen in a letter written by the Canadian Council of Law Deans (CCLD) to the Federation of Law Societies of Canada (FLS) committee reviewing TWU's law school proposal.[118] In this letter the CCLD said,

> Discrimination on the basis of sexual orientation is unlawful in Canada and fundamentally at odds with the core values of all Canadian Law Schools. We would urge the Federation to investigate whether TWU's covenant is inconsistent with Federal and Provincial law. We would also urge the

[113] Kissam, *supra* note 104 at 241. For Kissam's arguments on the way this appears in the various practices of law school, see *ibid* at 27 (the core curriculum), 34—35 and 39—41 (casebook readings), and 54—57 (examination).
[114] *Ibid* at 118.
[115] *Ibid* at 241—42.
[116] *Ibid* at 121.
[117] In his well-known essay, "The Ordinary Religion of the Law School Classroom" (1978) 29:3 J Leg Educ 247, Roger C Cramton describes a set of law school practices that result in similar attitudes. He focuses on the instrumentalist views of the ideal lawyer prevalent in law school, which engenders a deep indifference toward the values of legal education and the legal profession (*ibid* at 250, 257—58).
[118] Letter from Canadian Council of Law Deans to Federation of Law Societies of Canada (20 November 2012), online: Canadian Council of Law Deans <www.ccld-cdfdc.ca/images/reports/CCLDnov20-2012lettertoFederation-reTWU.pdf> [CCLD Letter].

> Federation to consider this covenant and its intentionally discriminatory impact on gay, lesbian and bisexual students when evaluating TWU's application to establish an approved common law program.[119]

On its face, this statement is straightforward enough. The CCLD is concerned about the rights of LGBTQ people in relation to TWU's Covenant. But the first and last sentences of this quotation read together—that discrimination is unlawful and that TWU's Covenant is intentionally discriminatory—imply that the TWU Covenant is in fact "unlawful." It is no simple or straightforward thing to say that the TWU Covenant is unlawful. It is true that in some contexts discrimination on the basis of sexual orientation is legally prohibited, but not in every context. Most notably, as was discussed earlier, the 2001 *TWU v BCCT* decision upheld TWU's ability to maintain its Covenant in the face of s 15 of the *Charter* and human rights legislation in British Columbia.[120] Although it is possible to argue that the *TWU v BCCT* decision should not apply to the question of accrediting TWU's proposed law school,[121] which is to say that in the context of legal education discrimination by TWU on the basis of sexual orientation should be unlawful, such an argument provides shaky grounds (at best) on which to rest a less equivocal view of the unlawfulness of the TWU Covenant.

The reference to unlawfulness in the CCLD letter makes more sense if seen in relation to the claim that the TWU Covenant is "fundamentally at odds with the core values of all Canadian law schools."[122] From this view, to say that TWU's Covenant is unlawful is to assert that the essence of the Covenant is inconsistent with the essence of legal education. Lawfulness in this sense refers to something other than established legal principles (as set out in, e.g., *TWU v BCCT*), pointing instead to the values and ideals that form the basis of legal education. What is at stake for the CCLD can then be seen in relation to the formation of jurists that align with particular values rather than to the content of legal rules. This, as we have seen, is directly connected to the tacit knowledge imparted through the discipline of law school, in the skills, abilities and habits of mind learned in law school.

The difficulty is the way that the CCLD letter holds side-by-side the notions of unlawfulness in Canadian law and the "core values" of law school, treating them as though they

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[119] *Ibid*.
[120] *TWU v BCCT*, *supra* note 12 at 811—14.
[121] See e.g. *LSUC* ONCA, *supra* note 6 at paras 54—59.
[122] CCLD Letter, *supra* note 118.

are one and the same. The effect is to inject uncertainty into the state of the law, which affirms the disciplinary structure of law school described by Kissam. It also emphasizes the stabilizing role of legal education in defining and maintaining the institutional integrity of the law. Where the law is ambiguous the law schools are not. By posturing the TWU Covenant (and the *TWU v BCCT* decision) against the "core values of all Canadian law schools," the CCLD draws out the incongruity between the apparent state of the law and the 'values' of legality and legal education. The invitation for the FLS to consider the legality of the TWU Covenant is an invitation for the law societies to share a common 'ethos' with law schools—to buttress against the swells and turbulence of the uncontrollable law and guard the true essence of legality.[123] Echoing Kissam's concerns, how are students supposed to view this assertion of institutional values other than as a call to submit themselves to the protective and enlightened community of the legal profession? Likewise, and perhaps more to the point, how is the TWU proposed law school to be perceived as anything other than an assault on the legal profession and *mutatis mutandis* on the law itself?

2.3 The Challenge of TWU

TWU's insistence on maintaining its Covenant disrupts the discipline of law school. For TWU the law is, at least in this case, not ambiguous. Given its success in the *TWU v BCCT* case, TWU held onto its (religious) right to keep its Covenant. Implicit in claiming for its proposed law school the rights and privileges afforded to religious institutions, TWU asserted that participation in the legal community should not require the passive acceptance of either the legal values or the professional identity encased within the discipline of law schools. Rather, TWU insisted that its identity and values, as well as the identities and values of its students, remain grounded in the truths of divine revelation in the Christian scriptures (embodied for them in the Covenant).[124]

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[123] I borrow the idea of law as a "buttress" from Milner S Ball, *Lying Down Together: Law, Metaphor, and Theology* (Madison, Wis.: University of Wisconsin Press, 1985). To set these legal institutions up against the larger edifice of the law, especially the operation of legislative exceptions provided for TWU, resonates with a similar trend identified by Frederick DeCoste in the self-conceptualized role of the courts in relation to the other governmental powers. DeCoste disdainfully called this the appearance of a "new aristocracy." See Frederick C DeCoste, "The Separation of State Powers in Liberal Polity: *Vriend v Alberta*" (1999) 44:1 McGill LJ 231, especially at 242—48.

[124] See TWU Covenant, *supra* note 5. See also, Trinity Western University, "Core Values", online: <http://www.twu.ca/about/core-values > [TWU, "Core Values"].

This orientation of TWU's proposed law school toward religious tradition opens up the professional, public aspect of law to forces ordinarily aligned with private religious life. TWU's mission, as a religious institution, is to prepare its students spiritually and professionally, equipping them to be fully-formed Christians who take on a profession with a public focus.[125] In seeking to extend its mission *through* legal education TWU challenges the boundary that divides private religious and public professional life.

This challenge has the ring of existential threat to it *if* the ethos of the legal profession is defined in terms of fundamental values. From this view, the threat of accrediting an unambiguously Christian law school is the replacement of secular (or non-confessional) legal values with religious values and teachings. Not only does this threaten to change the positive rights protected by the law—i.e. legal protections for LGBTQ people—but it also erodes the foundations on which the law is thought to rest. Elevating religious values and religious life, as TWU does, opens the question of whether the authority vested in the legal professional community could just as well be replaced by religious authority. As was explored earlier, this escalation from questioning particular values to undermining the entire legal system is a result of the way that values are tied to the legal professional community—the values *are* the community, constituting the very ethos of the community. If these values are threatened then so is the community.

But this view of TWU's argument is not complete. TWU does not in fact propose to supplant secular legal values with religious values or the legal professional community with religious community. This can be seen in the way that TWU distinguished between the actions of the institution and the actions of individuals within the institution. Although TWU claimed for its proposed law school the ability to exclude people based on sexual orientation it maintained that its law graduates are not being taught to act, and in all likelihood will not act, in a discriminatory way toward sexual minorities in the course of professional practice.[126] Likewise, TWU emphasized that despite the clear position in the TWU Covenant on human sexuality it is not

[125] See TWU, "Core Values", *ibid*. It should be noted that the straddling of the public/private divide was also pertinent to the decision in *TWU v BCCT*, *supra* note 12, where the propriety of training of future public school teachers at TWU was under question.
[126] Letter from Trinity Western University to Federation of Law Societies of Canada (17 May 2013), at 5 in FLSC, *Final Report*, *supra* note 28, Appendix B.

permissible for students to engage in homophobic behaviour.[127] TWU's proposal allows the institution to be openly exclusionary toward LGBTQ people in a way that individuals cannot be.

This feature of TWU's proposal is not entirely surprising given that the law of religious freedom in Canada maintains a stark distinction between private 'beliefs' and publicly 'acting' on those beliefs.[128] TWU's proposal does not deny the separation between religion and law. In fact, it reinforces the division between collective (private) identity in the faith and individual (public) identity as a legal professional. Arguing for strong religious freedom for TWU as an organization on the basis that it is private and religious seems to push religious identity further into the private realm and professional identity in the public realm. This sends the message that the ideas embodied in the TWU Covenant will be contained within the institution of TWU and within the interior thoughts of TWU graduates, which reinforces the view that religion (organizationally and personally) can only appear in the public space if it does not make any difference to the public space.[129] Rather than disrupting the integrity of the legal profession, TWU's proposed law school seems to be, for the most part, maintaining it.

The trouble is making sense of how this somewhat innocuous view of TWU's proposed law school relates to the rather radical aspect of TWU's mission to unify religious and professional life noted earlier. From the view provided by the competition between fundamental values, it looks like a fairly significant inconsistency between the two. But things appear differently if we look behind the TWU 'values' regarding the unity of religious and professional life to the religious theological tradition that informs those values. Even a cursory view of the Christian tradition would reveal that the public/private distinction that marks legal professional and religious identities also has roots in an ongoing theological discourse that distinguishes between the sacred and profane.[130] Somewhat surprising, perhaps, is the realization that the preservation of secular legal values distinct from sacred religious truths is not only the concern of the legal profession *but also of the Christian tradition*.

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[127] See TWU Written Argument, *supra* note 20 at para 22.
[128] Most clearly stated in *TWU v BCCT*, *supra* note 12 at para 36.
[129] This is precisely what the law societies and legal community are arguing for. See Victor M Muñiz-Fraticelli, "The (Im)Possibility of Christian Education" (2016) 75 SCLR (2d) 209.
[130] See e.g. Nomi Stolzenberg, "The Profanity of Law" in Austin Sarat, Lawrence Douglas & Martha Merrill Umphrey, eds, *Law and the Sacred* (Stanford: Stanford University Press, 2007) 29; Robert A Yelle, "Moses' Veil: Secularization as Christian Myth" in Winnifred Fallers Sullivan, Robert A Yelle & Mateo Taussig-Rubbo, eds, *After Secular Law* (Stanford: Stanford University Press, 2011) 23; Scherer, *supra* note 103.

The point is that 'values' cannot be isolated but must be understood in relation to the social and communal context within which they appear. The conflict over the TWU proposed law school could be critically engaged more fully if we were able to draw on a much larger range of social and communal considerations than what is available through imagining communal ethos in terms of fundamental values. The distinctions that appear between public/private, professional/individual, or institutional/individual are tensions that exist within (and are produced by) the processes of historical, political, philosophical and social discourse.[131] Treating these distinctions as rigid 'values' that are either accepted or rejected separates them from their social/communal contexts, which makes it difficult to articulate why certain values are central to a particular community. Without accounting for the processes by which values are formed inhibits our ability to discuss them intelligibly. It also makes it difficult to see the connections and overlaps between different values and ideals.

TWU's proposed law school does much more than assert a confessional aspect of professional life. The open acknowledgment in the TWU Covenant of the *disciplinary* aspect of the TWU community takes an important step toward bridging the gap between the meaning of values and the social processes by which they are formed. By placing the disciplinary aspect of professional education *first* the TWU Covenant thrusts the structure of community, of its own community as well as the community of the legal profession, into dialogue. In other words, the TWU Covenant challenges us to take account of the social processes by which communities define themselves, through their boundaries, ethos and discipline.

In doing this, TWU challenges the way that the relationship between the individual and community is understood. Students in law school are shaped by a tacit knowledge, practices and habits, which foster the separation between individual and professional identity. The individual has to receive or accept the values and ethos of the community separately from their participation in the community. Closing, or hiding, the discipline of law school in this way separates the meaning of legal values, the thing to which the legal profession is committed to, from the social process, or discourse, by which the values are authorized as authoritative.[132] To the contrary, TWU students are invited to actively accept the discipline offered through the Covenant. TWU's community and established law schools are equally disciplinary, both calling for conformity to

[131] See Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: Johns Hopkins University Press, 1993).
[132] *Ibid*, esp. ch 1 (discussing the process of authorization).

its communal structure. The difference between them is that at TWU the community values and disciplinary practices are connected to each other, which grounds the discussion of these values and practices in the social/communal processes in which they are formed and evolve. In this sense, it would be possible to see TWU's proposed law school pushing against the subterranean disciplinary forces of the legal profession and toward a more active engagement with the foundational discourse of the legal professional community. This type of shift would not only foster individual responsibility for the community of the legal profession, it would also open the possibility of connecting the interaction between communities to the evolution of the legal professional community.

The current dispute between TWU and the law societies has to be seen as part of the process of the social interactions that give shape to the community of the legal profession. This means that in the dialogue with TWU over the accreditation of TWU's proposed law school the law societies and the legal profession cannot claim a status that is external to or standing above the social nature of the dispute. The argument cannot be solely about the 'fundamental values' of the ethos of the legal profession, as if the integrity of the profession and its values are things that must be protected and preserved in an abstract sense. Rather, the integrity and values of the profession must be seen through the context of the social processes that have shaped the profession and that currently shape the profession.

In the end, I do not think that this challenge posed by TWU's proposed law school is necessarily a threat to the legal profession. It does not try to supplant the community of the legal profession or displace the tradition of the rule of law in Canada. It does, however, issue a strong challenge to the way we think about the legal profession and legal education, which does not allow the separation of values from the social processes that shape the community over time. The mere fact that TWU's proposed law school disrupts the abstract fundamental values of the legal profession is not a sufficient reason to refuse to accredit TWU. Instead, the practices and values of the proposed TWU law school, and the way that it engages and shapes the lives of its students, will have to be evaluated in relation to the purposes and goals of the legal profession. Alongside this the legal profession will also have to hold the mirror up to its own practices, to ensure that those practices continue to express the purposes and goals of the profession.

Of course this still leaves open the questions about whether the mandatory and disciplinary practices embedded in the TWU Covenant regarding sexual conduct should be

permitted in the context of legal education. However, the way in which this question is asked and answered will be radically changed. Looked at in terms of values, TWU's proposal simply adjusts the boundaries presumed to exist between law and religion, as embodied in the laws of religious freedom. It is possible, though, to see TWU's proposed law school as opening up questions that challenge the way we think about the boundary between law and religion, pushing to the forefront the processes by which the ethos of a community connects to its lived experience. This creates an opportunity to explore the depths of the social interactive dimension of community formation rather than rehearsing the (never-ending) discussion of fundamental values.

CONCLUSION

The two quotations used to start this chapter frame quite nicely what I take to be the central lesson of the conflict over the accreditation of TWU's proposed law school. The tension experienced in relation to TWU's proposed law school can lead to the strengthening of the boundaries between law and religion, to "keep the threatening others at bay". The idea of a confessional law school in Canada is uncomfortable for many because it threatens a tacit sensibility about what it means to be part of the legal profession and to participate in the role that the institutions of law play in society. But perhaps the threatening feelings roused by TWU's insistence to "plant its flag elsewhere" does not foreshadow the collapse of liberal legal education or legal practice. Rather, the desperation to keep the boundaries of the legal profession where they are shines a light on the profound responsibility and challenge to pursue openness and unity in the face of diversity. The idea of community interaction occurring through the boundaries and ethos of the legal profession helps us understand the nature of this threat and, I believe, helps dispel the foreboding that it engenders.

To see the dispute over TWU's proposed law school in relation to the social interactive process of developing a community leads us to the heart of the life of community as such, which is interactive and integrative. In the first part of the chapter I argued that the communities of the law societies and TWU are not separate and isolated from each other. The boundaries between them, which are the basis of conceptualizing 'us' and 'them' or 'inside' and 'outside', are constructed *through* the interaction between them. This means that the boundary between TWU

and the law societies is not a line between them but is actually a source that both draw on. Through their interaction they become part of each other, written into the very fabric of each other.

The integration that occurs in the interaction of community boundaries frames the way that the ethos of community should be approached. The legal community is produced through the process of integrating individuals into the community, which involves the transformation of the individual by the discipline of the community. I argued that the notion of the "ethos of the legal profession" used in opposition to TWU's proposed law school abstracts the values of the legal community from its practices. I traced this in relation to the disciplinary structure of law school, which reinforces a similar narrative of abstract fundamental values. In this context I suggested that the challenge posed by the TWU Covenant might actually help shed light on some of the negative aspects of the community of the legal profession.

The analysis showed that the process of community interaction is key for making sense of the TWU situation. It helps tie together the life of the individual and the life of her community, as well as the values of the community and its disciplinary practices, making the experience of each interdependent with the other. This locates the ethos of community in relation to the *process* by which a community constitutes itself through the lives of its members and through their integration together according to a common purpose and goal. From this perspective, the TWU Covenant can be put into conversation with the legal profession. The values of each perspective can be reframed in terms of the goods and purposes to which each community is oriented, which are constantly being refined by the lived experiences of TWU members and legal professionals alike.

All of this extends beyond the particular context of the dispute over TWU's proposed law school and applies to the way we conceptualize the law's interaction with religion more generally. The communal aspect of the dispute between TWU and the law societies turns our attention to the social interactive dimension of the law's encounter with religion. As the law adjudicates religious claims our ideas about both the legal and the religious shift and change. The constant temptation is to turn to essential characteristics of law and religion and to fundamental values and principles of legality to resolve tensions between law and religion that arise in this context. Doing so leads to trouble.

As we saw in this chapter, focusing on the values of legal community privileges and insulates a particular view of the legal community. It also shields from our critical reflection the disciplinary forces of the law. Something similar will be seen in the next chapter where I explore the process of determining the justiciability of religious matters. The crucial lesson is that legal analysis is enriched by an awareness of the social interactive dimension at play when law encounters religion. Accounting for the social dimension of the law's interaction with religion makes it possible to imagine the law's encounters with religion in a more positive way.

CHAPTER 2

Drawing Boundaries around Religion in Law: Justiciability of Religious Matters as an Existential Encounter

"The work here is watching water, containing it some."[1]

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INTRODUCTION

It is possible to track the dynamics of the law's interaction with religion on multiple levels. We have already looked at the interaction in terms of a particular conflict centred on the shape and ethos of communities. Now I will look at its foundational formative level by focusing on the conceptual distinctions that constitute the interaction between law and religion. This can be explored concretely through a discussion of the justiciability of religious matters in civil courts.

MH Ogilvie observed that, as inheritors of the British legal system, Canadian law follows the principle of Parliamentary sovereignty.[2] She went on to argue that the establishment of the Church of England, which is an important part of this legal tradition, places the sovereignty of Parliament over religion. This means that the courts cannot relinquish or abdicate jurisdiction over religious situations *per se*. From this view, the question of justiciability is not about when the courts do have the ability to exercise jurisdiction over religious matters but rather when they should not exercise it. It is important, however, to frame this point on the sovereignty of law over

[1] Coleman Barks, "Fightingtown Creek" in *Winter Sky: New and Selected Poems, 1968-2008* (Athens: University of Georgia Press, 2008) 230 at 230.
[2] MH Ogilvie, "Are the Members of the Clergy without the Law? *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston*" (2014) 39:2 Queen's LJ 441 at 450.
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religious matters within its broader historical context.[3] A popular referent point might be the opening sentence of the first article of the *Magna Carta*, which points toward the principle of non-interference in religious matters: "In the first place have granted to God, and by this our present charter confirmed for us and our heirs for ever that the English church shall be free, and shall have its rights undiminished and its liberties unimpaired."[4] The relation between legal sovereignty and religious life is part of an older and larger story between church and empire where the development of religion and law had several distinct evolution phases. The idea that civil law is separate from religious matters, which is the grounding point of the discussion of the justiciability of religious matters, is fundamental to the Western legal tradition. But as Harold Berman explained the tradition, law and religion are rival powers engaged in perpetual struggle over their limits.[5] The sovereign clam of law brought through the establishment of Parliamentary sovereignty in Britain is a part of this struggle and cannot be seen as an exhaustive answer to the question of law's jurisdiction over religion. This much is evident in the fact that today, in the post-Reformation and post-Enlightenment era, British courts continue to waver back and forth on the question of court jurisdiction in religious matters.[6]

Determining the justiciability of a religious matter involves drawing a line between what is and is not within the realm of the 'legal.' Justiciability therefore offers a unique view into the relationship between law and religion. It involves more than the application of rules and includes an existential dimension, which determines the extent, or boundary, of the law's reach. As in my discussion of community in the previous chapter, here I treat justiciability as an interactive encounter between law and religion that includes a social dimension. Questions of the justiciability of religious matters are best thought of in dynamic, not static, terms. In other words,

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[3] See e.g. Victor M Muñiz-Fraticelli and Lawrence David, "Religious Institutionalism in a Canadian Context" (2015) 15:3 Osgoode Hall LJ 1049.

[4] The wording of this opening phrase is virtually identical between the 1215, 1216 and 1225 versions of the charter. See David Starkey, *Magna Carta: The True Story Behind the Charter* (London: Hodder & Stoughton, 2015) at 162—163. Also see the British Library, "English Translation of Magna Carta" (28 June 2014), online: <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation>. For the connection between the *Magna Carta* and the idea of judicial non-interference I am indebted to Peter Smith, "The Problem of the Non-Justiciability of Religious Defamations" (2015) 27 Denning LJ 241.

[5] *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass: Harvard University Press, 1983). See also Brian Tierney, *The Crisis of Church and State, 1050-1300* (Toronto: University of Toronto Press, 1964); and John Witte Jr., *God's Joust, God's Justice: Law and Religion in the Western Tradition* (Grand Rapids: Eerdmans Publishing, 2006) at 210—224.

[6] For example, the recent decision *Shergill v Khaira*, [2014] UKSC 33, seems to increase court authority to deal with religious matters (in that case, of defamation), moving away from the more restrictive approach taken in *Blake v Associated Newspapers Ltd*, [2003] EWHC 1960 (QB). See Smith, *supra* note 4.

we should not focus solely on whether and when the courts should or could have jurisdiction over religious matters, but instead should include an examination of *how* jurisdiction is determined.

The 'how' of establishing law's jurisdiction over a religious matter involves drawing distinctions and connections between the civil and religious. Distinguishing between these is no simple task.[7] In the context of justiciability I argue that the division between civil and religious is an expression of the purposes of law—for something to be justiciable it must matter to the law. I argue that determining this involves the dynamic interplay between individual, community and institution, both in terms internal to the law as well as the relation between law and other institutional attachments. This process of establishing justiciability shows that both law and religion are social institutions that fit within a larger social frame.[8] Secondly, it shows that the boundary between social institutions is permeable and constantly changing. The purposes of law that affect the division between law and religion, especially for the question of justiciability, are shaped through the web of relations and interactions that compose our social environment.

The view of justiciability that I develop here reflects the discussion of the previous chapter on TWU's proposed law school, where I argued that the boundaries and ethos of the legal community arising from the dispute revealed the dynamic social interactive process that shapes and is shaped by the community of the legal profession. The boundary that divides TWU and the legal professional communities is a porous site of exchange. In a similar way, I argue here that justiciability is not grounded in ontological or essential features of 'civil' and 'religious' but involves an ongoing active transformation of the civil and religious. The processes at play in the previous chapter are helpful for thinking about justiciability, except now the focus shifts away from community interaction to a different level of social institutional interaction.

The shift in this chapter to the distinctions drawn between law and religion in justiciability moves the analysis of the dissertation one layer deeper. Our attention moves toward the conceptual distinctions made in law between the civil and the religious for the purposes of

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[7] See generally, Caleb E Mason, "What is Truth? Setting the Boundaries of Justiciability in Religiously-Inflected Fact Disputes" (2010) 26:1 J L & Religion 91.

[8] By "institution" I refer to the broad social organization of knowledge, practice, culture, language, authority, roles and relationships. This idea of social institution is taken primarily from Peter L Berger & Thomas Luckmann, *The Social Construction of Reality: A Treaties in the Sociology of Knowledge* (New York: Anchor Books, 1967). This use of "institution" focuses on the process of delineating the civil and religious in order to understand the conceptual basis of the boundary between law and religion, which is distinct from the argument of Muñiz-Fraticelli and David, *supra* note 3, who seek to recover the corporate organizational dimension of religious freedom.

determining the scope of law's authority to regulate religion. Community remains important here, but the process of distinguishing conceptually between the civil and the religious connects with a more foundational and pervasive sense of social reality on which particular communities of law and religion rest, as institutional formations in society. Distinguishing between the civil and religious 'points up' to the boundary drawn between communities, but it also 'points down' to the more basic components of the boundary between law and religion embedded in social and institutional reality. The concrete question of whether or when a religious matter is justiciable shows these complex social processes at work, making "theoretically visible" the multidimensional labours involved in building the boundary between religion and law.[9]

The analysis offered in this chapter has three parts. First I set out the groundwork for understanding the issues at stake in the Canadian approach to the justiciability of religious matters. I highlight some of the tensions between the determination of justiciability of religious matters, the principles of religious freedom and the implicit conceptions of religion and law at play. I note evidence of significant interaction occurring between law and religion when justiciability is considered—regardless of whether justiciability is established or denied. I point out that the approach taken to determining justiciability in terms of the religious or civil 'essence' of a matter fails to address the openness and social complexity of the justiciability question. Justiciability is not simply a matter of the application of a legal rule, but is an evaluation of what 'matters' to law, which engages a broader range of social and institutional issues about law and religion. This includes questions about the institutional purposes of law vis-à-vis religion and about the effect that determining justiciability has on other inhabitants (like religious communities) within the broader social environment. I argue that when analysing the justiciability of religion it is crucial to account for these social and institutional factors.

In the second part of the chapter I tackle the issues raised in the first section through a close reading of the well-known Supreme Court of Canada (SCC) case *Bruker v Marcovitz*.[10] My analysis of this case helps shed light on the process and effects of determining the justiciability of a religious matter. In *Bruker* the Court addressed whether and how a promise made in a civil marriage contract to grant a religious divorce upon marital dissolution might be enforced in civil law. The approach that the Court took to determine justiciability was grounded in the distinction

[9] Anssi Passi, "Boundaries as Social Processes: Territoriality in the World of Flows" (1998) 3:1 Geopolitics 69 at 70 and 86.
[10] *Bruker v Marcovitz*, 2007 SCC 54, [2007] 3 SCR 607 [*Bruker* SCC].

between legal 'form' and religious 'substance'. I trace some of the ways in which this approach to justiciability transformed the religious matter in the case. In addition to the effect on religious individuals, communities and traditions, there is also evidence of the law co-opting religion and transforming it according to the institutional purposes and designs of the law. I argue that the *Bruker* case shows the importance of having a broad view of the process of determining the justiciability of religious matters, with particular regard for the social dimensions of the interaction. This shift in approaching the justiciability of religious matters opens the possibility for us to reflect on the constitutive institutional element of the law's interaction with religion more generally.

In the third and final part of the chapter, I look beyond the case analysis to social theories of the formation and interrelation of institutions. I argue that the dialectic interconnection between different forms of social institutional knowledge is useful for thinking about the institutional differences and exchanges between law and religion occurring in the determination of justiciability. The process of constructing law's social reality fosters interconnection between law and religion, even though the differences between legality and religiosity are interminable and distinct. The inescapability of the divergence and convergence of law and religion in the justiciability analysis sets the stage for the next chapter of the dissertation.

1 THE JUSTICIABILITY OF RELIGION AND THE PURPOSE OF LAW

As mentioned earlier, the idea that civil law is separate from religious matters is fundamental to the Western Legal Tradition. But the meaning of this has shifted over time. The historic conflict between civil and religious authority was predominantly over land and title. As the conflict morphed over time it came to be seen as a conceptual rivalry between different forms of reason, reality and truth. The civil and religious each came to have total claim over their distinct domains, the temporal and spiritual (respectively). Hobbes and Locke oversaw the growing divide, where the claim of the temporal state was defined against the claim of religion.[11] Religion is where the state cannot reach, in the interior realm of faith, which cannot be

[11] See e.g. Russell Blackford, *Freedom of Religion and the Secular State* (Malden, Mass: Wiley-Blackwell, 2012), especially chapter 3. I should note that there is a significant difference between Hobbes and Locke insofar as Hobbes advocated state control of religious institutions whereas Locke argued more for the functional separation of religion and state (*ibid* at 39—41).

compelled.

This is reflected in the Canadian jurisprudence on religious freedom, which has given religion a highly subjective interpretation in order to avoid situations where the court might be called on to adjudicate religious dogma and pronounce upon an individual's subjective understanding of their religious beliefs and obligations.[12] Allowing the court to engage in religious questions would "entangle the court in the affairs of religion"[13] and lead to "nothing short of a religious inquisition…to decipher the innermost beliefs of human beings."[14] In a similar way, interfering in religious matters is understood to threaten the religious neutrality of the state.[15] This idea of the religious neutrality of the state has become an increasingly important theme in the Canadian jurisprudence, with its most recent and complete articulation made by the SCC in the *Saguenay* case.[16]

In practice, civil law and religious matters are not separated in a clear and decisive way. The 'civil' and the 'religious' do not come to us as clearly distinguished packages. Indeed, there is a staggering amount of overlap between the civil and the religious domains of life. This is evident in the broad range of circumstances in which the question of justiciability of religious matters has been considered,[17] including disputes over property,[18] church membership,[19]

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[12] This principle is most clearly established in *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551 [*Amselem*]. See also Faisal Bhabha, "From *Saumur* to *L(S)*: Tracing the Theory and Concept of Religious Freedom under Canadian Law" (2012) 58:2 Supreme Court L Rev 109 (identifying the evolution of jurisprudence toward an individual and subjective conception of religion and religious freedom in order to keep the law neutral in relation to religion, but also arguing for the possibility of a relational theory of religion and religious freedom in Canadian law).

[13] *Amselem*, *supra* note 12 at para 50.

[14] *Ibid* at para 52.

[15] *Témoins de Jéhovah v Lafontaine (Village)*, 2004 SCC 48, [2004] 2 SCR 650, at para 68 (LeBel J, dissenting). Although Justice LeBel dissented from the majority decision, his description of the religious neutrality of the state was not in conflict with the approach taken by the majority. The majority grounded its decision on the principles of procedural fairness rather than on the question of the religious neutrality of the state. LeBel J's narrative of the religious neutrality of the state was adopted in *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3 [*Saguenay*], at paras 63—69.

[16] *Saguenay*, *supra* note 15 at paras 65—78. See also, Benjamin L Berger, "Religious Diversity, Education, and the 'Crisis' in State Neutrality" (2014) 29:1 Can JL & Society 103; and Richard Moon "Freedom of Religion under the Charter of Rights: The Limits of State Neutrality" (2012) 45 UBC L Rev 495.

[17] The distinction should be noted between questions of membership in a religious association, adjudicating between a religious organizations and third parties, and adjudicating civil and property rights claims between religious individuals. See e.g. the dissenting opinion of Justice Wakeling in *Wall v Judicial Committee of the Highwood Congregation of Jehovah's Witnesses*, 2016 ABCA 255 [*Wall* ABCA], at paras 124—125.

[18] See e.g. *Delicata v Incorporated Synod of the Diocese of Huron*, 2013 ONCA 540, 117 OR (3d) 1 [*Delicata*]; *Bentley v Anglican Synod of the Diocese of New Westminster*, 2010 BCCA 506, 326 DLR (4th) 280 [*Bentley*]; and *United Pentecostal Church of Chipman v Chipman Pentecostal Church Inc*, 2001 NBQB 49.

[19] See e.g. *Wall* ABCA, *supra* note 17; *Mott-Trille v Steed* (1996), 27 OR (3d) 486 (Ont Gen Div); and *MacLachlan v Capilano Christian Assembly*, 2003 ABQB 159.

employment,[20] authority within and the structure of a religious organization,[21] and private and public wrongs committed within a religious organization.[22] Despite the highly subjective grounding for religious freedom in Canada, the courts are still willing to claim jurisdiction over conflicts that involve religion.[23] As a general rule, religious matters can be engaged by the court in order to determine an issue related to property or civil rights.[24] Courts do their best to tread lightly and to restrict their commentary to the legal aspects of a dispute in order to avoid pronouncing on questions of religious orthodoxy and practice.[25]

The effects of engaging with religious ideas and religious sources in order to resolve questions of property and civil rights can, however, become expansive and unruly. The *Ukrainian Greek Orthodox Church*[26] case, which is one of the foundational cases in Canadian jurisprudence on judicial involvement in religious matters, is a good example of this. In this case there was a dispute between a local congregation and the federally incorporated Greek Orthodox Church of Canada regarding the employment of the congregation's priest and the *antimins* (traditional cloth) that the priest used during religious rituals. The incorporated Church claimed total authority, spiritually and temporally, over the congregation, its priest and its sacred objects. The Court found that this claim must fail since there was no evidence that the congregation formally subjected itself to the incorporated Church.[27] The Court went on to expound its own

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[20] See e.g. *Hart v Roman Catholic Episcopal Corporation of the Diocese of Kingston, in Canada*, 2011 ONCA 728, 344 DLR (4th) 332; *Kong v Vancouver Chinese Baptist Church*, 2014 BCSC 1424; and *Caldwell et al v Stuart et al*, [1984] 2 SCR 603, 15 DLR (4th) 1.

[21] See e.g. *Ukrainian Greek Orthodox Church of Canada et al v The Trustees of Ukrainian Greek Orthodox Cathedral of St Mary the Protectress et al*, [1940] SCR 586, 3 DLR 670 [*Ukrainian Greek Orthodox Church*, cited to SCR]; and *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta*, 2015 ABCA 101, 382 DLR (4th) 150.

[22] See e.g. *B(V) v Cairns* (2003), 65 OR (3d) 343, [2003] OJ No 2750 (QL) (Ont Sup Ct J).

[23] See generally MH Ogilvie, *Religious Institutions and the Law in Canada*, 3rd ed (Toronto: Irwin Law, 2010) [Ogilvie, *Religious Institutions*] at 217—220.

[24] See *Lakeside Colony of Hutterian Brethren v Hofer*, [1992] 3 SCR 165 at 173—174, 97 DLR (4th) 17 [*Lakeside Colony* cited to SCR]; and *Ukrainian Greek Orthodox Church*, *supra* note 21.

[25] The courts in Canada aspire to remain neutral in relation to religion, but this sense of neutrality is understood to be distinct from the American "neutral principles of law" approach, which is framed in terms of the wall of separation in the First Amendment. Canadian courts have by no means adopted the "neutral principles of law" analysis "holus-bolus" (*Pankerichan v Djokic*, 2014 ONCA 709, OJ No 4866 (QL) at para 85). Other cases that consider the American practice of "neutral principles of law" analysis include *Bentley*, *supra* note 18; and *Delicata*, *supra* note 18. On the other hand, some commentators have argued that the Canadian *Charter* functionally operates in a way quite similar to the American 1st Amendment (see e.g. Jeremy Patrick, "Church, State, and Charter: Canada's Hidden Establishment Clause" (2006) 14:1 Tulsa J Comp & Int'l L 25; and MH Ogilvie, "Judicial Restraint and Neutral Principles in Anglican Church Property Disputes: *Bentley v Diocese of New Westminster*" (2011) 13:2 Ecc LJ 198 at 204—206).

[26] *Ukrainian Greek Orthodox Church*, *supra* note 21 at 591.

[27] *Ibid* at 591—592 (per Crocket J.), 598 (per Davis J, concurring), 606—607 (per Kerwin J) and 614—615 (per Hudson J).

understanding of the temporal and spiritual aspects of the case and the relevant authority that the incorporated Church and the congregation have, finding that the incorporated Church was created only for regulating a limited range of temporal matters, mostly administrative in nature.[28] The congregation maintained authority to deal with most of its own temporal matters (i.e. its property) and remained submitted to the spiritual authority of the "unincorporated Church" of the Greek Orthodox Church. As a result, the incorporated Church had almost no power to interfere with the operations of the congregation—neither the employment of the priest nor the symbolic object used during worship (the *antimins*).

Exceptional historical circumstances and the poorly executed creation of the Canadian ecclesial body played a significant role in the *Ukrainian Orthodox Church* decision, to be sure. But the case nevertheless underscores the practical difficulty of drawing a line between the legal aspects of a dispute and its purely religious component. The SCC had to construct its own understanding of how authority works in the global Orthodox Church. Even though there were clearly flaws in the statutory incorporation of the Ukrainian Orthodox Church in Canada, it is quite remarkable that the Court would cast it aside in favour of a spiritual unincorporated Church, and that this would be put forward as the ecclesial basis of the congregation. Even though the Court tried to simply follow the technical fallout of failing to properly incorporate the Church, they actually engaged in a rather robust construction of what the Church *really* was and how its authority *really* worked.

Often times, judicial engagement with religious matters will focus on procedural questions in order to avoid pronouncing on purely religious questions, the idea being that procedure is distinct from the substance of religion. The key procedural theme that courts tend to focus on is related the requirements of natural justice. But this, too, has its challenges. For example, in *Lakeside Colony of Hutterian Brethren v Hofer*[29] the SCC considered whether the Colony violated the principles of procedural justice in excommunicating three of its members. In the Court's view, deciding the question of membership expulsion on the basis of procedure and the principles of natural justice does not engage the merits of the expulsion; in other words the Court is not adjudicating a religious question.[30] With this distinction in mind, the Court canvased, in considerable detail, the Hutterian rules and practices for disciplining its members in

[28] See, especially, the reasons of Kerwin J, *ibid* at 608—612.
[29] *Lakeside Colony*, *supra* note 24.
[30] *Ibid* at 175.

order to determine whether the excommunication was done fairly.[31] The Court found that the process of meetings and discussions leading up to the expulsion of the defendants violated the principles of natural justice. The notice given regarding the meetings to determine the fate of the defendants did not detail the nature of the allegations against them, which deprived them of the chance to defend themselves.[32]

The Colony argued that it was actually the defendants who excommunicated themselves from the Colony, so the normal rules of notice and defence do not apply.[33] The majority of the Court disagreed and held that the principles of natural justice apply universally, regardless of the contextual peculiarity of the case.[34] McLachlin J, as she then was, in dissent agreed with the Colony and proposed that the principles of natural justice must be adapted contextually.[35] If the purpose of the procedural requirements of natural justice—here, giving notice—are fulfilled or have no practical function then its formalities can be dispensed with.[36] According to McLachlin, formal notice is unnecessary in the context of a closely-knit Hutterian community. The disciplinary response to the actions of the defendants would be clear to the defendants as well as to the other members of the community, and issuing formal notice to the defendants would not affect the situation or the consequences faced by the defendants.[37]

Another concern with rigidly applying the formalities of procedural justice is the effect it would have on the Hutterian religious community.[38] For Hutterites, discipline is 'offered' by the colony to a member in order to invite the person to re-submit themselves to the community.[39]

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[31] *Ibid* at 192—195. The Court's understanding of the rules requirements for discipline and expulsion were based on a larger review of the institutional structure of the Colony and the relation between the various sources of authority for the Colony (*ibid* at 176—192). Part of the discussion involved reflection on the distinction between the "incorporated" and "unincorporated" church (reflecting the discussion in *Ukrainian Orthodox Church*, *supra* note 21). The Court found the incorporated and unincorporated church to be "neither wholly identical nor wholly distinct" but rather "technically distinct" but practically joint (*ibid* at 189). This rather detailed examination of the religious organization was justified on the basis that once civil jurisdiction has been assumed the Court must reconstruct for itself an understanding of the internal workings of a private (here religious) organization for the purpose of deciding the question of rights (*ibid* at 191—192).
[32] *Lakeside Colony*, *supra* note 24 at 220—224.
[33] See *Ibid* at 184.
[34] *Ibid* ("natural justice requires procedural fairness no matter how obvious the decision to be made may be… This may not change anything, but it is what the law requires" *ibid* at 222).
[35] *Ibid* at 226—227.
[36] *Ibid* at 227.
[37] *Ibid* at 228—233.
[38] Denise G Réaume, "The Legal Enforcement of Social Norms: Techniques and Principles" in Alan Cairns, et al, eds, *Citizenship, Diversity, and Pluralism: Canadian and Comparative Perspectives* (Montréal: McGill-Queen's University Press, 1999) 177 at 183—186.
[39] See e.g. *Lakeside Colony*, *supra* note 24 at 184 and 229.

Submission and acceptance of discipline are necessary for reconciliation. Providing notice and an opportunity for the defendants to defend themselves against being excommunicated, which is essentially a form of resistance to the discipline offered by the community, as the formal procedure of natural justice requires, would be contrary to the core ethos of the community. A rigid conception and application of the principles of natural justice would be contrary to the core principles on which the Hutterian religious community is based; enforcing in law the formalities of natural justice runs the risk of destabilizing the community.[40]

Even this brief glance at the *Ukranian Orthodox Church* and the *Lakeside Colony* cases shows the multiple elements involved in conceptualizing religious community for the purposes of judicial scrutiny. A simple and rigid view of the separation between law and religion would struggle to account for the complex dynamics presented in these two cases. What I want to draw attention to at this stage is the importance of the way that the question of justiciability is framed for the solutions that are reached through legal analysis. The justiciability of religious matters is part of the conceptual foundation for the way that the relationship between law and religion is understood and develops.

The case of *Wall v Highwood Congregation*[41] demonstrates how the question about framing the justiciability of religious matters engages some very big and difficult questions about the way we understand the relationship between law and religion. In this case the plaintiff, Randy Wall, was expelled from the Jehovah's Witnesses Highwood Congregation and shunned by its members. As a result, Mr Wall, a real estate agent, lost about half of his clientele. Mr Wall petitioned the court for judicial review of his expulsion, arguing that the process fell short of the standards of natural justice. The Highwood Congregation challenged the petition on the basis that judicial review is limited to tribunals exercising powers and duties of a public nature and courts can only review decisions of religious tribunals insofar as they impact civil and property rights.[42] The question was whether the courts were able to interfere in a conflict regarding membership in a voluntary unincorporated religious association.[43] In other words, can the expulsion of Mr Wall be judicially reviewed?

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[40] Réaume, *supra* note 38 at 185—186.
[41] *Wall* ABCA, *supra* note 17.
[42] *Ibid* at para 12.
[43] It is interesting to point out that the fact the Congregation was unincorporated was noted by Wakeling JA, in dissent (*ibid* at para 30), but not by the majority. The majority described the Congregation as a voluntary religious association (*ibid* at para 12).

Mr Justice Wilson, of the Alberta Court of Queen's Bench, found that the matter was justiciable and could be reviewed by the court because of the economic impact on Mr Wall.[44] Affirming this decision, the majority of the Alberta Court of Appeal (ABCA) said that the courts have jurisdiction to review the internal proceedings of a non-statutorily grounded religious association where there is a breach of the rules of natural justice *or* if the complainant has exhausted the appeal process within the church.[45] In a verbose and highly footnoted dissenting opinion, Justice Wakeling would have refused the petition for judicial review on the basis that the nature of the claim is not justiciable.[46] For Justice Wakeling, the decision of the Congregation to expel and shun Mr Wall did not affect his legal rights. Even though his professional life was seriously affected by his dependence on his relationships with the Congregation members, without more this did not give rise to legally recognizable and enforceable rights and obligations. Mr Wall has no right in law to associate with the Congregation.[47] Ultimately, according to Wakeling JA, although the expulsion and shunning of Mr Wall hurt his practical ability to carry on business it did not affect his *legal* ability to carry on.

Justice Wakeling's conclusion was vindicated by a unanimous SCC decision, which held that the matter was not justiciable.[48] Although the SCC and Justice Wakeling reached the same conclusion, I believe that Justice Wakeling's opinion offers a more pointed demonstration of the challenges arising when determining the justiciability of religious matters. For Justice Wakeling, the key question was whether there is a principled basis to restrict the law's authority to become judicially involved in reviewing the activities of a private religious association? The majority of the ABCA did not seem to contemplate any principled limitations to the power to judicially review a religious organization's internal decision, so long as there is an allegation of a breach of the (procedural) rules of natural justice.[49] But according to Wakeling JA, the decision of the

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[44] *Ibid* at para 11.
[45] *Ibid* at para 16.
[46] *Ibid* at paras 39—48.
[47] *Ibid* at paras 45—47.
[48] *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v Wall*, 2018 SCC 26 [*Wall* SCC]. The decision of the SCC was more circumscribed than the dissenting opinion of Wakeling JA. The SCC held that courts did not have jurisdiction to judicially review the decision of the Highwood Congregation for three reasons: 1) judicial review is only for state action; 2) there is no independent right of procedural fairness unless there are legal rights at stake; and 3) even if the first two points are met, theological issues are not justiciable (*ibid* at para 12). "Judicial review is only available where there is an exercise of state authority and where that exercise is of a sufficiently public character" (*ibid* at para 14).
[49] *Wall* ABCA, *supra* note 17 at para 22. It has been argued that the ABCA's decision to include non-statutorily based entities and where the entity's internal process has been exhausted quite drastically expands the court's power

Highwood Congregation to expel and shun Mr Wall is presumptively out of the court's reach; justiciability requires a clearly decipherable intention that privately associated relationships, and the practices governing those relationships, are to be treated as legally enforceable.[50] This intention might be found in an association's incorporating charter, in its lived tradition or in the statutorily based structure of the organization.[51] If a religious association incorporates then it is more likely that the relationships it sustains will have a measure of legality added to them that justifies judicial review.[52] Since the Highwood Congregation was unincorporated and was not based on a statutory foundation it is an essentially private entity and outside the reach of the jurisdiction of the Court.[53]

Justice Wakeling's dissenting opinion demonstrates how the approach taken to justiciability reflects a particular perspective on the law's relationship to religion and religious claims. This can be seen in the parallels that he drew to making his point about the non-justiciability of religious matters. He first compared the religious Congregation to a "bridge club," saying that courts cannot compel a bridge club to play with someone because "[t]hey are private persons and nothing more."[54] He also equated the decision to expel Mr Wall with deciding whether Wayne Gretzky was a better hockey player than Gordie Howe.[55] For him, hockey greatness, bridge club membership and religious membership together are linked because nothing legally relevant turns on the court deciding them.[56]

Making these comparisons provokes the question of *how* something comes to matter to the law. Even though nothing might normally turn on deciding whether Gretzky was a greater hockey player than Howe, and so adjudicating the question is not naturally justiciable, the

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of judicial review. See Shaun Fluker, "Does Judicial Review Apply to Decisions Made by Religious Groups?" (15 September 2016) ABlawg (blog), online: <http://ablawg.ca/2016/09/15/does-judicial-review-apply-to-religious-groups/>.

[50] *Wall* ABCA, *supra* note 17 at paras 69—72.

[51] *Ibid* at nn 35 and 37. The SCC clarified that these factors do not by necessity make a matter justiciable (*Wall* SCC, *supra* note 48 at para 28), noting in particular that neither the mere presence of an empowering statute nor the allegation of a violation of natural justice establish justiciability (*ibid* at paras 18—22 and 24, respectively).

[52] *Wall* ABCA, *supra* note 17 at para 114. For Justice Wakeling, disputes over membership in a religious association must presumptively be treated as non-justiciable. But this presumption is weaker when the association is incorporated through law. The SCC adopted a stronger presumption of non-justiciability, holding that decisions regarding membership in a religious organization are presumptively *not* judicially reviewable unless a civil or property right is *formally* granted by virtue of membership, or where there is evidence of a clear intention to form contractual relations upon entering into community membership (*Wall* SCC, *supra* note 48 at paras 24 and 29).

[53] *Wall* ABCA, *supra* note 17 at paras 30—42.

[54] *Ibid* at para 83.

[55] *Ibid* at para 82. See also *Wall* SCC, *supra* note 48 at para 35 (referring to Justice Wakeling's examples).

[56] *Wall* ABCA, *supra* note 17 at paras 82 and 101.

situation is different if a wager were to be placed on the outcome.[57] Even a private matter will attract judicial attention in the right circumstances. In other words, it is *not the nature* of these situations that makes them non-justiciable, *but their context*. Justice Wakeling hinted at this point, noting that a matter is justiciable when the outcome of the conflict has real practical consequences for the parties and when judicial review of the decision would vindicate someone's legal rights or interests.[58] Justice Wakeling suggested that what counts as a "practical consequence" and a "legal interest" is measured in relation to "…the individuals involved or for the community or both."[59]

Justice Wakeling is onto something important here. If consequences and interests are important to different people for different reasons then determining whether a particular religious matter is *legally* important necessarily engages with broad social considerations. This gets to the heart of the justiciability of religious matters, recognizing that an answer to the question requires more than technical legal analysis. As Lorne Sossin noted, "Justiciability is not a single doctrine with a single rationale. It is rather a collection of related doctrines based on common norms and principles relating to the scope of *what* really matters may be properly litigated."[60] The key here is determining what really matters to the law. Determining what "really matters" to law turns on the law's purpose, and how that purpose relates to the matter in question. When a matter aligns with the purposes of law and the conceptual terminology provided by the law, then it is justiciable.

It is challenging, though, to apply this logic of justiciability to a religious matter because of the highly subjective conception of religion and religious freedom that has taken root within Canadian jurisprudence. As the SCC held in *Amselem*, "It is the *religious or spiritual essence* of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection."[61] This conception of religious freedom pushes the justiciability analysis of a religious matter to look for the 'civil' and 'religious' essence of the matter in question in order to determine the line between them. As a result, the social dimension mentioned by Sossin fades

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[57] *Ibid* at para 101.
[58] *Ibid* at para 80. See also *Wall* SCC, *supra* note 48 ("Jurisdiction depends on the presence of a legal right which a party seeks to have vindicated. Only where this is so can the courts consider an association's adherence to its own procedures and (in certain circumstances) the fairness of those procedures." At para 24.)
[59] *Wall* ABCA, *supra* note 17 at para 101.
[60] Lorne Sossin, Boundaries of Judicial Review: The Law of Justiciability in Canada (Toronto: Carswell, 1999) at 227.
[61] *Amselem*, *supra* note 12 at para 47 (emphasis added).

from view.

The effect of this challenge is evident in the way that Wakeling JA's analysis in *Wall* turned away from the question of the purpose of law in its social context to what he thought to be the essential features of religion. Religious belief was for him "intensely personal", and religious associations were merely an important mechanism by which individuals pursue their religious goals.[62] Viewed in this way, religion can never be anything but private and can never "matter" to law. Presumably, a different view of the essence of religion—one that is, for example, less focused on individual subjectivity and more on institutions, communities and relationships—might produce a different result.[63] But regardless of how religion is conceptualized, the difficulty with approaching justiciability in terms of 'essences' of religion and law is that it obscures the social dimension of determining justiciability and renders an analysis of justiciability in static terms. In this way, approaching justiciability through essences faces a similar challenge as approaching it through procedure. Both fail to adequately account for the social and dynamic interaction between law and religion occurring through the determination of justiciability.

Although the SCC did not rely on a rigid notion of procedure or an objective idea of the 'essence' of religion like Justice Wakeling did, the *Wall* decision nevertheless reflected a similar difficulty with defining the basis of the justiciability of religious matters.[64] The Court noted that civil courts are not alleviated of the duty to adjudicate a dispute merely because it involves a religious aspect, but on the other hand civil courts are not to decide matters of religious dogma.[65] Likewise, the Court said that procedural rules grounded in religious doctrine are presumptively not justiciable *but* they can still be civilly adjudicated if based on a contract between two parties—regardless of whether the contract is meant to give effect to religious doctrines.[66] The principle that the Court relied on here was that civil courts do not have the legitimacy or institutional capacity to determine questions of religious dogma, but that a clear intention to

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[62] *Wall* ABCA, *supra* note 17 at paras 111, 117—118. Justice Wakeling also points out that judicial expertise does not cover religious norms and values (*ibid* at para 121), and that the law must attempt to remain neutral in relation to religion (*ibid* at paras 120, 122). The SCC made a very similar statement regarding religion, saying that religious membership is presumptively outside the jurisdiction of the courts because it is based on norms that are faith-based and deeply held (*Wall* SCC, *supra* note 48 at para 29).

[63] See, e.g., Bhabha, *supra* note 12 (arguing that using a different approach for conceptualizing religion—using relational rather than individual terminology—would be better).

[64] It should be noted that the Court's finding regarding justiciability of religious matters is technically obiter. See *Wall* SCC, *supra* note 48 at para 32.

[65] *Ibid* at para 36 (*Bruker* was referred to as authority for the former proposition, and *Amselem* for the latter).

[66] *Wall* SCC, *supra* note 48 at para 38 (The Court again referred to *Bruker* as authority for this latter proposition).

create legal obligations can make a religious matter justiciable.[67] The trouble is that the Court did not address the core question of justiciability, which is: on what basis does a religious issue come to *matter* to the civil law? If religious practices are presumptively not within the legitimacy and competency of civil courts, then what is the process by which this legitimacy and competency might be established? The residual ambiguity of the justiciability principle articulated in *Wall* highlights the complex social and institutional dynamics of establishing the justiciability of a religious matter and the importance of accounting for these dynamics in the adjudication of a religious matter.

2 THE PROCESS OF JUSTICIABILITY—FORM AND SUBSTANCE

In this section I will now look more closely at the process by which justiciability is determined and reflect on the breadth of social considerations that the process entails. I will do this through an in-depth analysis of the well-known SCC decision *Bruker v Marcovitz*.[68] Although the justiciability issue gets surprisingly little attention from the Court, I argue that it is in fact central to the way that the case was decided. This is corroborated by the SCC's reliance on *Bruker* when discussing the issue of justiciability in *Wall*, as noted above. *Bruker* reveals much about the way that the Court viewed the relationship of civil law and civil courts to religion and religious claims, and the profound affect that this had on the way the Court dealt with the religious dimensions of the case. Many of the themes raised here, including the way that religion is conceptualized and the way that the court understands its role in relation to religious claims, will be taken up again in subsequent chapters.

Before getting into the discussion of the *Bruker* decision I will briefly recap the factual backdrop of the case. The heart of the conflict was about Mr Marcovitz's refusal to participate in securing a Jewish religious divorce for his ex-wife, Ms Bruker. During the process of separation, Ms Bruker and Mr Marcovitz agreed to a "Consent to Corollary Relief," which set out the negotiated terms of their divorce (the Agreement). The Agreement was appended to the court order finalizing the end of their civil marriage. Paragraph 12 of the Agreement stated that the parties would appear before the rabbinical authority to obtain a *get*, which is the certificate of

[67] *Ibid* at para 36 ("The courts have neither legitimacy nor institutional capacity to deal with such issues").
[68] *Bruker* SCC, *supra* note 10.

divorce required to end a marriage in Jewish law, immediately following the Decree Nisi. In the Jewish religion, a divorce will only be affected when the husband willingly gives the get and the wife accepts it. Until a *get* is given the wife is *agunah*, or "chained", to the husband. While *agunah* a woman is not able to remarry and any children she has with someone else during this time are considered "illegitimate."

For 15 years following their civil divorce Mr Marcovitz refused to request a *get* from the rabbinic authority, which meant that during that time Ms Bruker remained 'chained' to Mr Marcovitz within the Jewish tradition.[69] Ms Bruker sued Mr Marcovitz, claiming that his refusal to provide her with a *get* constituted a breach of contract and that she was owed damages for her inability to remarry within her religious tradition and have 'legitimate' children during that time.[70] Mr Marcovitz argued that his promise to provide a *get* was not legally binding in civil law because it was a religious promise and that to enforce it, either through specific performance or through awarding damages, would violate his freedom of religion.[71]

As already mentioned, the question of justiciability received surprisingly little attention from the majority of the Court in the *Bruker* decision.[72] Instead the analysis of the Court roamed between the technical details of contract law, the purpose and limits of religious freedom, the grand aspiration for gender equality in all state institutions, individual autonomy of religious belief and practice, and the collective identities and meanings of religious tradition. The broad range of issues dealt with by the Court, and the way that the issues were connected to each other, makes it difficult to pin down precisely what *Bruker* stands for.[73]

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[69] During this time there was ongoing conflict between the parties over the terms of their separation. Nine years after the Decree Nisi, Ms Bruker started an action against Mr Marcovitz for refusing to follow the Agreement and request a *get* (*Bruker* SCC, *supra* note 10 at para 26). Mr Marcovitz argued that Ms Bruker continually sought increases to the child support payments and prevented him from seeing his children regularly (*ibid* at para 27). The day before court proceedings began on the issue of his refusal to provide a *get*, Mr Marcovitz appeared before the rabbinical authority in Montréal, agreeing to finalize the religious divorce, and delivered Ms Bruker the *get* (*ibid* at para 29).
[70] *Ibid*, at para 26.
[71] *Marcovitz c Bruker*, 2005 QCCA 835, 259 DLR (4th) 55 [*Bruker* QCCA], at paras 29 and 34.
[72] Justice Deschamps disagreed, arguing in her dissenting opinion that justiciability was the central issue of the case. See *Bruker* SCC, *supra* note 10 at para 106. I do not discuss the whole of Justice Deschamps' decision because many of her arguments are not relevant for the purpose of my analysis. References to "the Court" throughout the discussion are in relation to the majority decision, unless otherwise stated.
[73] There is a broad range of scholarly reflection on the meaning and significance of *Bruker*. See e.g., MH Ogilvie, "*Bruker v. Marcovitz*: (Get)ting Over Freedoms (Like Contract and Religion) in Canada" (2009) 24:2 Natl J Const Law 173 [Ogilvie, "(Get)ting Over Freedoms"]; Richard Moon, "*Bruker v Marcovitz*: Divorce and the Marriage of Law and Religion (2008) 42 SCLR (2d) 37 [Moon, "Divorce and Remarriage"]; Norma Baumel Joseph, "Civil Jurisdiction and Religious Accord: *Bruker v. Marcovitz* in the Supreme Court of Canada" (2011) 40:3 Studies in Religion 318; FC DeCoste, "Cesar's Faith: Limited Government and Freedom of Religion in *Bruker v. Marcovitz*" (2009) 32 Dal LJ 153; Rosalie Jukier & Shauna Van Praagh, "Civil Law and Religion in the Supreme Court of

In my view, the movement between these broad considerations is symptomatic of a much deeper struggle regarding the way that law relates to religion. The way that justiciability is established in the first place helps demonstrate this point. As I will discuss below, the Court justified the justiciability of the religious matter of the dispute through the legal form of the Agreement. Casting justiciability in this way obscured the substantive aspect of the dispute, which made the justification offered by the Court for its decision less than clear. The result was to leave some crucial points of tension between law and religion unattended, and the impact that the decision had on these points unaccounted for. Turning our attention to the question of justiciability in the *Bruker* decision reveals that the process of determining whether to engage religious matters in civil law has a profound impact on the way that religious issues are conceptualized and dealt with. Recovering an awareness of the interactive dimension of the justiciability issue is crucial for understanding the nature of the law's encounter with religion in the case.

The following discussion has three steps. First, I look at the introductory comments of the Court in its decision and identify there a connection between legal form and larger ideas about the purpose of law. The logic set down in this first part can be traced throughout the rest of the Court's decision. Secondly, I look at the way in which the big ideas of law's purpose are at work in the application of legal 'form' by the Court. Thirdly, and finally, I look at the way the operation of substantive legal purposes under the guise of legal form dramatically shaped the way that the Court handled the religious dimension of the case. I argue that religion was transformed into a vehicle for the law's own purposes.

2.1 Legal Form and the Purpose of Law

The *Bruker* decision began by espousing the virtue of tolerating diversity and pluralism while expressing the importance of restricting difference in such a way as to protect the "evolutionary integrity of multiculturalism and public confidence in its importance."[74] This is a puzzling way to begin a decision about divorce and contract law. Consideration of the doctrinal

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Canada: What Should We *Get* out of *Bruker v. Marcovitz*?" (2008) 43 SCLR (2d) 381; and John C Kleefeld & Amanda Kennedy, "'A Delicate Necessity': *Bruker v. Marcovitz* and the Problem of Jewish Divorce" (2008) 24 Can J Fam L 205.

[74] *Bruker* SCC, *supra* note 10 at paras 1—2.

legal questions is framed by the constitutional aspiration for a certain type of multicultural diversity. First, multiculturalism includes a "right to integrate" into Canadian society despite one's ethnic, cultural or religious differences.[75] Secondly, the protection of multiculturalism—the Court refers to a "right to have differences protected"—does not protect hegemonic practices. Cultural difference is protected when it is compatible with Canada's "fundamental values," which means that differences must yield to "more pressing public interest[s]".[76]

These two points regarding multiculturalism appear to be directed at the claims of Ms Bruker and Mr Marcovitz, respectively. First, Ms Bruker's claim is to be able to have a Jewish divorce despite the lack of recognition within the Jewish tradition of such a right. Her claim lies not in the Jewish tradition but in the civil legal right for a woman to demand a civil divorce. The Court's definition of multiculturalism signals that Ms Bruker has a "right to integrate" her religious identity and her civil rights, which means that she should be entitled to benefit from her civil rights (including the right to divorce and remarriage[77]) despite the differences between her civil rights and religious tradition. Secondly, Mr Marcovitz's claim is that his promise to give Ms Bruker a religious divorce cannot be enforced in civil terms (here, as an award for damages) because it is a religious matter not a civil matter. The Court's definition of multiculturalism signals that Mr Marcovitz's religious "difference" (choosing not to grant a Jewish divorce) will not likely be protected.

Turning to consider the Jewish religious rules regarding marriage and divorce, which is the "difference" at issues in the case, the Court immediately defined them as hegemonic: "A *get* is a Jewish divorce. Only a husband can give one."[78] This creates a dichotomy for Jewish women, who are able to freely obtain a civil divorce in Canadian law but not in their religion.[79] The Court noted that the *get* rules are a point of ongoing tension within the Jewish tradition.[80] The Parliament of Canada responded to the situation with the *Divorce Act*, s 21.1,[81] which allows courts to refuse relief under the Act to a party unwilling to remove barriers to religious remarriage. The Court noted that this amendment was proposed in consultation with a broad range of religious institutions, but the Jewish practice of divorce was singled out because there is

[75] *Ibid* at para 1.
[76] *Ibid* at para 2.
[77] *Ibid* at para 80 (where the Court said that "denial of a get is the denial of the right to remarry").
[78] *Ibid* at para 3.
[79] *Ibid* at para 5.
[80] *Ibid* at para 6.
[81] RSC 1985, c 3 (2nd Supp).

no recourse to a religious tribunal to compel a man to give his wife a *get* (unlike Christian annulments, for example).[82] The Jewish tradition was described as "powerless to amend the situation," and all of the major Jewish organizations attending the legislative hearings gave their full support to the amendment.[83] The idea was that the amendment would allow Jewish communities to preserve their traditions while also realizing the equal application of Canadian civil divorce laws to all people.

With all of this in mind, the Court framed the legal issues of the case. Two questions were identified: 1) whether the Agreement is legally binding; and 2) whether the consequences of the breach of the Agreement can be avoided through a claim of religious freedom.[84] Switching to a broad policy point, the Court noted that balancing and reconciling competing interests must be done in a way that is in line with public values (echoing the first two paragraphs of the decision).[85] The Court then switched back to say that it believes the Agreement is an enforceable contract and that the consequences of breaching the Agreement cannot be avoided through a claim of religious freedom.

The Court linked these ideas to the question of justiciability. Justice Deschamps said, in her dissenting opinion, that to enforce the Agreement would be an unwarranted trespass of the secular into the religious.[86] In reply, Justice Abella, for the majority, said that religion cannot simply be ignored or avoided, and that,

> To determine whether a particular claim to freedom of religion is entitled to protection, a court must take into account the particular religion, the particular religious right, and the particular personal and public consequences, including the religious consequences, of enforcing that right.[87]

It is important to notice here that the majority shifted its characterization of where religion fit into the case away from the religious aspect of Ms Bruker's claim and toward the religious aspect of Mr Marcovitz's defence. Rather than asking if Ms Bruker had a valid basis for petitioning the Court to enforce the Agreement, the Court focused on whether Mr Marcovitz had a valid reason to renege on his agreement. This shift in focus is very important to the way the

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[82] *Bruker* SCC, *supra* note 10 at para 7.
[83] *Ibid* at para 9.
[84] *Ibid* at para 14.
[85] *Ibid* at para 15.
[86] *Ibid* at para 101 ("The question before the Court is whether the civil courts can be used not only as a shield to protect freedom of religion, but also as a weapon to sanction a religious undertaking").
[87] *Ibid* at para 18.

decision unfolded, pointing to the importance of the justiciability question. The shift obscured the point that it is necessary to first consider the justiciability of the *claim* and only afterward to consider the nature of the *defence*. By focusing on the consequences of enforcing Mr Marcovitz's defence, the Court lost sight of the challenges and consequences of finding Ms Bruker's religious claim to be civilly enforceable.[88]

Just prior to launching into the analysis, the Court expounded upon its role in dealing with religious claims in society. The Court said that it is a mediator between the "highly personal claims to religious rights within the wider public interest," and "…to ensure that members of the Canadian public are not arbitrarily disadvantaged by their religion."[89] Sometimes religion acts as a hegemonic force incapable of evolving and adjusting to the thoughts and wishes of its communities and individual adherents. Sometimes this negatively impacts the autonomy of an individual. When this happens the law has a responsibility, pursuant to the aspirations of multiculturalism, to foster the autonomy of the individual while also sustaining their connectivity with their religious identity, as mediated by their communities and traditions. The majority of the Court saw itself obliged to provide assistance to helpless Jewish communities and individuals at the mercy of their tradition.

Despite this narrative of rescue from religion, the Court did not perceive its intervention as endorsing or applying a religious norm. Instead, the Court saw itself identifying and upholding the civil consequences flowing from the breach of a valid civil contract.[90] This final turn exposes the division between legal form and religious substance that is central to the way that the Court understood the law's encounter with religion. The decision was about the *form* of the law not the *substance* of religion and multiculturalism. Yet throughout its decision, the majority of the Court constantly drew upon the substantive foundation laid in its introductory remarks to the case. The particular views of the purpose of law, the nature of religion, and the nature and focus of the claims constantly feed back to inform the legal analysis.

What I will do now is talk about the Court's decision in more detail, drawing out the way that these introductory ideas played out in the analysis. I will draw specific attention to the way

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[88] For example, what account of the Jewish religion is Ms Bruker's claim grounded in? What religious right does her claim presume? And what are the consequences of enforcing her claim, both privately (for individual Jews and Jewish communities) and publicly (for the law's relationship to religion and, specifically, to the Jewish tradition of marriage and divorce)?
[89] *Ibid* at para 19.
[90] *Ibid* at para 20.

that the big questions about the purpose of the law are avoided through an appeal to legal 'form' over religious 'substance', but that the heavily substantive ideas posited at the beginning of the case nevertheless have a profound impact on the direction of the decision.

2.2 The Substance of Form—Justiciability and Validity of the Agreement

The heart of Ms Bruker's claim was that she had been deprived of the ability to obtain a *religious* divorce and the opportunity for *religious* remarriage. The justiciability question is crucial here because it is not clear on what basis religious divorce and remarriage can be claimed and enforced in civil law. Failing to receive a religious divorce did not prevent Ms Bruker from obtaining a civil divorce, nor did it prevent her from civil remarriage.

In her majority opinion, Justice Abella repeated the general justiciability rule found in *Lakeside Colony* that courts do not get involved in a religious matter unless there is an issue of property or civil rights at stake.[91] This test for justiciability does not clearly apply to the facts of the *Bruker* case because there is no freestanding civil or proprietary right at stake. There is no right to religious marriage or divorce in Canadian law. The laws of marriage and divorce in Canada are religiously neutral.[92] Religious marital norms have no direct bearing on the obligations, benefits, rights and duties conferred through civil marriage.[93] Religious norms can, however, be imported into the marital context through supplemental agreements entered into by the parties to the marriage.[94] This is where the question of justiciability intersects with the question of contract law. The 'right' on which Ms Bruker's claim rested is located in the Agreement with Mr Marcovitz. This means that the justiciability of Ms Bruker's claim hinges on whether the Agreement created a *legal* obligation for Mr Marcovitz to give a *religious get*.

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[91] *Ibid* at para 45.
[92] See e.g. *Reference Re: Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698, especially at paras 21—22. Also see Ogilvie, *Religious Institutions*, *supra* note 23 at 365.
[93] This was an important point for Deschamps J., writing in dissent (*Bruker* SCC, *supra* note 10 at para 132). For Deschamps J, enforcing a religious norm through the mechanism of contract law violates the neutrality of Canadian law in relation to religion. Religious promises can only be enforced where they align with recognized positive laws (*ibid* at para 122). The religious impacts that flow from the failure to perform a religious promise are therefore outside of civil jurisdiction (*ibid* at paras 125—132).
[94] For example, promises made by a man to pay his wife a form of dowry as per Muslim marriage traditions have been found to be valid and enforceable contracts to a marriage. See Ogilvie, *Religious Institutions*, *supra* note 23 at 370.

In order to determine the justiciability question, the courts considered whether the essence of the Agreement was religious or civil. The Superior Court of Quebec found that the "…pith and essence of what is asked for in this case is not religious…"[95] and therefore within the jurisdiction of the civil courts. To the contrary, the Quebec Court of Appeal found that the nature of the substance of the obligation in question was religious in nature and should not be interfered with by the civil courts.[96] The SCC found that the essence of the Agreement was justiciable because it followed the prescribed civil *form* of a contract.

> We are not dealing with judicial review of doctrinal religious principles, such as whether a particular *get* is valid. Nor are we required to speculate on what the rabbinical court would do. The promise made by Mr. Marcovitz to remove the religious barriers to remarriage by providing a *get* was negotiated between two consenting adults, each represented by counsel, as part of a voluntary exchange of commitments intended to have legally enforceable consequences. This puts the obligation appropriately under a judicial microscope.[97]

It is important to note here that the Court's characterization of the Agreement for the purposes of justiciability differed from the language found in the Agreement iteslf. The wording of the Agreement had a distinctly religious tone: "…[to] appear before the Rabbinical authorities in the City and District of Montreal for the purpose of obtaining the traditional religious Get, immediately upon a Decree Nisi of Divorce being granted."[98] The SCC characterized the Agreement in civil legal terms: "…to remove the religious barriers to remarriage by providing a *get*…as part of a voluntary exchange of commitments intended to have legally enforceable consequences."[99] Essentially, the Court relied on the form in which the promise was given to determine whether the content of the promise was justiciable. Mr Marcovitz did not promise to perform a religious act but to remove religious barriers to remarriage. Re-framing the Agreement in this way avoided difficult questions about judicially interfering with a religious matter.[100]

Closely connected to the question of justiciability is the question of the legal validity of the Agreement. The distinction drawn between the two is razor thin. Justiciability considered whether the essence of the Agreement was religious or civil, i.e. whether the religious dimension

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[95] *Sub nom B (SB) v M (JBe)*, [2003] RJQ 1189 (Qc Sup Ct) [*Bruker* Sup Ct] at para 30.
[96] *Bruker* QCCA, *supra* note 71 at para 45.
[97] *Bruker* SCC, *supra* note 10 at para 47.
[98] Paragraph 12 of the Consent to Corollary Relief, referred to in *Bruker* SCC, *supra* note 10 at para 39.
[99] *Buker* SCC, *supra* note 10 at para 47.
[100] Ogilvie, "(Get)ting Over Freedoms", *supra* note 73 at 181.

of the Agreement was a bar to judicial consideration. The question of validity is whether the Agreement has a valid "object" according to the principles of contract law in Quebec.[101] "Moral obligations" are distinct from "civil obligations" and cannot be enforced in Quebec civil courts because they have to do with private matters of conscience.[102] However, both the Superior Court of Quebec and the SCC found that a moral obligation, like the religious aspect of the Agreement, could be "transformed" into a civil obligation and enforced in law. The Superior Court of Quebec held that because the Agreement was made in civil form it "…moved into the realm of the civil courts, and the religious obligation became embodied in a secular agreement…. Once there is a civil contract, even if its object relates to religious obligations, it is justiciable and within the jurisdiction of the civil court…."[103] Likewise, the SCC said,

> It is true that a party cannot be compelled to execute a moral duty, but *there is nothing in the* Civil Code *preventing someone from transforming his or her moral obligations into legally valid and binding ones*... [I]f it complies with the requirement of a contract under the C.C.Q…it is *transformed* from a moral obligation to a civil one enforceable by the courts.[104]

Whether or not the religious aspect of the Agreement is transformed into a civil obligation is framed here as a question of the formal requirements of contract law. But the tricky thing is that the formal legal requirement for contract validity in Quebec includes questions of public policy. Mr Marcovitz argued that the religious aspect of the Agreement is not a valid "object" of a civil contract in Quebec because it is against public order to enforce a promise with religious content; to do so would be against the legal protection of religious freedom.[105]

The Court looked at two aspects of the *Divorce Act* s 21.1 to find evidence that the Agreement is a valid contract. First, they looked at the purpose of legislative involvement in the matter of Jewish divorce through section 21.1 of the *Divorce Act*, where it was clear from the Parliamentary debates that gender inequality in the Jewish practice of divorce was being targeted.[106] For the Court, this was evidence that the "object" of the Agreement was not contrary

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[101] *Bruker* SCC, *supra* note 10 at para 48.
[102] *Ibid* at para 49—50.
[103] *Bruker* Sup Ct, *supra* note 95 at paras 19—20, referred to by both the majority and minority opinions of the SCC (*Bruker* SCC, *supra* note 10 at paras 31 and 111, respectively).
[104] *Bruker* SCC, *supra* note 10 at para 51 (italics added). See also Jukier & Van Praagh, *supra* note 73 (for further discussion of the application of Quebec's contract law principles to *Bruker*).
[105] See *Bruker* SCC, *supra* note 10 at para 54 (Mr Marcovitz' factum argument is quoted by the Court).
[106] *Ibid* at paras 63, 7—8. Although the imbalance of power in Jewish divorce often favours men over women, this is not always the case. For example, in the case *Wolf v Wolf*, 2014 ONSC 7434 (CanLII) it was the husband who

to public order but in line with Parliament's "…intention to encourage the removal of religious barriers to remarriage."[107] Second, the Court noted the wide support the *Divorce Act* section 21.1 received from Jewish institutions, which the Court described as a "consensus".[108] The Court perceived the Jewish religion to be transitioning away from the hierarchy that allows a husband to have all the power over the release of his wife from their marriage, which meant that enforcing the Agreement in civil court is supportive of the religious tradition and not interfering with it.

Support for this view can certainly be found. For example, Ayelet Shachar speaks positively of the *Bruker* decision, suggesting that it is an example of how Canadian law might be used to help support the evolution of the Jewish tradition. She calls this positive evolutionary support "transformative accommodation."[109] Similarly, within the historical Jewish tradition Maimonides (a famous Jewish rabbi of the 12th Century) said that there is nothing wrong with compelling a man to give a *get* to his wife, and even the civil authorities can be involved in this without compromising the religious validity of the *get*.[110] The state of Israel also provides a contemporary example where recalcitrant husbands can be imprisoned until they provide a *get*.[111]

However, some Jewish communities would reject the validity of a *get* if it were compelled in any way by the state.[112] Some research suggests that the *Bruker* decision might not change divorce practices in Jewish communities all that much.[113] Communities that desire to maintain the traditional, non-*Bruker get* practice are able to do so by increasing their separation from the civil (public) system of law (i.e. never enter into an agreement to give a *get* in any form that remotely appears civil).[114] Whether *Bruker* actually helps or hurts those women most

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claimed relief under s 21.1 of the *Divorce Act* because his wife refused to accept the *get* unless he compromise on the division of marital assets.

[107] *Bruker* SCC, *supra* note 10 at para 63.

[108] *Ibid* at para 81.

[109] Ayelet Shachar, "Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law" in Marie A Failinger, Elizabeth R Schiltz and Susan J Stabile, eds, *Feminism, Law and Religion* (Farnham: Ashgate, 2013) 109 at 126 and 131.

[110] See Kleefeld & Kennedy, *supra* note 73 at 214—215.

[111] *Ibid* at 215.

[112] See *Ibid* at 222; and Pascale Fournier, "Halacha, The 'Jewish State' and the Canadian Agunah: Comparative Law at the Intersection of Religious and Secular Orders" (2012) 44:65 The Journal of Legal Pluralism and Unofficial Law 165 at 185.

[113] Fournier, *supra* note 112 at 174.

[114] See *Ibid* at 180.

vulnerable to the effects of the *agunah* problem—i.e. those whose lives are fully integrated and bound within the life of a conservative Jewish community—is an open question.[115]

This cursory overview of the Court's analysis of justiciability and contractual validity raises many of the same questions identified in the earlier discussion of justiciability. How do we know when something matters to the law? Similar to Wakeling JA in the *Wall* case, the reasoning of the SCC in *Bruker* struggled between multiple conflicting directions to try to determine whether the religious matter is justiciable and the agreement enforceable (looking at the purposes of law, the effects of religious practice, public policy, etc.). Evaluating the justiciability and validity of the religious aspect of the Agreement in *Bruker* had a transformative effect, just as it did in the *Lakeside* and *Ukrainian Church* cases. The Court's comment in *Bruker* about the transformation of moral obligations into civil obligations did not capture the full extent of what this means. As will be discussed in the next section, the transformation occurring in *Bruker* has a much broader reach. For example, in Jewish divorce law there is no obligation for a husband to provide a *get*, which means that it is not a question of whether a religious obligation transforms into civilly enforceable form but rather whether civil form can *create* an obligation to perform a non-obligatory religious act. Likewise, invoking the *Divorce Act* section 21.1 raises questions about the relationship between law and religious institutions. What might treating the particular Jewish institutional voices present in the development of the *Divorce Act* section 21.1 as representative of the Jewish tradition mean for Mr Marcovitz's religious claim? Does the opinion of these Jewish institutional actors negate the argument (relied on in principle by Mr Marcovitz) that a religious promise is *per se* distinct from the realm of civil law?

The way that the Court answered these questions reflects its view of the purposes of law explicated at the beginning of the majority decision. This shows that establishing justiciability is a socially creative act. The Court participated in the process of designing and constructing the conceptual basis of the law's interactions with religion. The Court took up the authority (justiciability) to speak directly to (and against) the Jewish religious tradition of divorce. Relying

[115] Richard Moon noted that strong insular communities are better able to regulate issues like the *agunah* problem because of the social pressures available to them by virtue of their insularity (Moon, "Divorce and Remarriage", *supra* note 73 at 60). Ogilvie made a similar point, suggesting that the more distance there is between a community and the civil rules of obligation, the more likely the community will rely on obligations deriving from moral and relational sources, which depend on stronger relational and communal bonds (Ogilvie, "(Get)ting Over Freedoms", *supra* note 73 at 188—189). The conversation regarding these issues has been ongoing in Canada. See e.g. Shauna Van Praagh, "Bringing the Charter Home" Book review of *Religion and Culture in Canadian Family Law* by John T Syrtash, (1993) 38:1 McGill LJ 233.

on the distinction between 'form' and 'substance' in establishing justiciability makes it difficult to engage this conceptual process within the legal discourse. Applying the Agreement as a legal text 'in form' dampened the substantive issues related to the nature of the rights at stake, the nature of the promise made and the effects of the decision on Jewish religious communities. The constructive activity of the Court in its adjudication of religious matters is obscured.

2.3 Transformation of Religion

The issues identified regarding the justiciability and contract questions echo through the final stage of the Court's analysis, where the Court is evaluating Mr Marcovitz's argument that to civilly enforce the Agreement would violate his right to religious freedom.[116] I previously noted how even though there is no free-standing right to religious divorce and remarriage, such a right might well be created through a validly executed contract between parties. This is what made the question of justiciability and the question of the validity of the Agreement so important to the case. But at the final stage of the analysis the Court moved past the earlier nuances of the analysis and stated, "the denial of a *get* is the denial of the right to remarry."[117] The connection drawn here between the religious and civil dimension of the dispute moves past the terms of the Agreement to assert a more basic relation between the civil and religious dimensions.

The background to this connection between civil and religious is the idea that religious freedom must be balanced against (and limited by its collision with) the rights of others and significant public concerns.[118] The Court, I believe quite rightly, noted that it would not be good public policy to allow people to renege on agreements they freely enter into by appealing to ex post facto religious compunctions.[119] This is still within the bounds of the contract between Ms Bruker and Mr Marcovitz. But the Court's analysis did not end there. The Court went on to say that the other "significant intrusions into our constitutionally and statutorily articulated commitments to equality, religious freedom and autonomous choice in marriage and divorce that

[116] *Bruker* SCC, *supra* note 10 at paras 65ff (the final stage of the analysis).
[117] *Ibid* at para 82.
[118] *Ibid* at paras 70—78.
[119] *Ibid* at para 79.

flow from the breach of his [Mr Marcovitz's] legal obligation *are what most heavily weigh against him.*"[120]

What is interesting here is not only that the Court balanced Mr Marcovitz's religious freedom defence against public values but that the Jewish religion was also marshalled by the Court to support the weighing of public values against Mr Marcovitz's religious argument.[121] The Jewish religion is drawn against Mr Marcovitz in two ways. First, the Court pointed to the *Divorce Act* section 21.1 to say that Mr Marcovitz's religious freedom claim stood against the "consensus" of the Jewish community, "that the refusal to provide a get was an unwarranted indignity imposed on Jewish women and, to the extent possible, one that should not be countenanced by Canada's legal system."[122] Secondly, in the competition between Mr Marcovitz's understanding of the Jewish religious divorce practices (that he does not have to provide a religious divorce to her) and Ms Bruker's understanding of them (that she is entitled to a religious divorce and remarriage), the Court found that Marcovitz's view was an "unjustified and severe impairment of [Ms Bruker's] ability to live in accordance with this Country's values and her Jewish beliefs."[123]

By drawing the Jewish religion against Mr Marcovitz the Court effectively refashioned the Jewish tradition to support the Court's own values and goals.[124] This can be traced through a series of steps beginning with the Court measuring the effects of Mr Marcovitz's failure to fulfil the agreement. The Court said,

> [U]nder Canadian law, marriage and divorce are available equally to men and women. A *get*, on the other hand, can only be given under Jewish law by a husband. For those Jewish women whose

[120] *Ibid* at para 80 (emphasis added). Also see Ogilvie, "(Get)ting Over Freedoms", *supra* note 73 at 186 (arguing that by moving from contract to public policy evaluation the Court diminished the private freedom of contract; transforming religious freedom into a "species of illegality" provides the Court with a powerful tool for intervening in contractual arrangements).
[121] *Bruker* SCC, *supra* note 10 at 72—78 (outlining the jurisprudence establishing that religious freedom is limited in relation to the rights of others and to the public good). But see DeCoste, *supra* note 73 at 167 (arguing that the Court wrongly interpreted the natural limitations to the right of religious freedom in terms of the state policy of multiculturalism, which wrongly portrayed the state to be the author of the right to religious freedom rather than its custodian).
[122] *Bruker* SCC, *supra* note 10 at para 81.
[123] *Ibid* at para 93.
[124] See Ogilvie, "(Get)ting Over Freedoms", *supra* note 73 (arguing that *Bruker* exposes a transformation of the protection of religious freedom from "protecting the individual believer against a powerful state into an emphasis on the state in its judicial disguise choosing one party in a private dispute where conflicting religious positions are asserted" at 187).

> religious principles prevent them from considering remarriage unless they are able to do so in accordance with Jewish law, the denial of a *get* is the denial of the right to remarry.[125]

The religious rules regarding a *get* prevent religious remarriage, but the Court framed this block to religious remarriage as denying a woman's right to remarry. Since the "right to remarry" is not a Jewish religious category but is a *civil* right, we are witness to a slide from the religious understanding of divorce and remarriage into a civil understanding, the two being treated as though they are one. The law's interaction with the Jewish practice of divorce includes consideration of the *effect* of the Agreement. But the religious effects are considered in civil terms. Following directly from the previous quotation, the Court went on to strengthen the connection between religious and civil divorce and remarriage, saying,

> The refusal of a husband to provide a *get*, therefore, arbitrarily denies his wife access to a remedy she independently has under Canadian law and denies her the ability to remarry and get on with her life in accordance with her religious beliefs.[126]

From this statement it is clear that religious practice is understood to bear directly on the realization of civil rights. The religious identity of Ms Bruker is a necessary part of the realization of her civil rights.[127] There is much to be applauded in recognizing that the private aspects of life, like religious life, impact our civil lives. As Jukier and Van Praagh put it in their discussion of *Bruker*,

> Contractual obligations law reminds us that the interpersonal agreements and relations at the heart of civil law include those of religious individuals. They too can tell their stories, articulate their needs, fulfil their promises, and claim their damages, even if those stories and obligations and damages are necessarily linked to religious identity.[128]

But more is accomplished in *Bruker* than recognizing the link between civil (contractual) damages and religious identity. To say, as the Court did, that Ms Bruker's religion arbitrarily prevented her from realizing the civil right to divorce and remarriage implies that she had a *right to religious* divorce and remarriage. The Court understood the *civil* right to divorce not only as

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[125] *Bruker* SCC, *supra* note 10 at para 82.
[126] *Ibid* at para 82.
[127] In this regard, *Bruker* has been praised by some as a positive example of how the law is able to recognize both the secular and religious aspects of divorce. See Shachar, *supra* note 109 at 126.
[128] Jukier & Van Praagh, *supra* note 73 at 396.

freedom to secure a divorce and pursue remarriage under the civil law, but also the right to divorce and remarry *within one's own religion*.[129]

It is important to be clear about the awkwardness of merging the right to civil divorce with the Jewish religious marriage and divorce practices in this way. There is dissonance in the notion that Ms Bruker must be allowed to remarry according to her religious beliefs because the right to remarry does not exist within the Jewish religious tradition. This is precisely why the *agunah* problem is so significant. Despite concern in various Jewish communities about the *agunah* problem, those communities have been unable (or unwilling) to make the necessary changes to resolve it.[130] For the Court to say that Ms Bruker has a right to religious divorce and remarriage "within her own religion" purports to speak to Jewish marital norms (saying that the *get* rules really do not prevent her divorce and remarriage) or declare that the marital norms within the Jewish tradition do not matter (that Ms Bruker is entitled to a religious right that she believes she has, or ought to have, in spite of the Jewish *get* rules).

The approach taken by Justice Deschamps in dissent was opposite to the majority. She said that if Ms Bruker's religion prevented her from remarriage then there is in fact nothing that the Court could do about it: "Where religion is concerned, the state leaves it to individuals to make their own choices."[131] Unsatisfied with this laissez-faire approach to religious practice, the majority of the SCC chose to take up the task to fix what the Jewish religious tradition, for whatever reason, had not. Recall that this was flagged at the outset of the majority decision, where the Court claimed for itself the role of saving people, like Ms Bruker, from being unfairly disadvantaged by their (her) religion.[132] In doing so, the Court assumed for itself a role in the evolution of the Jewish religious tradition, supplementing (and perhaps displacing) the processes of creating and revising ideas about marriage and divorce within the Jewish religious tradition.

The majority opinion in *Bruker* showed very little concern for the way that the meanings and practices of Jewish divorce connect to Jewish communities. In the end, what the majority decision accomplished was not to give Ms Bruker freedom of Jewish divorce and remarriage *per se*, but rather to create for her a version of Judaism that was modified to conform to Canadian

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[129] *Bruker* SCC, *supra* note 10 at para 82.
[130] Moon, "Divorce and Remarriage", *supra* note 73 at 53.
[131] *Bruker* SCC, *supra* note 10 at para 88. Also see *Bruker* QCCA, *supra* note 71 ("It is not the role of secular courts to palliate the discriminatory effect of the absence of a *ghet* on a Jewish woman who wants to obtain one…" at para 76).
[132] *Bruker* SCC, *supra* note 10 at para 19.

fundamental values expressed in (and through) the civil law. The point of interaction between civil and religious understandings of divorce and remarriage produced a new form of meaning that it is neither Jewish nor civil but a hybrid between the two. The Court's support for Ms Bruker's position clothed the Jewish religious practice of marriage and divorce with civil constitutional meaning. As Richard Moon put it, "Mr Marcovitz was obligated to give his consent to a religious divorce not just because he promised to, but because public policy supported the removal of barriers to religious remarriage."[133]

These interventions by the Court drastically isolated Mr Marcovitz in his argument, turning even his religion against him. His motives and justifications for his actions were alienated from his religious community and from public values. His justification, drawn from his understanding of the Jewish religious tradition, was called "arbitrary" and his motivation for refusing to give a *get* was painted in terms of emotion (anger) rather than religion.[134] The Court went so far as to question the sincerity of his religious claim, again marshalling his religion against him:

> It is not clear to me what aspect of his religious beliefs prevented him from providing a get. He never, in fact, offered a religious reason for refusing to provide a get…. His religion does not require him to refuse to give Ms. Bruker a *get*. The contrary is true. There is no doubt that at Jewish law he could refuse to give one, but that is very different from Mr. Marcovitz being prevented by a tenet of his religious beliefs from complying with a legal obligation he voluntarily entered into and of which he took the negotiated benefits.[135]

This view of religion as purely a matter of rules and moral compunctions that *have* to be followed seems inadequate to capture the other ways in which Mr Marcovitz's religious views might have informed his choices and actions. Although it is true that his religious belief did not oblige him to not give a *get* to Ms Bruker, it was also his belief that he must give the *get* to her willingly; in other words, he believed that Ms Bruker could not demand the *get*.[136] Despite this, the Court's successful reduction of Mr Marcovitz's claim to personal, emotional and irrational action, led to the conclusion that, "Any infringement of Mr. Marcovitz's freedom of religion is

[133] Moon, "Divorce and Remarriage", *supra* note 73 at 49.
[134] *Bruker* SCC, *supra* note 10 ("[Mr Bruker's] confession confirms, in my view, that his refusal to provide the *get* was based less on religious conviction than on the fact that he was angry at Ms. Bruker" at para 69).
[135] *Ibid* at paras 68—69.
[136] *Bruker* QCCA, *supra* note 71 at paras 77—80 and 87.

inconsequential compared to the disproportionate disadvantaging effect on Ms. Bruker's ability to live her life fully as a Jewish woman in Canada."[137]

The Court's understanding of what Ms Bruker was entitled to *civilly* cannot easily be untangled from what they believed she should be entitled to *religiously*, and what they believed she should be entitled to religiously was informed by the social commitments represented in civil law. Having inserted civil legal purposes into the practice of Jewish divorce the Court assumed responsibility for the effects of the Jewish tradition on people's lives. The Court's reasons therefore did not have to explicitly displace the Jewish religious perspective and practice of divorce. Assuming civil responsibility and crafting a civil solution for the effects of the Jewish religious divorce practices did not engage the religious practice on its own terms but in the terms of the Court's understanding of Canadian values. Seeking to protect persons from being arbitrary disadvantaged by their religion[138] the Court's concern was to maintain (in its own words) the integrity of the evolution of multiculturalism.[139]

This returns us to the questions regarding justiciability raised earlier, which echoed throughout the final stage of the Court's analysis. The Court understood itself to not be deciding a question of doctrine but only giving effect to the natural consequences of a formalized civil agreement.[140] The assertion of legal form over religious substance allowed the Court to insulate itself from the full *religious* significance—to the tradition, community and individual belief—of its decision. But there proves to be no simple division between the questions of form and substance at stake in the case. Applying civil form involves the imposition of one set of substantive commitments over another. The substance of public social values works in *Bruker* both as the means and the justification for applying legal form. The religious substance of the Agreement was effectively neutralized in the process, but under the guise of the operation of legal form.

Another important point is that the justiciability of the Agreement could not be established by discovering a line naturally dividing its form and substance. Rather, the goals and purposes of civil law were used to determine what is and is not justiciable as a matter of civil form. The Court in *Bruker* began its analysis well by discussing the purposes of law and the

[137] *Bruker* SCC, *supra* note 10 at para 93.
[138] *Ibid* at para 19.
[139] *Ibid* at paras 1 and 2.
[140] *Ibid* at para 47.

relation between law and religion. Having this discussion up front made explicit that the purposes of law are the basis of the justiciability analysis. However, as described earlier, the Court retreated from the discussion of the purpose of the law and instead framed justiciability in terms of legal form. This pushed the substantive questions out of view. The presumptions of the Court's introductory comments became an implicit guide for the decision rather than an explicit part of the analysis and judgment. The powerful transformative effects on religion flowing from the decision—the way that an individual is understood to believe, the way that a religious institution relates to its tradition, the way that the religious individual relates to her tradition and community, and the way that religious freedom is understood—were, in the Court's analysis, swept under the rug of the operation of legal form.

DeCoste described the reasoning in the SCC majority decision in *Bruker* as an example of the alchemy of legal form.[141] That is, the Court tried to simultaneously distinguish the civil form and religious substance of the agreement while subsuming the religious concerns regarding divorce within the purview of civil legal jurisdiction. Applying the craft of legal analysis in this way produced two transformations. First, it transformed a crude case of marital and contractual failure into an affirmation of multiculturalism and Canadian constitutional values. Secondly, it transformed (co-opted) the Jewish religious tradition into a vehicle for the advancement of these social policies and constitutional values.

In my view, the trouble is not that the application of law affected religion, but that the Court's analytic framework obscured why and how the transformation occurred. I will further argue in chapter 3 that transformation is a part of the encounter between law and religion. It is less important to get religion right or to get the legal rules right than it is to get the discourse between law and religion right. In order to do this we have to figure out how to connect institutional voices of religion to the institutions of law. This depends on thinking better about the institutions of law and religion and how they work internally (in relation to members and the history of their tradition) and externally (in relation to other institutions, other individuals and other traditions). It is to this that we now turn.

[141] DeCoste, *supra* note 73 at 158—161, and 166. Alchemy was a medieval practice that involved transforming matter from a crude substance into a precious substance (like gold), see *The Oxford English Dictionary*, 3rd ed, *sub verbo* "alchemy".

3 JUSTICIABILITY AND THE SOCIAL CONSTRUCTION OF INSTITUTIONS

What is at stake in *Bruker*, which the Court's analysis obscured, goes beyond principles of contract law, religious freedom and multiculturalism to include the relationship between the institutions of law (the state and courts) and the lives of its subjects.[142] DeCoste rightly identified that in *Bruker* the Court placed the "values" and "goods" of the civil state—in this case the evolution of multiculturalism and the public policy of gender equality in divorce and remarriage—in a position above religious tradition.[143] Elevating the values and goods of the civil state in this way located the genesis of goods and values *within* the state and *independently* of the individual lives (and communities) of the subjects of the law. From this view, the *Bruker* decision is an example of the law extending itself beyond the boundary between state institutions and the lives of the subjects of law. The degree to which *Bruker* appears to reinforce the private power of contract by enforcing a religious promise in fact erodes the integrity of the private sphere by subjecting the analysis and enforcement of contracts to public values.[144] Other forums and traditions for defining and negotiating rights and obligations, such as the Jewish tradition, are supplanted in favour of state-based institutions of law creation and enforcement. The state (and Court as its judicial arm) is given priority in the management of 'goods' and 'values'.

Some (like DeCoste) might argue that we should strive to invert the *Bruker* decision, so the state defers to non-state (including religious) constructions of goods and values.[145] One reason to do this is because there are natural rights and liberties prior to and superior to the existence of the state.[146] The activity of defining the "good" is best left to the private institutions of the family and religion.[147] Stated more dramatically, for the state to displace the role of individuals and communities in generating the goods and values of civil society is, for DeCoste, the first step toward totalitarianism.[148]

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[142] DeCoste, *supra* note 73 at 155. In this regard DeCoste's argument is a defence of and elaboration upon the dissenting opinion of Justice Deschamps, who said "the [neutral] role of the courts cannot be altered without calling into question the foundations of the relationship between state and religion" (*Bruker* SCC, *supra* note 10 at para 182, quoted by DeCoste, *supra* note 73 at 165).
[143] DeCoste, *supra* note 73 at 166—169.
[144] Ogilvie, "(Get)ting Over Freedoms", *supra* note 73 at 185—186.
[145] DeCoste, *supra* note 73 at 172 and 175.
[146] *Ibid* at 167.
[147] *Ibid* at 175.
[148] *Ibid* at 174—176.

However, I do not believe that the solution lies in reasserting and hardening the wall that separates the private (religion) and the public spheres. This is clear when approached in terms of the question of justiciability. Unless one disavows the authority of the state entirely, it is necessary to answer the core question of justiciability: how does a private matter become a public matter to be managed through civil law? Strengthening the line that divides the public and private, to insulate the private from government intervention, either defers the question of justiciability or makes unwarranted presumptions about how to define it. For example, following DeCoste's argument, the Court should only review religious matters when someone is 'harmed'.[149] But this begs the question. Why is the religious *get* rule not a 'harm' that the law should interfere with?

My analysis of justiciability in *Bruker* focused on the problems flowing from distinguishing between civil 'form' and religious 'substance' for defining justiciability in an effort to get away from categorical definitions of law's boundary. Distinguishing between law and religion in terms of procedure, essential characteristics, or in terms of civil 'form' and religious 'substance' (as per *Bruker*) limits our view of the process by which justiciability is established. In *Bruker* this produced an analysis that wove policy considerations into the application of technical principles in a way that privileged the role and purposes of state institutions. The answer is not to privilege the role of private institutions instead because that would merely reinforce the distinction between civil form and religious substance that caused problems in the first place.

Dividing the civil and religious along lines of public and private life does not make sense of the complex blending of human life, the multiple levels of private-ness and public-ness, and the varying interactions of norms and obligations. The intersection of our multiple identities must be taken seriously in order to develop legal solutions (and analyses) that make sense of the experience of our lives.[150] What we need, then, is an approach that does not abandon the values and goods that operate within the state structure, but that reunites them with the (many) lives of the subjects of the law. The direction I take to address this is between recognizing the interdependence of state and non-state institutional formations (including norms and values) and acknowledging the boundaries that exist between public institutions of law and the private

[149] *Ibid* at 168, 173.
[150] This way of talking about the intersection between multiple identities within and through the law is drawn from Shauna Van Praagh, "Identity's Importance: Reflections of – and on – Diversity" (2001) 80 Can Bar Rev 605.

sources of norms and values. The tension between these two poles must remain at the core of the framework used to approach legal conflicts involving religion.

This dynamic of interdependence and independence can helpfully be traced in some of the theories that explain the function of institutional boundary markers. One such theory from the legal context is HLA Hart's notion of the "rule of recognition."[151] A closely related theory from the field of the sociology of knowledge is the notion of "legitimating formulas" described by Berger and Luckmann.[152] Although the rule of recognition, legitimating formulas and justiciability are not exactly the same, they all have to do with the process that is used to determine what can and cannot come under the authority of law. Because of this, the theories of legitimating formulas and the rule of recognition help clarify some of the social dynamics involved in the process of determining the justiciability of religious matters.

According to Berger and Luckmann, social institutions arise "…whenever there is a reciprocal typification of habitualized actions by types of actors."[153] In other words, institutions are based on human actions that have been objectified because this creates a shared background that stabilizes separate actions and interactions between individuals in society.[154] Institutions become autonomous—they "thicken," "harden" or "crystalize"—when they are passed on to and are internalized by others.[155] For an institution to thrive in a complex society individuals must experience it as an external and coercive fact that has its own reality.[156] When an institution is passed on from one generation to the next "legitimating formulas" are created and deployed to explain and justify the institution.[157] Legitimating formulas do not create this institutional reality, but they are the means by which the meaning of the institution is wrestled with over time.[158]

In the context of law, HLA Hart traced a similar idea to Berger and Luckmann. Hart argued that law is an autonomous institutional system grounded in primary and secondary rules.[159] The primary rules are what we ordinarily think of as rules, and secondary rules are rules

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[151] HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961) at 92ff.
[152] Berger & Luckman, *supra* note 8 at 62.
[153] *Ibid* at 54.
[154] *Ibid* at 57.
[155] *Ibid* at 58—61. It is worth noting the overlap here with chapter 1, sections 2.2—2.3, where I observed that community boundaries gain their strength and meaning through a process of internalization by individuals who understand themselves to be part of the community.
[156] *Ibid* at 58.
[157] *Ibid* at 61—62.
[158] *Ibid* at 61.
[159] Hart, *supra* note 151 at 95.

about rules. Chief among secondary rules is the rule of recognition, which is a rule for identifying whether a rule is legal.[160] Legitimating formulas are not precisely the same as Hart's rule of recognition, but there are parallels between them. The rule of recognition is, for Hart, the way to identify the concept of law and explain its autonomy as a social institution because it distinguishes legal justification from other justifications in society (and other social institutions), like ethical and moral discourses.[161] The legitimating formulas described by Berger and Luckmann function in a similar way by establishing a form of justification for social actions (and actors) unique to a particular institutional system.

Both the rule of recognition and legitimating formulas provide a specific 'logic' for an institution, but this logic is not purely an internal matter.[162] Like legitimating formulas, the rule of recognition connects the autonomous system of law to the social base of knowledge external to the law. The rule of recognition is a unique type of rule. It cannot be 'validated' in the same way as other rules because its existence does not depend, like other rules, on the conditions set by a rule of recognition.[163] Rather, the rule of recognition is based on the "…complex, but normally concordant practice of the courts, officials and private persons in identifying the law by reference to certain criteria."[164] It emerges out of social practice involving the kind of interactions where a variety of actors within a society begin to apply a rule of recognition. The rule of recognition is both law and fact (internal and external to the legal system).[165]

There is a dialectic relationship between the internal logic of the institution and the larger social base within which the institution operates. According to Berger and Luckmann, institutions depend on a shared social stock of knowledge.[166] This taken-for-granted stock of social knowledge provides the basis for an institution to create its own unique form of knowledge.[167] Institutional knowledge feeds back into the shared stock of social knowledge, which affects the perception of reality.[168] The connection between institutional knowledge and general social knowledge does not have a clearly defined border. Although they are distinct, they

[160] *Ibid* at 92.
[161] See Scott Shapiro, *Legality* (Cambridge, Mass: Harvard University Press, 2011) at 92—93.
[162] Berger & Luckmann, *supra* note 8 at 64.
[163] Hart, *supra* note 151 at 104.
[164] *Ibid* at 107.
[165] *Ibid* at 108.
[166] Berger & Luckmann, *supra* note 8 at 65—66.
[167] *Ibid*.
[168] *Ibid*.

are nevertheless deeply integrated with each other.

Berger and Luckmann portray this dialectic nature of social knowledge as *the* central feature of social reality and the production of social knowledge.[169] Institutional order is only realized through human action, and human action is representative of institutional order that defines the meaning and character of action.[170] "…[K]nowledge is a social product and knowledge is a factor in social change."[171]

Hart's theory of law displays considerably more angst with the dialectic than does that of Berger and Luckmann. Nevertheless, Hart's explanation of the rule of recognition displays similar social-institution dialectic features. Hart admitted, "The distinction between the uncertainty of a particular rule, and the uncertainty of the criterion used in identifying it as a rule of the system, is not itself, in all cases, a clear one."[172] When the limit of legality is in question, courts are put in a challenging position of having to decide through the tools of the law the existential limitations of legal authority.[173] Making such a decision is, according to Hart, properly speaking, not *legal* but *political*. "Here all that succeeds is success."[174] Even though courts must give legal reasons for their decisions, in these types of cases the decisions are not justified by the quality of the legal reasoning but rather by their success in being accepted by and internalized into the social community that underlies the legal system.[175] "Here power acquires authority *ex post facto* from success."[176] Legal decisions regarding fundamental questions of law are not, properly speaking, legal decisions, but they *become* legal in retrospect by creating the basis for the legal system to (continue to) operate. Hart insisted that the courts are able to take up such a foundational role because they are generally regarded (by society) as governed by the rules of the legal system, so when they speak about the foundations of the legal system their presumed authority over legal matters is understood to also permit the authority to speak to law's foundations.[177] This is the final turn of the dialectical circle: the internal production of

[169] The theme of dialectic appears throughout the text and is always described as a fundamental social phenomenon. See e.g. Berger & Luckmann, *supra* note 8 at 66, 86—87.
[170] *Ibid* at 79.
[171] *Ibid* at 87.
[172] Hart, *supra* note 151 at 144.
[173] *Ibid* at 148—149 (Hart argued that since the courts are recognized as having authority over legal matters (as a social fact) that they also have authority to determine the meaning of the rule of recognition).
[174] *Ibid* at 149
[175] *Ibid* 149—150.
[176] *Ibid* at 150.
[177] *Ibid*.

institutional knowledge feeds back to inform the broad social stock of knowledge that is shared. The decisions of the courts regarding the fundamental rules of law form part of the factual matrix that gives rise to the rule of recognition.

The dialectic overlap between law and social fact can also be seen in the challenges of interpretation arising from the open texture of rules (and of language).[178] For Hart, the meaning of a rule is neither simply what a judge says it is nor is it objectively determined, but rather it is derived from the *aim* of the rule.[179] The 'aim' of a rule is an expression of a choice made by a social group about what result should be produced in certain circumstances. Applying the rule to unforeseen circumstances "render[s] more determinate our original aim."[180] Community plays an important part in the process of forming legal meaning in the face of open texture. Responding to the open texture of law requires a return to the social practices that led to the formation of the rule in the first place. This might invite questions about institutional roles, such as who has the authority to decide questions arising from open texture, and how the responsibilities of role-players (like judges) are assigned.[181] Addressing questions like this requires reflection on the nature of the legal community and the way that the law is structured as a social institution. It is more than the autonomous language and conceptual edifice of the law that is used to reason through these questions. The answers engage a level of social knowledge and meaning that reaches beyond the internal function of the law.[182]

Although the parallels are not perfect, the notions of legitimating formulas and the rule of recognition resonate deeply with questions of justiciability. All three have to do with establishing the boundaries of what can and cannot come under the authority of law. The brief discussion of Berger and Luckmann and HLA Hart reveals that it is possible to see the conceptual boundaries of autonomous institutions as porous. Internal legal knowledge and external social meaning are interwoven.

The dialectic view of the connection between institutional and social knowledge makes it challenging to conceptualize the boundaries of an institution and the interrelationships between institutions in rigid terms. This is why the interactive process of determining justiciability is so

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[178] *Ibid* at 123—125. The idea of open texture is taken from Friedrich Waismann and Ludwig Wittgenstein (and perhaps Bertrand Russell)—for further commentary, see Brian Bix, "HLA Hart and the Open Texture of Language" (1991) 10:1 Law & Phil 51.
[179] Hart, *supra* note 151 at 125—126.
[180] *Ibid* at 126.
[181] Brian Bix, *Law, Language, and Legal Determinacy* (Clarendon Press: Oxford, 1993) at 65.
[182] See e.g. Roderick Macdonald and Jason MacLean, "No Toilets in Park" (2005) 50 McGill LJ 721 at 723—726.

important, and why the Court's failure in *Bruker* to fully engage with it is so problematic. The connection between the civil and the religious is at stake in the question of the justiciability of a religious matter, not just whether a particular matter falls within civil jurisdiction. Justiciability is a question about 'what really matters to the law,' and this is a much more complex analysis than what appears in the cases discussed (particularly in *Wall* and *Bruker*). Defining what is of concern to the law is an existential question for the law, which involves a dialectic mixture of legal and social facts. Exploring what 'matters to law' in relation to the justiciability of religion is part of a complex social process that involves the creation of institutional knowledge and social reality. In light of this complexity, retreat to a simplified sense of the boundary of law is perhaps unsurprising. But it is also deeply unsatisfying.

Turning to the essential characteristics of religion and law, as Justice Wakeling did, or to the operation of legal 'form' in *Bruker*, filters the complex social processes through the lens of the law. In one sense, this is entirely appropriate because the law, as a social institution, defines and legitimates itself. But it is questionable whether the legitimation of law can ever be separated from the context within which the institution of law operates as part of a larger social whole. In other words, the law's determination of justiciability, which is grounded in the legal conceptions of what is really worthwhile (harm, rights, property, multiculturalism, etc.), cannot be presented as the solely relevant conception of the situation.

This does not provide an answer to specific questions of the purpose of law in a particular time and place and how religious matters fit into that purpose (what is required to answer the justiciability question in specific situations). Rather it points to the social process of creating institutional grounding as a central point of reference for exploring the interconnection between law and religion occurring in the justiciability question. What I mean is that the purpose of an institution is connected to the social processes that give birth to the institution. The question of justiciability of religious matters works backward to the existential origin of the institution(s) of law. Justiciability is a question of the purposes of law and the purposes of law emerge out of the institutionalization of legality. The social institutional reality of law emerges out of the interaction between the internalities of the law and the social environment external to the law. Institutionalization is performed in relation to the broader social experience and other social institutions, like religion. Justiciability therefore should not be approached as an analysis purely internal to the law, but must attend to broader issues of social interaction with the external world.

CONCLUSION

The discussion of justiciability shapes the way we think about the law's interactions with religion not only in analytic terms but also in conceptual terms. The language and metaphors we use to talk about justiciability reflect different attitudes about the law's interaction with religion. Ogilvie offers a strong metaphoric reading of *Bruker*, arguing that the decision signals a sea change in the way that law and religion interact in Canada:

> Wherever one draws the wall between church and state, *Bruker* has breached that invisible wall and all that remains to be seen is whether the state and the courts will repair that breach or continue to rush through it and eventually overcome religion and religious communities in Canada.[183]

My analysis of *Bruker* showed that there is both mixture and distinction in the Court's approach, which suggests a 'third option' to Ogilvie's dualism.[184] In order for there to be a place in-between having or not having a wall of separation requires a more nuanced view of building and maintain walls. There are different ways to distinguish and different ways to join together. Sometimes distinguishing goes too far and reifies difference. Sometimes joining together goes too far and ignores all difference. But distinguishing can also acknowledge permeability and joining together can also recognize difference. Articulating these possibilities and critically evaluating when and how they occur is crucial to the legal analysis of the law's interactions with religion.

The metaphor of a "wall" separating law and religion is part of a family of metaphors rooted in individualistic and competitive terms. Milner Ball suggests that one of the main metaphors in this family, which has dominated the way that law is spoken of, is that law is like a

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[183] Ogilvie, "(Get)ting Over Freedoms", *supra* note 73 at 188.

[184] Indeed, things have so far not turned out the way predicted by Ogilvie. Instead of choosing to fashion the relationship between law and religion in Canada as either a wall of separation or a brackish mixture without distinction, we have seen more of a mixed bag. The two most recent decisions of the SCC on religion, *Loyola High School v Quebec (AG)*, 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*] and *Saguenay* (*supra* note 15) have elements of both 'flooding the breach' and 'repairing the wall'. *Loyola* provides protection for a religious institution to teach its religion according to its own understanding (reinforcing the wall), but prevents it from teaching other religions according to its own understanding (flooding the breach). *Saguenay* prevents individuals from carrying out their public duties in a way that aligns the exercise of public authority with a particular religious tradition (reinforcing the wall), but pulls itself away from enforcing a 'strict separation' between church and state (flooding the breach).

"bulwark of freedom."[185] From this view, the law is seen to be the thing that protects us from and against them or it. Embedded in this dam of law is also injustice; law is given priority over justice.[186] Law is a dam built against rising tides that threaten freedom. This leads to the view that law actually exists as its own thing.[187] Thinking of the law as a bulwark insulates it against critique and challenge, because to 'breach' the dam is to commit a cardinal sin against society, to expose it to threat of harm. This family of metaphors is rooted in individualistic and competitive terms.[188]

> Within this constellation humans are by nature individuals with conflicting self-interests. They seek achievement through a struggle in which each tries to master himself, his fellows and his world. Fulfillment lies in competitive success…. Because individuals (nations, corporations) pursue their own interests and because resources are limited, the war of each against all is always near at hand. It is avoided by temporary armistices of contending wills. Lasting justice is at best an ideal. Law settles for stability…. Man is alien individual, nature is resource, and law is bulwark.[189]

Ball challenges us to think about the law in a way that allows participation in the oceanic ebbs and flows of the hydrologic cycle, as a source of alternative metaphors to the bulwark/wall view of law.[190] Rather than seeing water (the external, i.e. religion) as an evil destructive force being held at bay, the hydrologic cycle sees water as the source of life. To exclude water hastens death. Rather than seeing law as a bulwark or wall that prevents ingress, the law should be thought of as a system of plumbing, where "The work here is watching water, containing it some."[191] In this metaphor water is used, and the system for watching and containing the water will sometimes leak and break down. Plumbing is not a terminal event, but an ongoing maintenance and set of adjustments to ensure the free flow and relative containment of water.[192] In a similar way, "Law may also be humanly, dynamically connective."[193] Ball described the family of metaphors that includes plumbing as the "Peaceable Kingdom."[194] Here, "…nature is

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[185] Milner S Ball, *Lying Down Together: Law, Metaphor, and Theology* (Madison, Wisconsin: University of Wisconsin Press, 1985) at 23.
[186] *Ibid* at 25 and 27.
[187] *Ibid* at 24.
[188] *Ibid* at 120—121.
[189] *Ibid* at 121.
[190] *Ibid* at 28.
[191] Barks, *supra* note 1 at 230, quoted by Ball, *supra* note 185 at 29.
[192] Ball, *supra* note 185 at 30—31.
[193] *Ibid* at 31.
[194] *Ibid* at 123.

gift and occasion for a gift cycle, a sharing of the advantages of time and earth. Politics is the action of forming, exchanging, and distilling opinion—the action of a body politic. And law is then a medium of solidarity."[195] From this view, the purpose of law is not to provide an end but a process for discussion, negotiation and argument, to "contain them some."

Approaching questions of justiciability of religious matters in terms of the normal distinctions of procedure, essential characteristics or 'form' versus 'substance' feed into the bulwark metaphor criticized by Ball. Imagining religion as an evil that must be guarded against is not only highly presumptive about religion (that it is bad) but also perceives law as something in and of itself that must be protected and guarded against invasion. Law is separated from the ebbs and flows of life external to the law; the law is cordoned off and separated into its own autonomous ontology. This reification of the law cuts its institutional life and knowledge off from the broader social environment out of which it grew and in which it continues to operate. This is dangerous for the life of the law and for the health of society. The metaphor works similarly when viewed from the other side of the 'wall', from the perspective of religious freedom: religious institutions, communities and traditions must be protected from the 'evil' ingress of the law and public values; religion is separated from public discourse and other social attachments and normative claims; "religion" comes to be seen as a thing unto itself that must be maintained and protected. As discussed earlier regarding DeCoste and Ogilvie, the solution to the problem of judicial overreach and the prioritization of legal institutions is not to re-establish the walls that separate social and institutional spheres. Rather, the law and its relation to religion must be re-framed in a way that acknowledges and affirms the permeation and exchange between them, "to watch the water and contain it some."

The clarity achieved by focusing on principles of procedure, 'essential' characteristics of religion, or the distinction between 'form' and 'substance', is purchased at a cost. Establishing justiciability on these bases presumes that the application of the principle of justiciability is distinct from the particularities of the actual dispute. But there is more, which the dialectic interaction between social institutions described by Hart, Berger & Luckmann reveals. Focusing on the interactive process of determining the justiciability of religious matters brings into relief what the normal approach to justiciability obscures. Law and religion are both social institutions dialectically related to each other (within) and to a shared social base. Although this does not

[195] *Ibid*.

provide a complete answer for how to understand the interaction of law and religion, it leads us further down the path of seeing the importance of the social dimension of their interaction. The following chapter turns to yet another aspect of the complexity inherent in the interaction of law and religion, by asking the question of how to frame the in(ter)dependence of legal and religious institutional realities through the lens of the law itself.

CHAPTER 3

The Gap in Law's Apprehension of Religion: Understanding Law's Religion as Legal Fiction

"…[T]here cannot be a universal definition of religion, not only because its constituent elements and relationships are historically specific, but because that definition is itself the historical product of discursive process."[1]

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INTRODUCTION

In the previous chapter I suggested that the question of the justiciability of religious matters is an "existential moment" for law. In a similar way, Perry Dane has suggested that the relationship between religion and the state is best understood as an "existential encounter" because what is at stake "is not merely a set of legal doctrines or policy prescriptions, but something deeper and more constitutive."[2] In this chapter I will expand the exploration of this "something deeper and more constitutive" by looking at the law's apprehension of religion and the dissonance, or 'gap', between the law's conception of religion and the lived experience of religious individuals and communities.

This chapter explores the existential aspect of the law's encounter with religion and the way in which this affects how we frame, or approach, the encounter. In doing this, I follow a developing methodology that explores the gap that exists between the law's apprehension of religion and the lived experience of religious groups. As Elizabeth Shakman Hurd explained, "The category of lived religion is meant to draw attention to the practices that fall outside the

[1] Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* (Baltimore: Johns Hopkins University Press, 1993) [Asad, *Genealogies*] at 29.
[2] Perry Dane, "Master Metaphors and Double-Coding" (2016) 53 San Diego L Rev 53 at 55.
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confines of religion as construed for the purposes of law and governance."[3] Likewise, Benjamin Berger has shown that the law's interactions with religion are based on a particular conception of what religion is, filtered through the law's own way of seeing the world.[4] When law apprehends religion, religion is 'formatted' to fit into the institutional, conceptual and functional structure of the law.

This conception of religion can be viewed as a *mis*conception.[5] But to see law's apprehension of religion as *merely* a misconception presumes that there must be congruence between the internalities and externalities of law (between law and religious experience). Congruence, though, remains an elusive goal. Evidence shows that the activity of the law has a very practical impact on the way that religious individuals and communities experience religious life.[6] This means that the law's view of religion is not only distortive but also constitutive.[7] Drawing an analogy between law's encounter with religion and the transposition of an orchestral piece into a piano score, Perry Dane observed, "The transposition is not merely a counterfeit. It has integrity of its own. But our richest understanding of it requires that we also have some access to the higher form to which it is connected."[8]

The accuracy of the representation of religion in law does not seem to be an appropriate measure of evaluation. But how then is the law's apprehension of religion to be approached? Drawing on Dane's analogy, what does it mean to access the "higher form" to which the law's apprehension of religion is connected? The underlying question here can be framed in different ways. For example, how do we reconcile the fact that law is a social institution dialectically related to other social institutions while also recognizing that the law has a peculiar and unique social role in relation to other social institutions and society at large? In modern liberal societies

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[3] *Beyond Religious Freedom: The New Global Politics of Religion* (Princeton: Princeton University Press, 2015) at 13.
[4] *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at 147—148.
[5] See e.g. Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005); Cécile Laborde, *Liberalism's Religion* (Cambridge, Mass.: Harvard University Press, 2017) chapter 1.
[6] See e.g. Howard Kislowicz, "Sacred Laws in Earthly Courts: Legal Pluralism in Canadian Religious Freedom Litigation" (2013) 39:1 Queen's LJ 175 (Kislowicz demonstrated the influence of state law norms on religious law norms—the state law process affects religious self-perception (via description) of their obligations).
[7] See generally Ananda Abeysekara, "The Un-translatability of Religion, the Un-translatability of Life: Thinking Talal Asad's Thought Unthought in the Study of Religion" (2011) 23 Method and Theory in the Study of Religion 257.
[8] Dane, *supra* note 2 at 78.

the law is *sovereign* in the way that the nation-state understands itself to be sovereign.[9] This affects the way that the law's encounter with religion is framed.

The presumption that it is the law's role to determine the boundary between law and religion is one particularly relevant example of this. Cécile Laborde called this the "jurisdictional boundary problem."[10] Basically, someone has to determine where the boundary is between religious and non-religious, public and private, and Laborde argued that in a liberal society it is necessary for the law to have that role. The jurisdictional boundary problem is often addressed in terms of the institutional autonomy of religion or through different constructions and justifications of liberal theory.[11] But it is not limited to this. As already mentioned (and discussed in the previous chapter), the dialectic exchange that occurs when the justiciability of religious matters is determined shows that the boundary between law and religion, between the inside and the outside of the law, is not static but dynamic. The jurisdictional boundary problem is a question of social, institutional and political expression as much as it is of legal principle.

All of this emphasizes the fact that the law is not closed off from having to confront the outside world of religion, and reinforces the importance of giving an account of how this confrontation works. The idea that the law of the state has a privileged position in relation to religion does not negate this. As Perry Dane aptly explained, "The sovereign nation-state, in some sense, looks out at the world around it and sees other entities that do not easily fit into its own internal sovereign architecture… [T]he sovereign state must step outside of a purely internal frame and try to make sense of the existential Other."[12] Some have gone further to say that the struggle between the internal and external to law reflects the struggle of the modern nation-state to define, maintain and portray itself as sovereign.[13] In this way, the privilege of law in relation to religion can be seen as pointing to a formative process with relational dimensions rather than to an abstract quality that is either possessed or lost.

The challenge, then, is to figure out how to step outside of the internal frame of the law without losing a sense of the integrity of the law, of what the law *is* and what it is supposed to

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[9] See Costas Douzinas, "The metaphysics of jurisdiction" in Shaun McVeigh, ed, *Jurisprudence of Jurisdiction* (Abingdon: Routledge, 2007) 21 at 27; and generally Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 2006).
[10] Laborde, *supra* note 5 at 5—6, 70.
[11] For analysis of these issues see e.g. Victor M Muñiz-Fraticelli, *The Structure of Pluralism: on the Authority of Associations* (Oxford: Oxford University Press, 2014); Laborde, *supra* note 5; and Berger, *supra* note 4.
[12] Dane, *supra* note 2 at 55—56.
[13] Douzinas, *supra* note 9 at 22 and 27. Also see Laborde, *supra* note 5 at 109.

do. The gap between law's apprehension of religion and the lived experience of religion provides space for us to work this out. I argue that accounting for the constitutive aspect of the law's encounter with religion is crucial. The gap in the law's apprehension of religion points to a process of social-symbolic meaning formation at the heart of the interaction between law and religion. At a basic conceptual level, this grounds the "constitutional imagination"[14] of the law's encounter with religion in the *process* of the law's apprehension of religion, which enables us to begin putting together a more robust approach for evaluating the law's interactions with religion.

My argument proceeds in four steps. The first step will be to confront the gap that exists between the law's apprehension of religion and the lived experience of religion. I do this through an analysis of the case *Bentley v Anglican Synod of the Diocese of New Westminster*,[15] which deals with a dispute internal to religion over the use of its property. I draw attention to the possibility that by fulfilling its function the law simply has no other option but to adopt a narrow view of the religious dimension of a dispute. The law cannot escape the limitations of its own perspective when addressing religion. This sets the stage for the rest of the argument in the chapter, which deals with the question of how to frame the law's apprehension of religion.

The second step will identify the persisting question about how to frame the integrity of the law's apprehension of religion. Theories regarding the law's apprehension of religion tend to run into a significant background issue, which is the presumption of the primacy of the perspective of the law. This, I suggest, is connected to the sovereignty of the law. My concern is not with constructing a particular view of sovereignty or deciding whether the primacy of law or the limited view of religion resulting from the law's perspective is justified. Instead, I am looking for coordinates from which to view the intersection between law and religion that can account for the relational and formative process of the law's apprehension of religion. To this end, I briefly explore the theories of Cécile Laborde and Benjamin Berger to trace the ways they frame the internal perspective of the law in relation to the law's encounter with religion. I argue that their efforts to shift the debate over the way that law's apprehension of religion is understood and evaluated, although helpful, are incomplete.

The third step turns to the idea of 'legal fiction' as a way to open up a new perspective for thinking about these issues. I argue the idea of legal fiction frames the law's apprehension of

[14] See Martin Loughlin, "The Constitutional Imagination" (2015) 78:1 Modern L Rev 1 at 3 and 12.
[15] 2010 BCCA 506, 326 DLR (4th) 280 [*Bentley* (BCCA)], aff'g 2009 BCSC 1608, 52 ETR (3rd) 246 [*Bentley* (BCSC)].

religion beyond a rigid 'true' or 'false' correspondence calculation, which changes the descriptive and critical analytic focus. Following the central theme of this dissertation project, the idea of legal fiction highlights the social dimension of the interaction between law and religion. When law apprehends religion, it does so fictively, and this involves a social-symbolic *process* of meaning formation.

In the fourth step, I turn to two recent Supreme Court of Canada cases as concrete examples of the implications of the argument. First, the recent *Ktunaxa Nation*[16] decision demonstrates the difficulty with approaching religious and spiritual meaning in law by dividing the subject and object of belief. I argue that attending to the process of symbolic meaning formation provides a better view of the religious meaning that informs religious claims, and opens the possibility of incorporating religious ideas more fully into legal analysis. Secondly, the older *Multani*[17] decision shows that the formation of legal meaning is wrapped up in the social-symbolic process. From this view, we see the formation of the legal understanding of a religious object through the intertwining of religious and constitutional meaning.

1 *BENTLEY*—NOTING THE GAP IN THE LAW'S APPREHENSION OF RELIGION

The first step in this chapter's analysis is a reading of the *Bentley* case, which illustrates the limitations of the law's apprehension of religion and the importance of accounting for those limitations in reckoning with the case. The *Bentley* case raises questions about the nature of religious institutions and the level of autonomy that should be ascribed to them in law. These questions often lead to discussions about the principles of state neutrality and religious institutional autonomy.[18] My discussion takes a different focus, looking instead at the gap that can be seen in the case between the way that the Court apprehends religion and the real lived experience of the religion. *Bentley* brings into sharp relief the challenge, if not impossibility, of capturing the dynamism and complexity of religious organization in legal terms. Although I critique the way in which the Court apprehended the religious dimension of the dispute in *Bentley*, I also raise the question of whether the law's apprehension of religion ought to be

[16] *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 SCR 386 [*Ktunaxa Nation* (SCC)].
[17] *Multani v Commission Scolaire Maurgerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256 [*Multani*].
[18] See e.g. Muñiz-Fraticelli, *supra* note 10; Laborde, *supra* note 5.

evaluated solely in terms of its correspondence with the lived experience of religion. This sets before us the burden of the rest of the chapter, which is to consider an alternate approach for addressing the gap between the law's apprehension of religion and the lived reality of religion.

1.1 Anglicanism vs Anglicanism

The conflict in *Bentley* reflected a much larger (both in terms of time and space) crisis within the Anglican religion. A number of Anglican congregations in Canada have broken away from the legally established and historically recognized hierarchical authority structure of the Anglican Church of Canada (the ACC) because of the controversial theological and liturgical developments occurring within individual dioceses of the ACC.[19] The legal dispute in *Bentley* deals with four congregations that broke away from the diocese of New Westminster in British Columbia.[20] The question for the Court was whether the church property of the congregations remained with the dioceses or could go with the individual congregations breaking away from diocesan authority.

Over the past 20 years there has been significant discussion regarding the place of same-sex relationships within the global Anglican Communion.[21] Things came to a head in 2002 when

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[19] See e.g. *Delicata v Incorporated Synod of the Diocese of Huron,* 2013 ONCA 540, 117 OR (3d) 1, aff'g 2011 ONSC 4403 (Sup Ct J). Regarding the organization of the Anglican religion, see Anglican Communion, "Structures", online: <www.anglicancommunion.org/structures.aspx>; the Anglican Church of Canada, "How We are Organized", online: <www.anglican.ca/about/organization/>. Individual churches form parishes, and parishes are subdivisions of a diocese. Dioceses are the fundamental administrative unit of the Anglican Church. Bishops are the leaders of dioceses and carry broad responsibility both locally (to appoint and oversee priests and their parishes) and globally (to attend and participate in the Lambeth Conference, which is the regular meeting of the Anglican Church). Dioceses are grouped into Provinces. Provinces and their leaders (usually called Archbishops) have various administrative roles in the global Anglican Communion (including participating in the Primates Meeting and in the Anglican Consultative Council). Provinces have some authority to regulate and guide the individual bishops and dioceses within a designated territory. But the central units of administration are the dioceses and their respective bishops.

[20] See *Bentley* (BCSC), *supra* note 15 at paras 1—6.

[21] The question of the Church's stance on same sex unions was discussed during the Anglican Communion's 1998 Lambeth Conference. See Anglican Communion, "The Lambeth Conference Resolutions Archive from 1998", online: <www.anglicancommunion.org/resources/document-library.aspx?author=Lambeth+Conference&year=1998>. The 1998 Lambeth Conference affirmed that same-sex couples should be cared for by the Church (*ibid* at resolutions 1.10(c and d)); the Church's teaching on human sexuality and family relationships should not be changed from its traditional understanding as monogamous and heterosexual (*ibid* at resolution I.10(b)); and the blessing of same-sex unions should not be authorized (*ibid* at resolution 1.10(e)). There was deep disagreement over the issue of human sexuality at the 1998 Lambeth Conference. See Anglican Communion, 1998 Lambeth Conference, "Section 1 Report – Called to Full Humanity", Subsection 3, online: <www.anglicancommunion.org/resources/document-library/lambeth-conference/1998/section-

bishop Ingham of the diocese of New Westminster in British Columbia decided to authorize the liturgical blessing of same-sex relationships. A group of priests walked out of the New Westminster diocesan meeting when the decision was reached, which signalled the breaking apart of the diocese. This led to the flurry of events, both local and global, that led to the *Bentley* case.[22]

The breaking apart of the local New Westminster diocese in Canada reflects a tension and growing fissure in the global Anglican Communion. In 1998 the question of same-sex relationships within the Church was on the agenda of the Lambeth Conference, which is the primary international gathering of Anglicans in the global Church community.[23] At that time the conference affirmed a conservative approach to same-sex relationships.[24] As the situation in some of the Canadian dioceses moved toward a progressive position, the global Anglican Communion reaffirmed the Resolutions of the 1998 Lambeth Conference.[25] Many of the global Anglican territories became frustrated with the ineffectiveness of the traditional leadership institutions in the Anglican Communion, including the Archbishop of Canterbury, to address the progressive developments in Canada (and America). A large portion of the global Anglican community responded by creating the Global Anglican Future Conference (GAFCON), which met in Jerusalem in 2008 as an alternative gathering to the Lambeth Conference occurring at the same time.[26] GAFCON settled on an Anglican confession that clearly excluded the progressive developments in Canada and America.[27] Ultimately, the growing divide within the global Anglican Communion has led to the establishment of the Anglican Church in North America (ACNA), which describes itself as a new "Province-in-formation" that overlaps the geographical

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i-called-to-full-humanity/section-i10-human-sexuality?author=Lambeth+Conference&year=1998>. The Lambeth Conference is the primary international gathering of Anglicans in the global Church community and one of the four "Instruments of Communion" of the Anglican Church. See Anglican Communion, "Instruments of Communion", online: <www.anglicancommunion.org/structures/instruments-of-communion.aspx> [Anglican "Instruments of Communion"].

[22] See *Bentley* (BCSC), *supra* note 15 at paras 7—171 (describing the history of the dispute).

[23] See the Anglican "Instruments of Communion", *supra* note 21.

[24] *Bentley* (BCSC), *supra* note 15 at para 67.

[25] See e.g. "A Statement by the Primates of the Anglican Communion meeting in Lambeth Palace", *Anglican Communion News Service* (16 October 2003), online: <http://www.anglicannews.org/tag/primates-2003.aspx>.

[26] See GAFCON, "About GAFCON", online: <www.gafcon.org/about>.

[27] GAFCON, "The Complete Jerusalem Statement" (22 June 2008), online: <www.gafcon.org/resources/the-complete-jerusalem-statement >; and GAFCON, "The Jerusalem Declaration" (29 June 2008), online: <www.gafcon.org/resources/the-jerusalem-declaration>.

territory of the ACC and the Episcopal Church of America.[28] Included in this Province is the Anglican Network in Canada (ANiC), which purports to be a new diocese. The congregations represented in the *Bentley* conflict were some of the first congregations to compose the ANiC.

The lawsuit in *Bentley* centred on the question of whether the parish properties go with the departing congregations or stay within the diocese. At the heart of the dispute were arguments about the foundation and organization of the Anglican religion, which centred on the question of whether Anglicanism is grounded in doctrines and a communal identity that transcends its local organizational structure. The disagreement over the nature of Anglicanism shaped the legal arguments used and the decisions of the courts.

The idea of Anglicanism relied on by the plaintiff congregations led them to frame their argument in terms of trust law. They claimed that the church property was held in trust for the purposes of Anglican ministry, not simply at the discretion of the bishops.[29] For the plaintiffs, the reference to "Anglican ministry" in the founding documents of the ACC referred to a history and community that transcended the geographical territory of the particular bishops and the Province of the ACC. For the defendant diocese to digress from the global Anglican perspective on same-sex relationships, the plaintiffs argued, caused a breach in its trust obligation to remain faithful to Anglicanism. The property should therefore follow the congregations in order to preserve its use in accordance with historical and global Anglicanism.

The defendant diocese argued that the clarity of incorporation and organizational structure of the Anglican churches and dioceses in Canada provided sufficient basis to determine the ownership and use of Church property.[30] According to them, the organizational documents spelled out a well-defined hierarchical and territory-based system of authority tied primarily to the dioceses and secondarily to a national association. As such, the theological and communal aspects of Anglicanism referred to by the plaintiffs were in fact embedded within organizational structures of the local diocese and the ACC. The internal processes of this organizational structure allowed for the progressive development of the diocese objected to by the plaintiffs. Hence, the property should remain within the diocese.

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[28] For an outline of the history leading to the creation of the ACNA Province and the ANiC diocese, see the Anglican Network in Canada, "Realignment in the Communion: *A Canadian Chronology*", online: <https://www.anglicannetwork.ca/our-genesis>.
[29] *Bentley* (BCSC), *supra* note 15 at para 172ff.
[30] *Ibid* at para 210ff.

The decisions of the courts in *Bentley*, both at trial and on appeal, sided with the diocese and refused the claim of the departing congregations to excise and bring the property with them. The courts adopted a view of Anglicanism that focused on the integrity of the local organization of the Anglican Church rather than on the international dimension of the Anglican Communion.[31] The Court of Appeal found that the parish properties were indeed being held in trust "for the purpose of Anglican Ministry"[32] but agreed with the trial decision that the highly structured nature of the ACC distinguished this case from other cases involving trusts and the use of religious property.[33] The Court did not think that "Anglican worship" or "Anglicanism" could be separated from the notion of the episcopal authority of the ACC, and found that Anglicanism is quintessentially hierarchical and operates generally independent of the global Anglican Communion.[34] The formalized authority of the hierarchy of the Anglican Communion appears only within the different Provinces and their dioceses. This means that the participation of the ACC in the global Anglican Communion does not depend on a structure of authority standing above the ACC. The ACC (and its constituent dioceses) is ultimately autonomous and entitled to decide for itself whether to approve same-sex blessings and risk causing schisms in the global Anglican Communion.[35]

The Court of Appeal went on to adopt a territorial basis for the Anglican Church structure, and found that it is antithetical to consider Anglican ministry in Canada in a congregation that has withdrawn from the authority of its diocese and bishop.[36] The Court admitted the possibility that the plaintiff congregations might indeed be in communion with the global Anglican Church, but did not presume the ability to speak to this.[37] Rather, the Court held that "Anglican ministry in Canada" means "according to the ACC."[38] Interfering with this clearly established governance by bishops would inject uncertainty in the internal affairs of the ACC and likely produce more conflict than it would resolve. The Court specifically said that the law should not be used to permit the continuance of Anglican congregations that have removed

[31] See *ibid* at para 256; *Bentley* (BCCA), *supra* note 15 at para 74.
[32] *Bentley* (BCCA), *supra* note 15 at para 65.
[33] *Ibid* at para 69.
[34] *Ibid* at para 74.
[35] *Ibid*.
[36] *Ibid* at para 75.
[37] *Ibid* at para 76.
[38] *Ibid*.

themselves from the authority of a geographically established bishop in favour of the authority of a foreign bishop because to do so would be unprecedented and (presumably) disruptive.[39]

1.2 The Gap in **Bentley** *and Subsequent Developments*

The Court of Appeal framed the challenge of its judgment as trying to bring "two ships passing in the night" within speaking distance of each other.[40] This statement was intended to reflect the distance between the parties. But I think it applies just as well to the gap between the Court's approach to the case and the lived experience of Anglican communities in Canada. It is true that in order to decide the legal question at issue in *Bentley* it was necessary for the courts to adopt some basic premises about the nature of Anglicanism, and this exercise itself is quite challenging. How were the courts to fit the square peg of an abstract universal notion of Anglicanism (claimed by the plaintiffs) into the round hole of the clearly defined organizational instruments and authority structures of Anglicanism that exist in Canadian law? But the challenge actually involves something more than that. As already mentioned, the *Bentley* dispute was only one moment within a much larger and longer dispute. The case that the courts had to decide was only a snapshot of a moving picture. How could the courts account for the full weight of the larger dispute within the particular dispute of the *Bentley* case? Or, to use another analogy, how could the courts relate its examination of a small cross-sectional tissue sample to the living organism from which it was taken?

The impossibility of the task faced by the courts comes clearer in light of how the conflict in the Anglican Communion has evolved following the *Bentley* decision. As time has passed after the *Bentley* decisions, the fracturing apart of the global Anglican Communion is becoming more and more apparent. GAFCON has become increasingly successful in calling for a disciplinary response to the doctrinal innovations within the ACC and the Episcopal Church of America. For example, in 2016 the Episcopal Church of America was suspended for a period of three years from participating in various aspects of the international Anglican Communion.[41] The same result now seems inevitable for the ACC since it, subsequently, has passed resolutions to

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[39] *Ibid*.
[40] *Ibid* at paras 52 and 61.
[41] Anglican Communion, Communiqué from the Primates' Meeting, "Walking Together in the Service of God in the World" (11-16 January 2016), online: <www.anglicancommunion.org/structures/instruments-of-communion/primates-meeting/2016.aspx>.

amend its Canon law definition of marriage to include same-sex unions.[42] The alienation of the Episcopal Church of America and the seeming inevitability of the same happening to the ACC undermine an important aspect of both the trial and appellate court decisions in *Bentley*. The trial court noted and relied on the fact that the ACC was still fully active within the global Anglican Communion.[43] Witnessing now the (albeit very gradual and slow) alienation of the ACC from the Anglican Communion indicates that perhaps the plaintiffs were correct to say that the ACC is out of step with "Anglican ministry".

A similar point can be made regarding the Court of Appeal focus on the fact that the Anglican Church in Canada is fundamentally a "government by bishops".[44] The Court of Appeal relied on the clearly defined geographical and hierarchical authority structure of the ACC.[45] Although the ACC sends its bishops to participate in activities of the global Anglican Communion, the Court of Appeal did not think this meant that the ACC is beholden to any authority other than its own local diocesan governmental organization. The question, then, is whether the growing recognition of the ANiC and the ACNA in the global Anglican Communion jeopardizes the Court of Appeal conclusion that "It is antithetical to the nature of Anglicanism to contemplate "Anglican ministry" in a parish that has withdrawn from the authority of its diocese and bishop."[46] ANiC and ACNA currently operate geographically parallel to the diocese and provinces of the ACC. It is possible that they will never be fully accepted in the Anglican Communion, but their recognition among the popular majority of the global Anglican Communion (in GAFCON) suggests that the territorial exclusivity of the "government of bishops" may not be quintessentially Anglican.

Having said all of this, it is not clear what legal effect should be given to these developments. There were compelling reasons for the courts to focus their analyses on the local level. The properties in question had a concrete physical location, which were registered locally. This frames the legal analysis quite naturally within the locally enacted structures of the Anglican Church of Canada—i.e. in the hands of the local bishop. Although the use of local property could be directed by a source external to the local territory, in order for that to happen it

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[42] See Anglican Church of Canada, General Synod 2016 Resolution A051 R2, "Amendment to Canon XXI (On Marriage in the Church)", online: <www.anglican.ca/gs2016/cc/resolutions/>.
[43] *Bentley* (BCSC), *supra* note 15 at para 260.
[44] *Bentley* (BCCA), *supra* note 15 at para 76.
[45] *Ibid* at para 74.
[46] *Ibid* at para 75.

is necessary for the link between the local property and the foreign directorship to be clear and unambiguous. This is precisely where the Court of Appeal sided with the ACC. The documents and instruments available to the Court for defining the ownership and use of the property provided a link between the property, the individual congregations and the local bishop. The local diocese was connected through its own governing documents with the national association of the ACC. That, however, is where the linkage ended. The Court of Appeal found that the connection between the local property of the congregation and the historical and global Anglican Communion referenced by the plaintiffs was not strong enough to supplant the well-defined authority of the local bishop.

This perspective of the Court of Appeal has support from within the global Anglican Communion itself. The then Archbishop of Canterbury, Dr. Rowan Williams, said that there is no central authority for settling disputes within the Anglican Communion. Even the joint perspective of church leaders does not constitute a "supreme court"; the "communion" of the Church is rooted more in joint action than doctrine.[47] It might well have been reasonable for the courts to take the position that their role is not to sort out the church's self-identity question, but to decipher the most practicable identity of the church for the purposes of applying Canadian law (managing the property rights at stake in the case). On the other hand, although there is no centralized mechanism for discipline there is an undeniable sense that the global Anglican Communion is a unity. The actions of each part affect the others. This has generated an unmistakable will of the Communion to press through differences and disagreements to continue to walk together.[48]

What, then, are we to do with the courts' apprehension of Anglicanism? It clearly does not reflect the complexity of the lived reality of religion for Anglicans at either the local or the global level. Does it matter that Anglicanism was portrayed in a state much firmer than the facts might allow? Despite any of its analytic strengths or weaknesses, the *Bentley* decisions clearly

[47] Rowan Williams, Archbishop of Canterbury, "Archbishop of Canterbury's statement at the final press conference of the Primates' Meeting", *Anglican Communion News Service* (16 October 2003), online: <www.anglicannews.org/news/2003/10/archbishop-of-canterburys-statement-at-the-final-press-conference-of-the-primates-meeting.aspx>.

[48] Justin Welby, Archbishop of Canterbury, "Archbishop Welby briefs ACC members on the Primates' gathering and meeting", *Anglican Communion News Service* (8 April 2016), online: Anglican News Service <www.anglicannews.org/news/2016/04/archbishop-welby-briefs-acc-members-on-the-primates-gathering-and-meeting.aspx>.

show the persisting tension between the law's conception of religion and the dynamic and evolving world of religious life.

The point from which we view the gap between the law's apprehension of religion and the lived experience of religion affects our ability to critically reflect on the law's interaction with religion more generally. It would perhaps be irrational to expect that the view of Anglicanism employed by the courts could adequately capture the full dynamism and complexity of an international and ancient organization like the Anglican Church. After all, "Legal analysis depends on the flattening of complexity, on the selection of material dimensions of experience and the deemed irrelevance of others."[49] But this does not mean that the connection between the law's apprehension of Anglicanism and the lived experience of Anglicans cannot be critically evaluated. Rather than propose how this might be done, I suggest that we look at some prior questions about the way in which we approach the gap between law's apprehension of religion and the lived experience of religion. Specifically, I will argue that the law's apprehension of religion must be understood *for what it is*, which involves more than critiques and justifications within the logic of correspondence. The way that religion is apprehended in law must be evaluated in a way that goes beyond the question of whether law gets it right or wrong.[50]

2 PERSPECTIVE IN UNDERSTANDING THE LAW'S APPREHENSION OF RELIGION

Here I will begin to explore what I think it might look like to reframe the gap between law and religion in terms of an existential encounter. What this involves at this stage is identifying and putting into question certain presumptions about the nature of legal sovereignty. This opens up a much broader range of dimensions at stake in the law's apprehension of religion and shifts the calculus regarding the gap between law and religion away from ideas of 'truth' and 'reality' to "something deeper and more constitutive."[51]

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[49] Berger, *supra* note 4 at 26. In the same place Berger referred to Bruno Latour's memorable idea that trying to access the world through law is like "trying to fax a pizza." Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'Etat* (Cambridge, UK: Polity, 2010) 268.

[50] Benjamin Berger made a similar argument in relation to the 'rendering' of religion in the cultural paradigm of the constitutional rule of law. For Berger, the point of looking at the way religion is rendered in law is not about whether law gets it right or wrong. Rather, drawing attention to what law leaves out in its account of religion increases our awareness of the cultural force exerted by the law when it intersects with religion. Berger, *supra* note 4 at 103—104.

[51] Dane, *supra* note 2 at 55.

Numerous theorists argue that religion takes a particular form within the modern liberal nation-state.[52] The formatting of religion is a necessary effect of modern western law and the modern political experience. In a sense, religion is a category produced by law (and the political force of the sovereign nation-state) designed for legal (and political) management.[53] Some have argued a more extreme position, that religion is so unruly a phenomenon that the only way it can be addressed is if it is forced through the assertion of some sovereign decision into a particular symbolic or metaphoric shape.[54] There are several views on what this means for legal and policy analysis. Some argue that religion remains a useful category standing proxy for a bundle of other rights and interests.[55] Others advocate that we move away from using 'religion' as a discrete category of legal governance, promoting instead a range of other social, historical, political and conceptual categories to substitute or supplement religion.[56] Others have argued that the law should avoid any formatting of religion and should recognize the autonomy and self-determination of religious associations.[57] Still others take some position in between.[58]

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[52] See e.g. Asad, *supra* note 1 at ch 1; Talal Asad, "Religion and Politics: An Introduction" (1992) 59:1 Social Research 3; Sabah Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton: Princeton University Press, 2015) (Mahmood seeks to contextualize the various appearances of secularism, as a universalizing project, particularly through a comparison of 'western' and 'eastern' experiences of religious difference); Marcel Gauchet, *The Disenchantment of the World: A Political History of Religion,* translated by Oscar Burge (Princeton: Princeton University Press, 1997) (offering an ambitious and controversial argument about the development of religion as a quintessential aspect of the development of the modern Western world); Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54 UT Fac L Rev 1 (describing the effects of the epistemological commitments of Canadian law on religion and religious claims).

[53] See e.g. Hurd, *supra* note 3 (showing and critiquing the ways in which the category of 'religion' is constructed through state action, especially in the context of intervention in foreign affairs, in order to describe and solve certain political problems). Also see Enzo Rossi, "Understanding Religion, Governing Religion: A Realist Perspective" in Cécile Laborde & A Bordon, eds, *Religion in Liberal Political Philosophy* (Oxford: Oxford University Press, 2017) 55.

[54] See Abeysekara, *supra* note 7 at 258.

[55] See e.g. Andrew Koppelman, "Conscience, Volitional Necessity, and Religious Exemptions" (2009) 15 Legal Theory 215.

[56] See e.g. Hurd, *supra* note 3 (historicizing and politicizing the global project of religious freedom); Laborde, *supra* note 5 (arguing for the disaggregation of religion into the values that inform the protection of religion); Brian Leiter, *Why Tolerate Religion?* (Princeton: Princeton University Press, 2013) (advocating the dissolution of religious freedom in favour of other protections); Larry Catá Backer, "Religion as Object and the Grammar of Law" (1998) 81:2 Marq L Rev 229 (arguing religious reasons and concepts should not be incorporated into legal decision-making); Winnifred Fallers Sullivan, "Judging Religion" (1998) 81:2 Marq L Rev 441 (arguing against the broad definitions of religion used in law and toward a more nuanced view of religion that focuses on political settings and cultural dimensions surround religious experience and practice).

[57] See e.g. Barry W Bussey, "The Legal Revolution Against the Place of Religion: The Case of Trinity Western University Law School" (2016) 4 BYU Law Rev 1127; Victor M Muniz-Fraticelli & Lawrence David, "Religious Institutionalism in a Canadian Context" (2015) 52:3 Osgoode Hall LJ 1049.

[58] See e.g. Jocelyn Maclure & Charles Taylor, *Secularism and Freedom of Conscience*, translated by Jane Marie Todd (Cambridge, Mass.: Harvard University Press, 2011).

Laborde's disaggregation theory is the latest and most thorough example of a liberal theory approach for understanding the gap between law and religion.[59] Broadly speaking, Laborde acknowledged the tension in the gap, or boundary, between facially 'neutral' and 'secular' liberal law and the richness and depth of religious life. The fact that her book is framed as a response to critical theorists who accuse the law of getting religion "wrong" shows that she takes the gap between law and religion quite seriously.[60] But despite claiming that she would deal with the "jurisdictional boundary problem head on"[61] Laborde never really addressed the way that law formats religion. Instead, she argued that liberalism endorses a restricted idea of the good, structured around specific ethical, socio-political and epistemic features.[62] Her understanding of liberal theory is that if the state indeed holds such a narrow conception of the good then there is no reason to deny the alignment of the state with religion, so long as the alignment does not push the state beyond the narrow bounds of the good that it can endorse.[63] Her point is that religion qua religion is irrelevant for evaluating the legitimacy of state action; religion, in other words, has no special status in the liberal calculus of justice, even for issues of delineating religion for the purposes of accommodation and tolerance.[64] For Laborde, it is a mistake to think that the separation of church and state is the paradigm of liberal government.[65] Rather, it is one of the effects that flow from the core *values* of liberal democratic ideals.[66] The boundary between religion and law, or church and state, should not start with a presumption of separation but rather with the liberal democratic ideals.[67]

Laborde's answer to the jurisdictional boundary puzzle was to assert that liberal theory and a liberal state does not share meta-jurisdictional authority—not with religious or any other "contingent" form of identity or membership.[68] According to Laborde, the radical claim of liberalism is not to make religion private. "[I]nstead [it] lies in the fact that it assumes state

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[59] Laborde, *supra* note 5.
[60] See e.g. *ibid* at 4—5 and 14—15 ("Critical religion theorists ask probing questions about liberalism's religion—the concept of religion at the heart of liberalism—and it is vitally important that liberal political philosophers adequately respond to it" at 14—15).
[61] *Ibid* at 8 and 160.
[62] *Ibid* at 115.
[63] *Ibid*.
[64] See *ibid* at 28.
[65] Contra Paul Horwitz, *The Agnostic Age: Law, Religion, and the Constitution* (Oxford: Oxford University Press, 2011) ("Liberalism itself, in all its changing forms, is ultimately just a recipe for the resolution of church-state conflict" at 303).
[66] Laborde, *supra* note 5 at 116.
[67] *Ibid*.
[68] *Ibid* at 162.

sovereignty: the state's prerogative to decisively fix and enforce the terms of the social contract."[69] In response to so-called "New Religious Institutionalism", Laborde suggested that the concept of state sovereignty is misconstrued and, in fact, religious institutionalism accepts the core intuition behind the notion of state sovereignty.[70] Laborde went on to argue that the sovereignty of the liberal state is internally restricted by liberal democratic principles and ideals.[71] The objection of religious institutionalism "confuse[s] the source of sovereignty with the considerations that make its exercise just."[72] The sovereignty of the liberal nation state is grounded in its institutional ability to enforce a scheme of cooperation over time and because it represents the interests of individuals as individuals and citizens as citizens.[73]

Laborde's attempt to clarify the liberal exercise of sovereignty and claim of meta-jurisdictional authority actually makes it more difficult to address questions about the gap between law's conception of religion and the lived experience of religion.[74] Although she willingly accepted the fact that liberal law is not neutral but a sovereign exercise of power, she never really allowed this observation to challenge law's conception of religion. Instead her argument focused on re-configuring the exercise of sovereign power into more agreeable liberal terms. Sovereignty in the liberal state, for Laborde, is not arbitrary or voluntaristic but is grounded in gentle and agreeable values and ideals of liberalism.[75] This re-framing of sovereignty turned the table on the critics who suggest that law's apprehension of religion gets religion wrong. Laborde passed over their critique by simply noting, "the implication of their critique is unclear."[76]

Laborde's refusal to allow the sovereignty of liberal law to be put into question ultimately precluded a whole range of ideas and questions from entering the discussion about the law's apprehension of religion. Softening the sovereignty of law hid from view "something more constitutive" at work in the law's apprehension of religion. It obscured what Benjamin Berger

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[69] *Ibid* at 163.
[70] *Ibid* at 167.
[71] *Ibid* at 168.
[72] *Ibid* at 170.
[73] *Ibid* at 162 and 168.
[74] It should be noted that Laborde's argument is pitched at somewhat different set of questions that I am considering here. Laborde is concerned with the status of religion as a minority identity and as the basis of an institutional claim. Here I am concerned with understanding the nature of the boundary between law and religion as evinced in the way that law formats religion for the purposes of legal management.
[75] Laborde, *supra* note 5 at 168.
[76] *Ibid* at 166.

called the cultural force of the constitutional rule of law. For Berger, the law, like religion, is a culture that is bound by its symbolic, linguistic, aesthetic and conceptual coordinates.[77] According to Berger it is problematic when legal actors (and legal analysis) forget that the law is a culture and presume that law sits above the fray of cultural interaction.[78] According to Berger,

> The efforts…to soften the law's force and to expand and refine the margins of indifference are important. Nevertheless, these accounts essentially replicate the pattern of engagement found beneath the law's story about religious pluralism. Each views law as something quite apart from the cultures that it is overseeing.[79]

Downplaying the effects of applying liberal values to the adjudication of religion, as Laborde does, is precisely the problem identified by Berger. Laborde's argument was framed fully from within the perspective of liberal values and attempted to show that the application of those values does not fall to the critiques often levied against them.[80] Laborde ultimately failed to address the "something more and constitutive" that is at stake in the gap between law and religion.

Another way to get at Berger's point would be to consider the law's apprehension of religion in terms of discourse. Discourse does not merely present facts, it prefigures the entire field in which facts become objects of analysis.[81] Whether seen in terms of culture or discourse, law's apprehension of religion is a constructed reality. The upshot is that when we think about the law's apprehension of religion we are dealing with a socially constructed reality, not with an object or essence of religion that exists separately and apart from the structuring power of the culture or discourse of law.[82] How, then, are we to evaluate or guide the law's encounter with religion if the point of meeting, the gap between law and religion, is a socially constructed reality?

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[77] Berger, *supra* note 4 at 17.
[78] *Ibid* at 12.
[79] *Ibid* at 137.
[80] See e.g. Laborde, *supra* note 5 at 181, 205 (Laborde argues that liberalism's view of religion is not simply a protestantization of religion because the liberal values that protect religion also protect other forms of association. What seems to be the protestantization of religion, on a disaggregated view of religion, is merely incidental to the protection of broadly accepted liberal values).
[81] Tim Murphy, *Representing Religion: Essays in History, Theory and Crisis* (London: Equinox, 2007) ("[D]iscourse is constitutive not only of the domain which can treat as a possible object of (mental) perception. It is also constitutive of the concepts it uses to identify the objects that inhabit that domain and to characterize the kinds of relationships they can sustain with one another.") *Ibid* at 6, quoting from Hayden White, *Tropics of Discourse: Essays in Cultural Criticism* (Baltimore: Johns Hopkins University Press, 1978).
[82] Also see Abeysekara, *supra* note 7.

Berger's approach was to analyze the interaction of law and religion as a cross-cultural encounter in an effort to keep in view the cultural force of the law.[83] His goal was to enable us to accept the good that constitutional legal order brings without replicating the negative conversionary pattern of engagement found when the law's cultural moorings are forgotten.[84] It is worth emphasizing that Berger explicitly sought not to displace the culture of the rule of law, but rather to change the stories we tell about the nature of legal multiculturalism in order to shift our understanding of the practices and virtues of adjudication.[85] For Berger, knowledge of law's cultural force leads to an ethos of fidelity and humility *within* the culture of the constitutional rule of law.[86] With this ethos in place, he argued, we can embrace and expand the law's indifference toward religion.

Cultivating indifference of the law toward religion, for Berger, expands the sense that religion is not a threat to the law—religion does not ultimately matter to the law and can be tolerated.[87] Berger argued that courts should be able to recognize that there is an irreducible difference between a religious claim and the values and concerns central to the culture of the rule of law (of which judges are to be faithful defenders). A judge can recognize the irreducibility and incommensurability of these two cultures, while also remaining faithful to the culture of the rule of law, by reading the commitments of the culture of the law as limited and contingent in scope.[88]

My concern is that Berger's argument regarding the cross-cultural nature of the encounter between law and religion is somewhat vulnerable to the problem of the sovereignty of law I identified earlier with Laborde's approach. This can be seen in Berger's statement that the constitutional rule of law forecloses the possibility of using a language other than law's own.[89] Although Berger argued for a fulsome translation of religious concerns into legal language, one might wonder whether the very presumption of the primacy of law's language would not also preclude the type of humility necessary to achieve the goal sought? The stakes are high. Humility

[83] Berger, *supra* note 4 at 105—107 and 148.
[84] *Ibid* at 142—144.
[85] *Ibid* at 149.
[86] *Ibid* at 170.
[87] *Ibid* at 178.
[88] Berger says that the ethos of humility is threefold: 1) humility about the potential universality of law's culture; 2) humility about the capacity of law to understand other cultural forms; and 3) humility in relation to the ultimate contingency of the privilege enjoyed by law's culture. *Ibid* at 173.
[89] *Ibid* at 140 and 179.

must take root within the ethos of legality and within the judicial mind in order to overcome the conceit of the prevailing story about law (as above culture). Without humility, indifference is merely an inflection of sovereignty. Berger recognized this in relation to the promise of neutrality, noting that if law is thought to be culture-free then even when religion thinks it 'wins' it actually loses because it wins only *despite* the cultural commitments of religious belonging.[90] "In this sense, the alienation begins before I enter the courtroom. It happens at the very moment that I am forced to reframe my claim as one about reason and right, not about culture."[91]

It seems to me that to successfully remove the conceit that law "stands above the cultural fray" in its interaction with religion would require seeing the law *entirely* as an expression of legal culture. In other words, the cultural dimension of the rule of law must be fully embedded within the language and institutional ethos of the law. But Berger seemed to resist taking his argument that far. He suggested that a fulsome *dialogic* approach of cross-cultural encounter between law and religion is not possible within the constitutional state.[92] Putting the 'truths' internal to the law in question, which is required for a dialogical cross-cultural exchange, is something that the law cannot do.[93] Viewed this way, the law's encounter with religion is a zero-sum game of sorts, where loosening the law's grip on the totality of meaning is to lose the game.

The adjudicative ethos of fidelity and humility that Berger advocated for within the culture of the rule of law, grounded as it is in a self-conscious awareness of the cross-cultural encounter of law and religion, seems to be limited insofar as it cannot put the 'truth' of law and its monopoly on meaning and language on the line. Until it is possible for the law to embrace the *risk* of its encounter with religion, as long as there is some core of the law withheld from the messy encounter with religion, then we have not yet escaped the conceit of law's sovereignty.

I agree with Berger that it is necessary to take the integrity of law, and its culture, seriously. The culture of the constitutional rule of law is tied to the social and institutional privileges of the modern nation-state. These facts are, for us, inescapable. To avoid them would be to re-imagine the state itself.[94] But do the facts of law's social and institutional structure necessarily make the risk of the interaction with religion a threat to law's existence? What if the

[90] *Ibid* at 156—158.
[91] *Ibid* at 159.
[92] See *Ibid* at 138—142.
[93] *Ibid* at 139.
[94] This was Laborde's response to the critical religion theorists, that they seem to imply that the democratic state has no *pro tanto* legitimacy in defining what counts as harm, offense, fairness, etc. Laborde, *supra* note 5 at 166.

basis of 'truth' and sovereignty of law could be thought of in different terms? Perhaps the 'risk' of cross-cultural exchange could be imagined not in terms of existential failure but as existential possibility? Such an approach would not deny the sovereignty and integrity of the law, but would shift the coordinates for framing the effects of the sovereignty and integrity of law.

3 LAW'S APPREHENSION OF RELIGION AS LEGAL FICTION

I propose that we think about law's apprehension of religion as a legal fiction. Reflecting on legal fictions can help us better understand the gap in the law's apprehension of religion. From this view, the law's construction of religion is not a divergence from 'fact'—in that it is either true or false—but is a construction meant to achieve a specific social purpose. "The fiction…forces upon our attention the relation between theory and fact, between concept and reality, and reminds us of the complexity of that relation."[95] I also argue that the notion of legal fiction offers new coordinates for orienting the way that the gap between law and religion is understood and evaluated.[96] It allows us to take seriously the sovereignty of law, which in the context of the law's interaction with religion has to do with the presumption that law has a special role in drawing the boundary between law and religion, while also recognizing the complex interdependence of what is inside and outside of the law.

In what follows I will look at the idea of legal fiction in two stages. First, I briefly trace the idea of what a legal fiction is and how it connects to the law's apprehension of religion. I argue that legal fiction is a socially constructive tool that operates where different views of reality and systems of meaning cross over each other. Legal fiction points us past the binary of truth/false and toward the importance of community (and the relationship between communities) to the law's apprehension of religion. From this view, the possibility of cross-cultural exchange when law apprehends religion is not a risk of existential failure but a source of existential promise. Secondly, I argue that the creation of a legal fiction is linked to a foundational process of creating social knowledge and meaning. I describe the process at work in legal fiction in terms

[95] Lon L Fuller, *Legal Fictions* (Stanford: Stanford University Press, 1967) at ix.
[96] A brief note of clarification. I am not arguing that law should be thought of as a fiction, although I do find the idea plausible and full of theoretical potential. The use of legal fiction here is more circumscribed, offering a different point of view from which to reflect on the gap between law and religion and what this means for the way that we conceptualize the boundary and interaction between law and religion.

of symbolic forms of meaning. Law and religion are both symbolic forms of meaning grounded in the same process of meaning formation.[97] This, I suggest, drastically shifts our understanding of the gap that exists in the law's apprehension of religion.

3.1 Legal Fiction, Falsity and Social Interaction

The idea of legal fiction is somewhat contentious in the academic literature.[98] There is no clear agreement about what constitutes a legal fiction, which means that there is also no agreement regarding the function and uses of the legal fiction. Legal fictions are sometimes portrayed as unnecessary and problematic for the function of law. Jeremy Bentham's disdain for legal fictions is famous. He went so far as to claim, "It has never been employed but to a bad purpose…. It has never been employed but with a bad effect."[99] For those less negative, fictions might serve a purpose, although only for a short time. They occupy a very small part of the territory of legal reasoning, representing the limitations of human language and reasoning in building clear and distinct laws—either of deficiency in terms of the purpose of the law or in terms of the language of everyday experience.[100] Legal fictions are eventually, and as a matter of course, outgrown and fall out of use.[101]

Others claim that legal fictions are a central part of the epistemological structure of law, which is to say that they are not a historical remnant or a transitory tool but central to the function of law and legal reasoning.[102] This is not to say that particular legal fictions are

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[97] The approach I take here, both methodologically as well as linguistically, reflects Berger's approach to the interaction of law and religion. Berger, *supra* note 4 at 131 ("Law and religion are, in this sense, homologous; through norms, rituals, institutions, and symbols, both constitute meaningful worlds.") My approach is distinct from Berger's insofar as I look at the process of social symbolic meaning formation.

[98] A thorough discussion of legal fictions from multiple perspectives can be found in Maksymilian Del Mar & William Twinning, eds, *Legal Fiction in Theory and Practice* (Cham: Springer, 2015).

[99] John Bowring, ed, *The Works of Jeremy Bentham*, vol 9 (Edinburgh: W Tait, 1843) at 77. In this same chapter Bentham rattled off such a series of harsh criticisms against legal fictions that it was difficult to pick which one to include. The substance of his objection to legal fictions is that they fly in the face of utilitarian reasoning, and hence can (and only ever are) used to perpetuate a situation of social organization and distribution of advantages, which supports the few at the expense of the many. This sentiment is represented in the following quotation: legal fictions enable "…[government functionaries] with the greater efficiency and to the greater extent, to make sacrifice of the universal interest to their several particular and sinister interests." *Ibid*, at 78.

[100] See Pierre JJ Olivier, *Legal Fictions in Practice and Legal Science* (Rotterdam: Rotterdam University Press, 1975) at 109—110.

[101] See e.g. Fuller, *supra* note 95 at 70, 117—118; Olivier, *supra* note 100 at 108.

[102] See e.g. Geoffrey Samuel, "Is Law a Fiction?" in Del Mar & Twinning, *sura* note 98, 31 ("The theorist provides a fictional ('as if') model for the judges within which the judges employ fictional ('as if') images to relate law to

permanent, but rather that the cycle of the formation and passing of legal fictions reflects a central part of law.[103] A popular idea along these lines is that the legal fiction is a mechanism for the evolution of the law as legal institutions and principles encounter and respond to new situations. Legal fictions have been described as a way for judges to creatively probe possibilities for the future development of the law by artificially extending a legal rule to encourage reflection on the possibility of a more permanent solution.[104] A fiction might be used as a tool of equity, to help soften what would be the otherwise harsh result of applying a legal rule.[105] A legal fiction might also be used as a way of incorporating a new reality into the existing legal system (for example, the fiction that a ship is a person).[106]

According to Fuller, legal fictions are a pragmatic tool, central to the evolution of the law and necessitated by the confluence of the limitations and the universal aspirations of law. They arise in order to reconcile a specific legal result with some premise or postulate about the law.[107] Law is a comprehensive system that cannot simply allow gaps to exist in its structure or to admit that some things are outside of its reach.[108] But the law is constantly confronting a world that is different, and legal fictions arise as the law adapts itself to this external reality. Fictions are like "the cement that is always at hand to plaster together the weak spots in our intellectual structure."[109] In other words, "fictions are, to a certain extent, simply the growing pains of the language of the law."[110] Through legal fictions the law asserts its structure over an unruly world, providing an alternate form of reality through which the law is able to address the world.

The creation of a legal fiction is parallel to the law's apprehension of religion. Positing a particular view of religion in law enables the law to act in relation to religion. The gap between

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social fact, this social fact itself resulting from an 'as if' construction operating both within and without the facts" at 51). Also see e.g. Frederick Schauer, "Legal Fictions Revisited" in Del Mar & Twinning, *sura* note 98, 113 ("The examination of legal fictions, therefore, is not simply an examination of an epiphenomenal and quaint feature of legal reasoning. Rather, it is an entry into the difficult problem of legal truth" at 126).

[103] See e.g. R A Samek, "Fictions and the Law" (1981) 31:3 UTLJ 290 (arguing that the temporariness of the legal fiction—the constant birth and death of legal fictions—is a part of a cycle of meaning formation that is central to the law). "The birth of a fiction inevitably leads to its death. A new dogma replaces the old, and the whole process starts all over again…. The stability of law is an illusion, and so is the lawyers' fixed belief that it can be reformed from within. Law, like the fictions which it employs, is a means to a social end, not an end in itself." *Ibid*, at 317.

[104] See Maksymilian Del Mar, "Legal Fictions and Legal Change" (2013) 9:4 Int'l J Law in Context 442.

[105] See e.g. Douglas Lind, "The Pragmatic Value of Legal Fictions" in Del Mar & Twinning, *supra* note 98, 83 (discussing the example of constructive eviction, at 102—103).

[106] See *ibid* at 95—96.

[107] Fuller, *supra* note 95 at 51.

[108] *Ibid* at x—xi.

[109] *Ibid* at 52.

[110] *Ibid* at 21—22.

the law (its apprehension of religion) and the reality of religion (its lived experience) represents the more pervasive struggle in the law between the concepts/theory of law and the reality/facts external to law.[111] From this point of view, the gap is both a problem *and* a foundational feature of legal meaning. The importance of this duality was captured well by Fuller, "Only in illness, we are told, does the body reveal its complexity. Only when legal reason falters and reaches out clumsily for help do we realize what a complex undertaking the law is."[112]

The challenge of making sense of the gap in the law's apprehension of religion is related to misunderstandings about the nature and value of fictions and their relation to truth. Fuller said that the law's alternate reality is not a "counterfeit of external reality" but rather is "an instrument which enables us to orient ourselves in this world of reality."[113] The problem is when we take the law's alternate reality and treat it as if it is the only reality. In terms of fictions, the problem is when fictions gain a gravity and sense of reality beyond the limited scope for which they were created and utilized.

Accompanying the creation of fictions is the temptation to keep them. Fuller explained, "A formal rule, no matter how firmly rooted its foundations may be in reality, tends to gather about itself a force not entirely justified by its foundations. It crystallizes and formalizes the truth it expresses."[114] But it is extremely important for Fuller that fictions "drop out of the final reckoning" because "We must not suppose that the "thing" [the fiction] is something more than the sum-total of its properties."[115]

This points to the idea that legal fictions are false, in a very specific sense of falsity.[116] Not everyone agrees that legal fictions are necessarily false, and there are many different views

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[111] *Ibid* at xi.
[112] *Ibid* at viii.
[113] *Ibid* at 105.
[114] *Ibid* at 46.
[115] *Ibid* at 117.
[116] For an exemplary definition, see Fuller, *supra* note 95 at 9: "A fiction is either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility". There have been many different proposed amendments to this definition, but the core of it has remained generally in tact. Pierre Olivier suggested that Fuller's definition, along with the other Anglo-American writers on the topic (like Jeremy Bentham, Sir Henry Maine and Jerome Frank), did not add anything unique to the earlier ideas of the Roman "Commentators" of the 14th and 15th centuries and the continental tradition. Olivier, *supra* note 100 at 36. Olivier's definition (gleaned from literature ranging a remarkably large historical space) does not differ significantly from Fuller's, except to further restrict the scope of its application: "Under legal fiction, I understand an assumption of fact deliberately, lawfully and irrebuttably made contrary to the facts proven or provable in a particular case, with the object of bringing a particular legal rule into operation or explaining a legal rule, the assumption being permitted by law or employed in legal science." *Ibid* at 16. See also Lind, *supra* note 105 at 87.

regarding what the falsity of a fiction entails.[117] I believe that it is helpful to consider the falsity of legal fictions in relation to the function of legal fictions within the law.[118] One way to think about this is in terms of the distinction between a fiction and a metaphor. A metaphor is an attempt to express the true qualities of an object by equating it to something that symbolizes those qualities.[119] The difference is between ontological reality and social reality. A metaphor (like other abstract legal notions) makes a statement about the reality of the object, whereas a legal fiction makes a statement about the object in relation to its treatment at law. But, if the social facts of law are considered to be real, even in a sense different than physical ontology,[120] then the legal fiction could be understood as an attempt to make a *truthful* description of the object *within the reality of law*.

Legal fictions need only be false in a more general sense if one form of reality is privileged over others. Kenneth Campbell challenged the idea that legal fictions are false, arguing that fiction is based on different classifications of fact rather than on an objective notion of truth.[121] In a similar vein, Karen Petroski argued that it is problematic to juxtapose fiction with a presumed other "reality" to which the law must conform.[122] For her, the law creates its own reality, and in this way should not be treated as false. The reality of law must be recognized and wrestled with in its complexity. Holding fast to the idea that legal fictions are false in the more general sense renders the nature of the reality of law more difficult to ascertain. If law is real and has real effects on people's lives then legal fictions cannot depend on factual falsity because that would mean they are not real.

This helps make sense of the gap between law's apprehension of religion and the reality of religion discussed earlier. If law's constructions must be true both in relation to law's own purposes as well as in relation to an independent factual reality then squaring these two forms of

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[117] See e.g. Karen Petroski, "Legal Fictions and the Limits of Legal Language" (2013) 9:4 Int'l J Law in Context 485 (reprinted in Del Mar & Twinning, *supra* note 98, 131); Kenneth Campbell, "Fuller on Legal Fictions" (1983) 2 Law and Phil 339. The notion of falsity has great potential defining and delimiting the idea and use of legal fictions. See e.g. Olivier, *supra* note 100 for an extensive discussion of what constitutes a legal fiction.

[118] Lind, *supra* note 105 at 99.

[119] Olivier, *supra* note 100 at 67. There is, though, ambiguity regarding what counts as "qualities," and how they are identified. For example, rather than seeing the physical trait of live birth as the attributed 'quality,' it could instead be understood to be an object that symbolizes the quality of holding a legal right (like the stone symbolizes hardness, coldness, etc.). In this way the legal fiction "the unborn child was born alive" is no different than the example of the metaphor "she has a heart of stone". Olivier discussed both examples, see *ibid* at 65—68.

[120] See John R Searle, *The Construction of Social Reality* (New York: The Free Press, 1995).

[121] *Supra* note 117.

[122] *Supra* note 117. Others making a similar argument against the privileging of one form of reality include Samek, *supra* note 103 and Lind, *supra* note 105.

reality becomes very difficult. It is better to recognize that legal fictions, like other legal structures, help constitute the reality of law. Recognizing this connection between legal fiction and the construction of law's reality fleshes out the concern that the falsity of fictions was trying to get at. "[A] fiction can…become dangerous when the force of its constitutive power is ignored. When this occurs, the label of fiction works a denial and removes from memory important lessons regarding the law and the fragility of the human experience."[123] Legal fictions must therefore always be framed in relation to the limited reality of the law.

The same insights apply to the law's apprehension of religion. Law creates its own fictional image of religion. The gap between this fiction and other accounts of the reality of religion are not a matter of truth or falsity, but reflect the purposes of the reality of law. This gap is not a matter of truth or falsity because the law's reality is not meant to be a reflection of external reality, but rather is guided by its own ends and purposes.

Approaching the law's apprehension of religion as a form of legal fiction reframes the law's encounter with religion as a criss-cross of realities.[124] What makes a legal fiction fictional is not its relation to the truth, but the fact that the 'truth' of the fiction claimed within the law collides and conflicts with the 'truth' claimed somewhere outside of the law. More precisely, a legal fiction is a legal proposition that collides with an alternate proposition from another *system* of meaning—it is a collision between systems of meaning.[125] What is at issue is not the objective true or real meaning of a thing, like a religious claim, but the interaction between different ideas about the meaning of the thing. To focus on finding the objective truth of the thing fails to capture the sense in which the 'truth' of the thing is precisely what is being explored. In other words, focusing on terms of truth and falsity tries to force the meaning of the fiction into a mould that does not fit.

As mentioned earlier, the focus on falsity in legal fictions assumes that we can know what the objective truth of a thing is, and that this can be used as a "yardstick" for evaluating and understanding the meaning of the fiction.[126] This assumes not only that there is an objective reality external to the law but also that this objective reality is privileged in relation to the law—

[123] Nancy J Knauer, "Legal Fictions and Juristic Truth" (2010) 23 St Thomas L Rev 1 at 8.
[124] See Lind, *supra* note 105 at 97 and 99.
[125] *Ibid* at 94.
[126] *Ibid* at 88 and 93.

i.e. legal constructions are fictitious because they disagree with objective reality.[127] Focusing instead on the interaction between different systems of meaning shifts the coordinates of evaluation toward the interaction/collision between meanings. From this view, the true meaning of a thing is an attribute of belief and a relation between ideas, objects and contexts.[128]

This shift toward the interaction between meanings reveals a social and communal dimension to the law's apprehension of religion as a legal fiction. Douglas Lind described this as a pragmatic approach to truth and reality.[129] Simply stated, for a fiction to be true and real it must work satisfactorily *for us*.[130] Pragmatic value, for Lind, is given by us to our raw experiences (to the world as we find it) in light of the problems, interests and purposes that we have in mind.[131] Legal fictions, like the law's apprehension of religion, are evaluated in terms of the pragmatic value they provide specific to our legal interests, purposes and goods. In other words, they are socially constructed through the life of a legal community. As a result, the truth and reality of legal representations are constantly in flux. Even though they are tied to our actual experiences they never reach a point of absoluteness or finality. They are always being built upon. "The virtue of fictions is their humility and tentativeness; they do not take themselves to be settled or immovable."[132] In this way, legal fictions remind us about the tentative nature of law in its relation to religion.[133]

From this view, the law's apprehension of religion, and the accompanying gap, can be approached as an expression of the social reality of the law and the law's relation to religion. This does not answer everything about how to evaluate the gap in the law's apprehension of religion, but it points toward a foundational aspect of human understanding, which I call a process of social-symbolic meaning formation, that lies at the heart of the interaction between law and religion. Understanding this process helps us to put together a more robust approach for evaluating the law's apprehension of religion.

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[127] Samek, *supra* note 103 (arguing that to think of fictions as false "…is to put a false premium on the conventional truths of the day" at 313).
[128] Lind, *supra* note 105 at 88.
[129] *Ibid* at 84.
[130] *Ibid* at 89—90.
[131] *Ibid* at 90.
[132] Samek, *supra* note 103 at 314.
[133] *Ibid* at 317.

3.2 Fiction and the Foundational Process of Symbolic Meaning

The idea of legal fiction helps show that the gap between the law's apprehension of religion and the external experience of religion cannot be framed in terms of truthful correspondence but must be seen in terms of the social purposes of the law. The gap in the law's apprehension of religion is an expression of the social reality of the law. Despite recognizing that the 'truth' of a fiction is grounded in the social reality of the law, the truth and value of a fiction are not entirely separate from the world existing separately from the social reality of law. There must be a connection—and a tension—between legal understanding of what is true and real and the ordinary, or external, ideas of what is true and real, or else the law would be rendered incapable of influencing and guiding people's behaviour.[134] As Schauer explained,

> Legal fictions are thus parasitic on a gap between legal language and all-things-considered sound results. Without this gap we would be unable to understand the idea of a legal rule, and unable to understand the way in which law, however technical at times it might get, must remain tethered to the language in which it is written, and thus tethered to the language of the linguistic community in which the legal system exists. Where it otherwise there would be no need for law. More importantly, where it otherwise, there would be no legal truth, no legal falsity, and, quite simply, no possibility of law at all.[135]

The tension between legal meaning and external reality found in the phenomenon of legal fiction is connected to a deeper process of human understanding. Fuller argued that the world of ideas, which is in tension with the real world, is not a counterfeit of external reality, "…but…an instrument which enables us to orient ourselves in this world of reality…."[136] In this way, the process represented by legal fictions points to a fundamental trait of human reasoning.[137] It is a process of assimilating the unfamiliar with what is already known, an adaptation of human understanding.[138] Even though fictions are untrue in one sense, they are also real insofar as they

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[134] Schauer, *supra* note 102 at 126.
[135] *Ibid* at 127.
[136] Fuller, *supra* note 95 at 105.
[137] *Ibid* at 94.
[138] *Ibid* at 65. Lind agrees, pointing out that 'truth' is comprehensive and that new truths must be brought into accord with existing truths, either replacing or adjusting the whole system in order to accommodate the new. Lind, *supra* note 105 at 91—92.

enable all that can be known to us.[139] In a similar way, Hans Kelsen described the work of legal fiction as a process of making sense of *actual reality*. "[A] fiction is characterized both by its end and by the means through which this end is reached. The end is the cognition of the actual world; the means, however, is a fabrication, a contradiction, a sleight of hand, a detour and passage of thought."[140] For Kelsen, fiction is the cognitive process of thought that "takes a detour in knowing its object…, a detour in which it consciously sets itself in contradiction to this object; and be it only in order to better grasp it."[141] This "detour" and turning away from reality represented by legal fiction is necessary for apprehending and understanding reality at all.

The foundational process of meaning formation that lies at the heart of legal fictions can be described as a symbolic form of meaning. This description highlights the constructive and dialectic forces involved in law's apprehension of reality. Symbols, by definition, involve a gap between the sign and the thing to which the sign refers.[142] Symbolic meaning adds to reality by creating distance between people and things.[143] The symbolic, as a form of meaning, is basically an in-between realm—the images humanity interposes between itself and reality function to separate humanity from the world and simultaneously to bring the world closer.[144] By objectifying meaning in a concrete sign, symbolic meaning gains a power of its own, not simply as a reflection of existing reality but as containing its own unique and formative power.[145]

The symbolic aspect of legal fiction shows that the law's engagement with reality is a *dialectic* encounter, which creates a new synthesis between 'I' and 'world'.[146] The symbolic

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[139] Fuller, *supra* note 95 ("Our concepts…are the constructs of our minds which facilitate thought by rendering comparison en masse possible. As all thinking proceeds through analogy and comparison, thought will be speeded up if we can group related phenomena into units convenient for comparison. But these constructs must be seen as *instruments* of thought only; we must treat them as servants to be discharged as soon as they have fulfilled their functions. They are foreign elements which may be inserted into the equation provisionally to render computation simpler, but which must be dropped from the final reckoning." at 123).

[140] Hans Kelsen, "on the Theory of Juridical Fictions: With Special Consideration of Vaihinger's Philosophy of the 'As If'" in Del Mar & Twining, *supra* note 98, 3 at 4.

[141] *Ibid* at 5.

[142] The second definition of "symbol" in the Oxford English Dictionary is "a thing that represents or stands for something else…" *The Oxford English Dictionary,* 3d ed, *sub verbo* "symbol".

[143] See Thomas Meisenhelder, "Law as Symbolic Action: Kenneth Burke's Sociology of Law" (1981) 4:1 Symbolic Interaction 43 at 44—46.

[144] Ernst Cassirer, ""Spirit" and "Life" in Contemporary Philosophy" in Paul Arthur Schilpp, ed, *The Philosophy of Ernst Cassirer: The Library of Living Philosophers Vol IV* (Evanston, Ill.: The Library of Living Philosophers, 1949) 855 at 874.

[145] See Deniz Coskun, *Law as Symbolic Form: Ernst Cassirer and the Anthropocentric View of Law* (Dordrecht: Springer, 2007) at 193.

[146] Ernst Cassirer, *The Philosophy of Symbolic Forms, Vol 1: Language*, trans by Ralph Manheim (New Haven: Yale University Press, 1953) [*PSF* 1] at 93.

object that is created by the subject (or subjects) is separate from the subject, acting upon the subject since the subject can only access the world through the mediation of the symbolic object.[147] The interpenetration between subject and object creates a permanent and enduring thing that we are capable of apprehending in the symbol.[148]

The dialectic nature of law's engagement with the world involves a risk. The creation of a symbolic form of meaning tends to "…imprint its own characteristic stamp on the whole realm of being and the whole life of spirit."[149] The danger is that by setting their meaning in things as permanent they tend to stop the process that is central to creating symbolic forms of meaning in the first place.[150] In other words, one form of symbolic meaning can come to determine what is really real. This risk helps explain the challenge with maintaining the balance between the value and the 'falsity' of legal fictions. Legal fictions and symbolic meanings walk a fine line because they are necessary for knowing and confronting reality, but it is difficult to define and distinguish their truth and apprehension of reality as against other external truths and apprehensions of reality.

In Cassirer's philosophy of symbolic forms, the process of creating symbolic meaning goes beyond recognizing the constructive and dialectic forces of law's apprehension of reality to also include an ethical dimension. The ethical has two main features. First, symbolic forms of meaning involve a relational encounter insofar as a symbol is a statement connected to an 'other', but they also contain some distance from the 'other', which leaves them with a sort of longing for the other.[151] This mirrors Robert Cover's description of the creation of legal meaning, which involves "the disengagement of the self from the 'object' of law, and at the same time requir[ing] an engagement to that object as a faithful 'other.'"[152] Secondly, Cassirer argued that the basic human function of creating symbolic forms of meaning accounts not only for the

[147] *Ibid* at 107 and 112 (Cassirer argued that reality is always only accessible through symbolic forms of meaning and that acquiring a sign is really what constitutes the first step toward knowledge of the nature of a thing).
[148] *Ibid* at 89.
[149] *Ibid* at 81.
[150] *Ibid* at 113—114.
[151] Gabriel Motzkin, "Cassirer's Philosophy of Symbolic Forms: A Foundational Reading" in Jeffrey Andrew Barash, *The Symbolic Construction of Reality: The Legacy of Ernst Cassirer* (Chicago: University of Chicago Press, 2008) 73 at 86.
[152] Robert Cover, "Forward: *Nomos* and Narrative" (1983) 97 Harv L Rev 4 at 45.

differences in culture and forms of knowledge—including language, myth, art, history, religion and science[153]—but also articulates a unity that transcends these differences.[154]

This latter point is particularly helpful for reflecting on the law's apprehension of religion. Some have identified law as a symbolic form of meaning, in Cassirer's philosophy.[155] Seeing law and religion both as symbolic forms of meaning grounded in the same basic process of meaning formation offers a unique and powerful way to account for the gap that exists in law's apprehension of religion. Recall the trouble I identified earlier in the discussion regarding Laborde and Berger, that their analyses and discussions of the law's encounter with religion were constrained by the horizons of the internal perspective of law. The approach made available through the social-symbolic process of legal fiction explains and transcends the question of the sovereignty of law in relation to religion. The sovereignty of law and its claim to the primacy of meaning in its interaction with religion is tied to the foundational process by which legal meaning operates *as a social-symbolic (fictional) form of meaning*. Religion, too, is a social-symbolic form of meaning. And it is through analysis of these forms of meaning and the intersection between them that the social-symbolic function, which distinguishes and joins them, can be clearly identified. This, I would argue, takes an important step forward in understanding the encounter between law and religion.

Reorienting the encounter between law and religion in terms of legal fiction and symbolic meaning prioritizes the constitutive aspect of the social interaction between them rather than particular claims of 'truth' and 'sovereignty' that are thought to distinguish them. The collision between different realities is a central part of the law. This does not dispense with the integrity, sovereignty and power that modern state law implies. The law is still sovereign and so we are still faced with the possibility of law simply asserting its 'fiction' to replace those other realities that it encounters. But by framing this encounter as between fictional 'realities' we open up a set of ideas that are extremely helpful in framing the evaluation of the counter. Fictions are for particular communities, in particular situations and toward particular purposes. To recognize the socially constructive dimension of law's reality, as a fiction, builds in awareness that the law is

[153] See e.g. Ernst Cassirer, *An Essay on Man: An Introduction a Philosophy of Human Culture* (New Haven: Yale University Press, 1944) at 25 and 68.
[154] See Cassirer, *PSF* 1, *supra* note 146 (Cassirer described his project as looking for a "functional unity" of being rather than a substantive unity of being, at 77).
[155] See Coskun, *supra* note 145.

necessarily limited and incomplete. These limitations are not destructive of legal meaning but constitutive of it.

The law's apprehension of religion will always be a reduction of the 'reality' of religion. But I am arguing here that this reduction reflects a foundational aspect of legal meaning and the formation of human understanding more generally. Although religion exists separately from law, the law does not concern itself with religion *qua* religion—as a brute social fact—but as an object of legal reality. With this in mind, it would be inappropriate to try to square the law's apprehension of religion with the 'reality' of religion. The goal instead should be to understand the law's limited view of religion in its functional context. Looking at functional context points beyond the conceptual specifics of law's apprehension of religion toward the *process* of the interaction between law and religion. As James MacLean observed,

> We can see then how we need our abstractions; they are useful constructs, tools. The problem arises when we begin to think of them as real, when we forget that they are symbols pointing to and participating in a reality beyond them. But we have forgotten how to think beyond the 'things' arrested from experience…[156]

The law's reductive view of religion enables it to wrestle with religion, to address an important part of human experience that deeply affects peoples' lives. Apprehending religion through the lens of law gives voice to religion in the discourse of law. But it is also crucial to continually push the boundaries of the law's conception of religion, to ensure that the fictional creation of religion in law is not taken to be separate from the processes of interaction by which law constructs its own reality (including through its interaction with religion). In order to guard against mistaking the law's apprehension of religion for religious reality it is necessary to identify the fictional quality, with its social-symbolic process, at the forefront of critical analysis of the law's encounter with religion.

4 THE INTERACTIONS OF LAW AND RELIGION AS A SOCIAL-SYMBOLIC FICTION

In response to the argument so far, this section will examine the legal fiction of law's apprehension of religion as a social-symbolic process through the lens of two case examples:

[156] James MacLean, *Rethinking Law as Process: Creativity, Novelty, Change* (Abingdon: Routledge, 2012) at 86.

Ktunaxa Nation[157] and *Multani*[158]. A close look at these cases will help develop a deeper understanding of the 'fiction' of law's apprehension of religion and the dynamic exchange that occurs in the legal adjudication of religious claims. Both cases deal with religious claims that have a unique symbolic dimension. *Ktunaxa Nation* involves a claim regarding the special spiritual significance of land, and *Multani* deals with the legal salience of the religious meaning of a Sikh kirpan. In both cases the Court struggled with how to fit the symbolic religious meaning into its analysis of the guiding principles of law. The struggles of these decisions demonstrate different aspects of the legal fiction and social-symbolic process at play. I will argue that both dealt with religious claims that are best understood from the perspective of the social-symbolic meaning process discussed in relation to legal fiction.

I will briefly outline what each decision demonstrates before moving on to the full analysis of them. In *Ktunaxa Nation* we see the Court struggling to find a way to make sense of the land-based dimension of the indigenous spiritual claim within the framework of religious freedom jurisprudence. To solve the problem, the Court distinguished between the subject and object of religious belief. I argue that this distinction highlights a gap in the Court's understanding of the process that occurs *between* subject and object in the generation of religious meaning. It also highlights significant limitations in the Court's evaluation of the indigenous religious claim and the justifications available to the Court for denying the claim. In *Multani* I explore the way in which the Court determined the legal meaning of the Sikh kirpan carried by a boy to grade school. The decision shows that the development of this legal meaning involved the integration of religious meaning, physical features and constitutional values. This, I argue, demonstrates that the law's apprehension of religion *is itself* (like religion) a process of social-symbolic meaning formation. I argue that both the *Ktunaxa Nation* and *Multani* decisions show that when the court fails to account for the social-symbolic qualities of law's apprehension of religion it blinds itself to the interactive and integrative nature of adjudicating religious claims.

4.1 Ktunaxa Nation v BC—*Dividing the Subject and Object of Faith*

In *Ktunaxa Nation* the courts had to wrestle with the *source* of religious meaning and how it fits into the protection of religious freedom offered in 2(a) of the *Canadian Charter of*

[157] *Supra* note 16.
[158] *Supra* note 17.

Rights and Freedoms[159] (the *Charter*). Ultimately, the SCC held that 2(a) protects only the freedom to have and to hold beliefs; it does not protect the object of belief. Separating the subject and object of belief fails to account for the process by which religious meaning is created. This failure to join the subject and object makes it difficult to see the process by which the law apprehends religion. The law's sense of reality was asserted and firmly set the way that religion was perceived in section 2(a) of the *Charter*.

The *Ktunaxa Nation* conflict arose when the BC government approved a proposal to develop a year-round ski resort in the Jumbo Valley of the east Kootenay Mountains. The Jumbo Valley is located within the traditional territories claimed by the Ktunaxa indigenous communities and is known to them as Qat'muk, which is the place where the Grizzly Bear Spirit lives. There was a long and drawn out process of reviews, studies and discussions beginning in 1991 and leading to the approval of the development plan in 2011.[160] The Ktunaxa were involved from the earliest stages and constantly resisted the development throughout the process. They expressed concern about the impact of the development on the land and on local animals (especially the local grizzly bear population). Their resistance was grounded in a sense that the land is sacred and contributes to the cultural and religious life of the Ktunaxa communities. When the development was approved Ktunaxa sued. They argued that the approval violated their 2(a) religious freedom and s 35 rights (under the duty to consult). A key premise of their claim was that the proposed development in Qat'muk would drive the Grizzly Bear Spirit away and, hence, decimate the spiritual lives of the Ktunaxa people.

For the Ktunaxa, the spiritual value of the land is a fact of the nature of the land itself. As one affiant explained: "…spirits like Grizzly Spirit have their own places. The Creator has put them here with us to help us lead happy lives in this world. Their places are not our places. We cannot treat these places any way we want…. To destroy a spirit's place, to make it unsuitable to the spirit, would make the spirit homeless."[161] For the Ktunaxa the land is not empty, but has a nature, a spirit, with value and interests on its own. For the Ktunaxa, their religion is dependent on the land. The Qat'muk valley is a spiritual anchoring point for the community. One affiant described it as: "Qat'muk provides for our Ktunaxa culture security in the present and continuity of that spiritual and cultural security into the future. It enables Ktunaxa citizens collectively to

[159] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
[160] *Ktunaxa Nation* (SCC), *supra* note 16 at para 13.
[161] *Ktunaxa Nation* (SCC), *supra* note 16 (Factum of the Appellants at para 7).

renew and continue, and in certain cases individually to tap into deep and anchored roots in the world as Ktunaxa."[162]

For the SCC, these two dimensions of the Ktunaxa claim—that the land has religious significance on its own and that the religion of the community depends on the land—challenge the framework of religious freedom protected under the *Charter* 2(a), which conceives of religious meaning solely in terms of beliefs and practices of an individual or community. The majority of the SCC agreed with the lower courts[163] to uphold the approval of the development and refuse to protect the spiritual interest claimed by the Ktunaxa. The central dictum of the SCC decision was to distinguish between the subject and object of religious belief and to clarify that religious freedom does not extend to protect the object of belief; religious freedom only protects the freedom to hold or to manifest a belief.[164] "In short, the *Charter* protects the freedom to worship, but does not protect the spiritual focal point of worship."[165]

Dividing the subject and object of religious belief had a significant impact on the way that the Court construed the Ktunaxa religious claim. The majority framed the Ktunaxa claim as "…not seeking protection for the freedom to believe in Grizzly Bear Spirit or to pursue practices related to it. Rather, [the Ktunaxa] seek to protect Grizzly Bear Spirit itself and the subjective spiritual meaning they derive from it."[166] What constitutes 'belief' depends quite heavily on what one thinks about the subjects and objects of belief. The Court referred to the "presence" of the Grizzly Bear Spirit in Qat'muk but described the spiritual significance of that "presence" as a product of the action of the believing subject—the subject "derives" spiritual meaning from the object by believing in the object, which means that the object does not impart spiritual meaning but spiritual meaning is extracted from it.

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[162] *Ibid* at para 8.
[163] See *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2014 BCSC 568, [2014] BCJ No 584 (QL) [*Ktunaxa Nation* (BCSC)], aff'd 2015 BCCA 352, 387 DLR (4th) 10 [*Ktunaxa Nation* (BCCA)]. Both the Supreme Court of British Columbia [BCSC] and the Court of Appeal of British Columbia [BCCA] upheld the government approval of the development plan, refusing to protect the Ktunaxa spiritual claim. The focus of both the BCSC and BCCA was that religious meaning could be used to restrict or guide others in the otherwise lawful use of land. The BCSC held that section 2(a) of the *Charter* does not confer a right to restrict the otherwise lawful use of land on the basis that such use would result in loss of meaning to religious practices carried on elsewhere. *Ktunaxa Nation* (BCSC), at para 296. The BCCA held that section 2(a) of the *Charter* does not apply to protect the subjective meaning of a religious community when the subjective meaning depends on others being required to act (or refrain from acting) in a manner consistent with a belief that they do not share. *Ktunaxa Nation* (BCCA), at paras 73—74.
[164] *Ktunaxa Nation* (SCC), *supra* note 16 at paras 70—71.
[165] *Ibid* at para 71.
[166] *Ibid*.

In the above quote, it is interesting to note that the Court did not deny the Grizzly Bear Spirit might be present in Qat'muk. For the Court, this *spiritual fact* is irrelevant because the freedom protected in s 2(a) is entirely concerned with the freedom to hold and manifest belief. Belief here is distinguished from the subjective spiritual meaning derived from the object. What is protected is *the ability to try* to derive spiritual meaning from an object, the *ability to pursue* spiritual meaning, not the apprehension of spiritual meaning itself. Belief, therefore, is portrayed as the triumph of the subject. The Court understood religious freedom to preclude protection of subjectively derived spiritual meaning from the presence of the Grizzly Bear Spirit in Qat'muk. To find otherwise would "put deeply held personal beliefs under judicial scrutiny. Adjudicating how exactly a spirit is to be protected would require the state and its courts to assess the content and merits of religious beliefs."[167]

The significance of the approach taken by the Court to religious freedom for the argument in this chapter is that dividing the subject and object ignores the social-symbolic process by which religious meaning is created. Protecting subjective belief and excluding protection for the object of belief denies the possibility of religious meaning persisting external to the believing subject. The process by which symbolic meaning is created, as discussed earlier in this chapter, suggests that objects actually do take on a level of reality and autonomy separate from the subjects that give the objects meaning. Individuals and their religious communities vest objects with religious symbolic meaning. Once the symbolic meaning is created it gains a life and force of its own. Religious objects feed back to influence the beliefs of the individuals who vested the object with religious meaning.[168] This is not to say that objects are above subjects, because to do so would fetishize objects and fail to recognize the dialectic process of engagement between subjects and objects of faith. Rather, it is to recognize that the Court's division between subjects and objects of belief rather drastically isolates and flattens the

[167] *Ibid* at para 72.

[168] For a thorough discussion of the dialectics of symbolic meaning and ritual in the context of religious formation, see Asad, *Genealogies*, *supra* note 1, esp ch 1, "The Construction of Religion as an Anthropological Category". For an extensive and illuminating study of the function of symbolic meaning in relation to the Christian religious experience, see Catherine Pickstock, "The Ritual Birth of Sense" (2013) 162 Telos 29; Louis-Marie Chauvet, *Symbol and Sacrament: A Sacramental Reinterpretation of Christian Existence*, translated by Patrick Madigan and Madeline Beaumont (Collegeville, Minn.: Pueblo, 1995). This dynamic in religion is also reflected in the law. For a discussion of this in relation to legal language and interpretation, see Roderick A Macdonald and Jason MacLean, "No Toilets in Park" (2005) 50 McGill LJ 721.

religious individual. The only reality that matters is the reality of the free subject; the only thing that is sacred is what the individual can make sacred on her own.

Justice Moldaver argued in dissent that protecting only the believing subject, divorced from the religious meaning of religious objects, is nothing more than a formal protection of empty gestures and hollow actions.[169] Justice Moldaver said that it must be recognized that the law's interference with religion cannot be seen through only one particular vision of what counts as religious "belief". "To ensure that all religions are afforded the same level of protection under section 2(a), courts must be alive to the unique characteristics of each religion, and the distinct ways in which state action may interfere with that religion's beliefs or practices."[170] Failing to do so excludes non-Western religious experiences from the protection offered under section 2(a) of the *Charter*. In particular, indigenous religions, with their unique attachments to land, will have no place in constitutional protections for religious freedom.[171]

Although Justice Moldaver's argument shifted from focusing solely on the subject to also include the object of religious belief, it still neglected the process by which religious meaning is created and evolves. This can be seen in his reference to the *Amselem* dicta that "[I]t is the religious or spiritual essence of an action" that attracts protection under 2(a).[172] Focusing on religious "essence" posits a new focal point for religious protection. It is no doubt a step forward to see religion as something more than the beliefs of individuals, as also including cultural and symbolic attachments. However, objectifying religion as some sort of cultural phenomenon that has to be apprehended and protected in its own unique terms actually reinforces the problem identified with the majority decision. The majority saw religious freedom as a formal protection for subjective pursuit of belief, whereas the minority saw religious freedom as a substantive protection for a more robust sociological phenomenon that includes rituals and practices alongside beliefs. Both imagine religion in static terms.

The static view of religion affects not only the way that religion is conceptualized but also the way that law is able to engage with religion in reasoning toward a solution to the conflict. This can be seen in two key points in the *Ktunaxa* case that did not factor into the analysis as significantly as one might have expected. First is the fact that the Ktunaxa religious

[169] *Ktunaxa Nation* (SCC), *supra* note 16 at para 130.
[170] *Ibid* at para 128.
[171] *Ibid* at para 131.
[172] *Ibid* at para 130, quoting from *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551, at para 47.

claim was raised extremely late in the consultation process.[173] Second is the fact that the development site in the Qat'muk was previously developed and used for mining.[174] The questions that these facts raise have to do with the evolution of the Ktunaxa religion in relation to the Qat'muk. Although the SCC recognized that religions are able to evolve with time, specifically in relation to the late revelation of the impact that the development would have on the Ktunaxa religion[175], they did not (and could not) engage with this evolutionary process within the parameters set by the division between the subject and object of religious belief. It is noteworthy that most of the Ktunaxa did not know or understand that the development would *expel* the Grizzly Bear Spirit from Qat'muk and *destroy* their religious beliefs.[176] This is connected to the other important point, which has to do with the previous use of the Qat'muk. The site of the proposed ski development was previously developed and used for mining, and the area is regularly used for a range of activities.[177] The Ktunaxa claim did not explain why the current development and activity would destroy the Ktunaxa religion when the previous mining development and current skiing activity did not. The fact that the Grizzly Bear Spirit and the Ktunaxa religion survived the previous mining development and the ongoing skiing activity seems to imply the possibility that they might also survive the development of the ski resort.

Introducing the process by which religious meaning is created and evolves into the religious freedom discussion would allow the courts to engage more fully with what is at stake for religious individuals and communities. The point is not to hold the Ktunaxa religion to an objective standard of 'reasonableness' but to be able to work into the evaluation of their religious claim the dynamism of individual/communal religious belief and the condition of the land. Maybe the Ktunaxa religion would change with the development, but would it be destroyed? It is impossible to evaluate this without first accounting for the dynamic social-symbolic process of forming religious meaning. As a result, neither the majority nor minority could engage some of the glaring difficulties with the Ktunaxa claim.

Both the majority and minority of the Court assert the law's reality over and against the reality of the religious experience of the Ktunaxa. Portraying section 2(a) of the *Charter* as only

[173] *Ktunaxa Nation* (SCC), *supra* note 16 at paras 6, 35—43.
[174] *Ktunaxa Nation* (BCSC), *supra* note 163 at paras 19 and 280. The Court of Appeal and Supreme Court did not mention the mine in their reasons.
[175] *Ktunaxa Nation* (SCC), *supra* note 16 at para 69.
[176] Noted in *ibid* at para 99.
[177] *Ktunaxa Nation* (BCSC), *supra* note 163 at para 280.

interested and capable of accounting for and protecting subjective religious belief, as the majority did, nullified the Ktunaxa understanding of the continuity between human life and nature. The individual is the sole source of meaning and agency. The minority asserted the predominance of the law's reality more subtly. I already mentioned that focusing on religious objects also sees religion as a static phenomenon. The privilege of law's reality comes through much stronger later in Justice Moldaver's reasons when he discussed balancing the minister's statutory objectives with the Ktunaxa claim.[178] Remarkably, Justice Moldaver found that the Ktunaxa religious claim—that its religion will be destroyed by the ski development—was outweighed by the objective of the BC Ministry to administrate and dispose of Crown land in the public interest.[179] The reason offered was because to grant the Ktunaxa claim "would effectively transfer the public's control of the use of over fifty square kilometres of land to the Ktunaxa", which would "undermine the objectives of administering Crown land and disposing of it in the public interest."[180] In other words, since the Ktunaxa claim threatened the exclusive authority of the Minster over the land it jeopardized the Minister's public interest objective. Framed in such stark and absolute terms exposes a gap between the Ktunaxa interest and the public interest. For Justice Moldaver the gap cannot be crossed. Both the public interest and the Ktunaxa claim are immovable positions. All the Court can do is make a choice about which one to support.

Simply making a choice between public interest and the religious claim, as two static alternatives, does not adequately address the social-symbolic nature of the religious meaning of the land claimed by the Ktunaxa. Why could the Ktunaxa claim not be understood as a function of public interest? Or, why not see the calculus of public interest as including the preservation of the Ktunaxa religion? In order to consider these integrative possibilities would require a frame of reference for viewing the religious claim and the ministerial objective in common terms. This is precisely what the perspective of legal fiction and its social-symbolic process provides. But this is also precisely what a static view of the Ktunaxa claim and the protection of religious freedom taken by the Court in *Ktunaxa Nation* precludes.

In order to more thoroughly trace what it looks like to connect the social-symbolic process of meaning formation to the law's apprehension of religion will require moving beyond the *Ktunaxa Nation* decision. I take this up in the following discussion of the *Multani* decision.

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[178] *Ktunaxa Nation* (SCC), *supra* note 16 at paras 145—155.
[179] Justice Moldaver outlined the statutory objectives of the Ministry in *ibid* at para 145.
[180] *Ibid* at para 152.

In *Multani* we see the Court define the legal meaning of a Sikh boy's kirpan. I argue that in doing this we can see an answer to the question left open by the *Ktunaxa Nation* decision regarding how legal meaning itself relates to the social-symbolic process of meaning formation at work in religion.

4.2 Multani—*The Social-Symbolic Process of Forming Legal Meaning*

Multani dealt with the refusal of a public school board to grant religious accommodation to a Sikh boy to bring his kirpan—in this case a large metal dagger—to school. The case was decided through a *Charter* analysis of whether the school board's decision to refuse to accommodate the religious practice of carrying a metal kirpan violated Multani's religious freedom and whether that limit to his religious freedom could be justified under section 1 of the *Charter*.[181]

The Court struggled to navigate between the religious meaning and physical attributes of the kirpan in trying to determine its legal meaning. The religious meaning of the kirpan and its physical features were strikingly different. The kirpan was an imposing object—a 20-cm metal knife.[182] The school board's argument focused on the objective dangerousness of the kirpan, that it symbolized violence and that its presence would have a poisoning effect on the safe environment of the school.[183] Competing against this understanding of the kirpan was its religious meaning. Sikhs carry kirpans as an integral part of their religious practice.[184] According to the evidence of the appellants, Sikhism teaches pacifism, respect for other religions and that the kirpan is never to be used as a weapon or to hurt anyone; the kirpan is for Sikhs a symbol of mercy, kindness, honour, and would never be used for violence.[185] The Court held that maintaining a reasonable level of safety in school did not require a total ban on carrying kirpans

[181] It should be noted that the analysis conducted by the Court in *Multani*, which followed *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 (applying s 1 of the *Charter*), has been replaced by a similar but more flexible analysis established in *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395. The new *Doré* analysis and the old analysis used in *Multani*, although distinct, are in "conceptual harmony" because both work the same "justificatory muscles" of proportionality. *Ibid* at paras 5 and 57.
[182] *Multani*, *supra* note 17 at para 87.
[183] *Ibid* at paras 37, 55 and 71.
[184] This is a central tenant of the Sikh faith along with uncut hair (under a turban), carrying a wooden comb, wearing a kaccha undergarment and a steel bracelet. These "5 Ks" of the Sikh faith (kesh, kangha, kara, kaccha and kirpan) were noted in *ibid* at para 36.
[185] *Ibid* at paras 36 and 37.

in school.[186] It was thus unreasonable for the school board to reject the accommodation agreement reached by the appellants and the school for Mr Multani to carry his kirpan under restricted conditions (sheathed, and sewn into a cloth envelope).

What makes this case remarkable is not the result reached by the Court, but how central the struggle between the religious meaning and physical features of the kirpan was to the process of giving legal meaning to the kirpan. The Court tied the various perceptions of the kirpan together under the law. The notion of legal fiction helps us see the Court's decision as a process of knitting the objective features of the kirpan (its religious symbolic meaning and its physical features) into the reality of the law. Ultimately, the Court reconciled the religious and physical features of the kirpan by writing the kirpan into the language of constitutional values—of diversity, tolerance and respect. This emerging image of the kirpan wove together the understandings of individuals (Sikhs and students), of different groups (Sikh communities and schools) through the story of legal constitutional values. The kirpan became a symbol within the law of multiculturalism and religious freedom, which demanded respect and accommodation from everyone within the law's world.

Breaking down the Court's analysis will help show the way that this process works and expose some remaining challenges. For the majority, Justice Charron described the kirpan as, "…a religious object that resembles a dagger."[187] Likewise, the minority described the kirpan as, "while a kind of "knife," [] above all a religious object…."[188] Despite the preference for religious meaning signalled in these words, both the symbolic and physical aspects of the kirpan were relevant at different stages of the analysis. First, finding that there was a violation of Mr Multani's religious freedom, Charron J. said that it would be wrong to focus entirely on the physical characteristics of the kirpan.[189] The fact that the kirpan was a large (and potentially dangerous) knife did not mean that it could not be protected as a matter of religious freedom. Secondly, the Court noted that despite its "profound religious significance" the kirpan "also has the characteristics of a bladed weapon and can therefore cause injury."[190] This established a rational connection between banning the kirpan from school and the legislative goal of fostering

[186] *Ibid* at para 67.
[187] *Ibid* at para 3.
[188] *Ibid* at para 98.
[189] See *ibid* ("[T]he question at this stage of the analysis cannot be answered definiteively by considering only the physical characteristics of the kirpan" at para 37.)
[190] *Ibid* at para 49.

reasonable safety in school. The point where the two aspects of the kirpan collided, and where the Court had to clarify the reality of the kirpan within the world of law, was at the stage of evaluating whether a total ban "minimally impairs" young Gurbaj's religious freedom—i.e. whether it was possible to accommodate him in a way that did not impose an undue burden on the school (and fellow students).[191]

The question for the Court was what legal salience should be given to the risks of allowing a kirpan into school. According to the school the risks included the violent use of the kirpan and the negative effect it would have on the school environment.[192] Regarding the risk that the kirpan would be used for violence, the Court noted that there was no evidence that the appellant Gurbaj Multani posed such a risk.[193] The Court went on to note some very broad evidence showing that there were almost no recorded incidences of Sikhs using their kirpans for violence.[194] In particular, the Court noted that there have been *no* reported incidents of a kirpan being used for violence in an Ontario school over the last 100 years.[195] This remarkable fact was attributed to the Sikh understanding of the kirpan, that for them it is a symbol of peace and is not to be used for violence. For the Court, this evidence showed that there was no support for a total ban of kirpans from school on the basis (as tendered by the school board) that "kirpans are inherently dangerous objects".[196]

From these observations it appeared that the Court was setting up to conclude that the religious beliefs of Sikhs could be trusted, that a kirpan in the hands of a Sikh is not dangerous and poses no risk to the public. Instead the Court appealed to other contextual factors that mitigated the risk posed by the kirpan. The Court relied on the fact that the kirpan was rendered inoperative under the conditions of accommodation imposed by the Superior Court.[197] The Court also insisted on the importance of environmental context for determining reasonable restrictions on kirpans. The ongoing relationship between Multani and the school was important for evaluating the risk involved in carrying the kirpan. This unique feature of the school

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[191] The Court held that the constitutional standard of "minimal impairment" (part of the proportionality analysis established in *Oakes*) requires "reasonable accommodation" (where the argument of "undue hardship" comes from) (*Multani*, *supra* note 17 at para 52).
[192] *Ibid* at para 55.
[193] *Ibid* at para 57.
[194] *Ibid* at paras 59—61.
[195] *Ibid*.
[196] *Ibid* at para 67.
[197] In the concurring words of the minority decision, the kirpan was "…almost totally stripped of its objectively dangerous characteristics." *Ibid* at para 98.

environment distinguished other contexts, like courtrooms and airplanes, where bans on kirpans have been judicially upheld.[198]

On the surface, this seems like a sensible and pragmatic distinction. As long as the harmful potential of the kirpan is neutralized—as the Court found it was in this case (both in terms of the conditions imposed on Gurbaj to carry the kirpan, as well as on the statistical non-violent usage of kirpans in the hands of a Sikh)—then there is no reason to prohibit it in school. Some danger can be tolerated, but not too much. While the Court was satisfied that the danger was neutralized based on the facts of the *Multani* case they were not satisfied that the conditions would be met elsewhere.

A pragmatic solution was not what the Court was after, though. The Court insisted on the importance of the religious symbolic meaning of the kirpan. This can be seen in the Court's response to the second "minimal impairment" argument put forward by the respondent school board. Relying on expert evidence (from a psychologist) that the presence of the kirpan in school would poison the school environment, the respondent alleged that to allow Multani to carry the kirpan would send the message that weapons are a legitimate way to resolve conflict and would incite feelings of unfairness toward Sikh students.[199] The Court responded to these arguments by saying that religious tolerance is an important value in democratic society and schools have a special role in instilling this value in students.[200] The attitude that disregards the symbolic religious value of the kirpan because of its physical features stifles the promotion of multiculturalism, diversity and respect for those who are different.[201] As such, "A total prohibition against wearing a kirpan to school undermines the value of this religious symbol…"[202] The possibility (or probability) that the kirpan would incite this type of response from students was not a reason for banning it. Instead, it exposed people's ignorance of Sikhism. The Court saw this negative perception of the kirpan as a call to the education system to double its efforts to promote awareness of different cultures and religious traditions, so that people would know that a kirpan is not a weapon for a Sikh but a symbol of peace. The Court's defence of the kirpan showed that for the purposes of law the kirpan does not only represent what Sikhs

[198] See *Ibid* at paras 63—66. The Court distinguished *Hothi v R*, [1985] 3 WWR 256, 1985 CarswellMan 170 (Man QB) (prohibited bringing a kirpan into an assault trial) and *Nijjar v Canada 3000 Airlines Ltd* (1999), 36 CHRR D/76 (Can Trib) (prohibited a kirpan on an airplane).
[199] *Multani*, *supra* note 17 at paras 70—75.
[200] *Ibid* at para 76.
[201] *Ibid* at para 78.
[202] *Ibid* at para 79.

believe (peace, non-violence, etc.). The Court made the kirpan a symbol of the constitutional values of multiculturalism, tolerance, diversity and respect.

There is a gap in the legal meaning given to the kirpan and the religious meaning of the kirpan. The gap is not about whether the kirpan is a symbol of peace or danger. In this regard, the legal and religious views on the kirpan seem to coincide. Rather, there is a gap *in the way that meaning is given* to the kirpan. For Sikhs, family and community have an important role in defining the meaning of the kirpan. For the law, the meaning of the individual is given priority. This caused inconsistency in the Court's decision. The Court scolded the school for not being multiculturally minded or respectful enough of religious diversity, but then retreated from holding all other public engagements with Sikh kirpans to the same standard of awareness and respect. The legal meaning of the kirpan pulled in opposite directions. On the one hand, the Court said that the religious meaning of the individual had to be recognized and protected. On the other, the Court was unwilling to engage with the communal religious tradition in which the individual understanding of the religious meaning of the kirpan was embedded. The gap here reflects the gap in the *Ktunaxa* decision between the subject and object of belief. But in *Multani* we see more clearly how the subjective and static view of religious meaning shapes the process of creating legal meaning.

The gap between individual and communal religious belief that grounded the Court's construction of the legal meaning of the kirpan produced instability in its legal meaning. The Court was not clear what its own purposes were, nor how it incorporated religious meaning into legal meaning. If the law's purpose is pragmatic, then it was unnecessary to say that the failure to accommodate Multani's kirpan in school was an affront to multiculturalism and religious diversity. The evidential facts that reduce the dangerousness of the kirpan should carry the day. But if the law's purpose is to promote and advance constitutional values, then it was unnecessary to draw on the evidence that reduced the dangerousness of the kirpan. Multicultural and religious diversity should carry the day. Turning to evidence of safety distracted from the purpose of multiculturalism and suggested that multicultural and religious tolerance depend on the physical risks and dangers of the culture and religion in question. From this perspective, even though culture and religion "win", they actual lose, given that the decision to tolerate the carrying of a kirpan is not due to its cultural or religious meaning but despite it. Berger made the same observation (albeit in a slightly different context):

> Even if I am successful in my religiously motivated claim, culture was irrelevant to the legal conclusion. If my position is legally acceptable, it is so *despite* my cultural commitments and only to the extent that I was capable of stripping my claim of the terms that make it meaningful to me in the first place. The "win" is not a product of cross-cultural understanding; rather it turns on the successful suppression of the dimension of culture.[203]

The Court did not seem to be aware of the social-symbolic constructive process at play in its decision. The Court seemed to portray its multicultural solution to the case, which merged the religious meaning of the kirpan with its physical perception, as carving out a 'neutral' space where the various forms of meaning were balanced with each other. The decision was not simply a pragmatic solution, but neither was it an adoption of religious symbolic meaning. Rather, in working toward its own ends of multiculturalism and religious diversity the Court established its own symbolic form of meaning, into which the kirpan was embedded. From this view, it is necessary to recognize that the thing—the dagger/kirpan—does not simply speak for itself. As Suzanna Mancini noted, "Symbols do not have a univocal significance. Objects are neutral by nature and the significance that is attributed to them reflects the culture, the beliefs, the choices of those who see them."[204] The 'reality' and meaning of the kirpan are always mediated through symbolic meaning, whether the religious meaning of the Sikh individual and community, or the risky and dangerous meaning perceived by the students and the school. The 'reality' and meaning of the kirpan does not stand separate and apart from the social-symbolic processes by which meaning is given to it. The Court's decision in *Multani* demonstrates that law's apprehension of the kirpan is no exception. Determining the legal meaning of the kirpan subsumes the diverging symbolic meanings (religious and otherwise) into a higher symbolic order established in the law.

The trouble with the *Multani* decision is not that the religious meaning was considered alongside the dangerous physical features of the kirpan or that the law integrated the religious and physical meanings of the kirpan into the constitutional order of meaning. Rather, the problem is that the Court did not provide the conceptual grounds in its reasons for the connection it drew between the physical characteristics, the individual subjective meanings and the collective meanings given to the kirpan. Instead, we were left with the mere *assertion* of the

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[203] See Berger, *supra* note 4 at 158—159.
[204] Suzanna Mancini, "The Power of Symbols and Symbols of Power: Secularism and Religion as Guarantors of Cultural Convergence" (2009) 30 Cardozo L Rev 2629 at 2655.

law's constitutional framework to coordinate the physical, cultural, social and religious dimensions of the case. This failed to *explain* the intersection between the different meanings at stake and how this intersection led to the production of legal meaning.

In demonstrating that the law is engaged in the social-symbolic process of meaning formation when apprehending the meaning of a religious object, *Multani* draws attention to the importance of taking this process into account within legal analysis. Losing sight of the social-symbolic process in the law's apprehension of religion leaves our understanding of the law's encounter with religion beholden to a world structured by the law and exempt from critical reflection. Approaching the law's apprehension of religion in light of the social-symbolic processes at work allows us to contextualize and fruitfully reflect on the appearance of religion within the law's reality. This is an important step in understanding and engaging with the law's encounter with religion in adjudication of religious claims.

CONCLUSION

In this chapter I explored the existential aspect of the law's encounter with religion in the context of the law's apprehension of religion. Through a discussion of the *Bentley* case I identified a gap that persists between the law's apprehension of religion and the lived experience of religion. Law's apprehension of religion cannot capture the fullness and complexity of religious life. I argued that in order to confront this gap it is necessary to first identify and put into question certain presumptions about the nature of legal sovereignty. Through a discussion of the theories of Cecile Laborde and Benjamin Berger I identified the challenge as the need to address an apparent unwillingness to disrupt the primacy of the legal point of view when the law apprehends religion. This point of view, it seems, hinders our ability to fully evaluate and critique the law's apprehension of religion. It turns away from what is happening at the point of encounter between law and religion and shields from view the force of the law's perspective (or culture) in shaping its apprehension of religion. I argued that the process at work in this point of encounter between law and religion is where our attention should be if we are to understand and critique the law's apprehension of religion. Part of the challenge is to re-frame the way in which the law's apprehension of religion is conceptualized.

I proposed that we might make further ground in addressing the gap in the law's apprehension of religion if we frame the encounter in terms of the social-symbolic process of meaning formation that is at work in the idea of legal fiction. Legal fiction helps show that the gap between the law's apprehension of religion and the reality of religion is an expression of the social reality of the law. The law's encounter with religion is not a matter of true or false correspondence but rather a criss-cross of realities, or the collision of different systems of meaning. In this way, legal fiction points to a foundational aspect of human understanding in the creation of symbolic forms of meaning. Drawing on Ernst Cassirer's philosophy of symbolic forms I argued that law and religion could both be seen as symbolic forms of meaning grounded in a common process of meaning formation. This, I suggested, allows us to move past the conceptual limitations of framing the law's encounter with religion in terms that presume the priority of law's perspective. The gap in law's apprehension of religion can now be seen and evaluated functionally, not in terms of the specifics of what is or is not apprehended in law but in terms of the *process* of the interaction between law and religion.

In the final part of the chapter I explored this social-symbolic re-casting of the law's apprehension of religion through the lens of the *Ktunaxa Nation* and *Multani* decisions. The Court in *Ktunaxa Nation* took a narrow view of religion as restricted to the believing subject. By doing this, the Court excluded not only a place for the object of belief (as it intended) in the religious freedom protection, but also excluded consideration of the social-symbolic process of meaning formation. This hollowed out the rationale for the decision by ignoring a core aspect of the religious claim. It also put out of sight the dynamics of law's encounter with religion. Or, framed somewhat differently, the fictional character and social-symbolic process of constructing law's apprehension of religion was forgotten and the law's reality came to determine the horizon of meaning by which the encounter could be understood.

The Court in *Multani* seemed to have settled for a restricted view of the law's encounter with religion similar to what was seen in *Ktunaxa Nation*. The decision, nevertheless, advanced our understanding of the law's interaction with religion by demonstrating how the law's apprehension of religion involves a complex and dynamic interweaving of meanings together within the frame of constitutional reality. This shows that the legal construction of meaning in relation to the law's encounter with religion is itself caught up in the process of the social-construction of meaning. Although the Court may have failed to account for this in the *Multani*

decision, the prospect of understanding the law's interaction with religion in this way holds great promise.

The gap in the law's apprehension of religion first noted in the *Bentley* case can be approached in a way that does not require the evaluation of the true/false correspondence between law and the lived experience of religion. Dislodging the dispute between law and religion from the absolute binary of true/false does not remove the gap between them but opens the possibility of finding bridging points. That is to say, shifting back to one of the main metaphors of this project, the boundary between religion and law is not impermeable. Making the boundary permeable does not demolish the boundary entirely. The law still has its purposes. The law will apprehend religion through the constitutional lens, which causes distortions, confusions and challenges. But as long as our view of the law continues to include its social interactive dimension then the challenges of working with law and religion across the boundary are not insurmountable.

What is more, we are now able to address the issue of sovereignty more effectively. The point is not to deny the category of sovereignty, but to reorient it in a way that loosens the conceptual restrictions that come with presuming the sovereignty of law in its encounter with religion. Focusing on the social-symbolic dimension of the law's apprehension of religion allows us to view the law's encounter with religion from the perspective of social interactive processes that are not conditioned by the law's internal perspective. This provides a crucial step forward in the way we understand and evaluate the law's adjudication of religious claims. I will advance this argument in the next chapter through an analysis of the balancing question in the constitutional rights context. The argument will specify more concretely what is involved in drawing together the fictional reality of the law and the lived experience of religion. On the one hand, the two seem to be incommensurable. On the other hand, as I have been arguing, the two can indeed be engaged through a process they share, which is grounded in the social-symbolic dimensions of their interaction.

CHAPTER 4

Balancing, Incommensurability and Tradition

"Religious claims about the world are claims about the *truth*: about what the fact of the matter is and what it means for human affairs. Liberal democracy cannot avoid those claims either. Either it denies their importance, at the cost of its own incoherence, or it stakes its own claim to the truth and enforces it under penalty of law. There can be accommodation and coexistence. Much of the history of Western civilization is a story about how to accomplish this, and it has succeeded beyond the wildest hopes of its many authors. But there cannot be two truths—and, in the end, there cannot be two masters."[1]

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INTRODUCTION

Paul Horwitz rightly identified that one of the central issues in the relationship between law and religion is a question about the truth of the way the world really is. Religions make claims about this, and liberal democratic states cannot avoid confronting these claims. In the previous chapter I traced the prominent role that the notions of truth and reality play in the law's apprehension of religious claims. The challenge for law is, as Horwitz said, to navigate between acknowledging the salience of these claims while also preventing any particular claim from becoming entrenched within the exercise of state power (i.e. through the law).

In his book *The Agnostic Age*, Horwitz proposed that law should approach the adjudication of religion agnostically rather than making a judgment about the truth or falsity of religion *ab initio*. The point of this 'constitutional agnosticism' is to put the issue of 'truth' into question—to face the problem rather than bracket it off or suppress it—but to refrain from

**Note: an earlier version of this chapter was published as "Religion and Law in R v NS: Finding Space to Re-Think the Balancing Analysis" (2015) 32 Windsor YB Access Just 25.

[1] Paul Horwitz, *The Agnostic Age: Law, Religion, and the Constitution* (Oxford: Oxford University Press, 2011) [Horwitz, *Agnostic Age*] at 305.
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answering it in law. This involves, for Horwitz, a mixture of humility and candour, as "it recognizes that our world is filled with unbridgeable conflicts and tragic choices."[2] I agree generally with Horwitz's project, except that I also want to put into question the assumption that there are unbridgeable conflicts in law that require tragic choices. I do not believe Horwitz is suggesting that the "tragic choices" made in law are irrational but rather that legal decisions are always made from within the limitations of law, both in terms of perspective and in terms of purpose. I agree with this insofar as legal decisions will always, in some way, inadequately respond to the 'truth' of the situation they address. However, I want to put into question the notion that these limitations of law leave us with "unbridgeable conflicts" because this would suggest that the reasons for a legal decision are unable to reach beyond the perspective internal to the law and therefore unable to engage with different points of view. This is especially pertinent for the legal adjudication of religious claims, where there is a gap between the legal and the religious perspectives. If religious claims are truly unbridgeable—or incommensurable—in law then how are legal decisions regarding religious matters to be justified and evaluated?

The puzzle here is related to the argument in the previous chapter, which moved us away from truth and falsity when evaluating the law's adjudication of religion. If the law's apprehension of religion is a 'fiction' then how are practical decisions regarding religion to be made? This challenge can be seen when balancing a religious claim with another legal right or interest. How is religion to be measured and weighed in comparison to the other rights, interests or values *within the law*? The discussion of chapter 3 is certainly relevant insofar as the law must first apprehend the religious claim before it weighs it against another right. But the focus of the discussion here will not be on the law's construction of religion but on *what is involved in framing the intersection* of religion with other rights within the context of law. How are we to think about the role of the law in adjudicating these types of claims? How do we rationally engage with decisions that balance religion and other rights while also accounting for the limitations of law's encounter with religion?

In this chapter I look at the way that law adjudicates conflicts between religious and other legally recognized rights. Whereas the discussion of the law's apprehension of religion in the previous chapter considered the gap between law's conception and the lived reality of religious

[2] Horwitz, at 306. On the theme of tragedy, see also Marc De Girolami, *The Tragedy of Religious Freedom* (Cambridge, Mass: Harvard University Press, 2013).

experience, the focus of this chapter is on the way that the intersection between religious and other legal rights is framed in legal adjudication. This involves a less direct aspect of the interaction between law and religion than has been considered in the three preceding chapters. But it is no less significant. My analysis explores the nature of legal discourse and related questions about the structural framework on which the legal adjudication of conflicting rights rests within the context of balancing religious freedom with other constitutionally protected rights. I branch out from this concrete starting point to explore broader and further-reaching questions about adjudicating religious claims.

The first part of the chapter examines the approach taken in the recent Supreme Court of Canada (SCC) decision *R v NS*[3] to balance a religious claim with the constitutionally protected right to a fair trial. I focus on the way that the Court framed its approach to balancing the rights and the effect this had on the decision-making process rather than the doctrinal issues regarding balancing the rights in question. I argue that the Court failed to meaningfully reflect on the structure, or the conceptual framework, on which its balancing analysis was based. As a result, the Court's approach to balancing the rights obscured some of the central questions in the case. This raises questions about the social and philosophical basis on which a balancing analysis in law is framed and carried out.

In the second part of the chapter I look at what is involved conceptually in the process of comparing and weighing rights against each other. I approach this in relation to the idea of incommensurability and some of the literature that theorizes the incorporation of incommensurability into the legal decision-making context. This helps clarify and sharpen some of the questions that arise regarding the balancing analysis in *NS*. The issue of incommensurability, as articulated and developed by the literature, sheds light on the important (and inescapable) role of social context in forming the frameworks by which religious claims intersect and are balanced with other rights. This confirms the importance, and clarifies the challenge, of engaging with these frameworks in the context of legal adjudication. I argue, though, that theories of legal decision-making grounded in incommensurability are limited in their self-reflective and critical capacity, which leaves them unable to address the encounter between different social communal perspectives. This limitation is especially problematic when the conflict between rights involves a religious claim.

[3] 2012 SCC 72, [2012] 3 SCR 726 [*NS*].

In the final section of the chapter I look to Alasdair MacIntyre's theory of tradition-based rational discourse to explain the deficiencies that I identified in the *NS* balancing analysis and the theories grounded in incommensurability. MacIntyre's theory offers a new vocabulary of discursive and philosophical concepts that provides insight into and new solutions for the problems described. I propose using his theory to frame the intersection of religious claims and other legal rights, within the context of law, as an engagement between *traditions*. This way of framing the law's adjudication of conflicts between religious claims and other rights disrupts commonly help presumptions about legal discourse and opens new possibilities for integrating religious and other interests within the law.

This chapter is concerned with more than resolving the conflict between religious and non-religious rights through the practice of balancing in law. It is geared instead toward understanding the social and communal conceptual frameworks that operate in legal adjudication and how to engage them more effectively in legal analysis and legal decision-making. Questions and issues related to these frameworks all too easily fade into the background of legal analysis, which means that their significant impact on the adjudication of religious claims goes unaccounted for. Bringing these questions forward enhances the way we understand and approach the law's encounter with religion. It reframes the adjudication of cases that deal with the competition between religious and other rights in a way that sees their resolution in terms of a process that develops connections, or builds bridges, between truths rather than simply making a 'tragic' choice between them.

1 THE CHALLENGE OF BALANCING: *R V NS*

At the end of 2012, the SCC handed down its judgment in a case known as *R v NS*. The Muslim appellant, NS, alleged charges of sexual assault against her uncle and cousin. During the preliminary inquiry, the court granted the petition by the accused to order NS to remove her niqab while giving oral testimony. It was argued that the visibility of NS's face was a matter of trial fairness because seeing her face is necessary to properly evaluate her testimony. NS refused to comply and appealed the order, arguing that her religious beliefs precluded her from exposing her face in the courtroom.

The primary objective for the SCC in *NS* was to balance between two rights protected in the *Charter*—the right to religious freedom and the right to a fair trial.[4] But, as I already suggested, there is much more at stake here. Balancing a claim to wear a niqab with a claim to see the face of an accuser raises the question of commensurability: how are such drastically different rights compared and balanced? I argue that the way the Court framed its approach to balancing the conflicting rights—to avoid establishing a clear rule—indicated that the issue of commensurability was vital to its decision. But the actual analysis carried out by the Court failed to address the issue. I argue that the Court's decision was framed by a particular perspective of unarticulated commitments, which had a significant effect on the way the balancing of the rights was carried out. This raises other broader questions about the nature of the law's role in adjudicating conflicting rights, especially when a religious claim is involved, which will be taken up in the second and third sections of the chapter.

There were three sets of reasons provided by the Court in *NS*, and all three sets of reasons contribute something unique to the discussion of balancing religious and other legal rights. The majority decision, penned by Chief Justice McLachlin, and the dissenting decision of Justice Abella frame the dispute in a similar way. I will argue later that the difference in their conclusions highlights the weakness of how they framed the balancing analysis. Both said that when two conflicting rights are at issue, the approach should be one of balancing and reconciliation rather than establishing a clear rule or hierarchy of rights.[5] The majority explicitly argued against adopting a clear rule for or against the wearing of niqabs.[6] Instead, in each case the judge must evaluate whether the wearing of the niqab poses a serious risk to the fairness of the trial. This is grounded in a contextual analysis focused on finding a just and appropriate balance between the rights at issue.[7]

The dissenting decision penned by Justice LeBel (and joined by Justice Rothstein) took a very different approach. It proposed a hierarchy of values whereby the value of religious

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[4] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*], ss 2(a) and 11(d), respectively.
[5] *NS*, *supra* note 3 at paras 1—2 (per McLachlin), 81 (per Abella). The majority decision relies on *Dagenais v Canadian Broadcasting Corp,* [1994] 3 SCR 835, 120 DLR (4th) 12 [*Dagenais*], and *R v Mentuck*, 2001 SCC 76, [2001] 3 SCR 442 to frame the balancing test used (see *NS*, *supra* note 3 at para 7). *Dagensais* described the balancing of rights as the alternative to establishing a hierarchy of rights; balancing is to fully respect the importance of both sets of rights, (*Dagenais*, at 877).
[6] *NS*, *supra* note 3 at paras 46—56.
[7] *Ibid* at paras 46—47. For the formally stated test established by the court, see para 3.

freedom is to be subjugated to the value of open and transparent communication within the trial process.[8] Justice LeBel framed the matter in relation to multiculturalism and the foundational social values of the Canadian political and legal tradition.[9] For him, religion is one voice within the public sphere, and as such should be limited in any way necessary to preserve the openness and communicative capacity between individuals in public forums, especially in the court. In this view, the religious practice of wearing a niqab is opposed to the idea of open communication and prevents an individual from fully engaging with the judicial institution.[10] As a result, Justice LeBel proposed that a clear rule should be adopted to prohibit niqabs from being worn while giving testimony in a criminal trial.

The majority of the Court chose not to adopt a 'clear rule' that either allowed or disallowed the wearing of a niqab in a trial.[11] The majority framed its decision in terms of the two-step analysis described in *Dagenais*, to first seek to avoid the conflict between the rights at issue by exploring accommodation options and, only failing this, to resolve the conflict of rights through a proportionality-type of balancing analysis.[12] According to the majority in *NS*, the purpose of the *Dagenais* analysis was to "reconcile" the rights in conflict.[13]

The way that the majority of the Court juxtaposed its accommodation/balancing analysis against adopting a "clear rule" portrayed its approach as the only rational, neutral and justifiable option.[14] Balancing was presented as the only approach capable of protecting the integrity of the rights embodied in the *Charter*. It is the only method by which conflict between rights can be evaluated and restrictions imposed on rights adequately justified.[15] However, it is important to note that the "clear rule" alternatives described by the Court—to either totally ban or totally permit niqabs in court—reach beyond the facts of the case. By framing the balancing approach as a 'third option' the majority minimized key questions about how two rights are evaluated and weighed against each other. Using the "clear rule" alternatives as a foil to bolster the appeal of its

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[8] *Ibid* at paras 71—78.
[9] *Ibid* at para 72, LeBel describes constitutional protections, such as those found in the *Charter*, to be grounded in "…its political and legal traditions." Relying on the words of Chief Justice Dickson, LeBel J says that "The 'living tree' keeps growing, but always from its roots."
[10] *Ibid* at para 77.
[11] *Ibid* at paras 1—2, 31. ("Some argue that a witness should always be permitted to wear a niqab in court, while others argue that she should never be permitted to cover her face in court", at para 47).
[12] *Ibid* at paras 8, 32—34, 52.
[13] *Ibid* at paras 30, 31, 52.
[14] See *ibid* at paras 1—2, 48—51.
[15] *Ibid* at para 56.

balancing analysis, the majority obscured the role played by structural and conceptual presumptions in the balancing process.

The importance of questions of commensurability, including the background structural and conceptual values and commitments that affect the balancing analysis, can be initially seen in the way that the Court described the rights at issue. The Court recognized the importance of religion in Canadian law, both in terms of its enduring ritualistic function (e.g. swearing of oaths[16]) as well as the historical commitment to tolerating and accommodating religious belief and practice.[17] The Court said that a general restriction to religious practice within the legal context (like wearing a niqab while giving testimony) would be unacceptable. "The answer is not to ban religion from the courtroom, transforming it into a 'neutral' space where witnesses park their religious convictions at the door."[18] The Court envisioned instead a reconciliation of religious and secular practices and values within the legal context. One should not displace the other in the form of an absolute rule, but instead be decided through a proportionate balance.[19]

The right to a fair trial was found to have a very different place in the history of the Canadian legal tradition. The majority in *NS* characterized it as a practice emerging from time immemorial, a foundational aspect of our system of criminal justice. The fair trial right, guaranteed in s 11(d) of the *Charter*, stands in close relation to the "principles of fundamental justice" entrenched in s 7 of the *Charter*.[20] The aspect of fair trial procedure at issue in this case was the practice of seeing a witness's face in order to evaluate the credibility of the witness as well as to aid in cross-examination. The main concern was that the credibility or veracity of the witness's testimony would be more difficult to determine if her face could not be seen. This raised the risk that the accused might be wrongfully imprisoned, which is a concern central to the legitimate rule of law.[21] The Court paid great deference to these historically established practices, saying that they can only be displaced "if shown to be erroneous or based on

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[16] *NS*, *supra* note 3 at para 53.
[17] *Ibid* at para 54. Some scholars have criticized the language of accommodation used by the court because it puts religious practices in a position subservient to other rights that more closely align with a secular worldview—for example. See e.g. Faisal Bhabha, "From *Saumur* to *L(S)*: Tracing the Theory and Concept of Religious Freedom under Canadian Law" (2012) 58:2 Sup Ct L Rev 109.
[18] *NS*, *supra* note 3 at para 31.
[19] *Ibid* at paras 32—33.
[20] *Ibid* at para 15.
[21] *Ibid* at para 38 ("The right to a fair trial is a fundamental pillar without which the edifice of the rule of law would crumble. No less is at stake than an individual's liberty – his right to live in freedom unless the state proves beyond a reasonable doubt that he committed a crime meriting imprisonment. This is of crucial importance not only to the individual on trial, but to the public confidence in the judicial system").

groundless prejudice…."[22] The practice of seeing a witness's face during cross-examination is deeply rooted in our criminal justice system and requires "compelling evidence" to dislodge it.[23]

The Court's description of the religious and fair trial rights portrayed them as incommensurable. They are about as different as two rights could be. Both are core rights that are foundational, in very different ways, to the legal order. This chiasmic distance between the rights was an important part of how the Court framed its balancing analysis. Given the importance of both rights, the majority refused to approach the conflict between them in a way that would lead to preferring one right over the other; to do so would jeopardize the integrity and importance of the rights. Instead, the majority adopted the strategy to evaluate and compare the effects—both 'harms' and 'benefits'—of allowing or disallowing the claimant to wear a niqab.[24] This prioritized the formal evaluative process of contextual harm over other substantive questions about the nature of the rights and the conflict between them. This, it was claimed, would more accurately embody the neutral analysis and justification proper to the adjudication of constitutional rights.[25]

In my view, the problem with the Court's discussion of the weight and balance of the harms and benefits is that it did not clarify the basic question of commensurability provoked by the significant differences between the two rights. If the rights are as different as suggested by the Court, then how are they to be measured and weighed against each other? The majority decision referred to a broad range of considerations regarding the benefits and harms at stake but failed to explain how these factors intersected with each other and balanced against each other to resolve the conflict.[26]

There is one point in particular, when comparing the individual harms involved, that the majority's balancing analysis seemed to have obscured the way that the rights are evaluated and

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[22] *Ibid* at para 22.
[23] *Ibid* at para 27.
[24] It should be noted that the Court in *NS* understood its balancing analysis as akin to the proportionality analysis set out in *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200. *NS*, *supra* note 3 at para 35. The dissenting opinion of Justice Abella also used harm as the key to working out the balance. *Ibid* at para 80.
[25] See *NS*, *supra* note 3 at para 52.
[26] In the proportionality balancing analysis, the Court offered the following factors to consider: the deleterious effects on the individual of ordering the removal of the niqab during testimony (*ibid* at para 36), the broad societal harms of ordering the removal of the niqab during testimony (*ibid* at para 37), the salutary effects of ordering the removal of the niqab on individual defendant and the public confidence in the justice system (*ibid* at para 38), the nature of the proceeding (*ibid* at para 39), the stage of the proceeding (*ibid* at para 40), whether the evidence is going before a judge or jury (*ibid* at paras 41—42) and the nature of the evidence in relation to the accusation trial fairness (*ibid* at para 43).

weighed against each other. There are two features of the harms involved that the Court had to navigate: the significance and directness of the harms. In terms of the individual experience of harm, the Court noted that the harm done in restricting religious freedom is, generally speaking, difficult to calculate.[27] It is hard to know what is actually lost when a person is forced to give up a religious practice. In other words, how does one apprehend and express the compromise of the condition of the soul, the soul's relation to God and one's standing in a religious community?[28] Fair trial interests on the other hand are not so difficult to ascertain because they involve a very concrete and universally understandable experience of an individual losing their physical liberty.[29] Loss of personal physical liberty is very tangible, whereas the religious effect of not wearing a niqab is subjective and vague.

In addition to this, the Court had to consider the directness of the harm involved in the two rights. Although it was not clear how serious the harm of having to remove a niqab to give testimony would be, there is no doubt that the harm would be immediately and directly felt. To the contrary, the harm flowing from allowing a niqab to be worn during testimony is indirect and contingent on the outcome of the case. Limiting the practices that protect the fairness of a trial might indeed result in serious harm, such as being wrongly punished by the state. However, there is no guarantee but only a *risk* that that the harm will be felt. The risk materializes into harm only if wearing the niqab in fact hides some weakness in the claimant's testimony, which would otherwise have been detected, and that this is the difference between a guilty and not-guilty verdict.

The experience of the seriousness and directness of the harm were blended together in the Court's analysis. The majority found, "where the liberty of the accused is at stake, the witness's evidence is central to the case and her credibility vital, the possibility of a wrongful conviction must weigh heavily in the balance, favouring removal of the niqab."[30] This result of balancing the harms in *NS* points to the difficulty in apprehending religious experience in law (discussed in

[27] *NS*, *supra* note 3 at para 36.
[28] *Ibid* at para 36. Also, see generally Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at 45—61 (discussing how the 'aesthetics' of religious freedom exclude certain religious concerns from translating into legal language); Winnifred Fallers Sullivan, *The Impossibility of Religious Freedom* (Princeton: Princeton University Press, 2005); Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54 UT Fac L Rev 1.
[29] *NS*, *supra* note 3 at para 38.
[30] *Ibid* at para 44.

chapter 3). The apprehension of religion in law affects the way that religious harm is evaluated and weighed against other harms. The balancing framework provided by the majority of the Court in *NS* gave greater weight to the physically tangible and contingent harm of wrongful conviction than to the difficult to articulate but direct harm flow from a religious violation. In other words, the *risk* of physical harm outweighed a *certain* spiritual harm. I would suggest that this way of framing the balancing analysis diminishes the religious concerns at stake.[31]

The significance of this can be seen in the way that the Court reflected on the social interests and harms in *NS*. The majority noted that limiting fair trial protections would compromise the public interest in maintaining justice.[32] Wrongful punishment is one of the gravest injustices, and failing to protect against it undermines the legitimate rule of law.[33] On the other hand, the majority also noted that requiring Muslim women to remove their niqabs to testify in court would prejudice them in criminal proceedings.[34] If they are victims of crimes then they will be unable to access the institutional mechanisms of justice and give evidence of their suffering. Likewise, if they are accused of committing crimes then they will be unable to speak in their own defence.[35]

The difference in how these social dimensions were framed by the majority decision significantly affected how they played into the balancing analysis. On the one hand, individuals facing prosecution were portrayed as the passive victims of state power, and limiting protection for them was a matter of speaking to the legitimacy of law itself. On the other hand, restricting the ability of Muslim women to access the criminal justice system was framed against the backdrop of the law's evolution regarding women's rights and the progress made to bridge the gap between women and legal institutions in the context of sexual assault cases.[36] The implication was that Muslim women needed to meet the Court half way—that the blockages they

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[31] This limitation of legal adjudication, i.e. the tendency to focus on easily measurable factors, has been identified and challenged by others. See e.g. Steven D Smith, "Legal Discourse and the *De Facto* Disestablishment" (1998) 81:2 Marq L Rev 203 (proposed the use of difficult to understand human experiences, such as religious experience, to re-define damages in the context of tort law).
[32] *NS*, *supra* note 3 at para 38.
[33] *Ibid* at para 38 (quoted above at note 21).
[34] *Ibid* at para 37. This was a point emphasized by Justice Abella in her dissenting opinion (*ibid* at paras 94-96).
[35] Justice Abella raised both aspects mentioned here in her dissenting opinion (*ibid* at para 94).
[36] See *ibid* at para 37 ("In recent decades the justice system, recognizing the seriousness of sexual assault and the extent to which it is under-reported, has vigorously pursued those who commit this crime. Laws have been changed to encourage women and children to come forward to testify. Myths that once stood in the way of conviction have been set aside").

might experience would be a result of their own religious choices rather than institutionalized discrimination.[37] Muslim women were portrayed as active and able to avoid their victimization.

Justice Abella contested this portrayal of religious choice, arguing that religious obligation could not be understood simply as a matter of personal preference or free choice.[38] For Justice Abella, the majority's position regarding Muslim women was offensive to the rule of law (and perceptions of justice); it would be unjust to ask Muslim women to choose between their religion and access to justice. Justice Abella's argument helps show that one of the features of the majority's balancing framework is that it presumes the distinction between a Muslim woman's agency and her religious commitment. If religious commitment, as expressed through religious practice, is similar to other personal preferences then the harms flowing from restricting religious practice will be view as less serious and of lesser weight in the process of legal balancing.

Whereas the majority suggested that the balancing analysis favoured removal of the niqab,[39] Justice Abella found that the exclusion of Muslim women from the criminal justice system weighed more heavily than the moderate risk posed by a veiled witness to trial fairness.[40] This difference in conclusion points to the remarkable amount of variation possible in the evaluation and balancing of harm. The balancing of the rights depends heavily on which aspects of the harms align with the particular frame of reference held by the decision-maker.

My criticism of the majority in *NS* is not directed at the conclusion they reached *per se*, but at the way the Court tried to evade the substantive judgments involved in adopting a "clear rule". The majority decision was not an objective weighing and balancing of the rights in question, as if the categories of 'harm' and 'benefit' are neutral or common measures for both rights. Instead, we find the balancing process influenced by a particular perspective that framed the way the various rights, interests, and harms were perceived and weighed. The framework also influenced the way other questions of social goods, public values, individual identity and choice were addressed. Despite its best efforts, the majority in *NS* could not avoid the substantive issues raised by Justice LeBel. By trying to place the legal balancing analysis above the fray of

[37] The role of choice in a proportionality analysis involving religious freedom is complex, and full treatment of it goes beyond the purpose of my current analysis. See e.g. *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 (especially the discussion of whether a religious claimant had a "meaningful choice", at paras 86—96).
[38] *NS*, *supra* note 3 at paras 93—94.
[39] *Ibid* at para 44.
[40] *Ibid* at paras 93—96, 109.

the substantive issues captured in a "clear rule" the majority of the Court also obscured the key questions and issues at stake in the process of balancing.

This, I suggest, shows that balancing of conflicting rights cannot be treated as if it is a neutral or objective weighing of benefits and harms without anything more. This is *not* to say that there is some kind of anti-religious bias at work in balancing conflicting rights (either generally or in the majority *NS* decision), but rather to notice that a particularly legal perspective naturally structures the balancing of rights within the context of legal adjudication and that this affects the way that religious rights are balanced against other constitutionally protected rights. The question then becomes, how can this structural dimension be accounted for in legal analysis?

I do not believe that a conflict between rights should be evaluated from a 'view from nowhere.' If anything, my discussion so far demonstrates the opposite—that deliberations regarding the adjudication of conflicts between rights must reach beyond the idea of balancing as a neutral and objective activity and engage with ideas of law, religion, social goods, public values and justice. In order to do this it is necessary to put into question the way in which the resolution of conflicting rights is framed. Otherwise it is not possible to consider the full range of forces affecting the adjudication of the conflict between religious claims and other rights. This is what happened in *NS*, where the established legal practices and perspectives affecting the weighing and balancing of the competing rights were hidden from view.

As we saw in the previous chapter, it is important to be aware of the impact that the law's internal perspective can have on adjudicating religious claims. The law's apprehension of religious claims will be shaped by law's reality. This will inevitably affect the balancing of religious claims against other claims because the balance is occurring within the law. The question, though, is how to take this into account when reasoning through the balancing process. My argument is that consideration of this discursive dimension in the law's adjudicatory role requires attending to that which is precluded from (or missing in) the neutral view of balancing displayed in *NS*. The important question is, in other words, what is necessary to confront incommensurable rights through legal adjudication?

2 INCOMMENSURABILITY AND LEGAL ADJUDICATION

The idea of incommensurability provides a useful point of departure from the *NS* decision. In this section I will explore the possibility of re-framing the legal adjudication of conflicting rights in terms of incommensurability. Several theorists have argued that there is no common metric for weighing different rights and interests (or values and goods)—they cannot be reduced beyond a certain point and are therefore incommensurable.[41] The idea that rights are incommensurable challenges a core assumption of balancing, which is that conflicting rights can be compared (as commensurable) to each other. Each right has to be treated as significant in its own right. Drawing on this literature, I argue that in order to make sense of the decision-making process in the face of incommensurability requires us to provide a role for social community, including social values and commitments, as an aspect of legal reasoning.

Although the idea of the incommensurability of rights very helpfully draws attention to the importance of social community in the decision-making process, I argue that incommensurability alone is insufficient to make sense of legal decision-making. In particular, if too much weight is put on incommensurability it becomes very difficult to provide a satisfactory basis for critical engagement with the social values and commitments that animate the decision-making process. I will argue that incommensurability does not displace the possibility of balancing or reconciling rights in conflict, but helps direct our understand of the process by which commonality is made possible through legal analysis. Exploring the notion of incommensurability sharpens our understanding of balancing and clarifies our search for a way to engage critically with the discursive dimensions of the legal adjudication of conflicts between religious claims and other legal rights.

2.1 Plurality of Values and Reasons

Cass Sunstein explored the relevance of incommensurability to the law.[42] He argued that incommensurability is a good thing, and that its use in law will help clarify the analysis of

[41] See e.g. Ruth Chang, ed, *Incommensurability, Incomparability, and Practical Reason* (Cambridge, Mass: Harvard University Press, 1997). My analysis of incommensurability does not address all of the philosophical issues at stake, but uncovers some of the philosophical points that often get passed over presumptively in legal analysis.
[42] Cass R Sunstein, "Incommensurability and Valuation in Law" (1994) 92:4 Mich L Rev 779.

various legal questions, especially helping us understand what is at stake in hard cases.[43] Sunstein contended that the plurality of values encountered in human life cannot be reduced to a single conception, like happiness or utility.[44] In order to avoid the reductive tendency of value monism, values should be viewed as incommensurable. For Sunstein, legal decision-making is an act of value judgment, which involves deciding which values should be used to adjudicate different types of cases. From this view, the purpose of legal adjudication is to "…constrain prevailing kinds of valuation."[45]

The import of this view can best be seen through examples. Sunstein proposed that the rules prohibiting the sale of children, or the offer of money for sex, are best understood as value judgments based on the incommensurability of money, the responsibility to care for children and the meaning of sexual relationships.[46] Acknowledging that the value of money is of a different kind than parental responsibility or sexual relationships makes it wrong to act as if they are commensurable. According to Sunstein, to reduce human value to a single measure, or to assume that conflicting values can always be made commensurable, obfuscates our understanding of human value and behaviour.[47] Failing to appreciate the irreducibility of human values will make some legal concepts impossible to understand.[48]

Richard Warner provided a similar view to Sunstein, but framed the matter in terms somewhat more familiar to the legal ear.[49] He described incommensurability as a prior judgment that precludes the use of certain *reasons* (rather than Sunstein's reference to the less-specific idea of value) in specific contexts.[50] Incommensurability is constructed through the commitments we make, which, by their nature, require the exclusion of some reasons from being considered

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[43] *Ibid* at 782.
[44] *Ibid* at 784.
[45] *Ibid* at 792.
[46] Sunstein discusses a whole range of examples throughout the essay, and includes a section dealing specifically with conflicts between uses of money and other values (*Ibid* at 785-790). Similar examples are used regularly in other academic works on incommensurability. For example, Richard Warner discusses extensively a hypothetical example of being asked to sell his daughter (see "Excluding Reasons", *infra* note 44 at 438—441).
[47] Sunstein, *supra* note 42 at 794.
[48] Sunstein spent a significant portion of his essay discussing how incommensurability helps us understand different areas of law, such as civil equality, free speech, environmental protections, the remedy of specific performance and feminist legal claims (see *ibid* at 824—853).
[49] The two articles by Richard Warner that I rely on are: "Excluding Reasons: Impossible Comparisons and the Law" (1995) 15:3 Oxford J Legal Stud 431 ["Excluding Reasons"], and "Does Incommensurability Matter? Incommensurability and Public Policy" (1998) 146:5 U Pa L Rev 1287 ["Incommensurability and Public Policy"].
[50] Warner justifies looking at reasons instead of values because values can easily be understood as constituting a form of reason (see "Incommensurability and Public Policy", *supra* note 49 at 1292). There are certainly echoes of the exclusion of reason in Sunstein's text (ee e.g. Warner, "Excluding Reasons", *supra* note 49 at 801—804).

during the decision-making process.[51] Warner argued that this view of incommensurability is more than simply a factual description of legal and policy decisions; it also affirms the inviolable value and dignity of individuals and the restrictions that this imposes on public decision-making.[52]

There is an intuitive appeal to the arguments made by Sunstein and Warner insofar as it does not seem possible to boil down and equalize things as different as money and familial relationships to a single factor. This observation provides a fairly powerful argument for expanding the scope of what is taken into account when discussing legal rules and the balancing of rights. It encourages us to regard all of human experience as potentially relevant, and militates against assuming that one aspect of enquiry or one notion of value or reason should be given deferential authority. To do otherwise would be contrary to our human experience.[53]

There is a point of overlap here with the view taken by the majority in *NS*, which affirmed the equal importance of the rights at play in the case. Recall that this led the Court to deny the possibility of developing a clear rule because to do so would threaten the integrity of the rights and of the process of restricting them. The individual integrity of rights resonates with the views of Sunstein and Warner on the plurality of values and commitments involved in comparing rights. But the difference comes when a practical solution must be proposed for resolving a real conflict between rights. The majority in *NS* turned to the formalities of weighing and balancing the harmful and beneficial effects of the decision. Sunstein and Warner would likely resist this approach because of the way it reduces the complexity of the values and commitments at stake in different rights to a single concept (i.e. harm). Imposing a term of comparison, even in a formal sense, will have a transformative effect on the rights in question.[54]

At first glance, incommensurability seems to be diametrically opposed to the very idea of balancing. But this is not necessarily the case. Paul-Erik Veel, for example, contended that incommensurability does not lead us to deny judicial practices of balancing or proportionality.[55]

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[51] Warner, "Excluding Reasons", *supra* note 49 at 439. A similar argument is provided by Richard H Pildes in his article "The Structural Conception of Rights and Judicial Balancing" (2002) 6:2 Rev Const Stud 179 at 184.
[52] Warner, "Excluding Reasons", *supra* note 49 at 433.
[53] Sunstein, *supra* note 42 at 854—855.
[54] *Ibid* at 815.
[55] Paul-Erik N Veel, "Incommensurability, Proportionality, and Rational Legal Decision-Making" (2010) 4:2 Law & Ethics of Human Rights 177 at 186. There are other proponents of the incommensurability thesis that attempt to devise strategies for making rational choices between rights or values. Some of these theories propose a model for comparing rights or values. No one attempts as direct, or convincing, of a defence of the balancing analysis as Veel, which is why I focus on him exclusively here. For some of these other examples, see Leo Katz, "Incommensurable

Veel argued that balancing is possible if we could avoid weighing the 'goodness' of values and instead define them as equal in relation to a 'choice rule'.[56] The idea is that if a scale can be created to measure the severity of the impact of a choice on two opposing rights *in their own terms*, not in relation to each other, and if the rights at issue are considered to be equally worthy of full realization, then the severity of the impact of the choices on each right can be used as a reasonable way to make a decision in a particular case.[57] Veel's theory appears roughly consistent with the harm-based balancing analysis used by the Court in *NS*, where the harmful impact on both of the rights were considered individually and then the impacts were weighed against each other.

It is not clear, however, whether Veel's approach to balancing incommensurable rights is able to avoid the transformative effects of making comparisons warned against by Sunstein and Warner. As was argued earlier, the description of the harmful and beneficial effects on the rights at issues in *NS* did appear to have a transformative effect on the nature of those rights.[58] In order for Veel's theory of balancing to succeed in this regard requires the 'choice rule' that measures severity to be purely symmetrical between the rights in conflict. Such a view of symmetry must have a point of reference. Although Veel might be right to say it is not necessary to have a formula of 'the good' to compare rights, there must at very least be a political community that agrees on the symmetric equality of the rights at issue—a point that Veel, to his credit, acknowledged.[59] It is also necessary to determine whether the notion of symmetrical equality being used is appropriate in the particular circumstances of each case.[60] But then the idea of balancing is not really neutral or value-free in the sense that the majority in *NS* seemed to have thought.

Choices and the Problem of Moral Ignorance" (1998) 146:5 U Pa L Rev 1465; Virgílio Afonso Da Silva, "Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision" (2011) 31:2 Oxford J Legal Stud 273; and Pildes, *supra* note 51.

[56] Veel, *supra* note 55 at 198—201. Veel's theory is an adaptation of the 'Nash Bargaining Solution'.

[57] *Ibid* at 200—201.

[58] As was identified earlier, the weighing and balancing of harm in the majority decision of *NS* was influenced by a particular legal worldview that was empirically focused, oriented to formal (over substantive) analysis, had a particular view of autonomous choice free from religious commitment, and was concerned for the integrity of institutionalized legal rights. This, I suggested, had the effect of diminishing the weight of religious concern, individually and socially.

[59] Veel, *supra* note 55 at 219.

[60] This is what Veel sets out to do in the final portion of his article, discussing the applicability of symmetry to cases of statutory law (*ibid* at 220), common law (*ibid* at 222), competing private constitutional rights (*ibid* at 224) and competition between private constitutional rights and public interests (*ibid* at 225).

Balancing rights and maintaining their integrity, even if the rights are considered to be incommensurable, cannot be a neutral or value-free process. Balancing depends on a conceptual framework for recognizing and interpreting values (or rights and interests), and this framework is connected to the *social* processes at work in political community. The legal adjudication of rights reflects a commitment to certain values and reasons embedded in social community, which builds the common conceptual ground needed to join together incommensurables. This is not a process of equating values or rights (or interests) but of making them commensurate within a particular social context.

2.2 Incommensurability, Social Commitments, Collective Identity and Rational Enquiry

Sunstein and Warner also pointed to the importance of social community. For them the reconciliation of the plurality of values and reasons requires us to draw on our collective identities and social commitments to guide the adjudication of particular cases.[61] In other words, the legal adjudication of rights in conflict draws on the conceptual framework provided by a social background (collective identity for Sunstein, social commitments for Warner). For Sunstein and Warner, where there is disagreement about what our social commitments demand for right conduct, such as when rights conflict with each other, as in the *NS* case, the courts (and other public decision-makers) must act as interpreters of our social commitments and identity.[62]

What was left unaddressed in the majority decision of *NS*, and what seemed to be lacking in Veel's account of the balancing analysis (the role of conceptual frameworks), was openly recognized and embraced by Sunstein and Warner. Although this appears to be a step in the right direction, we cannot stop at the mere recognition of the importance of conceptual frameworks, but have to also ask *how* the court is to utilize them. What guides the interpretation and understanding of them? How are they formed and justified? In short, how do we engage with them critically and rationally?[63]

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[61] Warner, "Excluding Reasons", *supra* note 49 at 438—443; Warner, "Incommensurability and Public Policy", *supra* note 49 at 1294—1299 and 1319—1323; Sunstein, *supra* note 42 at 856—857. Warner also sees this at relevant to individual decision-making ("Excluding Reasons", *supra* note 49 at 438).

[62] Warner, "Excluding Reasons", *supra* note 49 at 456; Sunstein, *supra* note 42 at 857.

[63] It should be noted that Sunstein and Warner argue for a view of incommensurability that is not apposite to the 'rationality' of decision-making. See Warner, "Excluding Reasons", *supra* note 49 at 427; Sunstein, *supra* note 42 at 811. Others argue for a stronger form of incommensurability, where decision-making does not depend on truly

For Sunstein, there is no absolute rule as to which values should apply in a given situation. Instead, the valuation process is a struggle that must be engaged within each particular case, and the values chosen are based upon higher-order considerations of what constitutes the good life and a good political system.[64] In order to decide between competing incommensurable goods depends on achieving a certain type of social self-understanding, which requires us "…to be clear about what we value most deeply and to make choices that properly express the deepest valuations."[65] He suggested that this might require "…a form of narrative continuity within a life or within a society."[66] He went on to argue that the idea of incommensurability helps to construct the social institutions that foster our social values.[67] In this way incommensurability produces for itself the raw materials (foundational values) necessary to make legal decisions.[68]

Although this certainly carries some appeal, in that it turns to social institutions rather than esoteric universal ideas to guide legal decision-making and the principles of right conduct, it leaves itself open to the criticism of self-referentiality. The system Sunstein envisioned seems to be self-enclosed. He seems to presume that social self-understanding will always be able to produce a satisfactory resolution to conflicts that arise between values (or rights). This leaves his theory without a mechanism for engaging in critical self-reflection, or for participating in dialogue that reaches beyond the given conceptual framework. A view from outside the system will be disregarded as irrelevant since it is based on a different social self-understanding.

Warner took his theory down a route similar to Sunstein. As mentioned earlier, in Warner's theory it was the core commitments of a society that acted as the ultimate guide for the legal decision-making process. Drawing on the work of John Finnis, Warner took the view that social communities simply *adopt* a set of social commitments for themselves.[69] Warner

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rational categories. See e.g. Stavros Tsakyrakis "Proportionality: An Assault on Human Rights?" (2009) 7:3 International Journal of Constitutional Law 468; Joseph Raz, "Incommensurability and Agency" in Chang, *supra* note 41, 110.

[64] Sunstein, *supra* note 42 at 855.

[65] *Ibid* at 857.

[66] *Ibid* at 856.

[67] See *ibid* at 826 (arguing that the language of incommensurability creates space for the growth of love within the family, reason within political life and worship in religion).

[68] *Ibid* at 805 ("Incommensurability operates as an obstacle to certain sorts of behavior; but it constitutes others, and makes them an option for us. For this reason, both social norms and life might insist that incommensurability of various sorts is desirable as a means of maintaining attitudes and relationships that are parts of good lives").

[69] Warner, "Incommensurability and Public Policy", *supra* note 49 at 1321. For John Finnis' theory in his own words, see his essay "Natural Law and Legal Reasoning" (1990) 38 Clev St L Rev 1. I find it somewhat surprising that an otherwise conservative natural law theorist puts so much stock into *choice* and circumscribes so drastically the importance of human rationality in creating law. One possible explanation for this is that he wants to draw

suggested that this is not the same thing as assuming a common metric for weighing values, nor is it an irrational exercise. A public decision-maker must explain and provide reasons for why it has adopted its set of commitments.[70] Different and mutually exclusive choices may both have reasons, and making one choice instead of another is not irrational when it is made for the reasons provided in its defence.[71] For Warner, some disagreement in our commitments is natural and does not preclude the reasons we have for adopting a commitment; it is just that the reasons we find compelling may not be compelling to everyone else.

In my view, Warner's theory is limited, much like Sunstein's, in its ability to address what is involved in reasoning about our primary social commitments. Warner suggested that the public choice of a set of social commitments is to be justified by nothing more than a statement of the reasons leading to a particular commitment.[72] The problem here is that we are left in the position of evaluating commitments solely in terms of the reasons offered for them, without the ability to ask or answer whether one set of reasons for social commitments is more compelling than a rival set. This provokes similar questions as when deciding between incommensurable rights or conflicting values: how do we decide between different social commitments? The questions regarding the basis of decision-making are displaced but not resolved. As we saw with Sunstein, Warner's theory also leads us to a self-enclosed view of legal decision-making process, which deprives us of the resources needed to fully engage it in critical reflection.

2.3 Incommensurability and NS— *Shared Limitations*

The theories grounded in incommensurability help articulate some of the limitations and difficulties inherent in the balancing analysis. Emphasizing the plurality of human values and reasons attunes us to some difficulties that arise when rights (or values) are forced into comparison. Even more significant than this is the recognition of the important role of social

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greater attention to the role of the community in the creation of legal meaning and the importance of history in understanding and developing those meanings. Another explanation would be in the fact that he distinguishes between law and moral reasoning, describing the former as technical in nature (*ibid* at 5—6).

[70] Warner, "Incommensurability and Public Policy," *supra* note 49 at 1321.

[71] See *ibid* at 1321—1323.

[72] Admittedly, the openness proposed by Warner in adopting social commitments would likely attract sufficient public scrutiny to prevent wanton decision-making, insofar as the reasons for the commitment would have to be compelling to at least the majority of the public. For further discussion of the theories regarding pragmatism and public discourse, see Jeffrey Stout, *Democracy and Tradition* (Princeton: Princeton University Press, 2004).

community and conceptual frameworks in the decision-making process. Despite these positive contributions, these theories are limited in their critical capability. Although social conceptual frameworks are recognized as important, there is an obvious struggle to develop a way of engaging them in dialogue that reaches beyond their inherent boundaries.

When we compare the rationales for the various approaches discussed so far—the *NS* decisions and the incommensurability theories—we can identify a type of cascade effect occurring. The majority decision in *NS* attempted to move away from the raw assertion of primary and subsidiary values given by Justice LeBel. As we saw, this strategy did not avoid the influence of a background conceptual framework that operated similar to value commitments. The incommensurability theories described this phenomenon well, arguing that legal rules and the decision-making process should be understood and interpreted through the conceptual frameworks of our social commitments and identities. But this did not solve the challenge faced by adjudicating conflicts between religious rights and other legal rights. These theories are unable to critically engage with the social conceptual frameworks on which the decision-making process, such as balancing, rests. The understanding of these frameworks was restricted to the choices and self-perceived identities of the social community in question.

In the incommensurability theories discussed, the process of reflecting on the conceptual frameworks used in legal decision-making is not altogether dissimilar from the approach taken by Justice LeBel in *NS*. Both adopt a source for social values that is not disposed to critical reflection. For Justice LeBel, it was the principles of constitutionalism and democracy; for the incommensurability theories, it was the commitments or self-understanding of a social community. Although from the outside the incommensurability theories look to have advanced beyond the ideas in *NS*, they are in fact very much bound by those same concerns. Indeed it seems that those concerns have taken on new life and become even more pressing. The challenge shared by Justice LeBel, the majority in *NS*, and the incommensurability theories is to articulate and critically engage with the foundational presumptions that keep them from moving beyond a view of legal adjudication of conflicting rights as simply making a raw choice. With this in mind, we should now consider what would help us engage in critical reflection on the conceptual frameworks underlying the legal decision-making process.

3 TRADITION, RATIONAL ENQUIRY AND LEGAL DISCOURSE

H. Patrick Glenn's critique of theories based on incommensurability helps point a way forward in our investigation. He observed that these theories are steeped in philosophical presumptions with a particularly modern outlook, insisting on "…singularity, particularity and diversity… [and] an abstract individual, free of apparent particularity, choosing amongst the particularities of the world."[73] In this section I will look to the tradition-based rational enquiry theory of Alasdair MacIntyre to develop a critique of and an alternative approach to this modern philosophical outlook. Although MacIntyre's theory is pitched at a high level of social abstraction, taking on the idea of 'liberalism' and its effects on moral philosophy, it is relevant to questions of legal adjudication and balancing under investigation in this chapter.

I argue that MacIntyre's theory provides a way of thinking about the legal adjudication of conflicts between religious claims and other rights that moves us beyond the limitations of the *NS* balancing analysis and the theories grounded in incommensurability. MacIntyre's theory enables dialogue between various social perspectives, including between the religious and non-religious. A key part of why MacIntyre is able to do this is because he challenges the priority given to individual preference in modern moral philosophy and replaces it with the idea of tradition as a site for rational enquiry. His view of tradition is dynamic, not static. He recognized the importance of social and historical context, but went on to claim that rational enquiry depends on participation in a communal pursuit of the ultimate human good. This view of reason and rational enquiry provides a theoretical and analytic basis for engaging diverse perspectives and experiences in a common rational discourse. I argue that this perspective enables us to re-frame our understanding of the law's adjudication of conflicts between religious claims and other rights in a way that enriches the integrative and self-reflective capacity of legal decision-making.

3.1 Preference and Fractured Rational Enquiry

MacIntyre began his classic work *After Virtue* by pointing to what appears to be an impasse in contemporary moral and ethical debate.[74] This debate is not simply protracted but

[73] H Patrick Glenn, "Are Legal Traditions Incommensurable?" (2001) 49:1 Am J Comp L 133 at 138.
[74] Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 3d ed (Notre Dame: University of Notre Dame Press, 2007) [MacIntyre, *After Virtue*] at ch 2.

seems to have the elements of intractability: "There seems to be no rational way of securing moral agreement in our culture."[75] MacIntyre suggested three features of the debate that lead it to this point of impasse. First, there is "…conceptual incommensurability of the rival arguments…" insofar as there does not appear to be a way to rationally connect the different premises on which the various arguments rely and the normative bases of the claims they make.[76] Second, each different argument purports to be rational and objective in a way impersonal to the relationships between the parties and independent of the particular contexts of each situation.[77] Third, the philosophical bases of the different arguments seem to be downplayed in favour of particular voices, which separates philosophical justification from its historical/conceptual context.[78]

Echoing Glenn's critique of incommensurability theories, MacIntyre described the growing reliance on the notion of 'preference' as one of the central features of modern moral discourse.[79] That is to say that every individual is encouraged to propose and live by their own conception of the good, and that no single conception of the good can be used to guide the lives of everyone.[80] This notion of preference alters the idea of justification for selecting courses of action by replacing rational moral evaluation with a form of free-market competition.[81] The result is the separation of the various spheres of life, where the goods pursued in one area are distinguished from those pursued in another. Individuals become responsible for giving order to all of the various goods of life, and the public space is constructed to protect the separation of goods as well as the primacy of the individual in the creation and pursuit of those goods.[82]

MacIntyre argued that as this idea of preference took hold in modern society it changed the way we conceived of rational debate and the resolution of philosophical disagreements. What once engaged all of society in collective dialogue, between philosophical, religious and political voices, became the sole prerogative of the individual. Moreover, the resolution of conflicting interpretations of what is required in a given situation was also removed from broader social

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[75] *Ibid* at 6.
[76] *Ibid* at 8.
[77] *Ibid* at 8—9.
[78] *Ibid* at 10—11.
[79] See especially Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame: University of Notre Dame Press, 1988) [MacIntyre, *Whose Justice?*], ch 17 and at 335—339 (discussing the nature of preference).
[80] *Ibid* at 336. There are many varieties of this liberal conception of justice. For a helpful summary, see Stephen Gardbaum, "Liberalism, Autonomy and Moral Conflict" (1996) 48:2 Stan L Rev 385.
[81] MacIntyre, *Whose Justice?*, *supra* note 79 at 336.
[82] *Ibid* at 337—338.

dialogue and formalized in the process of legal adjudication, which was charged with resolving conflicts without invoking an overall conception of the human good.[83]

The meaning and implications of this critique become clearer when viewed through the lens of the issues raised in the discussion of *NS* and incommensurability. First, regarding *NS*, I argued that the balancing analysis employed by the majority tried unsuccessfully to avoid the kind of value judgments associated with adopting a clear rule. This failure was seen in the influence of a conceptual framework (which reflected certain value judgments) in the application of the balancing analysis. MacIntyre would elaborate on this in a slightly different way. For him, the position taken by the majority in *NS* would be indicative of the modern liberal effort to construct legal institutions in such a way as to avoid the use of any theory of the ultimate human good, and thus to remain 'neutral'. For MacIntyre, this effort would be bound to fail for a couple of reasons. First, because in taking this view the Court is relying on the modern model of moral reasoning, which is based on certain value judgments of what is 'good' (i.e. individual preference) and 'bad' (i.e. whatever resists the freedom of individual preference).[84] Second, establishing preference as the basis of legal adjudication limits our ability to rationally resolve conflicts between rights. It breaks apart the discourse of reason that once unified all of human thought, and denies legal adjudication access to a broad spectrum of human experience, understanding and discourse. We should therefore not be surprised when difficulties arise in resolving conflicts between rights within this way of framing the balancing analysis. Grounding legal discourse in a fractured view of human reason deprives the courts of the conceptual tools necessary for developing an analytic framework capable of navigating the complex range of interests, goods and claims that arise in a case involving a conflict of rights.

Regarding the theories of incommensurability, I argued earlier that they are limited in their ability to engage in critical self-reflection of their conceptual frameworks. I suggested that this is related to the self-enclosed nature of deliberation and justification that these theorists propose. MacIntyre's theory shows that the role of communal social commitments or self-understanding functions in these theories in a way similar to individual preference in modern moral philosophy. Deference to community preference indicates that the underlying philosophical structure of the incommensurability theories mirrors that of the *NS* case, which

[83] *Ibid* at 344.
[84] *Ibid* at 345.

resulted in the fragmentation of human reason and giving preference to formal processes of conflict resolution rather than engaging with its substantive aspects. The result is that one of the central arguments made by the incommensurability theories—that our legal discourse is grounded in social context (commitments and self-understandings)—is based upon a view of legal adjudication that aspires to be value-free and abstracted from social moorings. In other words the importance ascribed to social discourses in these incommensurability theories, which is grounded in a commitment to value-plurality in society, is undermined by a contrary commitment to value-free legal discourse.

These critiques of balancing and incommensurability clarify the implications of MacIntyre's moral rational theory to legal adjudication. The fragmentation of human reason renders ambiguous the origin and meaning of the conceptual frameworks that operate in adjudicating conflicts between rights. Focusing on ideals of neutrality and individual preference pushes these conceptual frameworks to the margin. This destroys the possibility of integrating various interests and perspectives within society (religious, philosophical, familial, etc.) through legal adjudication by denying the philosophical structure that could unite them in a single discourse. Formal legal adjudicatory procedures like balancing are looked to as a way to resolve conflicts in a diverse society, but built into the adjudicatory process are presumptions that inhibit the creation of a unifying discourse of conflict resolution. The "reconciliation" of rights (as mentioned by the majority in *NS*[85]) cannot be achieved as long as the formal structure of decision-making presupposes disunity from the start. The result is a perpetual cycle of managing conflict between diverse interests and perspectives. MacIntyre disrupted this cyclical narrative of disunity by challenging the presumptions leading to the fractured vision of human reason and articulating a view of rational enquiry that is able to engage more openly and comprehensively with the whole of human experience.

[85] Whether the resolution of a conflict between rights leads to reconciliation is a bit ambiguous in the case law. As mentioned in the earlier discussion, the majority in *NS* viewed the balancing of rights as a process of reconciling rights (*supra* note 3 at para 30). But reconciliation is also sometimes attached to the idea of accommodation, and distinguished from the process of resolving a "true conflict" of rights. See e.g. *NS*, *supra* note 3 at para 8; *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698 at para 50.

3.2 Embedding Reason in Tradition—Participation and the Ultimate Good

The main thrust of MacIntyre's theory, which directly responds to the idea of preference, is that reason is always embedded within a web of historical, cultural, and social institutions and relationships, and that this unity provides the background against which conflicts between rights can be resolved. There is some overlap here between MacIntyre's theory and the theories grounded in incommensurability. They agree that human reason is embedded within our social institutions and relationships. What distinguishes them is the way that the social embedding of reason is related to the process of rational enquiry. As was discussed earlier in this chapter, theories grounded in incommensurability conceptualize the process of rational enquiry in terms of social commitments and communal self-understanding (which seems to ultimately be a self-enclosed perspective). MacIntyre, to the contrary, understood the process of rational enquiry in terms of the idea of "tradition". Two unique features of MacIntyre's notion of tradition, which are relevant for the resolution of conflicts between rights, are the importance of participation and the pursuit of the ultimate good in the process of rational enquiry.[86]

For MacIntyre, human understanding is something that we participate in with others in the context of communities that extend and evolve over time. The ideas and institutions we are connected to have been received and will be passed on.[87] It is in this way that social relationships, institutions, languages and philosophical conceptions are to be thought of as 'traditions'. We all inherit our ideas about things from the traditions within which we belong.[88] There is no place of human understanding or rational expression that exists separately from its embodiment within a tradition.[89] For MacIntyre, individual free thought always emerges out of participation in and a commitment to a community or tradition. Greatness and success at

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[86] There are various views on the notion of tradition and its role in legal thought. For various views on these issues, see e.g. H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 5th ed (Oxford: Oxford University Press, 2014); H Patrick Glenn, "A Concept of Legal Tradition" (2008) 34 Queen's LJ 427; Martin Krygier, "Law as Tradition" (1986) 5 Law and Philosophy 237; Stout, *supra* note 73.

[87] MacIntyre grounds his theory in the correspondence theory of knowledge, and how it is reflected in the truth claims that develop and change over time through tradition (MacIntyre, *Whose Justice?*, *supra* note 79 at 355—361). Similar arguments regarding the correspondence theory of knowledge can be found in Michael Oakeshott, *Experience and its Modes* (Cambridge: Cambridge University Press, 1933), especially in ch 1. Jeffrey Stout, although a critic of MacIntyre's anti-liberalism, also argues for a similar evolution of conceptions of truth from what is received towards an undefined end. See Stout, *supra* note 72, especially ch 11 and 12, where he argues for and develops a concept of "pragmatism" which involves the pursuit of truth grounded in a form of tradition and practice not altogether dissimilar from MacIntyre's theory.

[88] MacIntyre, *Whose Justice?*, *supra* note 79 at 221.

[89] MacIntyre, *After Virtue*, *supra* note 74 at 222. Also see MacIntyre, *Whose Justice?*, *supra* note 79 at 401.

something (such as chess) first requires disciplined learning of the established practice and its rules.[90] A pupil must first learn from a master. Only after mastering the received practice can she then push the practice and its ideas beyond existing convention.[91] Ideas that are original and effective—freethinking itself—are therefore grounded in existing traditions.

It is important that MacIntyre saw participation in a tradition in terms of the *common* pursuit of an ultimate end, or an ultimate good (i.e. teleology). For MacIntyre, developing an understanding of the ultimate good or ultimate end is a dynamic process that is neither apprehended through purely scientific and abstract reflection nor through a purely pragmatic and institutional process. Rather, it is a combination of both. MacIntyre argued that Aristotle captured this best when he supplemented Plato's theory of the forms with the idea that the forms can only be understood through their various incarnations.[92] In other words, abstract theoretical understanding is only possible when coupled with practical knowledge. For Aristotle this meant that to come to know what a just polis is requires participating in a political community.[93] To know the ultimate end is to participate *with others* in the pursuit of the ultimate end. As a result, the idea of the ultimate good is not a static thing; rather, it is only through the *quest for* the ultimate good with others that we come to understand what the ultimate goal of the quest really is.[94] For MacIntyre the idea of the 'ultimate end' of human reason is never closed but is an ongoing and necessarily incomplete exploration.[95]

From this we can see that MacIntyre envisions the process of rational enquiry as dialectical (rather than circular) in nature. The pursuit of ultimate ends is necessary to animate a tradition; it connects a tradition to the past, carries a tradition forward in time and perpetuates the vitality of the social relationships and institutions on which a tradition is based. Simultaneously, the pursuit of ultimate ends must take place through participation in a community. We receive

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[90] MacIntyre, *After Virtue*, *supra* note 74 at 190.
[91] MacIntyre notes that practices do not have goals that are fixed for all of time, but that they are fluid, even despite their complex reliance on institutionalization (see *ibid* at 193—194).
[92] MacIntyre, *Whose Justice?*, *supra* note 79 at 93.
[93] *Ibid* at 98—99.
[94] MacIntyre, *After Virtue*, *supra* note 74 at 219.
[95] MacIntyre describes his project as a kind of historicism that "…involves a form of fallibilism… [and] excludes all claims to absolute knowledge" (*ibid* at 270). MacIntyre looks to Aquinas' theory as mode for the way that "…the ultimate end of human beings is outside and beyond this present life" (MacIntyre, *Whose Justice?*, *supra* note 76 at 192). And again: "The practical life, as Aquinas portrays it, is a life of enquiry by each of us into what our good is, and it is part of our present good so to enquire. The final discovery of what our good is will indeed reveal to us the inadequacy of all our earlier conceptions, an inadequacy strikingly expressed in Aquinas' verdict in his own work in the days immediately before his death. But at every stage in this practical enquiry we have a knowledge of our good adequate to guide us further…" (*ibid* at 193).

what has come before, critically reflect on the meaning of what we received within our current context and experiences, and through this process give shape to what will be passed on. In this social dialectical process, reason can only be found and articulated with a view of the self (and society) as a unified whole, as within a narrative that connects all the parts of our lives.[96] Rational enquiry and decision-making cannot be divorced from social/political commitments, conceptual/linguistic inheritances, or the development of human virtues and excellences, as they exist in the context of shared practices.

In response to the issues raised by *NS*, MacIntyre might say that the resolution of conflicting rights is only possible when set within the context of a background that can accept the unity between the rights at issue in terms of the communal pursuit of the good.

> It is in looking for a conception of *the* good which will enable us to order other goods, for a conception of *the* good which will enable us to extend our understanding of the purpose and content of the virtues, for a conception of *the* good which will enable us to understand the place of integrity and constancy in life, that we initially define the kind of life which is a quest for the good.[97]

Without the ultimate good forming part of the conceptual background of legal decision-making, we would be unable to rationally decide cases involving a conflict between rights.

MacIntyre's theory of tradition provides a way to approach conflicts between rights totally different than that taken in the *NS* case and the theories grounded in incommensurability. Situating rational enquiry within tradition—participating in the pursuit of the ultimate human good that unifies all of our lives—provides a background that encompasses even the most divergent rights and interests within a single discourse. Within this framework there is no need to seek 'neutrality' or to assert a particular set of social values, commitments or self-understanding. Instead, it enables direct engagement with the many different substantive interests and perspectives that arise in the conflict between rights. This addresses the central weaknesses of the *NS* balancing analysis and the theories grounded in incommensurability, but in so doing it points to the necessity of developing a new, and relatively thick, philosophical foundation for legal discourse.

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[96] MacIntyre, *After Virtue*, *supra* note 74 at 205, 218.
[97] *Ibid* at 219.

3.3 Encountering and Integrating Difference

MacIntyre's theory provides an important set of ideas that can be used to re-frame how we understand legal discourse and the adjudication of religious claims, especially in the context of conflicting rights. A crucial component of this is how, for MacIntyre, rational enquiry *necessarily* engages with and integrates diverse perspectives and experiences. It is because of this that MacIntyre's theory of tradition-based rational enquiry is at its core neo-Thomistic, inspired as it was by Aquinas's integration of the diverse views of Augustinian theology and Aristotelian philosophy.[98] This, I believe, is a key part of the framework on which to develop a self-reflective legal analysis and integrative solutions for conflicts between religious and other legal rights.

Traditions, for MacIntyre, do not provide static and isolated definitions of meaning and truth. Rather, they are constantly evolving and interacting with other ideas and conceptions of meaning and truth. For MacIntyre, a tradition evolves when it encounters something outside of its own conceptual framework, like ideas or experiences that it cannot account for from within its own resources. One of two things happens in the encounter. Normally, the participants within the tradition will develop solutions to these conceptual challenges by innovating with the resources of the tradition itself, pushing the meaning of those existing ideas to include the new phenomenon without disrupting the core identity of the tradition in the process.[99] This results in the growth and expansion of the tradition, making it stronger. Alternatively, in extremely difficult situations the internal innovative process might fail, in which case the tradition enters into a moment of crisis, "…when by its own standards of progress it ceases to make progress…."[100] At this point a rival tradition might be able to provide an explanation for the crisis and its resolution, in which case the old tradition is either subsumed into the new tradition or isolates itself and begins to disintegrate.[101] This constant encounter with diverse ideas, experiences and perspectives, is central to the life of a tradition as such. It represents the ongoing collective pursuit of a conception of the ultimate good and the unification of human life.

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[98] MacIntyre, *Whose Justice?*, *supra* note 79 at ch 10.
[99] See *ibid* at 355—356.
[100] *Ibid* at 361. The discussion of epistemological crises is described in detail from 361—365.
[101] *Ibid* at 365.

This type of encounter with foreign concepts and other traditions, envisioned by MacIntyre as central to the process of rational enquiry, does not seem possible either within the balancing analysis provided by *NS* or the incommensurability theories. From what we have seen previously, the majority in *NS* perceived its approach as standing above the fray, as neutral regarding values and the like, void of hierarchies of rights and values, formal and objective in balancing the harmful and beneficial effects of its decision. This view is incapable of engaging various voices and ideas in rational discussion because it denies the forum within which such a discussion can take place. Focusing on an analysis devoted to neutral balancing pushes the conceptual background for decision-making aside. Framing balancing in this way exposes legal decision-making to the cycle of managing conflict with no true reconciliation possible.

Likewise, although the incommensurability theories drew on a set of broader social discursive ideas they could not produce meaningful engagement between divergent points of view. Incorporating a larger frame of social context into the decision-making process did not answer the question of how to choose and justify one view amongst many. An increased awareness of social contextual factors cannot guide the adjudication of conflicting rights if the process of adjudication is restricted to a single social communal perspective and insulated from external criticism. It is necessary to address how diverse points of view might be integrated together in the legal decision-making process, otherwise diversity can only be engaged within the limited frame of reference provided by a particular perspective. MacIntyre's theory outstrips these limitations by framing rational enquiry as simultaneously context (tradition) specific *and* dependent on the interaction between different perspectives (traditions). It is the shared *process* of rational enquiry, of the collective pursuit of the ultimate good, which enables the integration of diverse perspectives.

This can be seen if we turn back to look at the approach taken by Justice LeBel in *NS*. Justice LeBel did not pretend to place his decision above the discourse on social communal commitments and values, but sought to strengthen and apply the values embedded in the Canadian social and legal tradition. The key point to consider here is that Justice LeBel portrayed the conflict between religious and other rights solely from within the frame of reference provided by the Constitution.[102] The challenge with framing the evaluation of the compatibility of the Muslim face covering practice with the established Canadian criminal trial face-to-face

[102] *NS*, *supra* note 3 at para 72.

testimony practice in this way is that it precludes any meaningful engagement between the Canadian social-legal tradition and the Islamic religious tradition. As MacIntyre's theory argued, the encounter between traditions is a *necessary* part of the life of a tradition and the process of rational decision-making. This means that to approach the conflict between rights in *NS* through the Canadian social-legal tradition, as a tradition-based rational enquiry, must foster openness in the encounter with other traditions.

I would suggest that Justice LeBel's reference to the Canadian social-legal tradition is not open to inter-tradition dialogue but is framed as an internal and self-enclosed reflection. This, I have already argued, is the same type of self-enclosure we saw with the incommensurability theories, which asserts one particular social communal set of commitments and understandings. There are two main results that flow from this self-enclosed process of decision-making. First is it cannot engage or critically evaluate the rights and values at issue because it forecloses certain (external) arguments *ab initio*. Second, just as importantly, it restricts the reach and forcefulness of the reasons justifying the decision. Resolving a conflict between rights from a self-enclosed view of the Canadian social-legal tradition will only be "reasonable" within that tradition and for those who belong to it. Framing a decision in this way will not be reasonable and justifiable in the same way for those belonging to the Islamic religious tradition, but will rather appear as an assertion of the power and authority of the Canadian state legal system. Those who see themselves belonging to both the Canadian and the Islamic traditions, perhaps like NS[103], will be left with the task of building connections to bridge the gulf between the two. In other words, Justice LeBel's approach misses an opportunity to integrate the Islamic religious tradition with the Canadian social-legal tradition.

MacIntyre's theory of tradition-based rational enquiry provides the conceptual tools that enable us to move beyond the limitations found in *NS* and the theories of incommensurability. But deploying MacIntyre's theory in the context of the legal adjudication of conflicts between religious and other rights involves a significant shift in the way we understand and frame legal adjudication. How this looks in practice will take considerable time and effort to address. The preceding discussion shows that in order to begin this process will require a posture of openness to engaging with diverse views and perspectives as part of a single and unified discourse. This

[103] Another recent legal example of an individual engaged in the struggle to belong to both the Canadian social-legal and Islamic religious traditions would be Zunera Ishaq. See *Ishaq v Minister of Citizenship and Education*, 2015 FCC 156, [2015] 4 FCR 297, 381 DLR (4th) 541, aff'd 2015 FCA 194.

will affect the way that we conceptualize the interaction between religious and non-religious claims, interest, goods and values within the framework of legal discourse. This is not to say that one must subsume or bow to the other; rather, all of these voices can be knit together through participation in the common process of pursuing the ultimate human good.

CONCLUSION

The *NS* case opens a very interesting and compelling conversation regarding the nature of legal discourse and its relationship with diverse viewpoints, especially religious claims. The conflict between rights in *NS* draws our attention to the background against which the meanings of those rights are understood. This leads us to consider the nature and impact of the conceptual presumptions underlying the legal analysis, and all of the complexities that go along with that. In *NS*, we are forced to confront the fact that the process of resolving a conflict between rights involves much more than simply weighing and balancing rights. It engages with the social communal commitments and understandings that structure the balancing process.

The challenge of balancing rights of religion with other rights puts the puzzle of incommensurability front-and-centre. How are courts to compare and weigh things when there is a (sometimes rather drastic) gap between them? In concrete situations such as these the temptation to put the law "above the fray" is at its greatest. Claiming a neutral and formal balancing analysis is the manifestation of this. The theories of incommensurability show that it is necessary to invoke some form of social-communal basis to compare and to balancing rights. Conflicts involving religious claims and other legal rights can only be resolved through a process of creating common ground through the activity of a social community. In this way the discussion of this chapter mirrors many of the arguments made throughout the dissertation project. For the law to do what it does, especially when religion is at issue, requires more than the bald application of principles to facts. Or, rather, the application of legal principles involves a social and communal dimension. In order to compare and balance rights depends on being able to frame legal adjudication in a way that engages these dimensions. In the context of adjudicating conflicts between rights this requires drawing together diverging perspectives into a single, common rational process that includes its social dimension.

I argued that MacIntyre's theory of tradition-based rational enquiry provides the conceptual and philosophical tools to begin to develop such a framework for legal analysis. MacIntyre's theory helps provide a clear and compelling description and explanation of the difficulties identified with the *NS* decision and with the incommensurability theories. It also helps provide an alternative philosophical perspective that challenges the way we are accustomed to think about legal discourse and its interaction with diverse points of view. Given the seeming insufficiency of the approaches taken in the *NS* balancing analysis and the theories of incommensurability, MacIntyre's insights should be welcomed even if they are unable to answer all of the questions we have.

There are no simple or definitive solutions for the questions that have arisen throughout this chapter. There are, however, a few general points that can be gleaned from the discussion that will help move us forward in a new and positive direction. First, we must identify the conceptual framework underlying the legal decision-making process, and its connection to historical context and the other modes of human and social experience. Second, we must allow our understanding of this framework to be open to criticism and challenge from both within and outside of its natural boundaries. We must be willing to acknowledge that the framework is always limited in some way and in constant need of adaptation and revision. Third, ideas that come from a framework foreign to our tradition of law must be engaged seriously, as potentially having insight into the nature of the conflict and its resolution. To close off the discussion to ideas that do not already fit within our current framework undermines the value of the discussion (and our tradition) as a whole. This means that legal discourse should remain open to forms of discourse that are alien (or even opposed) to the framework of our legal tradition, and pursue forms of enquiry supportive of such openness. These points set the agenda for the next chapter.

MacIntyre's theory opens us to the possibility that ideas derived from religious discourse might be able to provide a unique perspective on legal issues that is immensely helpful. Religious voices should not be *prima facie* disregarded and should not be forced to adapt to a presumed set of discursive and philosophical ideals in order to speak within the legal discourse. In this sense MacIntyre affirms Horwitz's argument, which proposed that law should approach the adjudication of religious claims agnostically rather than making a judgment about the truth or falsity of religion *ab initio*. But MacIntyre's theory takes us one step further to say that it is in fact the very difference of religious ideas that holds promise for achieving resolution through

legal discourse. In light of MacIntyre's theory, we must reconsider the role of law in adjudicating religious claims, especially when religious claims conflict with other legal rights and interests, and reframe it in terms of the interactive and mutual participatory process of tradition based rational enquiry.

In conclusion, I would suggest that the apparent unwillingness of the Court in the *NS* case to engage the questions discussed in this chapter warrants serious concern. This resistance breeds a self-enclosed discourse laden with conceptual and structural analytic limitations. The voices of religion are muted within the legal discourse; religious ideas and interests are adjusted to fit the framework of the court. My reflections on the *NS* case, incommensurability and Alasdair MacIntyre, provide a starting point to recast the way we conceptualize legal discourse and the way it frames the interaction between religious and non-religious claims and interests. We are now in a position to explore new paths for framing the law's interaction with religion and to imagine better ways to integrate religious and other legal claims.

CHAPTER 5

Translation and Common Ground: Reframing the Legal Adjudication of Trinity Western University's Proposed Law School

"Common ground is what emerges when you assume the normative status of your own judgment and fix the label of "unreasonable" or "inhuman" or "monstrous" to the judgment of your opponents . . . The irony—not a paradox or even a matter of blame because it is inevitable—is that while adhering to "common ground" is proclaimed as the way to sidestep politics and avoid its endless conflicts, the specifying of common ground is itself a supremely political move."[1]

"At the centre of law is the activity of translation."[2]

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INTRODUCTION

Chapter 4 left us in a strong position to return in this final chapter of the dissertation to the dispute surrounding Trinity Western University's (TWU) proposed law school. In the first chapter I examined the TWU dispute as a matter of making space for a religious community within the institutional structures of the legal profession. This turned our attention to the way that the law's encounter with religion can be seen as an interaction between communities. Bracketing the jurisprudential questions of the dispute put the social interactive dimension of the relationship between law and religion front and centre, which chapters 2 and 3 then took up and explored in greater depth. Chapter 4 brought the discussion of the social interactive dimension of

**Note: an earlier version of this chapter was published as "Translating the Conflict over Trinity Western University's Proposed Law School" (2017) 43:1 Queen's Law Journal 175.

[1] Stanley Fish, "Mission Impossible: Settling the Just Bounds Between Church and State" (1997) 97:8 Colum L Rev 2255 at 2264.

[2] James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990) at 246 [White, *Justice as Translation*].
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law's relationship with religion to the context of the balancing analysis, which is central to the legal puzzle of the TWU dispute.

The crux of the TWU dispute, which led to the litigation introduced and discussed in chapter 1,[3] is that TWU requires its students to sign and follow TWU's Community Covenant Agreement, which restricts permissible sexual activity to heterosexual marital relationships.[4] The legal arguments and analyses in the dispute have focused largely on balancing the rights of religious freedom with the equality rights that protect LGBTQ people against discrimination.[5] In this context it is all too easy to look to the law for an objective answer to the dispute, as if understanding what the law 'really is' would lead to a just and right decision. But this fails, I believe, to address the ways in which the process of legal adjudication structures the legal arguments and analyses offered by the parties and the courts. The complex social and structural issues lurking behind the legal questions of the TWU dispute must be accounted for in the process of legal adjudication, even though they are not easily incorporated into the legal argument and analysis.

The conclusions reached in chapter 4 help set the direction that I will take here to address these social dimensions within the context of the jurisprudential issues of the TWU dispute. Chapter 4 identified the importance of drawing on the deep social and philosophical backgrounds of the diverse perspectives brought to the law for balancing. I suggested that the process of legal balancing must be framed in a way that can incorporate and integrate these backgrounds, accounting for their specificity while also pressing them forward in the pursuit of a common good. I left open the question of exactly how this is accomplished in the legal context and how it might alter the way we perceive the legal adjudication of religious claims.

In this chapter I propose the idea of translation as a way to bring these insights to an analysis of the jurisprudential questions of balancing at issue in the TWU dispute. The trope of

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[3] *Trinity Western University v The Law Society of British Columbia*, 2016 BCCA 423, 405 DLR (4th) 16, [*LSBC* BCCA]; *Trinity Western University v Law Society of Upper Canada*, 2016 ONCA 518, 131 OR (3d) 113 [*LSUC* ONCA]. As noted in chapter 1, both the British Columbia and Ontario lawsuits were appealed to the Supreme Court of Canada. They were heard together on November 30 and December 1, 2017. On June 15, 2018, the concurrent decisions *Law Society of British Columbia v Trinity Western University*, 2016 SCC 32 [*LSBC* SCC], and *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 [*LSUC* SCC] were released. Both upheld the decisions of the law societies to refuse to accredit TWU's proposed law school.

[4] Trinity Western University, "Community Covenant Agreement", online: <www8.twu.ca/studenthandbook/twu-community-covenant-agreement.pdf> [TWU Covenant].

[5] How this balancing occurs within the administrative context has its own unique implications, which are also subject to legal argument. Further discussion of the features of the administrative law analysis will be found in Part 2, *below*.

"translation" has two functions here. First, it reframes the way we look at the legal arguments used in the conflict over the accreditation of TWU's proposed law school to see the residual tension of using the language of the law to express positions laden with social complexity. Secondly, translation also helps us take a step beyond the questions about where to draw the line in law between TWU and the Law Societies (i.e. between private religious association and public legal institutions) and to focus instead on what is involved in integrating TWU and the Law Societies through the process of legal interaction.

The integration contemplated here is different than in chapter 1. In chapter 1, integration was considered between the community of TWU and the community of the legal profession. In this chapter the integration is between TWU's religious perspective and the other perspectives in the dispute (the public interest of the law societies and the equality interest of LGBTQ people). This integration is *through* or *within* the law, not the integration *with* the law (which was the subject of chapter 1). This in-between role of the law in managing social conflicts was a key part of the discussion in chapter 4, and provides a way for us to return to and reimagine the legal adjudication of the TWU dispute now.

There are five parts in this chapter. In the first two parts I trace two perspectives, each with its own interests, concerns and presumptions, in the legal arguments and analyses offered in the process of adjudicating the TWU proposed law school. The first part will briefly look at the intersection of TWU's evangelical perspective with its argument for religious freedom.[6] TWU's evangelical perspective affects how it describes itself in law as a community and its practice of community discipline. I will show the difficulty that TWU has in translating its evangelical perspective into the language of the law of religious freedom. In the second part I will explore the way in which the language of discrimination and equality is used in relation to 'harm' to oppose TWU's proposed law school.[7] I look specifically at the discursive effects of these

[6] I chose to focus on the translation of TWU's argument for a couple of reasons. First, the arguments of the law societies and their social/communal dimensions were already discussed in quite a bit of detail in chapter 1. Secondly, the arguments of the law societies are dealt with indirectly through the decisions of the Ontario courts—see note 7 below.

[7] I rely here primarily on the Ontario court decisions (*Trinity Western University v Law Society of Upper Canada,* 2015 ONSC 4250, 126 OR (3d) 1 [*LSUC* ONSC], and *LSUC* ONCA, *supra* note 3) instead of the arguments of the law societies represented in their litigation pleadings. There are two reasons for this. First, the decisions of the Ontario courts capture and articulate quite precisely the heart of the legal argument that opposes accrediting TWU's proposed law school, and so serves the purpose of this chapter by providing a foil that draws out the dissonance in the competing uses of law. Secondly, looking at the legal analysis offered by the courts instead of the legal

arguments and how they obscure an important question about how the various interests of the legal profession, the public and the LGBTQ community fit together. The imperfections in translating these perspectives into the language of law— the way they contort, stretch and bend the meaning of the law— are incredibly informative. Through them, we see not only the unsettled parts of the legal doctrine at issue but also the way that doctrine reflects and refracts different worldviews.

Paying attention to the *process* of translating these different perspectives into the language of the law reminds us that the law is indeed a *language*. The normative demands of the law speak as much to social attitudes as to propositional coherence. From this view, the dispute over the interpretation of the law regarding TWU's proposed law school is a conversation between two users of the language of the law. Deciding the fate of TWU's proposed law school will affect legal *relationships*, not just legal propositions. This sets the stage for the third, fourth and fifth parts of the chapter. In the third part I propose the idea of "law as translation" as an approach for confronting the dissonance caused by holding the first two parts next to each other. In the fourth part I set out to describe the way that the discourse of the legal adjudication structures the relationship between TWU and the Law Societies. I argue that the way the legal adjudication has been framed hinders the process of interaction that lies at the heart of the law as an enterprise of translation. In the fifth part I propose a reconfiguration of the legal discourse, which casts the process of balancing the religious and other interests through the law as participating together in a "community of friendship" rather than a competition between strangers.

I should note that this chapter focuses less on developing the theoretical ideas at work than previous chapters have. Instead of talking *about* translation I aim to trace the process of translation at work in the TWU dispute and explore its implications for the way the process of legal adjudication manages the dispute. This shift in emphasis is intentional. Embarking on a detailed analysis of the legal arguments and analyses of the TWU dispute puts many of the insights developed throughout the other chapters to work in the nitty-gritty of legal adjudication. The goal is to demonstrate the effect of accounting for the socio-relational dimensions of the interaction between law and religion on the process of legal adjudication. In other words, the

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arguments of the Law Societies (and interveners) shows that the legal adjudicatory activity of the courts is also caught up in the process of translation.

purpose of this chapter is, as indicated by its title, to show what it looks like to translate the situation surrounding TWU's proposed law school from a conflict over legal principles to an ongoing process of social interaction.

1 TRANSLATING TWU'S COVENANT INTO THE LANGUAGE OF THE LAW

The TWU Covenant is based upon a view of the TWU community that is oriented equally toward academic achievement and spiritual formation, understanding these two things to be mutually corroborative. The opening paragraph of the TWU 2016–2017 Academic Calendar says: "Trinity Western University is much more than an institution with classrooms, books and exams; it is a passionate, intentional, disciple-making academic community."[8] TWU describes itself as "an arm of the Church, [which] is first and foremost an academic community of people passionately committed to Jesus Christ and to God's purposes".[9] One of the six core values of TWU is "[d]iscipling in [c]ommunity", which encourages all members of the community "to deepen their understanding of what it means to be disciples of Jesus Christ, to practice such discipleship, and to help others be disciples".[10] Students are invited to be "co-owners" and "shareholders" of the community, accountable to each other in the common pursuits of the community.[11]

TWU is a thoroughly evangelical organization. In addition to its formal affiliation with the Evangelical Free Church of Canada, TWU's self-description displays several of the main features of evangelicalism.[12] This includes a focus on individual responsibility for the pursuit of "purity", which calls for the total surrender of the individual will to God's will.[13] The evangelical

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[8] Trinity Western University, "Academic Calendar 2017-2018" at 5, online: <www.twu.ca/students/current-students/academic-calendar> [TWU, "Academic Calendar"].
[9] *Ibid* at 5.
[10] *Ibid*. See also Trinity Western University, "Core Values", online: <www.twu.ca/about/core-values> [TWU, "Core Values"].
[11] TWU, "Academic Calendar", *supra* note 8 at 4.
[12] See *ibid* at 4—6. TWU has six core values: 1) obeying the authority of scripture; 2) pursuing faith-based and faith-affirming learning; 3) having a transformational impact on culture; 4) servant leadership as a way of life; 5) striving for excellence in university education; and 6) discipling in community. *Ibid*. See also TWU, "Core Values", *supra* note 10 (the evangelical aspect of the core values is especially apparent in the fuller descriptions of each value, except for "[d]iscipling in [c]ommunity", provided on TWU's website); TWU, "Academic Calendar", *supra* note 8 at 10 (the evangelical aspects are also apparent in the "Statement of Faith" section of the Academic Calendar).
[13] See Mark Y Hanley, "Evangelical Thought" in *Encyclopedia of American Cultural and Intellectual History*, Vol 1 by Mary Kupiec Cayton & Peter W Williams (New York: Charles Scribner's Sons, 2001); Ian A McFarland, et al,

focus on individual regeneration/transformation is part and parcel with a disestablished view of the Christian Church. In this perspective, the "true Church" is understood in spiritual terms and grounded in the pursuit of and obedience to God's will; those who are being transformed by God compose the Church, so that the individual life of purity through obedience to God is the essence of the Church.[14] For many of the Reformed Christian movements, including evangelicalism, inner discipline is inseparable from Church discipline.[15] The process of transformation experienced by individuals together is understood to have a role in God's plan to transform the world.[16] The Church is the power of light and obedience in a dark and evil world. It is through individual participation in the communal pursuit of God's will and obedience to his instruction, in being made pure, that God's work is done in the world. This understanding connects to a strong sense of mission in evangelicalism, in seeking to convert individuals to faith in God and to learn to be obedient to God's will.[17]

Voluntariness in religious choice is a central aspect of evangelicalism (and the Christian Reformation movement generally).[18] But it is important to note the unique emphasis given to voluntariness in evangelicalism, which sees the free choice of faith not as a good in itself but as a necessary precondition for surrender and obedience to God. Hence, the TWU Covenant reads, "True freedom is not the freedom to do as one pleases, but rather the empowerment to do what is best."[19] God provides guidance for humanity through the Bible, supplementing the limitations of human understanding. It is through surrender to God's guidance, supplanting human understanding with God's instruction and aligning oneself with God's will and truth, as revealed in scripture, that human corruption is transformed and redeemed.[20] Through this process alone,

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eds, *The Cambridge Dictionary of Christian Theology* (Cambridge: Cambridge University Press, 2011) *sub verbo* "evangelical theology".

[14] For a description of the changing views on the understanding of the Christian Church, see McFarland et al, *supra* note 13, *sub verbo* "ecclesiology"; Susan E Schreiner, "Church" in *The Oxford Encyclopedia of the Reformation* by Hans J Hillebrand (Oxford: Oxford University Press, 1996).

[15] See Lee Palmer Wandel, "Church Discipline" in *The Oxford Encyclopedia of the Reformation* by Hans J Hillebrand (Oxford: Oxford University Press, 1996).

[16] See DG Hart, "Evangelical Protestants" in *Encyclopedia of American Cultural and Intellectual History* by Mary Kupiec Cayton & Peter W Williams (New York: Charles Scribner's Sons, 2001).

[17] See TWU, "Core Values", *supra* note 10 (specifically addressed in the subsection "Transforming Culture").

[18] See Hanley, *supra* note 13.

[19] *Supra* note 4 at 3.

[20] See TWU, "Core Values", *supra* note 10 (specifically addressed in the subsection "Obeying the Authority of Scripture"). Biblicism is another key aspect of Evangelicalism. See McFarland et al, *supra* note 13, *sub verbo* "evangelical theology". For definitions regarding the corruption of human nature and the process of regeneration, see *ibid*, *sub verbo* "sanctification"; Alister E McGrath, "Sanctification" in *The Oxford Encyclopedia of the Reformation* by Hans J Hillebrand (Oxford: Oxford University Press, 1996).

true freedom is experienced. Asking students to commit themselves to follow biblically grounded standards of moral behaviour—even asking them to give up aspects of their lives as personal as sexuality—is not the specific prerogative of TWU, but is a precondition for the students to experience the true freedom that is from God. This is an essential element for achieving TWU's evangelical mission, which is to develop the whole student: intellectually, socially, emotionally, physically and spiritually.[21]

The concern of the TWU community in holding its members accountable to "right living" reflects an ancient theme of maintaining the purity of Christian community.[22] In the contemporary setting, the concern for the purity of Christian community is seen most strongly in the (sometimes rather extreme) exercises of church discipline in Anabaptist communities. The Anabaptists understand the Church to be the presence of God in a dark and evil world separated from the world, sanctified and holy through the obedience of its members to God's words. The Anabaptist Christian community is jealously guarded and its purity judiciously enforced through different forms of church discipline such as excommunication.[23] Although TWU's self-description does not have the same apocalyptic fervour of some Anabaptist groups, they do share key elements. This includes the sentiment that Christian community is a shelter where believers are strengthened and enabled to participate in God's redemptive work in the world, and, as such, the community must be protected in order to preserve its role in fulfilling God's mission of transforming the world.[24]

The ideas of human limitations, surrender to God, membership in community and participation in God's mission undergird the TWU Covenant and the concern of TWU to maintain a structure of accountability for the members of its community. This complex theological perspective is not easily translated into the religious freedom protected in the *Canadian Charter of Rights and Freedoms*.[25] From its earliest interpretation, section 2(a) of the *Charter* was understood to protect individuals from being coerced by the state regarding their

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[21] TWU, "Academic Calendar", *supra* note 8 at 9.
[22] See generally Dale B Martin, *The Corinthian Body* (New Haven: Yale University Press, 1995) (although the ancient sense of purity of Christian community, which was grounded in Greco-Roman conceptions of the connection between the individual and social bodies, does not appear in the same terms today, it is still found today in the idea that the behaviour of individual members affects the health of community).
[23] See e.g. Schreiner, *supra* note 14; Wandel, *supra* note 15.
[24] See TWU, "Core Values", *supra* note 10 (specifically addressed in the subsection "Pursuing Faith-Based Learning and Faith-Affirming Learning").
[25] Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, [*Charter*] s 2(a).

religious beliefs.[26] As this understanding developed, it came to be seen as a protection for the individual's own understanding of his or her religious obligations.[27] All that was needed was a nexus with religion, rather than alignment with "orthodox" religious teachings or practices.[28] Protection from being coerced has remained relatively central to the freedom of religion jurisprudence.[29] Of course, the law has recognized the ability of religious communities to exercise disciplinary authority over their members, even at great cost.[30] But there is also a counter-narrative, which has recently gained strength, whereby religious freedom is understood to protect individuals from the power and abuse of their religious communities.[31] Likewise, there is a line of decisions that affirm the communal aspect of religious freedom.[32] But communal rights of religious freedom have been understood as a vehicle for individual rights, rather than something that stands on its own.[33]

The importance given to the individual in the Canadian law of religious freedom resonates with TWU, as seen in the evangelical focus on the individual journey of faith. The goal

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[26] See *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 336—37, 60 AR 161 [*Big M*].

[27] See *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256; *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551 [*Amselem*].

[28] *Amselem*, *supra* note 27 at para 46.

[29] See e.g. *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3, at para 74 (the principle of the religious neutrality of the state creates a neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality); *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54, [2017] 2 SCR 386 [*Ktunaxa*], at para 152 (Moldaver J, concurring with the majority in result, expressed concern about restricting the use of public land to conform with the religious beliefs of a particular group).

[30] See e.g. *Hofer v Hofer*, [1970] SCR 958, 13 DLR (3d) 1; *Delicata v Incorporated Synod of the Diocese of Huron*, 2013 ONCA 540, 117 OR (3d) 1 [*Delicata*]; *Caldwell v Stuart*, [1984] 2 SCR 603, 15 DLR (4th) 1; *Barickman Hutterian Mutual Corp v Nault*, [1939] SCR 223, [1939] 2 DLR 225 [*Nault*].

[31] See e.g. *Bruker v Marcovitz*, 2007 SCC 54 at para 19, [2007] 3 SCR 607; *Hall (Litigation guardian of) v Powers* (2002), 59 OR (3d) 423, 213 DLR (4th) 308 (Sup Ct J).

[32] See *Ktunaxa*, supra note 29 at para 74. See generally *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567; *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772 [BCCT]; *Loyola High School v Quebec (AG)*, 2015 SCC 12, [2015] 1 SCR 613 [*Loyola*]. The communal aspect of religious freedom is part of the original description of the concept. See *Big M*, supra note 26 at 336. For further discussion of the intersection of religious communalism and religious freedom doctrine, see Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016); see also Richard Moon, ed, *Law and Religious Pluralism in Canada* (Vancouver: UBC Press, 2008).

[33] See Faisal Bhabha, "From *Saumur* to *L(S)*: Tracing the Theory and Concept of Religious Freedom Under Canadian Law" (2012) 58:2 Sup Ct L Rev 109 at 110 (Bhabha argues that despite the communitarian aspect of early constitutional encounters with religion, post-*Charter* Supreme Court of Canada jurisprudence has tended more to a liberal theory in which individual autonomy is paramount). One implication of this is that religious freedom is inherently limited by the rights of others. See e.g. *P (D) v S (C)*, [1993] 4 SCR 141 at 182, 108 DLR (4th) 287; *B (R) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at paras 80, 107—09, 226, 21 OR (3d) 479 at paras 80, 107—109, 226. For further discussion regarding the complexity of accounting for the relationship between individual, familial and communal dimensions in the legal adjudication of religious claims, see e.g. Shauna Van Praagh, "Faith, Belonging, and the Protection of 'Our' Children" (1999) 17 Windsor YB Access Just 154.

of the TWU Covenant is to help foster *individual* intellectual and spiritual formation, not to develop the profile or purposes of the community per se. The difference between TWU and Canada's law of religious freedom emerges in the particular emphasis given to the focus on the individual and the implications that this carries. The Canadian law on religious freedom maintains that religious belief and religious choice are, despite their associational component, fundamentally *private* activities.[34] TWU's evangelical perspective pushes against this view. Even though for TWU the choice to follow God is the responsibility of the individual, it is also through this choice that the individual participates in God's larger plan for the whole world. Individual choices therefore have an intrinsic and ineffaceable public dimension. The divergence from Canadian jurisprudence can be seen in TWU's view of the role of the community in relation to the individual choices of its members. Educating students in an evangelical way requires the university community to foster the students' intellectual and spiritual pursuit of God in its private dimension, too. In particular, the community provides accountability for the individual to remain faithful to the Bible, which is the ultimate guide for Christian life and mission.

The unique public nature of the legal profession is precisely what motivates TWU to become involved in legal education— to train good, Christian lawyers, who will model the purity and integrity of Christian living in a public (and morally agnostic) profession.[35] TWU's mission as an evangelical institution, a self-proclaimed arm of the Church and a site for the spiritual formation of Christian disciples, forges a deep connection between religious commitment and public life. In seeking to open a law school, TWU aims to push further into the public space and advance the goals of its eschatological mission of social transformation. This helps make sense of why TWU has met so much resistance from within the legal profession. There are two countervailing ideas about the public and its relation to religion. On the one hand is the view,

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[34] For a discussion of the associational component of the freedom of religion and its application to TWU's proposed law school, see Mark Witten, "Tracking Secularism: Freedom of Religion, Education, and the Trinity Western University Law School Dispute" (2016) 79:2 Sask L Rev 215 [Witten, "Tracking Secularism"]; Thomas MJ Bateman, "Trinity Western University's Law School and the Associational Dimension of Religious Freedom: Toward Comprehensive Liberalism" (2015) 66 UNBLJ 78. The decision that comes closest to recognizing an institutional aspect, separate from the individual aspect, of religious freedom is *Loyola*, where the associational aspect of religious freedom is emphasized in the majority decision, but it is only explored as an independent aspect of religious freedom in the minority concurring decision. See *Loyola*, *supra* note 32 at paras 60, 62, 67, 91—100, 135—139.

[35] For an interesting discussion of the potential benefits of religious lawyering, see Faisal Bhabha, "Religious Lawyering and Legal Ethics" in Benjamin L Berger & Richard Moon, eds, *Religion and the Exercise of Public Authority* (Oxford: Hart, 2016) 41.

informed by Canadian law, which sees religion as a private matter that should be kept, for the most part, out of the public. On the other hand is the view, informed by an evangelical perspective, which sees the division between religious belief and public life as something to be overcome. It is precisely TWU's hope to further its evangelical mission through legal education that has been perceived as a threat to the *public* nature of legal education and the legal profession.

TWU's claim that it has a protected right to employ its Covenant does not fit neatly into the Canadian legal conception of religious freedom because religious freedom is philosophically grounded in the division between internal beliefs and external practices, which reflects the division between private and public spheres in Western liberal societies more generally.[36] Of course, TWU received some legal recognition by the Supreme Court of Canada in 2001 of the legitimacy of the TWU Covenant.[37] The professional field at issue in *BCCT* was TWU's teacher training program, and whether the British Columbia College of Teachers could refuse to accredit TWU's program because of the TWU Covenant.[38] The Court upheld the TWU Covenant in this context, but even in doing so, reiterated the distinction between the privacy of religious belief and the activity of public life. This is summed up in the pithy statement of the Court: "The freedom to hold beliefs is broader than the freedom to act on them."[39]

The central question in the *BCCT* case was whether teachers trained solely at TWU, with its institutionally ingrained religious conservative view of acceptable human sexuality, would be capable of teaching in such a way as not to harm LGBTQ students.[40] In finding that the TWU Covenant does not provide sufficient basis to reach such a conclusion, the Court held that TWU graduates are free to hold whatever views about human sexuality are provided by their religion, regardless of how hurtful those views might seem, as long as they do not act on those beliefs in such a way as to harm their future students. Without evidence of such harm (which the Court

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[36] See generally Fish, *supra* note 2; Mark Witten, "Rationalist Influences in the Adjudication of Religious Freedoms in Canada" (2012) 32 Windsor Rev Legal Soc Issues 91 [Witten, "Rationalist Influences"]; John Von Heykin, "The Harmonization of Heaven and Earth?: Religion, Politics and Law in Canada" (2000) 33:3 UBC L Rev 663; Paul Horwitz, "The Sources and Limits of Freedom of Religion in a Liberal Democracy: Section 2(a) and Beyond" (1996) 54:1 UT Fac L Rev 1; Saba Mahmood, *Religious Difference in a Secular Age: A Minority Report* (Princeton: Princeton University Press, 2016) at 167—80.

[37] See *BCCT*, *supra* note 32.

[38] *Ibid* at paras 5—8.

[39] *Ibid* at para 36.

[40] *Ibid* at para 72 (Justice L'Heureux-Dubé, in dissent, went so far as to say that the mere fact that someone had signed their name to the TWU Covenant raised a reasonable concern that they might act in a discriminatory manner toward sexual minority students in their classroom).

could not find), there is no reason in law to limit private religious beliefs from entering the public realm.[41]

TWU's victory in the *BCCT* case was fairly hollow, insofar as the decision quite specifically avoided legitimizing TWU's evangelical mission to bridge faith and public life. Private religious beliefs were allowed into the public (i.e., the TWU Covenant in an accredited teacher-training program) so long as those beliefs did not migrate too far into the public and affect sexual minorities.[42] The public persona granted by the Supreme Court of Canada to religious beliefs through the TWU Covenant was heavily circumscribed. Religious beliefs could be present in the public as long as they were neither seen nor heard.[43] TWU's request for law school accreditation seems to ask for a more robust recognition of the public character of private religious beliefs and practices.

This difference regarding the relation between religion and the public is reflected in the way that harm is understood. As mentioned, the *BCCT* decision used the idea of harm to draw a strict line between private belief and public action, so that the ideas about "sacred" sexuality represented in the TWU Covenant could be believed but could not be acted upon. In the dispute over the accreditation of its law school, however, TWU relies on the insistence in the *BCCT* decision that harm be evidentially based rather than speculative, which pushes the line between private faith and public action in the opposite direction. The TWU Covenant, itself a form of public action, should be allowed as long as there is no evidence of harm. Although TWU's point is not necessarily incompatible with the *BCCT* decision, it raises questions about the purposes of religious freedom. Does religious freedom allow religious institutions to shield themselves from being shaped by the discourse of public values, as some sort of "super private" institutions?

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[41] *Ibid* at para 38.

[42] *Ibid*. Justice L'Huereux-Dubé, in dissent, openly recognized the nuances of the public/private divide at issue in the case. However, she also took the separation between belief and action to a much more extreme conclusion, saying that the TWU Covenant was not a proxy for religious belief, which means that restricting it is not offensive to religious freedom. *Ibid* at paras 62, 102.

[43] See Victor M Muñiz-Fraticelli, "The (Im)possibility of Christian Education" (2016) 75 SCLR (2d) 209 at 220 (Muñiz-Fraticelli argues that a highly circumscribed approval system that comports with institutional values essentially makes religious institutions irrelevant). See also Bateman, *supra* note 34 at 85—86. Bateman's general argument is that the move in Canadian jurisprudence away from plural liberalism to comprehensive liberalism, which can be discerned in the TWU law school dispute as well as in the case law more generally, undermines the Canadian legal narrative of fostering diversity. *Ibid* at 114. But see Witten, "Tracking Secularism", *supra* note 34 at 238 (arguing that the *BCCT* decision provided a robust protection for private religious institutions wading into the public sphere). These authors argue against such an approach to religious freedom, saying that individual religious freedom requires a robust associational element. From this perspective, opposing the accreditation of TWU's proposed law school leads to a fairly radical redrawing of the boundaries between public and private, which is not justified in the liberal tradition of Canadian law.

The tension between TWU's argument and the *BCCT* decision also draws out a very interesting ambiguity in the notion of harm. According to TWU's evangelical perspective, the obedience to God that leads to participation in God's redemptive work in the world is painful stuff. The evangelical claim involves the total surrender of personal preferences and the total embrace of a perspective informed by the Bible. But this pain would not be considered harmful by TWU because it is ultimately liberating and life-giving. Since the Bible is true, subjecting oneself to its teachings will never be detrimental but always beneficial. TWU understands the TWU Covenant as a point of resistance to the moral and social elevation of self-fulfillment.[44] It is a concrete way to ground oneself in a particular Christian worldview.[45] TWU decries the moral relativism of self-fulfillment as philosophically dishonest and intellectually vacant. Self-fulfillment produces people who are insensitive to the needs and circumstances of others, which stands contrary to the social attitudes of charity and mercy that are valued by TWU. The TWU Covenant creates a communal environment that embodies the attitude of putting the needs and concerns of others above one's own.[46]

This affects the ways in which harm might be used to evaluate the TWU Covenant. A sexual minority individual giving up his or her sexual preferences to attend TWU will undoubtedly feel pain, but that pain would be understood by TWU as beneficial, providing the means by which to develop spiritual discipline. But this surely does not exhaust the idea of harm related to TWU's Evangelical point of view. Harm seems to have another relevant dimension. If

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[44] See *BCCT*, *supra* note 32 at para 10 (citing an older version of the TWU Covenant). In *BCCT* the Court cited the following explanation that used to be given to students at TWU to explain the Covenant:

> When you decided to attend TWU you signed on to live by different standards than the rest of the world does. The "rules", or Community Standards, are not meant to be the bane of your existence, but to create an atmosphere that is consistent with our profession of faith.
>
> You might not absolutely agree with the Standards. They might not be consistent with what you believe. However, when you decided to come to TWU, you agreed to accept these responsibilities. If you cannot support and abide by them, then perhaps you should look into UIG [University of Instant Gratification] or AGU [Anything Goes University].

Ibid.

[45] See TWU, "Academic Calendar", *supra* note 8 (this is reflected, for example, in the following statement on Academic Freedom: "Trinity Western University is committed to academic freedom in teaching and investigation from a stated perspective, i.e., within parameters consistent with the confessional basis of the constituency to which the University is responsible, but practiced in an environment of free inquiry and discussion and of encouragement to integrity in research" at 48).

[46] See TWU, "Covenant", *supra* note 4 ("a distinctly Christian way of living finds its fullest expression in Christian love, which was exemplified fully by Jesus Christ, and is characterized by humility, self-sacrifice, mercy and justice, and mutual submission for the good of others" at 1—2 [references omitted]).

it can be shown that an LGBTQ person does not have a meaningful choice to *not* attend TWU then they will effectively be forced, via the TWU Covenant, to abandon or hide their sexual orientation. This, of course, is one of the key elements standing against accrediting TWU's proposed law school. The desirability and competitiveness of getting into law school means that some students will probably feel that they have no choice but to attend TWU. The tricky thing is to acknowledge the significance of this aspect of harm without disregarding the reality and importance of human spiritual experience. One helpful point to keep in mind is the centrality of free individual will and choice in evangelical theology. While some might feel pressured to attend TWU, TWU is highly motivated (religiously) to proactively avoid situations where LGBTQ people might be forced to follow the TWU Covenant against their will.[47] The concept of harm cannot account on its own for the enormous complexity of experiences, risks and motivations at play.

The conflict regarding the accreditation of TWU's proposed law school is not the first time that the ambiguities of harm have played a significant role in adjudicating a claim involving religious freedom. In her book *Defining Harm*, Lori Beaman explored the way that harm was used in *BH v Alberta (Director of Child Welfare)*[48] to adjudicate whether a mature minor could be compelled to receive medical treatment despite her religious objections.[49] Although the facts of the *BH* case do not align with the facts of the TWU dispute,[50] Beaman's argument nevertheless "act[s] as a reminder or map for possible nexus of discourse that work to bind the

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[47] *Ibid* at 1. The contractual language of the TWU Covenant invites students to carefully consider their choice to enter into a covenantal relationship with the TWU community. A similar sentiment is reflected in TWU's ideas about education, which decries the indoctrination of Biblical values as offensive to a Christian biblical understanding of truth, human dignity and educational goals. See TWU, "Core Values", *supra* note 10 (this is reflected in the subsection titled "Pursuing Faith-based Learning and Faith-affirming Learning"). One possible conundrum is if a student were to realize her sexual orientation is LGBTQ while attending TWU. The student would have presumably entered TWU freely agreeing to follow the Covenant, but after having made that initial free choice began to experience the Covenant as oppressive and in contradiction with her free will.

[48] 2002 ABQB 371, [2002] 7 WWR 616 [*BH*], aff'g 2002 ABPC 39, [2002] 11 WWR 752, aff'd 2002 ABCA 109, [2002] 7 WWR 644.

[49] Lori G Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (Vancouver: UBC Press, 2008).

[50] For a discussion of the factual background of the case see *BH*, *supra* note 48. *BH* is distinct from the TWU law school dispute because the former deals with harm to an individual claiming religious freedom protection whereas TWU deals with harm to LGBTQ people resulting from the TWU Covenant. In *BH* the Court had to balance between two harms that the claimant faced: harm to her spiritual/religious condition if she received a blood transfusion (as per her religious beliefs) and harm to her physical body if she did not receive a blood transfusion (likely leading to her death). The Court also had to include the public interest concerns regarding the sanctity of human life and child welfare. *Ibid.* There might be lessons that could be drawn from the *BH* litigation for the TWU dispute, but those would have to be the subject of their own analysis at a different time.

definition of religious freedom".[51] Her book shows that particular difficulties arise when harm is used to adjudicate cases that involve religious matters and reasons. Harm is tied to the different philosophical backgrounds that inform different groups of people (for Beaman, the fields of medicine, social work and religion). The idea of harm used in legal analysis reflects some form of philosophical and ideological commitment to identity, truth, reality and reason. Often times, this background stands in tension with religious worldviews.

Beaman found this to be the case in *BH*. According to Beaman, the way that the courts used harm seemed to be motivated by fear of the way that the claimant's religion conceptualized "health" and "life". The notion of harm used by the courts reflected a particular picture of a "normal" desire to live and certain predilections regarding truth, reality and the self. The claimant's religious motives were portrayed as irrational, unduly influential and, ultimately, harmful. This does not mean that religious perspectives should be given preference over other perspectives. Rather, Beaman's critical reflection on harm draws attention to the way that the claimant was isolated and alienated from her religious community and religious tradition. Exposing this helps shift the narrative of legal analysis, broadening its philosophical engagements and opening us to the discursive effects of the courts' decisions on the way religious interests are engaged in legal adjudication.

A similar process can be used to reflect on the legal dispute regarding the accreditation of TWU's proposed law school. In the following section I turn to look at the discursive effects of the arguments used against accrediting TWU's proposed law school. I consider specifically the way that the ideas of harm, equality and discrimination have been used to cover over and obscure some very important social and philosophical considerations affecting the dispute. Like Beaman, I am not arguing for the application of TWU's religious perspective in law. Rather, I aim to disentangle the subterranean forces at work in the dispute so that we can more clearly address the way that law intersects with the social and relational dynamics of the dispute.

2 TRANSLATING HARM, EQUALITY AND DISCRIMINATION INTO LEGAL ANALYSIS

Harm is an important theme for those who oppose TWU's proposed law school. But there is some ambiguity about the nature of the harm at stake and how it is conceptualized and used in

[51] Beaman, *supra* note 49 at 2.

the legal analysis. Although the conflict is often viewed as the collision between LGBTQ equality rights and TWU's religious rights,[52] this is not technically the proper way to frame the legal dispute. The conflict involves the judicial review of the administrative decisions of the law societies of Ontario and British Columbia to refuse to accredit TWU's proposed law school. This means that the balance is actually between the exercises of administrative discretion and TWU's asserted religious rights. The general framework for the judicial review of this type of case is found in *Doré v Barreau du Québec*,[53] in which the Supreme Court of Canada held that in such cases, courts are to determine whether the administrative body properly balanced the *Charter* values at stake with its own statutory objectives.[54] *Doré* goes on to say that administrative bodies must also consider the *Charter* values underlying their empowering legislation when exercising their administrative powers.[55]

One of the challenges with analyzing the dispute over the accreditation of TWU's proposed law school is that there are essentially three sets of *Charter* values at stake. The equality rights of LGBTQ people and the religious freedom rights of TWU are obvious, but there is also an underlying *Charter* value of equality in the empowering statutes of the Law Societies.[56] It is clear in *Doré* that the equality interest of the Law Societies is to be balanced with TWU's religious rights. It is not clear, however, precisely how the equality rights of LGBTQ people fit in. Should they be treated as the subject or the object of the administrative decision under review?[57] The Ontario Court of Appeal took the latter approach and framed its

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[52] See e.g. *LSUC* ONCA, *supra* note 3 at para 113.

[53] 2012 SCC 12, [2012] 1 SCR 395 [*Doré*]. Balancing *Charter* rights with the public interest is usually performed through the application of section 1 of the *Charter* pursuant to the test in *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200 [*Oakes*], but the Supreme Court of Canada in *Doré* decided that the *Oakes* analysis should not be applied in the context of the judicial review of administrative action. Instead, the Court established a "flexible administrative approach to balancing *Charter* values" that in essence "works the same justificatory muscles" as a traditional *Oakes* test without its formal confines. *Doré,* supra note 53 at paras 5, 37.

[54] *Supra* note 53 at paras 55—56.

[55] *Ibid* at paras 24, 35.

[56] See *Law Society Act*, RSO 1990, c L.8, s 4.2; *Legal Profession Act*, SBC 1998, c 9, s 3 (I refer to this throughout as the "public interest mandate" of the law societies).

[57] If treated as the subject of the administrative action, then the judicial review analysis would be framed in terms of the reasonableness of the balance that the law societies struck between the LGBTQ equality rights and the TWU religious rights in making their decisions to refuse accreditation. On the other hand, if LGBTQ equality rights are treated as the object of the administrative action, then the judicial review analysis would be framed as the reasonableness of the balance between the mandate of the law societies (including both the equality interest of the law society as well as the protection of LGBTQ equality rights) and the *Charter* right to religious freedom struck in the decision to refuse accreditation. The former does not map well onto the analysis of *Doré*, which did not involve the review of an administrative decision that balances *Charter* rights against each other. It is not clear how to factor in the equality aspect of the public interest mandate of the law societies. The latter, which aligns the LGBTQ

analysis in terms of whether the LSUC reasonably balanced its public interest mandate to "promot[e] a legal profession based on merit and excluding discriminatory classifications with the limit that denying accreditation would place on [TWU's] religious freedom".[58] Framed this way, balancing the public interest of the Law Societies against the religious freedom of TWU also involves the collision of TWU's religious freedom and respect for LGBTQ equality rights.[59]

The question that follows from this is how are these two forms of equality— LGBTQ equality rights and the equality dimension of the public interest mandate of the Law Societies— merged? This merger is highly significant for the way that the administrative discretion of the Law Societies is balanced against the religious freedom of TWU. I do not think that this can be answered simply by clarifying the framework for judicial review provided by *Doré*.[60] Instead, we must attend to the effects on the legal discourse flowing from the way that the equality interests of LGBTQ people and the equality aspect of the public interest mandate of the Law Societies might be merged. This can be traced through the ways in which the ideas of "harm" and "discrimination" are used.

The main basis of the argument that the TWU Covenant is discriminatory toward LGBTQ people is that sexual orientation is a foundational and immutable aspect of a person's identity, and that it cannot be restricted or regulated without affecting the full depths of the person.[61] This argument focuses on individuals who might want to attend law school at TWU but do not share TWU's evangelical perspective. For these people, the restriction or regulation of

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equality rights at stake with the mandates of the law societies, appears to fit better within the analysis set out in *Doré*. See *Doré*, *supra* note 53 at paras 55—56.

[58] *LSUC* ONCA, *supra* note 3 at para 112.

[59] See e.g. *LSUC* ONCA, *supra* note 3 at para 113. The Supreme Court of Canada took a similar approach in its decisions: see *LSBC* SCC, *supra* note 3 at paras 39—40, 57—59, 79, 92—93, 96, 103; *LSUC* SCC, *supra* note 3 at paras 19—20, 30—31, 37—39. I will not discuss the SCC decisions here, but it is worth noting that many of the questions raised in relation to the Ontario decisions could equally be used to examine and evaluate the SCC decisions.

[60] I would like to emphasize that my argument is not regarding the administrative questions of standard of review or the jurisdiction of the law societies over law schools. Likewise, I am not arguing about the Ontario Court of Appeal's decision to frame LGBTQ equality interest through the rubric of the public interest mandate of the law societies. These are questions that I happily earmark as worthy of further analysis.

[61] This connection between sexual orientation and personal identity is a theme that has developed recently in Canadian jurisprudence. See e.g. *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609; *Vriend v Alberta*, [1998] 1 SCR 493, 156 DLR (4th) 385; *M v H*, [1999] 2 SCR 3, 43 OR (3d) 254; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467 [*Whatcott*]. It is not without irony that TWU also recognizes the deeply personal aspect of sexuality. The TWU Covenant describes sexual choices as "physically, spiritually and emotionally inseparable," and that they profoundly affect one's relationship with God, others and oneself. *Supra* note 4 at 4. The similarity between these two points of view was highlighted by Muñiz-Fraticelli. See *supra* note 433 at 216.

sexual conduct on the basis of sexual orientation is understood to affect their innermost self and cause deeply felt harm. In the words of the Ontario Divisional Court,

> [N]otwithstanding TWU's stated benevolent approach to the conduct of students and others at its institution, in order for persons, who do not hold the beliefs that TWU espouses, to attend TWU, they must openly, and contractually, renounce those beliefs or, at the very least, agree not to practice them. The only other apparent option for prospective students, who do not share TWU's religious beliefs, but who still desire to obtain one of its coveted law school spots, is to engage in an active deception, in terms of their true beliefs and their true identity, with dire consequences if their deception is discovered.
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> …
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> [I]n order to attend TWU, [LGBTQ persons] must sign a document in which they agree to essentially bury a crucial component of their very identity, by forsaking any form of intimacy with those persons with whom they would wish to form a relationship.[62]

The Ontario Court of Appeal agreed and, taking the argument one step further, said, "[T]he part of TWU's Community Covenant in issue in this appeal is deeply discriminatory to the LGBTQ community, and it hurts".[63] For the Ontario Courts, this hurt was transformed, in the context of legal education, into a constitutionally recognized harm, against which the Law Society must protect in the name of public interest.

In support of its conclusion that the TWU Covenant is discriminatory, the Court of Appeal referred to Iacobucci and Bastarache JJ, who, writing for the majority (8-1) in the *BCCT* decision, observed that "a homosexual student would not be tempted to apply for admission [to TWU], and could only sign the so-called student contract at a considerable personal cost".[64] Read in context, however, Iacobucci and Bastarache JJ were *defending* TWU's ability to maintain its Covenant:

> TWU is not for everybody; it is designed to meet the needs of people who share a number of religious convictions. That said, the admissions policy of TWU is not itself sufficient to establish

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[62] *LSUC* ONSC, *supra* note 7 at paras 112—13. See also *LSUC* ONCA, *supra* note 3 at para 117 (which quotes the passage).
[63] *LSUC* ONCA, *supra* note 3 at para 119.
[64] *Supra* note 32 at para 25. See also *LSUC* ONCA, *supra* note 3 at para 116. Similar language has been used to define analogous grounds to those enumerated in section 15 of the *Charter*. See e.g. *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1 ("personal characteristic[s] that [are] immutable or changeable only at unacceptable cost to personal identity" at para 13).

> discrimination as it is understood in our s. 15 jurisprudence . . . To state that the voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution, is sufficient to engage s. 15 would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality.[65]

The fact that the Ontario Court of Appeal felt that Iacobucci and Bastarache JJ could be called on to *oppose* accrediting TWU's proposed law school reveals the significant investment the Court places in the hurtful effect of the TWU Covenant. The hurt experienced by LGBTQ people because of the TWU Covenant is related directly to the "considerable personal cost"[66] of having to bury one's sexual identity. The role ascribed to hurtfulness was contested by the British Columbia Court of Appeal, which, referring to the same section of the *BCCT* decision, concluded that "hurt feelings" are not a "harm" that the Constitution protects against. Refusing to accredit TWU on the basis of hurt feelings undermines religious freedom in a democratic and liberal society.[67]

The view of harm put forward by the Ontario Court of Appeal represents a shift in how the principles of discrimination and equality embedded in section 15 of the *Charter* are understood. This is reflected in the focus taken by the Ontario Superior Court of Justice in rejecting TWU's argument that it lawfully discriminates against LGBTQ people, despite the fact that TWU is partially exempted from the BC *Human Rights Code*[68] and, as a non-state actor, is not bound by the *Charter*.[69] In support of its decision, the Ontario Superior Court of Justice relied on the distinction drawn in *Miron v Trudel*[70] that even something good (like religious freedom) might nevertheless be used for the evil of discrimination.[71] As such, the Court labelled the TWU Covenant as "by its very nature, discriminatory".[72] It does not matter for the Court whether TWU is a private Christian university, or whether the TWU Covenant is based on religious principles.

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[65] *BCCT*, *supra* note 32 at para 25.
[66] *Ibid* at para 13.
[67] *LSBC* BCCA, *supra* note 3 at paras 176—88. For similar arguments regarding the limitations of hurtfulness in relation to religious freedom, see *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25 at paras 204, 213, 381 DLR (4th) 296 [*NSBS*].
[68] RSBC 1996, c 210.
[69] *LSUC* ONSC, *supra* note 7 at para 107. For TWU's argument, see *Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326, 392 DLR (4th) 722 (Written Argument of the Petitioners at paras 337—67).
[70] [1995] 2 SCR 418, 124 DLR (4th) 693.
[71] *LSUC* ONSC, *supra* note 7 at paras 108—09.
[72] *Ibid* at para 108.

The reference to *Miron v Trudel* is somewhat surprising considering that it was decided before *BCCT* and that there are a plethora of other, more recent section 15 cases that have undertaken rather drastic reformulations of the section 15 analysis.[73] Furthermore, the reference to *Miron v Trudel* did not really answer the question that the Court claimed to address. The question was whether or not the differential treatment of LGBTQ people in the TWU Covenant should be considered discriminatory. It is undoubtedly true, as per *Miron v Trudel*, to say that things considered good might be used for discriminatory purposes and in that case it was the good of supporting marriage that was being used to discriminate against de facto spouses in claiming certain insurance benefits.[74] TWU's claim does not engage the question of whether religion can be used to discriminate wrongly. Rather, TWU's claim raises the question of whether the differential treatment of LGBTQ people resulting from the TWU Covenant is discriminatory in such a way as to transgress the values embedded in section 15 of the *Charter*. Referring to *Miron v Trudel* merely begs the question of whether TWU's hurtful treatment of LGBTQ people is discriminatory.

Using *Miron v Trudel*, the Ontario Superior Court of Justice refocused the application of section 15 on the issue of individual merit. The purpose of section 15, according to *Miron v Trudel*, in combatting the evil of discrimination is "to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics *rather than on the basis of individual merit, capacity or circumstance*".[75] From this formulation, TWU appears to stand in direct violation of the value embedded in section 15 because it does not evaluate its incoming (or current) students solely on the basis of their merit, but also takes into account, through its Covenant, their sexual orientation. Openly LGBTQ students are therefore evaluated, in coming to and remaining within the TWU community, on the basis of their sexual practices, not solely on their merits and capacities as individuals. Following the logic of *Miron v Trudel*, this is precisely the evil that section 15 is charged to protect against.

The turn to merit makes sense in light of the way that the Law Societies understand their role in guarding admission to the legal profession as flowing from their mandate to protect the

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[73] See e.g. Jennifer Koshan & Jonnette Watson Hamilton, "The Continual Reinvention of Section 15 of the Charter" (2013) 64 UNBLJ 19; *Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61 [*Quebec v A*].
[74] *Supra* note 70 at para 158.
[75] *Ibid* at para 131 [emphasis added].

public interest. According to the Court there are two gatekeepers to the legal profession, the law schools and the Law Society.[76] The purpose of the second gatekeeper, the Law Society, is to take steps to ensure that equal access to the legal profession is maintained.[77] The Law Societies are portrayed, in direct contrast to TWU (via *Miron v Trudel*), as being concerned primarily with upholding equality, which is grounded in merit:

> [I]n carrying out its mandate under its enabling statute, the respondent, throughout its long history, has acted to remove obstacles based on considerations, other than ones based on merit . . . In keeping with that tradition, throughout those many years, the respondent has acted to remove all barriers to entry to the legal profession save one—merit. It is the respondent's position that it is in the public interest to ensure that the legal profession is open to everyone. It views that approach as being fundamental to its functions. In adopting that position, the respondent says that it achieves two companion objectives. One is to ensure diversity in the legal profession. The other is that, if the legal profession is open to everyone then, perforce, it is open to "the best and the brightest".[78]

For the Court, accrediting TWU would corrupt the gatekeeper, both by allowing TWU to discriminate and by shackling the Law Society's ability to remove discrimination from the legal profession. According to the Ontario Superior Court of Justice, TWU's position effectively seeks to impose a Christian worldview onto the Law Society.[79] Accreditation of TWU's proposed law school is equated with condoning the discriminatory practices of the TWU Covenant. The Law Society must be free to consider the effect on LGBTQ people if it accredits TWU's proposed law school and, thereby, condones TWU's worldview.[80]

The approach taken by the Ontario courts appears to shift the focus away from LGBTQ people and toward the integrity and autonomy of the Law Society. The harm of discrimination protected against in section 15 is now related to the communal integrity of the legal profession. The problem here is not that the equality interest of LGBTQ people was tied to the equality mandate of the Law Society (which might indeed be what *Doré* prescribes), but rather that the courts conflated the allegation of individual harm to the LGBTQ community with the allegation that the institutional purpose and integrity of the Law Society will be compromised. Merging the discriminatory concerns related to LGBTQ people with concerns regarding the integrity of the

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[76] See *LSUC* ONCA, *supra* note 3 at para 130.
[77] See *ibid* at para 132.
[78] *LSUC* ONSC, *supra* note 7 at paras 96—97.
[79] *Ibid* at para 115.
[80] *Ibid* at para 116.

Law Society's mission transformed the idea of equality embedded in section 15 of the *Charter*. The decisive move from concrete and demonstrable harm to abstract institutional harm feeds back to support the inclusion of hurtfulness as part of what section 15 protects against. Framing the merger between these two distinct harms in this way means that discrimination is no longer about particular harms suffered by certain individuals in specific contexts in relation to particular entitlements. It is expanded to include the perception of hurtfulness toward LGBTQ people that is communicated symbolically through the presence of the TWU Covenant within the institutions of law.

The transformation flowing from the conflation of the individual and institutional interests endows the notion of harm with a symbolic dynamic that is understood to justify the political and symbolic response of the Law Societies to TWU's proposed law school. The Ontario Superior Court of Justice held that, "It was open to the [law society] to take a decision that it viewed as not only promoting its statutory mandate but, as importantly, *being seen as* promoting that mandate."[81] The justification for the symbolic response to TWU's proposed law school is also couched in ideological terms: "It was also open to the respondent to view accrediting TWU's law school, while professing equal opportunity and equal treatment for its members, its prospective members, and for the legal profession as a whole, as fundamentally inconsistent, if not hypocritical."[82]

The Supreme Court of Nova Scotia took exception with a similar symbolic aspect of the Nova Scotia Barristers' Society's refusal to accredit TWU.[83] Justice Campbell found that the symbolic nature of the response to a symbolic harm demonstrated that there was actually no harm caused by TWU's proposed law school rising above the level of what should be tolerated in a liberal society.[84] Discrimination law is similar to hate speech law in that people are expected to endure a certain amount of hurtfulness as part of existing in a diverse democratic environment.[85] This is especially so when religious beliefs are protected in order to "carve out a space" for

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[81] *Ibid* at para 118 [emphasis added].
[82] *Ibid*.
[83] *NSBS*, *supra* note 67 at paras 251—264.
[84] *Ibid.* See also *LSBC* BCCA, *supra* note 3 at paras 188—89.
[85] See *NSBS*, *supra* note 67, at paras 204—208. See generally *Whatcott*, *supra* note 61 (throughout the decision the Supreme Court Canada relied on the connection between hate speech and discrimination law). See also Elaine Craig, "TWU Law: A Reply to Proponents of Approval" (2014) 37:2 Dal LJ 621 at 655—57 (Craig also drew on these connections to make her argument against accrediting TWU).

religion in the public sphere.[86] Justice Campbell reminds us that the way in which protected religious beliefs are made part of the public space, and how they are put into practice, must be considered as part of the process of delineating and balancing between religious freedom and equality rights.[87]

The idea of harmful discrimination put forward by the Ontario Courts (and the Law Societies) in opposition to TWU's proposed law school has the effect of redrawing the line between the public and the private. Placed in the context of legal education, the religious grounding of the TWU Covenant is portrayed as a contagion that spreads beyond its institutional boundary. In one way, this dissolves the division between the public and the private. Since it is through the entrance of the TWU Covenant into the public space of legal education that its symbolic harm is released, the fact that TWU is a private religious institution is considered irrelevant. Simultaneously, the division between the public and the private is *strengthened*. Religion is bound to the private sphere alone, and this is accomplished by refusing TWU, a private religious institution, entrance into the public space of legal education. The Ontario Superior Court of Justice said that the decision to not accredit TWU does not prevent TWU from opening and operating a religious law school.[88] In other words, TWU still has the protected religious freedom to open its own law school, but it cannot bring its religious beliefs into the public realm of legal education.[89]

The emerging boundary between the public and the private is tied to a particular image of the individual self that corresponds with the purposes of equality described in *Miron v Trudel* and to the idea of harm embraced by the Ontario Courts, as described above. From this view, the inherent dignity of the individual is connected to her merit, capacity and circumstance, and shorn from any identification she has with a particular group. Dignity, merit and capacity are conceptually separated from belonging to a community, or, rather, they become the basis by

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[86] *NSBS*, *supra* note 67 at paras 209—13.
[87] *Ibid* at para 206 (this helps balance against falling into a one-sided focus on equality law and the harmful effect that TWU's Covenant has on LGBTQ people).
[88] *LSUC* ONSC, *supra* note 7 ("[i]f TWU wanted to operate its law school for purely religious purposes, it would be content to proceed with its view of the proper law school but with the full knowledge that its students would only be automatically eligible for membership in the Bar of some Provinces, while not others" at para 121).
[89] *Ibid* at para 117. The Court stated: "It remains the fact that TWU can hold and promote its beliefs without acting in a manner that coerces others into forsaking their true beliefs in order to have an equal opportunity to a legal education. It is at that point that the right to freedom of religion must yield." *Ibid*. Witten argues that the *LSUC* decision reconfigures the public/private divide with a more aggressive secular drive than historically appears in Canadian law. Witten, "Tracking Secularism", *supra* note 34 at 217—18.

which one belongs to the community of the legal profession. In either case, if the legal profession and those who join the profession are to reflect the image of human dignity protected by the transformed vision of equality and discrimination embedded in the *Charter*, then the public profession of the law is separated quite drastically from the communal religious aspects of human life.[90]

Taking into account these various dimensions of harm, dignity, conceptions of the self and the public/private division makes it quite difficult to say with any categorical certainty how the *Charter* value of equality and non-discrimination applies to the TWU Covenant. Determining whether hurtfulness constitutes harm for the purposes of identifying discrimination under section 15 is a factual analysis driven by context and focused on the impact that the hurt has on perpetuating the discrimination of LGBTQ people.[91] The chief indicia of discrimination developed in the jurisprudence seem to focus on perpetuating prejudice or stereotypes that devalue the image of persons or portray them as not equally deserving of respect and opportunity.[92] The trickiness of how all of the different dimensions of section 15 feed into a coherent analysis is on full display in the recent Supreme Court of Canada jurisprudence on section 15.[93]

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[90] This certainly stands in contrast to the vision of TWU's proposed law school, which links the ultimate good of the individual with a program of Christian transformation driven by participation in Christian community. The purpose of the Covenant is meant to affirm the dignity of the individual and to support the development of their capacities. But the idea of what dignity is, and how it is supported, is attached to the conformity of the individual, through discipline in community, to the revealed truth of God.

[91] The core concern is whether the TWU Covenant perpetuates arbitrary disadvantage or historical discrimination. For the Supreme Court of Canada's current approach to the "arbitrary disadvantage" requirement, see *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at paras 16, 18, 20, [2015] 2 SCR 548 [*Taypotat*]; *Quebec v A*, *supra* note 73 at para 332, Abella J, dissenting in result. The Court asks whether the disadvantage "fails to respond to the actual capacities and needs of the members of the group and instead impose burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage". *Taypotat*, *supra* note 91 at para 20. It further asks whether a "disadvantage" is "one that perpetuates prejudice or that stereotypes". *Quebec v A*, *supra* note 73 at para 171. Such a disadvantage must be an "expression of prejudice," that portrays "aspirations" as not equally deserving of respect, and that devalues the image of the persons in question. *Ibid* at paras 198—99. The scope and impact of the denial must also be taken into account. *Ibid* at paras 200, 327.

[92] The precise role of prejudice and stereotyping in the discrimination analysis is unclear due to the constant fluctuation in the evolution of the section 15 jurisprudence. For further commentary on this evolution, see Koshan & Hamilton, *supra* note 73.

[93] The recent SCC decision *Quebec v A*, is shockingly fractured. *Supra* note 73. There are four different decisions written with varying points of overlap and divergence on all parts of the section 15 and section 1 analyses, which defy a clear *ratio decidendi* of the case on the important question of how section 15 applies. *Taypotat* offers some clarity, adopting the judgment of Abella J, especially the analysis at paragraphs 319 to 347, in *Quebec v A* (*supra* note 73) as the leading approach to section 15 analysis. *Taypotat*, *supra* note 91. However, *Taypotat* does not nullify or exclude the other judgments in *Quebec v A*, and so does not solve the unique range of possibilities that are available in a section 15 analysis. For further discussion of the difficulty involved in trying to decipher the *ratio* of *Quebec v A*, see Michelle Biddulph & Dwight Newman, "Equality Rights, *Ratio* Identification, and the

Whether and how the hurtful aspect of harm proposed by the Ontario courts can be taken into account in the legal analysis regarding discrimination is not clear. It is possible to assume that differential treatment of a historically disadvantaged group in fact does contribute to the perpetuation or promotion of an unfair social characterization of the group and that the differential treatment has an impact tantamount to harm because of the fact that the group is already vulnerable.[94] This might suggest that allowing a law school to regulate its students according to religious principles that treat LGBTQ people differently (as the TWU Covenant does) might indeed contribute to the perpetuation of an unfair characterization of LGBTQ people—even though the harm is more symbolic than direct. However, this idea must also be grounded in a flexible and contextual analytic approach to the nature of the impact on the group in question.[95] In addition, the fuzziness that surrounds exactly what constitutes the perpetuation of discrimination, either through prejudice, stereotypes or otherwise, remains unclear in the jurisprudence. Arguments could certainly be made either way regarding the TWU Covenant.[96]

The balance that is struck between the public interest of the Law Societies and the religious rights of TWU (per *Doré*) depends on how the harm to the equality of LGBTQ people is integrated into the institutional concerns of the Law Society. Since it is not clear whether the harm to LGBTQ people flowing from the TWU Covenant constitutes discrimination under section 15 of the *Charter*, the question becomes whether there is a valid statutory objective for the Law Society to pursue equality for LGBTQ people beyond the purview of section 15 of the *Charter* and, if there is, whether it is sufficiently strong to outweigh TWU's religious rights. This might well be so. But the merger performed in the decisions of the Ontario courts between the LGBTQ interest and the Law Society's public interest obscures rather than illuminates these important questions.

Un/Predictable Judicial Path not Taken: *Quebec (Attorney General) v A* and *R v Ibanescu*" (2015) 48:1 UBC L Rev 1.

[94] See *Taypotat*, *supra* note 91 at para 20, quoting *Quebec v A*, *supra* note 73 at para 332. See also *ibid* at para 176, LeBel J. Craig observed a similar "symbolic" feature operating in *Whatcott*, which allows the court to infer the harm that results from speech that perpetuates prejudice and stereotypes can be assumed when dealing with a historically disadvantaged minority group. Craig, *supra* note 85 at 637.

[95] See *Quebec v A*, *supra* note 73 at para 331. Chief Justice McLachlin also relied heavily on the context of the situation, noting in her separate opinion that the stigma attaching to non-married spouses historically has recently faded. *Ibid* at para 411. This contextual perspective was affirmed in *Taypotat*, *supra* note 91 at para 18.

[96] For evidence of these competing arguments, see Witten, "Tracking Secularism", *supra* note 34; Bateman, *supra* note 34; Robert E Charney, "Should the Law Society of Upper Canada Give Its Blessing to Trinity Western University Law School?" (2015) 34:2 NJCL 173.

The challenges that come through the way the language of discrimination and equality are used, both in translating TWU's evangelical practice into the language of section 2(a) and in articulating opposition to that practice through the language of section 15, show that the objective demands of the law in this dispute are evasive. The dispute is not about harm, legal institutions or religious freedom, per se. Rather, it is about what taking all of these together implies. Behind the somewhat awkward legal arguments put forward on either side of the dispute, there are unaddressed social questions regarding the structure of religion in public and private spaces as well as the nature and role of the courts in sorting out the dispute over TWU's proposed law school. The discourse surrounding the TWU dispute, both from the perspective of TWU and its opponents, has so far proved to be inadequate. The legal arguments for and against accrediting TWU's proposed law school speak past each other because there is something missing in the legal account given.

3 FRAMING LAW, COMMUNITY AND LANGUAGE AS TRANSLATION

The analysis of the dispute over the accreditation of TWU's proposed law school, so far, has shown two very different accounts of what the law demands and some of the associated social structural implications. TWU argues that religious freedom demands protection for the evangelical mission of bridging the private and public. The Law Societies and the Ontario courts argue that equality laws demand that the divide between public and private cannot be bridged but must be vigorously maintained. TWU's argument claims robust protection for collective constructions grounded in individual religious belief, seemingly in spite of other interests and concerns that persist in the public realm. The Law Societies and Ontario Courts see the principle of equality and non-discrimination in terms that structure the public space in such a way as to gloss over the complexities of individual and communal harms and interests in favour of the integrity of public institutions.

This dissonance also shows something about the social nature of the law itself, which can be seen by drawing on the communal function of language and the process of translation. In the conflict over TWU's proposed law school, the law is simultaneously the subject and the object of the interaction between TWU and the Law Societies. The law provides the language by which either side represents its interests, but these interests are expressed through the language of the

law as meeting the demands of the law itself. The law has a dual function, acting as a tool by which the parties accomplish their own goals and, at the same time, exerting its own force on how the conflict will be resolved between the parties. The two very different accounts of law provided by TWU and the Law Societies persist within a shared frame of reference provided by the law.[97] The law, therefore, reflects a key paradox of language: "we create it, by speaking, and yet it creates us, for without it we could not speak".[98]

The tension that exists in the dual function of law, as something that can be used and as something that has its own force and gravity, is the grounding point for a community of interpretation. James Boyd White talked about this in terms of fidelity. White said that fidelity is the "central ethical imperative" of interpretation, and that fidelity in interpreting a text reflects the same kind of imagination and self-assertion that goes into the creation of an original text.[99] Change is an aspect of fidelity.[100] Fidelity in interpretation is expressed through the individual and communal activities of people that understand themselves to be committed to a text. The text becomes meaningful in the ways that the community treats it through its use.[101]

The use of legal language has a relational dimension. Those who use, or used, a language are bound together through the relationships established by this common use. As Harold Berman explained,

> Language is a dramatic expression of social confrontation, whereby men affirm, sustain, renew and create social relationships. It is at the same time the collective memory of such confrontations

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[97] I have to admit here my indebtedness to all of the participants (presenters and attendees) in a discussion that followed a presentation I gave on the TWU law school proposal at the 2016 Canadian Law and Society Association annual Conference as part of a panel titled "The Trinity Western Controversy and Foundations of Constitutional Law." I want to acknowledge Benjamin L Berger's question during the discussion in particular, which turned my attention to explore this alternate way of framing the dispute over the accreditation of TWU's proposed law school. The idea that the language of law occupies a space between different voice and perspectives, which I develop here, is drawn generally from White, *Justice as Translation*, *supra* note 2 at 261—262.

[98] Harold J Berman, *Law and Language: Effective Symbols of Community*, ed by John Witte Jr (Cambridge: Cambridge University Press, 2013) at 45. See also Bernard S Jackson, *Semiotics and Legal Theory* (London: Routledge & Kegan Paul, 1985) at 24—27 (Jackson notes the overlap between law and language in terms of a common tension between individualism and collectivism); and White, *Justice as Translation*, *supra* note 2 at 24—25 ("We are always making ourselves, as individuals and communities, always making our language; yet we are always being made by our language, by our past, and by the actions of others, and the line between the maker and the made is never clear").

[99] White, *Justice as Translation*, *supra* note 2 at 243. See also Jackson, *supra* note 98 at 265—310.

[100] See Lawrence Lessig, "Fidelity in Translation" (1993) 71:6 Tex L Rev 1165 at 1169—73. Lessig stated that "some changes can be *changes of fidelity*". *Ibid* at 1169 [emphasis in original].

[101] See White, *Justice as Translation*, *supra* note 2 at 34—35. See also James MacLean, *Rethinking Law as Process: Creativity, Novelty, Change* (Abingdon, UK: Routledge, 2012) at 130—31.

> experienced in the past, the deposit left by history in our social consciousness, and hence a basis for a common future.[102]

We use the language that we inherit; we do not invent it. By using language, we identify ourselves as members of a community and a tradition.[103] At the same time, by using language we also participate in shaping it for future use.

White connected these communal and relational dimensions to the process of translation. He referred to the "translator's impossible ethic", which he said is the struggle of the translator between fidelity to the original text and fidelity to the world into which the text comes.[104] Translation, according to White, is not simply a matter of transferring meaning from one context into another. Instead, translation is more like a performance given in response to the text in question; it is an act of creating something new.[105] Interpreting and applying the old to the new changes both the meaning of the old and the order of the new—meaning is added or subtracted and transformation occurs.[106]

Wrestling with the different uses of the law and its different meanings through legal interpretation and legal argument draws connections between different ways of seeing the world. This includes connecting the context where the legal rule originates (either as a case or piece of legislation) and the context of the current situation.[107] It also includes connecting the expectations, experiences and linguistic differences of all the parties involved in a legal conflict—such as between lawyers, between clients, with witnesses and with the judge. The meaning of the law that emerges is not so much about the bare results of a case, but much more about the way in which the case is conceived of and talked about, and about the kinds of relationships that this activity fosters and sustains.[108]

If the law is thought to involve the clear and unambiguous application of legal principle to the context of the TWU dispute, then it is hard to see the arguments levied and the decisions discussed as anything but a complete disaster. But if, on the other hand, the law is understood in

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[102] Berman, *supra* note 98 at 43.
[103] *Ibid* at 44.
[104] James Boyd White, *From Expectation to Experience* (Ann Arbor: University of Michigan Press, 1999) at 109 [White, *Expectation to Experience*].
[105] White, *Justice as Translation*, *supra* note 2 at 252.
[106] See MacLean, *supra* note 101 at 136.
[107] See White, *Expectation to Experience*, *supra* note 104 at 102—106.
[108] See White, *Justice as Translation*, *supra* note 2 at 222; MacLean, *supra* note 101 ("judges do not simply apply rules to facts, they also have to think what they are thinking about and about how they are thinking about it" at 137).

terms of the process of translation, then the emerging tensions, gaps and cracks lose their menace. Indeed, these gaps provide the space for law to grow. As James MacLean argued, "we need to stop thinking about law under the terms of its decisional imperative and more in terms of a forum for encouraging free and unrestricted dialogue, an opportunity for distilling and discovering ideals that will lure us into future commitments."[109]

Although in one sense the resolution of the conflict over the accreditation of TWU's proposed law school required a choice to be made between the competing understandings of the law, the process by which it is made and the relationships established through the process are just as important as the choice made. Choosing a particular result and the way that the result is framed in terms of the language, process and obligations of the law, involves the translation between the different claims made, the parties involved and the law. Choice does not end interaction and exchange, but adjusts the orientation of the interaction and exchange. Choice feeds back into the exchange, providing new opportunities for interpretation and the translation of particular perspectives, interests and experiences into the language of the law.[110]

The social aspect of 'harm', which I have located around the public/private divide, reflects this form of linguistic feedback. The indeterminate notion of harm is a placeholder by which TWU and the legal community assert themselves and grapple with the expectations of the law in a tangible way. The way that 'harm' has been used as a legal category in adjudicating the dispute between TWU and the Law Societies helps establish and modify the discourse in which TWU and the Law Societies mutually participate. The dissonance that exists in the translations of the arguments and analyses put forward is central to how the demands of law are conceptualized and how the legal resolution of the dispute is configured. Raising our awareness of this process shifts attention away from searching for an objective notion of harm and opens a new possibility for recasting the law's role in the conflict.

The analogy of language and translation shows that the law is not just the language being used in the dispute. Rather, the law embodies *the process of overlap and interaction* between TWU and the Law Societies. In mediating the interaction between TWU and the Law Societies in this way, the meaning of legal language is both *for*, and produced *by*, the process of adjudicating the conflict. This draws our attention away from an objective evaluation of the

[109] MacLean, *supra* note 101 at 99.
[110] *Ibid* at 136—38.

substantive legal principles at play and toward the way that the application of these principles shapes a shared social reality. The legal adjudication of the TWU dispute can then be approached and evaluated in terms of the nature of social and relational interaction that it produces.

4 THE STRUCTURE OF THE RELATIONSHIP BETWEEN TWU AND THE LAW SOCIETIES

The idea that we view the legal adjudication of the TWU dispute in terms of the process of translation presses us to consider whether the approach being used fosters the kind of interaction implied by translation. To do this it is vital to consider the way that the dispute is conceived and talked about and the kinds of relationships that this conceiving and talking establish.[111] As I have argued so far, the current trajectory of the legal conflict over the accreditation of TWU's proposed law school is problematic because it fails to engage some of the central issues at stake in the case and feeds a narrative that makes such an accounting difficult, if not impossible. This is the way that the dispute is conceived and talked about. In this section, and the next, I will focus on the relational dimensions of the legal analysis, which supplements the discussion of the balancing of legal rights (duties, harms, costs, etc.) with an evaluation of the narrative and discursive qualities of the process of legal adjudication. I will trace this relational dimension of the dispute through the comparison sometimes drawn between the TWU situation and the United States Supreme Court case *Bob Jones University v United States*.[112] In this section I will show that this comparison has flattened the way that religion is brought into the legal analysis.

Like TWU, Bob Jones University (BJU) is a private religious school that had religiously based rules guiding student conduct.[113] The *Bob Jones* case arose when the Internal Revenue Service (IRS) revoked BJU's tax-exempt status on the basis that BJU's student code of conduct was racially discriminatory.[114] Prior to 1971, BJU refused to admit any black students, and after 1971 admitted them only if they followed the university guidelines restricting interracial dating

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[111] See White, *Justice as Translation*, *supra* note 2 at 222.
[112] 461 US 574 (1983) [*Bob Jones*]. For another discussion of the comparison between the TWU cases and *Bob Jones*, see Mary Anne Waldron, "Analogy and Neutrality: Thinking about Freedom of Religion" in Newman, *supra* note 32, 249.
[113] *Bob Jones*, *supra* note 112 at 579—582
[114] *Ibid* at 581.

and marriage.[115] Similar to TWU, BJU's legal argument was that its discriminatory policy should be permitted because it was a private school, the policy was grounded in religious beliefs, and the code of conduct merely asked black students to respect the university's standards while attending the school.[116]

Drawing on the similarities between TWU and the *Bob Jones* case, Elaine Craig, one of the more outspoken opponents of accrediting TWU's proposed law school, asserted that there is no principled way to distinguish discrimination on the basis of sexual orientation and discrimination on the basis of race.[117] If a Law Society would say "no" to racial discrimination in law school, then they must also say "no" to discrimination on the basis of sexual orientation in law school.[118] In this argument, sexual orientation discrimination and racial discrimination are equated in two senses. First, both are understood to address fundamental aspects of personal identity.[119] Second, sexual acts are considered to be inalienable from the identity aspect of sexual orientation just as skin colour cannot be removed from racial identity.[120] From this point of view, to ask an LGBTQ person to not engage in LGBTQ sexual activity while at TWU is the same as asking a black person to not date a white person while at BJU.

Whether or not the similarities drawn between sexual orientation and racial discrimination are defensible, it is important to take note of the ways in which their alignment affects how the TWU law school dispute is cast in terms of law. First, setting the inalienability of sexual acts and personal identity in opposition to the freedom of religion pushes the conception of religion further toward the distinction drawn between religious belief and religious action. The TWU Covenant is not considered to be a proxy for religious belief, but is a form of action separate from belief.[121] This is the way that the Ontario Court of Appeal employed *Bob Jones* in its legal analysis, citing it as an example of the distinction between state action that interferes with religious belief itself and state action that denies a benefit because of the impact of that religious belief on others.[122]

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[115] *Ibid* at 579—582.
[116] *Ibid* at 602, 605. See also Craig, *supra* note 85 at 659.
[117] *Supra* note 85 at 659.
[118] *Ibid* at 659.
[119] See *BCCT*, *supra* note 32 at para 69 (describing the fundamentality of sexual orientation to personal identity).
[120] See Craig, *supra* note 85 at 637—38 (describing the inseparability of sexual practices from identity).
[121] See *BCCT*, *supra* note 32 at para 72.
[122] *LSUC* ONCA, *supra* note 3 at para 136.

The tension within religious freedom—the (in)separability of belief and action—is resolved with surprising simplicity. The Ontario Court of Appeal said that "the LSUC's decision not to accredit TWU does not prevent the practice of a religious belief itself; rather it denies a public benefit because of the impact of that religious belief on others—members of the LGBTQ community."[123] Although religious belief and action are distinguished in Canadian law, the tension of distinguishing and holding these two things together is neither lost nor resolved in the jurisprudence.[124] Dividing TWU's religious belief from its religious action (in the TWU Covenant) in an attempt to insulate religious beliefs from the regulation of religious practices, as the Ontario Court of Appeal did, overlooks the tension in Canadian law of simultaneously distinguishing and protecting religious belief and action.

Secondly, separating religious codes of conduct from religious belief has the effect of marginalizing within legal discourse the meanings and rationales that exist for religious action.[125] Levelling the differences between sexual orientation and race discrimination in the TWU and *Bob Jones* cases signals the erasure of the moral, philosophical and theological arguments that might be used to engage (and distinguish) the two practices. In the TWU Covenant, it seems not to be "because I am gay" that I cannot have sex with another man, but rather it is because the act of two men having sex with each other is contrary to TWU's understanding of Christian doctrine that I cannot have sex with another man. This is different than the prohibition in *Bob Jones*, where it is very clearly "because I am black" and "because you are white" that two people cannot have sex.[126] The point here is to note that the prohibition in *Bob Jones* is based upon a hierarchy of race and the theological meanings attached to racial difference, whereas the TWU Covenant is about the morality of sexual activity, not a hierarchical view of sexual orientation as such. The

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[123] *Ibid* at para 138.

[124] See e.g. *Loyola*, *supra* note 32 (where the inescapability of the Catholic perspective in teaching about religion, culture and ethics is simultaneously recognized and denied). See also *Chamberlain v Surrey School District No 36*, 2002 SCC 86, [2001] 4 SCR 710 (where the religious perspective of the school board members was recognized as inalienable, but simultaneously restricted in the role that it could play in making decisions of public policy); Richard Moon, "The Supreme Court of Canada's Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality in Public Schools" in David Rayside & Clyde Wilcox, eds, *Faith, Politics, and Sexual Diversity in Canada and the United States* (Vancouver: UBC Press, 2011) 321 at 323—324 (Moon argues that it is incoherent to try to recognize both religious and civil values in public—for him, public education—by dividing them along public/private lines and insulating them from each other).

[125] *Cf* Bateman, *supra* note 34 at 92 (Bateman pointed out that the aspect of the TWU Covenant dealing with sexual behaviour is often considered separately from its theological context, which is to engender a whole religious lifestyle grounded in a more complete theological worldview).

[126] *Supra* note 112 at 580—81.

ethics and morality of sexuality are grounded in deeply theologized understandings of human anthropology and physiology, which endow sexuality with divine purpose and design.[127]

Overlooking the theological, philosophical and moral particularities of the TWU Covenant and the BJU dating policies allows two radically different ideas to be grouped together and dealt with as a single phenomenon. This means that the TWU Covenant can only be defended on the basis of the fact that it is religious and cannot be engaged in any other way. Despite the fact that the Supreme Court of Canada in *Amselem* established the principle that courts are not to decide questions of theology, this does not mean that the courts should disengage with religious ideas altogether.[128] To the contrary, courts are not alleviated of the responsibility to address religious matters where a question of religious freedom or other civil or property rights are at issue.[129] As was seen in chapter 2, many Canadian cases discuss questions of theology and church organizational structure in detail in order to determine property and civil rights.[130] The theological and religious differences between the TWU dispute and the *Bob Jones* case are important *factual* distinctions that cannot be ignored without crippling the legal analysis and legal judgment. Furthermore, refusing to consider them puts TWU into the awkward position of having to defend its Covenant through a version of religious freedom that also protects racial discrimination (or worse), which leaves TWU (and those who support it) appearing to support racist theology (which it does not).

Flattening the theological and philosophical distinctions between the TWU Covenant and the *Bob Jones* case treats the product of internal religious discourse differently than the product of other forms of rational discourse. The reasons that support religious positions are treated either as inherently irrational or as irrelevant simply because they appear in a religious context.[131] Lumping together theories of racial hierarchy with theories of sexual morality renders

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[127] See e.g. Douglas Farrow, *Desiring a Better Country* (Montréal: McGill-Queen's University Press, 2015), ch 2.
[128] *Supra* note 27 at para 50.
[129] See *Bruker v Marcovitz*, *supra* note 31 at paras 18, 41—45.
[130] See e.g. *Lakeside Colony of Hutterian Brethren v Hofer*, [1992] 3 SCR 165 at 173—74, 97 DLR (4th) 17; *Ukrainian Greek Orthodox Church of Canada et al v The Trustees of the Ukrainian Greek Orthodox Cathedral of St Mary the Protectress et al*, [1940] SCR 586 at 591, [1940] 3 DLR 670; *Pankerichan v Djokic*, 2014 ONCA 709, 123 OR (3d) 131; *Bentley v Anglican Synod of the Diocese of New Westminster*, 2010 BCCA 506, 326 DLR (4th) 280; *Delicata*, supra note 30; *United Pentecostal Church of Chipman v Chipman Pentecostal Church Inc*, 2001 NBQB 49; *Mott-Trille v Steed*, 27 OR (3d) 486, 1996 CanLII 7955 (Ont Ct (Gen Div)); *MacLachlan v Capilano Christian Assembly*, 2003 ABQB 159; *Kong v Vancouver Chinese Baptist Church*, 2014 BCSC 1424, 17 CCEL (4th) 108; *Sandhu v Siri Guru Nanak Sikh Gurdwara of Alberta*, 2015 ABCA 101, 382 DLR (4th) 150.
[131] The theme raised here echoes the discussion of the rationalist and epistemological preferences of legal discourse that can be found in, e.g., Witten, "Rationalist Influences" *supra* note 36, and Horwitz, *supra* note 36.

the reasons that distinguish them of lesser value to the discourse of the law. This ignores both the rational aspect of religious discourse and the non-rational aspect of legal discourse. Legal discourse is set above the fray of the messiness in which religion is caught up.[132] The content of religious dialogue is irrelevant; only the effects of the end product of the dialogue—whether it causes harm—are considered relevant to legal discourse. This denies that there is a connection between the religious and the public, and the possibility that the religious discourse might contain insights that escape the vision of public discourse. Alienating legal analysis from the theological bases of religious action obscures the limitations and difficulties involved in using legal principles like harm, discrimination, religious freedom and public interest. In other words, it reinforces the problems and challenges identified in the first half of this chapter.

A third effect that flows from aligning racial and sexual orientation discrimination is that the particularities of social-historical context are passed over. Racial discrimination at a private university in 1970s America has a very different symbolic significance than the discrimination against LGBTQ people at a private university in Canada in 2018. Racial equality in America, between black and white people especially, became central to national, political and constitutional identity through the experience of the Civil War.[133] The American Civil Rights Movement in the 1950s and 1960s precipitated significant legal changes in favour of racial equality and provoked questions about the systemic implementation and enforcement of equality rights.[134] It is this special history, along with the volatility of racial tensions in 1970s America, which gave the practice of racial segregation at BJU its particular legal salience. The IRS action against BJU had an existential overtone for the national and political identity of America; the *Bob Jones* decision confirmed the basic commitment of the American national, political and constitutional community to racial equality.[135]

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[132] See e.g. Benjamin L Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at 12, 181 and 192 (Berger identifies the same dynamic but in terms of the cultural fray that law perceives itself to stand above).

[133] See generally Clayborne Carson, "American Civil Rights Movement" in *Encyclopaedia Britannica*, online: <https://www.britannica.com/event/American-civil-rights-movement>; Michael Vorenberg, *Final Freedom: The Civil War, the Abolition of Slavery, and the Thirteenth Amendment* (Cambridge: Cambridge University Press, 2001). See also James M McPherson, "Out of War, a New Nation", *Prologue Magazine* 42:1 (Spring 2010) 6, online: <https://www.archives.gov/publications/prologue/2010/spring/newnation.html>; Alexander Tsesis, "Introduction: The Thirteenth Amendment's Revolutionary Aims" in Alexander Tsesis, ed, *The Promises of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment* (New York: Columbia University Press, 2010) 1.

[134] See Carson, *supra* note 133.

[135] *Supra* note 112 at 595. "Few social or political issues in our history have been more vigorously debated and more extensively ventilated than the issue of racial discrimination, particularly in education . . . [T]he Government has a

Sexual minorities have a very different place in the national, political and constitutional identity of Canada than racial minorities in America. The historical marginalization of non-heterosexuality in Canada, which was often quite drastic, is remarkable and shameful.[136] The historical criminalization and punishment of homosexuality in Canada is an ugly blemish on our legal history.[137] Without question, this negative history informs the way that the TWU Covenant is perceived. TWU's institutional stance that LGBTQ sexuality is deviant will likely be felt by many as hurtful and perpetuating views on sexuality that fuelled (and fuel) the mistreatment of sexual minorities. However, the *social, political and constitutional* dimensions of the hurt flowing from the TWU Covenant does not appear equivalent to those at stake in *Bob Jones*. Canada's history regarding sexual minorities has no equivalent to the American Civil War. This is not to say that the TWU cases must be decided in favour of TWU. Rather, the sense of "elementary justice"[138] at stake in *Bob Jones*, which is also present in the TWU cases—that all people should be treated with dignity and respect—does not lead to the conclusion that the TWU cases must be decided the same way as *Bob Jones*. This dissertation project has argued throughout that even the most basic notions of justice, such as the notion of harm, engage social contextual dimensions when being applied in law. The difference in social, political and constitutional context between the accreditation of TWU's proposed law school and the *Bob Jones* case cannot be overlooked.[139]

Although there are similarities between racial and sexual orientation discrimination, and between TWU and BJU, ignoring their distinctions in the name of equality law establishes a discourse structure that is distinctly flat. The tensions that exist between religious belief and action, and between sexual orientation and sexual activity, are removed; the range of reasons

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fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's constitutional history". *Ibid* at 595, 604.

[136] See Krishna Rau, "Lesbian, Gay, Bisexual and Transgender Rights in Canada" in *The Canadian Encyclopedia*, by Davida Aronovitch (Toronto: Historica Canada, 2014), online: <www.thecanadianencyclopedia.ca>.

[137] Homosexuality was decriminalized in Canada though the *Criminal Law Amendment Act, 1968–69*, SC 1968–69, c 38, which received Royal Assent on June 27, 1969.

[138] See *BCCT*, *supra* note 32 at para 70, L'Heureux-Dubé J, dissenting; *Bob Jones*, *supra* note 112 at 592.

[139] This includes, as I have just argued, the big historical, political and constitutional differences (like the American Civil War), which speak to the meaning (i.e., 'harm') of the TWU Covenant. It is important to mention that social context can also include smaller differences, like the difference between tax exemption and the granting of accreditation. See *LSBC* BCCA, *supra* note 3 at paras 182—84 (the Court distinguished the tax exemption at issue in *Bob Jones* and the accreditation at issue in the present case—the former confers financial support (tax relief), whereas the latter merely licenses the activity of an institution (which is otherwise lawful) for the specific purposes of pursuing a legal career). Both the big and small differences help shape the social dimension of the case and should be accounted for in the legal analysis of the refusal to accredit TWU on the basis of the Covenant.

available for discussing religious action and its relation to sexual identity are circumscribed; and the social contextual factors that situate the conflict and characterize the significance of the situation in question are ignored.

5 REIMAGINING THE RELATIONSHIP BETWEEN TWU AND THE LAW SOCIETIES

The result of flattening the legal discourse over the accreditation of TWU's proposed law school leaves us vulnerable to a narrative of legal adjudication that leads to impasse and alienation. Disconnecting legal adjudication from the background considerations of religious belief and action, of theological discourse and of social and historical context, alienates the claimants from each other and deprives the legal decision-making process of some significant deliberative and justificatory tools. The limitations of this emerging narrative of legal adjudication are mirrored in American federal discrimination jurisprudence pertaining to affirmative action programs. American scholar James Boyd White found that there was no readily available legal answer to satisfy the competing claims of injustice at stake.[140] The first two sections of this chapter noted a similar frustration persisting in the litigation over the accreditation of TWU's proposed law school. The concerns of both TWU and the Law Societies are understandable and equally difficult to articulate clearly in the terms of the law. Finding a legal solution that recognizes both sets of concerns while constructing a way forward has been evasive. I believe that the way White worked through the question of racial affirmative action can inspire us to reimagine a way forward in the TWU dispute.[141]

White did not propose a solution to solve the legal questions regarding affirmative action programs. His simple but profound contribution was to draw attention to the importance of the way that people narrate the relationships at stake.[142] White noted the contemporary white workers resisted affirmative action laws on the basis that they have no direct personal connection, or family history, to slavery.[143] As a result, for these workers there was no justice in demanding that "we" give up opportunities (to jobs) in order to make up for the historic wrongs

[140] White, *Justice as Translation*, *supra* note 2 at 219.
[141] *Ibid* at 218—22. White looked specifically at the case *United Steelworkers of America v Weber*, 443 US 193 (1979), which considered whether Title VII of the *Civil Rights Act of 1964*, 42 USC § 2000 (1964) was violated by an affirmative action program embedded in the collective bargaining agreement.
[142] *Ibid* at 216—17, 222.
[143] *Ibid* at 220.

suffered by "them".[144] Interpreting the law from this perspective looks for a causal connection in order to impute responsibility. White noted that this way of framing moral obligation had two narrative elements—first, it focused on the relationship between contemporary white people and the white slave owners of history; second, it portrayed the contemporary relationship between white and black workers as one of competition between strangers for access to scarce resources (like good jobs).[145] White suggested that the moral equation radically changed if focus was placed on the connection between contemporary white workers and those in history who fought and paid dearly for the emancipation of slaves (rather than on slave owners).[146] The moral obligation that led these men and women to sacrifice so much was not out of a duty to make reparation but rather out of a desire for a better country, where the harms of slavery have no place.[147] In other words, White suggested that we focus the calculation of our moral and legal obligations on the *character of the community to which we all belong*.[148]

This narrative turn proposed by White shifts the way that we interpret equality law. Rather than thinking about equality in terms of ascribing fault and allocating costs between strangers, we now see it in terms of the duties and demands of sacrifice and love flowing from a community of friendship.[149] This narrative of a community of friendship enabled White to articulate an interpretation of law that connected the parties to each other in a more meaningful way and justified the demands placed upon them. Embedding friendship within community was crucial because it enabled a link to be drawn between victim and perpetrator as well as between us today and those in the past who have paid dearly to help secure a world free from racism. The world we inhabit is a world that we inherit. The obligations we owe, which are crystalized within the law, reflect this inheritance. For White, "such a community is what an inherited Constitution is, a cultural legacy: not a penalty for the crimes of one's ancestors, but an opportunity for meaningful action".[150] Affirmative action in equality law is therefore not about paying a price for past sins, but a call for us to participate in the life of the (national, political and constitutional) community that we inherit.

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[144] Ibid.
[145] Ibid.
[146] *Ibid* at 221.
[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] Ibid.

Although, as already observed, the Canadian experience of historical discrimination of sexual minorities cannot be equated with the American experience regarding race, White's re-imagination of the law as a community of character still resonates. One of the central arguments against accrediting TWU's proposed law school is that access to legal education is scarce, and that to allow TWU to discriminate on the basis of sexual orientation leaves LGBTQ people in an unfair position to compete for access to this scarce resource.[151] Likewise, TWU's argument that its institution should be insulated from the public process of addressing the social wrongs committed against LGBTQ people refuses to see the TWU community as a fully active and responsible participant in the larger social community. Such arguments view the relationship between TWU, law schools, the legal profession, law students, the public and LGBTQ people as strangers who are fighting against each other for scarce resources and self-protection. Justice is thus a matter of making sure that the fight is equal. Individuals (and communities) are shorn of anything that degrades their ability to fight for their share or their own.

In response to hiring quotas aimed at addressing racial inequality in the workplace, White suggested that white workers needed to learn to accept the cost of these affirmative action programs as a part of participating in the community inherited through the American Constitution.[152] What might this mean for the conflict over the accreditation of TWU's proposed law school? In the TWU dispute, who is parallel to the white workers? Who needs to accept whom? The Law Societies say that TWU must accept sexual minorities (LGBTQ students), whereas TWU says that the Law Societies must accept religious minorities (the institution of TWU). I do not think that White's proposal helps us decide the direction in which the conflict should be resolved. Rather, his proposal helps us see that any answer developed through the law must take account of the social relational, discursive and communal aspects at stake in the dispute.[153]

Though there is much to be said for merit, fair competition and neutrality, which I do not want to contend with, it is important to beware of the effects of embedding the legal discourse of equality in a narrative that is neutered of those things that connect us to others and connect us to a shared past. There is an aspect of justice missing in this formulation. If we approach the

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[151] See *Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326, 392 DLR (4th) 722 (Written Argument of the Respondent at paras 83—89, 534); *LSUC* ONSC, *supra* note 7 at para 67.
[152] White, *Justice as Translation*, *supra* note 2 at 220—21.
[153] *Ibid* at 222.

interpretation of law solely from the perspective of deciphering and applying a principle that is neutral (e.g., resource competition), the loss of connectivity eventually leads to impasse. Drawing on an ethic that seeks to enhance social relationships (i.e., "friendship") in the task of interpreting law makes it possible to evaluate the social effects of legal decisions and to justify the choices made through law in a way that binds people together rather than pulling them apart.

Criticizing White's attempt to reframe the American legal perspective as a community of friendship, Sanford Levinson observed, "[t]he constitutive understandings of American life, including its constitutional dimension, have been written in blood as much as forged in conversation."[154] Levinson's astute insight, which must be acknowledged here, is that naïve faith in the unifying capacity of law is deeply unsatisfying.[155] Insofar as White's project might have overlooked or avoided arguments that threatened the unifying appearance of law, I agree with Levinson.[156] However, Levinson's critique does not, in my view, negate the usefulness of seeing the law as a "community of friendship" but rather helps sharpen our understanding of what its use might achieve. The point of using the community of friendship idea is not to make everyone under the rule of law friends in the sense of obliterating their disagreements. Rather, it is to bring to the foreground the socially constructive aspect of legal conflict and use *that* as the basis for developing a sense of unity through legal adjudication.

Legal disputes rarely, if ever, lead to a happy and contented unity of different perspectives. Usually there is a gap that remains despite legal resolution. TWU's litigation experience demonstrates this: TWU won protection for its Covenant at the Supreme Court of Canada in 2001, and has now lost a very similar protection at the Supreme Court of Canada in 2018.[157] It would be unwise to presume that the intervention of the Supreme Court of Canada regarding TWU's proposed law school will draw a seamless end to the dispute between TWU and the Law Societies. This highlights the importance of exploring and evaluating the legal dispute in a way that looks beyond the interpretation and application of legal rules to include the social and relational dimensions of the dispute. Even though the recent litigation might not

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[154] Sanford Levinson, "Conversing About Justice", Book Review of *Justice as Translation: An Essay in Cultural and Legal Criticism* by James Boyd White, (1991) 100:6 Yale LJ 1855 at 1866.
[155] *Ibid* at 1864—65.
[156] Levinson said that White's solution to the problems of affirmative action, although beautiful, "smells of the scholar's lamp or, perhaps more accurately, the scholar's armchair out of which this book seems to have been written". *Ibid* at 1868. Levinson thought that White cherry-picked his examples and his scholarly interlocutors in order to make the law appear more rosy and peaceable than it actually is. *Ibid* at 1856.
[157] *BCCT*, *supra* note 32; *LSBC* SCC, *supra* note 3; *LSUC* SCC, *supra* note 3.

resolve the underlying questions and challenges posed by the TWU community, it is possible to develop a view of the law's encounter with religion that is based on a commitment to the process of translation and an obligation to participate in a conversational community of friendship. This would foster the basis on which to build mutual understanding (not mutual agreement), mutual respect and shared responsibility for preserving the law and the shared world that the parties have inherited.

There are (at least) two conceptual components that flow from approaching the dispute between TWU and the Law Societies in terms of its social and relational dimensions. The first is the recognition that all of the concerned parties—individual Christian and LGBTQ people, and the groups of TWU and Law Societies—participate together in the community of the law insofar as they are connected by the social production of meaning through the use of the language of the law. This means that the law, its rules, principles and values, must not be used to exclude, alienate or silence the diverse perspectives brought to the conflict. This also means that the arguments and responses given in the language of the law should be attentive to and respectful of the opposing perspective, carefully responding to each other in order to foster common understanding and avoid obscuring each other's claims. Secondly, the institutions of law, such as the courts, have an important role to play. Even though they have limited influence over the way that disputants use the tools of legal language, the courts are nevertheless able to help build a narrative and legal discourse within which a community of friendship is possible. Unfortunately, the decisions of the Ontario courts in the TWU dispute seem to have reinforced a narrative that distorts rather than clarifies the interests and claims at stake. Not only did the Ontario courts alienate religious perspectives and brand TWU's religious practice as contemptuous, they also refused to consider LGBTQ equality concerns in their own right and instead co-opted them as ultimately being about the integrity and purpose of the Law Society. Colonizing LGBTQ interests and alienating the TWU claim rendered both groups passive in relation to the law's pursuit of perfection. The law (and its institutions) is portrayed as the only active agent in the story. This hampered rather than fostered the mutual participation and commitment required by the process of translation.

Approaching legal analysis in terms of the character of community, such as a community of friendship, pushes in the opposite direction. Framing the legal process of conflict resolution in terms of friendship invites us to focus less on deciphering the "correct" answer to a legal

problem or maintaining the integrity of the institutions of law for their own sake and more on discerning the ways in which the legal system can be used to foster a healthy legal discourse and a vibrant democratic community.[158] This is particularly important following the recent Supreme Court of Canada decisions regarding the TWU dispute, which invite further discussion of whether and how there might be room to renew the ongoing interaction between TWU and the Law Societies. Examining and evaluating the past legal arguments and legal decisions in terms of the relational dimensions and discursive effects of using legal language, as I have done here, re-configures the relationship between the parties moving forward, so as to emphasize and foster open engagement, mutual participation and respect.

CONCLUSION

When viewed through the lens of translation, the dissonance and tension in the legal arguments and analyses of the TWU dispute come to the fore. How does the law, as adjudicator charged with making a decision, deal with this? Part of the solution that I proposed in this chapter is to view the law as standing in the gap between different ways of seeing the world—that is, to see law as translation and legal adjudication as the embodiment of the social interactive process of translation. Reframing legal adjudication in this way would shift from focusing solely on the content of the law as the source for resolving the dispute and toward the way that legal arguments and analyses structure the relationships and forms of engagement.

This shift in perspective is particularly important for the complex balancing occurring in cases like the TWU dispute. We saw that the evangelical perspective of TWU does not fit well into the law of religious freedom in Canada. Recognizing the dissonance here pointed us to the underlying social questions that lie at the heart of the dispute. How is religion dealt with in relation to the division between public and private spheres of life? The challenge posed by TWU's proposed law school is that its evangelical mission seeks to bridge the private religious and the public lives of its students. The social stakes of the situation are clarified by the decisions of the Ontario courts to uphold the LSUC refusal to accredit TWU's proposed law school. The questions raised by the evangelical effort to cross the boundary between private religious and

[158] See White, *Justice as Translation*, *supra* note 2 at 223.

public life were exacerbated by appealing to the ambiguous notion of hurtfulness as a basis for finding discrimination. The tipping point came from eliding the distinction between the discriminatory effects of the TWU Covenant and its impact on the institutional goals of the legal profession. The dispute morphed from a matter regarding the treatment of sexual minorities by a religious institution into a matter of the relation between private religion and public law.

Although the Law Societies and TWU have two separate ways of seeing what is at stake in the dispute and what solutions are available, their differences do not have to lead to impasse or alienation *if* the interaction between them is understood in the communal and relational terms of language and translation. This is no simple thing. It requires that each recognize the limitations of its own perspective, and to see that the world they inhabit together is incomplete and constantly subject to change. It also requires them to see their appeal to law as a dialogue that evolves through mutual participation rather than obedience to reified legal principles. A just, right and good solution to the dispute is not one that simply establishes either TWU's religious institutional autonomy or expands the reach of public values embedded in the legal profession. Rather, TWU and the Law Societies must be seen as common users of a common legal language and, therefore, part of a common effort to create a shared social reality through the law. Both are responsible to work toward building a shared future and the common ground on which it is based. The obligation they both have to be faithful to the law is the same obligation they have to be faithful to each other.

Approaching the relationship between TWU and the Law Societies in this way frames their past interactions—as well as any future interactions that might follow the 2018 Supreme Court decisions—in the context of the law's ongoing encounter with religion. Reconstructing the law's encounter with religion starts by reimagining the narrative by which legal disputes are constituted. The challenge is to structure the discursive movement of translation back and forth between two opposing perspectives in such a way as to guard against vacating the relationship between them, established through law, of its social interactive aspect. Rather than looking at legal adjudication as allocating costs and benefits between strangers in an empty economy of competition and self-protection, we can draw inspiration from the possibility of seeing law as a community of friendship. There is no guarantee that reframing legal adjudication in this way will always produce decisions that are satisfying to the parties. But that is precisely the point. Friendship does not dispel difference and conflict but creates the conditions of belonging and

participation that enable conflict to produce meaning that can be shared. In response to the concern raised by Stanley Fish in the quotation at the beginning of this chapter, a community of friendship is not apolitical and does not seek to sidestep ongoing conflicts. Rather, it reframes, or translates, legal conflict from a struggle that ends in victory and defeat to an ongoing process of mutually constructing and reconstructing common ground.

CONCLUSION

We cannot help but live 'betwixt and between' and keep using 'a variety of tradition-generated resources of thought and action' precisely because we cannot avoid living in overlapping and rapidly changing social space.[1]

What is to be hoped for, then, is not a surrender of standards but translation, the art of "making it possible for people inhabiting different worlds to have a genuine, and reciprocal impact upon one another."[2]

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How do we conceptualize the law's encounter with religion? In response to this question, which is central to my dissertation, I proposed that the law's encounter with religion involves a *social interactive dimension*. My analysis showed that accounting for this crucial dimension of the law's encounter with religion enriches our understanding of and ability to critically evaluate the legal adjudication of religious claims. Approaching an analysis of the law's encounter with religion in this way provided an opportunity to reimagine the relationship between law and religion in a way that promotes dynamic and fruitful interactions.

I began the project by describing some of the challenges with framing the distinction and engagement between law and religion. I suggested that difficulties arise when the distinctions between law and religion are viewed as necessarily oppositional, and when their differences are conceived of as total. If the law's encounter with religion is viewed in this way, then cases that involve a religious dimension will be resolved through a strategy of containment and isolation. This blinds legal analysis and unduly limits the integrative potential of legal adjudication. I do not dispute that law and religion are separate and different, and that their engagement in a legal

[1] Miroslav Volf, *Exclusion and Embrace: A Theological Exploration of Identity, Otherness, and Reconciliation* (Nashville: Abingdon Press, 1996) at 210.
[2] Milner S Ball, "The Legal Academy and Minority Scholars" (1990) 103:8 Harvard L Rev 1855 at 1857 [Ball, "Minority Scholars"], quoting Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (New York: Basic Books, 1983) at 161.
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context has particular limitations. I contend, however, that it is possible to frame the law's encounter with religion in a way that acknowledges these differences and limitations while also fostering a relationship between them that is open, reciprocal and dialectic. Although the complex encounter of law and religion is not easily captured within the legal approach to religion and religious claims, it is possible to uncover and look beyond these limitations.

The solution that I proposed and explored throughout the project was to focus on the process of the law's encounter with religion, and to provide an account of the social interactive dimension of the encounter within the context of legal adjudication. I developed this through a close reading of a number of cases that involve the adjudication of religious matters alongside a discussion of related literature on social and legal theory. I traced the social dimension of the law's encounter with religion in these cases and, with the help of the secondary literature, advanced our understanding of the ways that the interaction between religion and religious claims are conceptualized and dealt with in legal analysis. Approaching the law's encounter with religion in this way engaged with a range of relational, dialectical, symbolic, communal, institution and discursive elements that are often not addressed in legal analysis. This shifted the discussion of the cases and legal analysis away from the technical application of legal rules and principles and toward terms and concepts pertaining to the encounter itself.

My analysis showed that when approached this way, the legal adjudication of religion is not left rudderless. The social interactive process provides a strong critical perspective for examining legal decisions, grounded in the communal, relational and discursive dimensions of the legal disputes in question. This, I have argued, re-casts the legal adjudication of religious matters in a way that includes the integration of the religious perspective as part of the purpose of legal decision-making. Legal analysis and decision-making are not displaced, but rather the social interactive dimension is made an integral aspect of the analytic and decision-making process.

My analysis did not propose a particular principle for resolving the legal adjudication of religious claims. Rather, my analysis provided a new and unique way of thinking and talking about law's encounter with religion in the context of adjudicating religious claims.[3] This, I believe, showed the possibility and potential of making the legal adjudication of religious claims

[3] The theme of "thinking and talking" is adapted from James Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990). See discussion in chapter 5, section 3.

a more dynamic and fruitful encounter. It offers a set of terms, concepts and ideas that foster and support an open, reciprocal, and integrative engagement between law and religion. Shifting attention in the legal adjudication of religious matters to the social interactive dimension re-frames the differences and tensions between law and religion as constructive rather than destructive. In other words, it allows us to see law and religion as perfect strangers that are also friends.

In this concluding chapter I will review each of the substantive chapters to outline the arguments I made in each context and to identify some of the ways that they work together as a larger conversation. I will then describe some of the key themes running through the project in order to articulate the contribution that my project makes to the way we think and talk about the relationship and encounter between law and religion. My final concluding comment will briefly identify some ideas about where the project might lead us next.

1 REVIEW OF THE ANALYSIS

The approach that I took in the project was to analyse a variety of different contexts of the law's encounter with religion, and to trace in each context the social interactive dimensions at play. Each chapter developed an analysis focused on a unique set of cases and secondary literature. The chapters all drew attention to the vast background of philosophical, theoretical and social issues at play in the way that the law adjudicates religious claims, and highlighted the challenges we face when bringing these issues into legal analysis. Together, the chapters provide a multivalent and rich understanding of the nature of the interaction of law and religion and the possibilities for developing a more fruitful and dynamic way of approaching the engagement between them.

Chapter 1

In the first chapter I explored the community aspect of the contemporary Canadian dispute over the accreditation of Trinity Western University's (TWU's) proposed law school. There were two main elements of community that I discussed in relation to this dispute. First, I looked at how communities are shaped by their boundaries and the interaction that occurs with

other communities in the process of creating these boundaries. Boundaries are not rigid or impermeable, but rather are dynamic sites of interaction and exchange between different perspectives and claims about communal identity. Community boundaries are symbols that hold together a diversity of views under a common 'banner' of communal belonging and simultaneously distinguish one group of people from another. From this view, communities and their boundaries emerge through interaction and conflict; boundaries are dynamic and communities are intertwined. In my discussion I also identified the power of communal narratives of identity exercised in the crossing-over between communities. This, I suggested, is part of the existential basis of community existence. The tensions felt in the law's encounter with religion—in the dispute over the accreditation of TWU's proposed law school—reflects this existential experience. The challenge is to *not* abandon this tension by appealing to some "essence" of religious or legal community that is separate from the process of interaction between communities.

I explored this challenge in terms of how the "ethos" of the legal community is defined in the TWU dispute. Communal values should not be severed from the disciplinary practices when defining the nature and ethos of a community. This is particularly important when there is an intersection between communities because, as already mentioned, communal identity is constructed and evolves through interaction with other communities. It is crucial to be able to articulate the connection between values and practices in defining communal ethos. Otherwise the active role of individuals and the inter-communal interaction, which are integral to community life, are subsumed in a reified idea of communal identity.

I argued that the identity of the legal community is connected to its encounter with religious communities. From this view, the dispute with TWU helps illuminate the nature of the boundaries and ethos of the legal community. If it is the case that legal community emerges from (or is shaped by) its interaction with TWU, then the dispute should not be framed in terms of abstract ideas about the essence of law and legal values. Doing this has a negative effect on the legal community, alienating individual identity from professional identity and other forms of communal belonging from membership in the legal profession. It would also have a negative effect on the resolution of the dispute over the accreditation of TWU's proposed law school, casting TWU as a foreign entity that threatens the stability of the legal community. Instead, the dispute should be approached in such a way as to account for and foster the interaction between

TWU and the legal community as part of the process of developing the boundaries and ethos of the legal community.

The first chapter enriches our understanding of legal education, the legal profession and the possibility of integrating religious communities, like TWU, into the legal community. This opens up discussion of the social and communal dimensions of the law's encounter with religion more generally. Focusing on the boundary between TWU and the legal community exposed the social interactive dynamics that help shape the two communities, which enriches our understanding of the law's encounter with religion. One of the key ideas that the first chapter introduced, which resonates throughout the project as a whole, is that the law's encounter with religion is constructive, not destructive. The social interactive dimension of the encounter between legal and religious communities illuminates a process that involves mutual participation and reciprocal engagement. The interactive process identified here is not limited to the particular materials regarding TWU's proposed law school discussed in this chapter, but helps set up the upcoming academic discussion of the recent SCC decisions. The analysis and conclusions of this chapter also contribute the ongoing discussions of legal education, the legal profession and the way we think and talk about the law's encounter with religion more generally.

Chapter 2

In the second chapter I discussed the process of determining the justiciability of religious matters in civil courts. Although the jurisdictional division between civil law and religion is fundamental to the Canadian legal tradition, there are different ways that this distinction can be framed. I argued (as in chapter one) against distinctions that appeal to the essence of 'law' and 'religion', looking instead to the way that justiciability involves questions about the purposes of law as a social institution. Approaching the question of justiciability in this way looks to the ongoing and active exchange that occurs when determining the division between legal authority and religious matters. I showed that the process of drawing this distinction is a social constitutive act, which engages the complex interplay between individual, community and social institution. The process of distinguishing conceptually between the civil and the religious connects with a foundational sense of social reality shared by law and religion as institutional formations in

society. The question of whether or when a religious matter is justiciable helps reveal the complex social processes involved in building and developing the separation of law and religion.

My analysis highlighted the importance of establishing justiciability of a religious matter to the way that a religious claim is dealt with in legal analysis. Even though justiciability is intended to distinguish and separate the civil and religious spheres, the jurisprudence shows that the process of determining justiciability itself has a transformational impact on religion. I found this to be the case regardless of whether jurisdiction over a religious matter is accepted or refused. Moreover, as my discussion of *Bruker v Marcovitz* demonstrated, the way justiciability is approached has an impact on the outcome of a case even when justiciability is not thought to be a central issue to the case. I found that problems arise when the justiciability of a religious matter is guided by some objective factor, such as essential notions of "law" and "religion" or the operation of legal "form". In both cases, appealing to an objective factor masked the social interactive exchange occurring between law, religion and the broader social environment.

Even though justiciability is a question tied to the purpose of law as a social institution, the process of answering the question of justiciability also has a significant effect on religious individuals and communities. I argued that the way that the Supreme Court of Canada (SCC) in *Bruker v Marcovitz* distinguished between form and substance in order to establish justiciability hid the substantive activity of deciding the religious dimension of the disputes in question. The result was that the religious dimension of the dispute was transformed into a vehicle for advancing the purposes and goals of the Canadian constitutional framework, its values and social policies. My argument did not seek to undo the transformations occurring in the determination of the justiciability of religious matters, but rather to develop a way of accounting for these transformations when examining and evaluating the adjudication of religious matters.

In response I introduced the social construction of institutional boundary markers as a way to help account for the interactive dimension of determining the justiciability of religious matters. The question of justiciability is about determining what 'really matters' to law, which is foundationally a question of the institutional purpose of law. Although institutions articulate their purposes from an internal point of view, the process of developing institutional purpose is dialectically connected to other institutions and to a larger social environment. I argued that this dialectic tension should be part of the framework used to approach the determination of justiciability and the legal adjudication of religious matters. The law's perception of what is

worthwhile, although crucial for determining justiciability, cannot be treated as the solely relevant factor for conceptualizing the situation. Rather, the justiciability of a religious matter should be framed in terms of the multidimensional social interactive context within which the law operates.

The question of the justiciability of religious matters has far-reaching implications for the way that the law's encounter with religion is understood. My analysis exposed the importance of how the boundary between law and religion is conceptualized to the way that the encounter between law and religion plays out. Although some type of transformation is inevitable when the two meet, the purpose and context which frames the encounter will influence the way that the transformation is portrayed. If justiciability is evaluated as an objective application of legal form or a separation of incompatible spheres then the transformative effect of the process of determining justiciability will be hidden from view and the religious will be co-opted by the legal. But if the justiciability of religious matters is approached in light of the dialectic process of engaging different institutional forms of meaning within the larger social context then the encounter can be framed in terms that are mutually engaging and socially constructive.

At the end of chapter two I proposed a new metaphor for describing the process of the justiciability of religious matters. Drawing on the work of Milner Ball, I suggested that we turn away from seeing law as establishing a bulwark to protect against the threat of religious invasion and toward viewing the boundary between law and religion as "plumbing" that is intended to "watch the water and contain it some."[4] Thinking of law as a bulwark insulates it from critique because to breach the dam exposes society to external invasion, which is an existential threat. Grounding the intersection of law and religion in terms of plumbing, to the contrary, allows the differences between law and religion and the purposes of restricting their intermingling to be seen in terms that are dynamic, integrative and respectful.

Chapter 3

In chapter three I explore the law's encounter with religion in light of the gap that exists between the law's apprehension of religion and the experience of religious individuals and

[4] Milner S Ball, *Lying Down Together: Law, Metaphor, and Theology* (Madison, Wis: University of Wisconsin Press, 1985) at 123.

communities. I began by pointing out that when the law apprehends religion in the context of legal adjudication it is involved in a process of creating meaning. The law's encounter with religion is not merely a *mis*apprehension and distortion of religion, but rather manifests a social-symbolic process of meaning formation that is foundational to the development of the legal worldview. The challenge that I addressed has to do with accounting for this constitutive dimension of the law's encounter with religion in a way that is objective and critical while also recognizing its importance and inescapability. My answer to this challenge was to reframe the legal adjudication of religious claims in terms of the social-symbolic *process* at the heart of the law's apprehension of religion.

The discussion in chapter three followed four steps. First, I confronted the gap between law's apprehension of religion and the lived experience of religious individuals and communities through the *Bentley* case, which dealt with a dispute over the use of Anglican Church property. I suggested that the gap in the law's apprehension of a religious matter is an inescapable part of the law's institutional reality. Second, I explored the challenge of framing the integrity of the law's apprehension of religion in light of this gap. I argued that the assertion of law's sovereignty does not justify the primacy of law's perspective. Rather, it is necessary to develop an understanding of the law's encounter with religion that can account for the relational and formative process of the encounter. Third, I proposed legal fiction as a way to accomplish this re-framing. Legal fiction is particularly useful for exposing and exploring the social-symbolic process of meaning formation at the heart of law's apprehension of religion. Fourth, I looked to two case examples (*Ktunaxa Nation* and *Multani*) to help unpack these dynamics in the law's apprehension of religion.

The discussion of the *Ktunaxa Nation* and *Multani* cases helped crystalize the argument of the chapter. I looked at the ways that the courts struggled to fit religious meaning into their legal analysis and argued that this demonstrated two things. First, it pointed to the process of social-symbolic meaning formation at work in the law's encounter with religion. Second, it also highlighted the problems that arise from inadequately accounting for the process within legal analysis. In response to the *Ktunaxa Nation* decision, I suggested that law must account for the social-symbolic process occurring within the religious context in order to properly evaluate and decide the merits of a religious claim. Focusing on the individual believing subject, as the majority decision in *Ktunaxa Nation* did, created a blind spot in viewing the religious claim as

well as in understanding the influence of the legal point of view on the legal analysis. I argued that the *Multani* decision showed that the development of the legal meaning of a religious object involves the integration of the religious, physical and constitutional dimensions to the meaning of the object. The law's apprehension of the religious object was itself (like religion) engaged in the process of social-symbolic meaning formation. Failing to see this process at work in the law blinds the court to the interactive and integrative nature and potential of legal adjudication.

My analysis in chapter three showed how the process of social-symbolic meaning formation is able to offer a point of reference for critically evaluating the law's apprehension of religion and the encounter between them more generally. Law's apprehension of religion is not simply a matter of importing the religious into the legal context. Law is neither simply making space within itself for religion nor simply remaking religion into its own image. Rather, it seems that the law is doing both simultaneously. The law's apprehension of religion is a creative act that participates in the constitution and evolution of the law's reality. The encounter between legal and religious reality does not lead to the establishment of either the legal or the religious but to the creation of something new. The encounter involves the integration, overlap and exchange between law and religion; it leaves its mark on both law and religion.

I concluded in the third chapter that the law's apprehension of religion cannot be evaluated or considered in terms of truth and falsity but rather in terms of fiction, which points to the social-symbolic process of meaning formation. This conclusion also speaks to the argument of the dissertation as a whole. Fiction directs our thinking about the law's encounter with religion toward the *process* of meaning formation that they share. The point of view provided by this shared process of social-symbolic meaning formation makes it possible to frame the law's encounter with religion in terms of an engagement and exchange that is integrative and dialectical. If the law's apprehension of religion can be seen as a legal fiction then the collision between the worlds of law and religion is not a risk to the sovereignty of law but is an opportunity for the ongoing development and evolution of legal meaning.

Chapter 4

In chapter four I explored the legal adjudication of conflicts between religious and other rights. I argued that there are background issues and presumptions that heavily influence the

adjudication of conflicts between religious and other rights, and that this background often goes unaccounted for in legal analysis. My discussion traced the role played by these background issues and presumptions in the process of legal decision-making as well as the way in which they are obscured in legal analysis and theory. This confirmed that the ways in which legal discourse and legal analysis are framed has a significant impact on law's encounter with religion. In order to adequately account for the process of legal adjudication of religious rights that are in conflict with other rights requires engaging with the questions and presumptions related to the way that the intersection between the rights is framed. I proposed in this chapter a way to bring these background frameworks into legal analysis and the legal decision-making process.

My analysis in chapter four followed three steps. First, I explored the background issues and presumptions at work in the *NS* decision, which framed its balancing analysis as a way to resolve a conflict between rights that avoided having to establish a clear rule. My analysis of the *NS* decision showed that the process of balancing religious and other rights did not actually avoid the substantive issues and presumptions associated with establishing a clear rule. Rather, by acting as if balancing is a neutral or formal process, the Court obscured the way in which these issues and presumptions affected the decision-making process. Second, I discussed the idea that rights are incommensurable, and the insight that this idea offers for thinking about balancing religious and other rights. I found that the theories grounded in incommensurability revealed the important role of social community and social conceptual commitments to the legal decision-making process, which is quite helpful. However, these theories left unanswered some crucial questions about how to critically engage with the social and communal commitments and ideas that shape the balancing of rights. The theories grounded in incommensurability contained some presumptions that left their decision-making framework self-referential and circular. Without the ability to critically engage with these background presumptions the social communal dimensions brought in by incommensurability theories ultimately failed to advance beyond the neutral and formal view of balancing discussed in the *NS* case. Rather, it left us in a place where one must select and assert one particular set of values to guide the process of decision-making.

In the third and final part of the chapter, I proposed Alasdair MacIntyre's tradition-based rational enquiry theory, and his critique of liberal social philosophy, as a way to identify and engage the background issues and presumptions that the balancing and incommensurability approaches could not engage. My discussion of MacIntyre pointed to the way in which the

notion of preference in moral discourse leads to a fractured view of human reason and decision-making. I argued that both the balancing analysis used by the majority in the *NS* as well as the theories grounded in incommensurability relied on these presumptions about moral reasoning. As a result, both approaches to the adjudication of conflicts between religious and other rights were unable to take account of the crucial presumptions and ideas that affected the decision-making process within their analyses.

MacIntyre suggested two major ideas that could be used to understand and reframe the legal adjudication of conflicts between religious and other rights. First, participating together in the pursuit of the ultimate human good is a crucial part of rational decision-making. Second, the engagement between different traditions, experiences and perspectives is a necessary part of rational enquiry. Applied to the legal balancing of rights, these ideas help show that to frame the adjudication of conflicting rights without the elements of participation and engagement would alienate a range of human experiences and restrict legal analysis to one particular point of view. From this view, legal adjudication can never be truly successful in resolving disputes between religious and other rights; because it has no way to connect (and critically engage) with the social context within which it occurs, it is also unable to consider and rationally engage with other points of view.

This chapter adds a very important element to the discussion of the social interactive dimension of the law's encounter with religion. As I argued throughout the first three chapters, the social dimension of the law's encounter with religion is crucial and it must be accounted for in the legal analysis. The fourth chapter showed that it is not sufficient to merely recognize the social dimension, but that more is needed to understand how the social intersects with legal analysis and how this intersection can be critically evaluated. The discussion of the social interactive dimension of the law's encounter with religion requires a framework of analysis that includes as one of its core features an account of the participation and engagement between different social perspectives. Appealing to the social interactive dimension of decision-making (explored in the first three chapters) helps clarify the philosophic conditions (described in chapter four) necessary to foster this type of engagement. The reflection in chapter four on the way that the background frameworks intersect with legal decision-making points us in a direction that puts different perspectives into conversation with each other in a unified and integrative discourse.

Chapter 5

In chapter five I returned to the TWU dispute and offered an analysis that integrated the religious and other rights and interests at stake *through* or *within* the law. I found in this chapter that the law's role in managing the conflict between different social interests offered an opportunity to explore the potential of the integrative process of law in action. I used the idea of translation to reframe the way we look at legal arguments, to see them as part of a process of integration. From this view, I cast the tensions and disagreements between the different perspectives in the TWU dispute as a part of the process of using the common language of the law. Focusing on this interaction through legal language exposed some very important relational dynamics at work in legal adjudication, which I used to frame an approach to balancing religious and other interests that fosters participation in a "community of friendship".

In the first two sections of chapter five I explored the multiple perspectives brought to the legal dispute and to the way that these perspectives have been translated into the language of the law. The tensions and challenges of translating different perspectives and interest into legal language demonstrate the evasiveness of the objective demands of the law and the importance of accounting for the social-relational dimensions in legal analysis. Specifically, I found that the translation of TWU's evangelical perspective on Christian discipline did not fit well within the religious freedom protections found in s 2(a) of the *Charter*. The two points of tension I traced were with regard to the public/private divide and the notion of 'harm'. Similar points of tension were traced in the Ontario court decisions. I argued that the way the interests and concerns of the law societies and the LGBTQ community were translated into the legal concepts of harm, equality and discrimination glossed over the complexity of fitting these interests and concerns into the constitutional and administrative analysis. The effect was a redrawing of the lines between public/private and reframing of the process by which law carves out space for religion.

By setting out these tensions and ambiguities, my analysis identified the subterranean social and relational forces at work in the legal adjudication of a religious claim. I argued that the TWU dispute shows how the law is both the subject and object of legal analysis. The law is a tool for both sides to use, but also exerts its own normative force. In this dialectical engagement the parties use legal language, shaping it to accord with their interests while also conforming their interests to the patterns of claims available in law. This shows how the legal adjudication of

a conflict between religious and other interests is a process of overlap and interaction, of mutual participation in and belonging to the language of the law. This social interactive dimension of engaging with each other through legal language shows that the process of decision-making is not only about determining the correct legal answer but also (and in cases like the TWU dispute, perhaps more importantly) about creating a structure for the relationships and interactions between different perspectives within law.

In the final two parts of chapter five I turned to explore in greater depth this relational dimension of legal adjudication and its potential for critically reflecting on the TWU dispute. I considered how the dispute has been conceived and talked about in law and the kinds of relationships that this conceiving and talking about establish. I argued that the discourse emerging from analogizing TWU to Bob Jones University flattens the way that religion is brought into legal analysis. In particular, I noted the ways that the discourse pushed the distinction between religious belief and action, marginalized religious rationales for action and ignored crucial social and historical contextual factors. Drawing inspiration from James Boyd White's discussion of racial equality laws in America, I proposed that we shift the way we approach the legal adjudication of the TWU dispute. Rather than seeing its resolution as the allocation of costs and rights between strangers, I proposed viewing it in terms of the mutual obligations and demands flowing from a community of friendship. Reframing legal adjudication in this way draws into the legal discourse an ethic that seeks to enhance social relationships through the law. The goal of legal adjudication, from this approach, is not simply about deciding a winner, but also about fostering the process of participating together in a social interactive community. This, I argued, makes it possible to develop common ground through legal adjudication, and for legal decision-making to bind people together rather than pull them apart. As with chapter 1, the analysis and conclusions reached in chapter 5 are not limited to the particular materials and cases discussed regarding the earlier stages of the TWU dispute. They provide a starting point for examining and evaluating the recent SCC decisions on the matter.

2 THE CONTRIBUTION OF THE PROJECT

One of the main challenges of writing on the relationship between law and religion is finding a way to make a meaningful contribution to this rather broad field. The literature on the

relationship between law and religion is far-reaching and constantly growing. It could be approached from a variety of angles and address a host of different questions and issues. The contribution of my project to this conversation is a way of thinking and talking about the relationship between law and religion within the context of legal adjudication of religious matters. Focusing specifically on the social dimension of the interaction between law and religion offers a way of thinking and talking that is open to the genuine and reciprocal impact of the encounter between law and religion. This makes it possible to imagine and develop a dialectic and integrative view of the law's encounter with religion in the context of legal adjudication, so that the perspectives, claims and interests of those who inhabit different worlds can genuinely engage with each other.[5]

In this vein, my project offers a vocabulary that helps describe and frame the way we think about and approach the law's encounter with religion. This vocabulary goes beyond words and phrases to encapsulate themes and concepts that relate to certain attitudes and conditions. These are heuristic tools, by which I mean that they are useful for enabling the discovery of, or learning about, the law's encounter with religion.[6] They are not meant to be definitive descriptions or deterministic explications. Nevertheless, they have a normative and critical component, which directs us to a dynamic and open, rather than static and closed, view of law's encounter with religion.

There are many terms, themes and ideas that emerged throughout the project. Three in particular capture and demonstrate the contribution of the project as a whole: community, transformation and friendship. Highlighting these themes now will help crystalize the conclusion of this dissertation. These themes and terms do more than simply remind us about the particular issues that arose in the different contexts of encounter between law and religion dealt with in the individual chapters. They also point toward the way that the larger conversation about the

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[5] Geertz, *supra* note 2 at 161 ("The problem of the integration of cultural life becomes one of making it possible for people inhabiting different worlds to have a genuine, and reciprocal impact upon one another. If it is true that insofar as there is a general consciousness it consists of the interplay of a disorderly crowd of not wholly commensurable visions, then the vitality of that consciousness depends upon creating the conditions under which such interplay will occur. And for that, the first step is surely to accept the depth of the differences; the second to understand what these differences are; and the third to construct some sort of vocabulary in which they can be publicly formulated….")

[6] This approach reflects the language and strategy used by Benjamin L Berger in his work on law and religion; see e.g. *Law's Religion: Religious Difference and the Claims of Constitutionalism* (Toronto: University of Toronto Press, 2015) at 18—19 ("Speaking of law in this way thus captures something real about the modern institutionalized interaction of religion and the constitutional rule of law; it is a heuristic move, one that can afford a different appreciation of the character of the legal engagement with religious difference.")

relationship and encounter between law and religion is conceptualized, thought about and talked about, and how my approach contributes to this conversation.

Viewing the law's encounter with religion through the lens of community opened a fresh perspective on the encounter. The idea of community was prominent throughout the project, and its use engaged a variety of symbolic, institutional, conceptual, philosophical, linguistic and relational elements. The symbolic and interactive function of community boundaries pointed to the dynamic interplay of diversity and unity, which was very helpful for reflecting on the law's relationship with religion. Community refers not just to boundaries, which define the limits and distinctions with other communities, but also to ethos and practices. Participation in social practices like telling stories, using language, making arguments, offering and receiving discipline, are central to the life of community and to establishing the ethos or character of the community. This participatory aspect of community points to an intersectional aspect of community. In the context of translation, for example, community was framed in relation to the common use of a shared language. The participatory and intersectional aspects of community highlight the role of diverse perspectives in the process of decision-making, as we saw in the context of chapter four.

The idea of community also highlighted the multi-functional role of law in its encounter with religion. In one sense, law engages with religion, but in another sense law is the context within which religion is engaged. The law is a community *in* interaction and a community *of* interaction, and these two facts are dialectically intertwined. In legal analysis, law is both the subject and the context of the encounter with religion. In terms of community, law is both a community that intersects with religious community as well as a community within which religion and other claims, interests and perspectives intersect with each other. This multi-functionality of the law's encounter with religion directs attention toward the social interactive processes that I unpacked throughout the dissertation. It helps link the processes internal to the law with the process of the law's interaction with external reality. This is particularly pertinent for developing an understanding of the law's encounter with religion in the legal adjudication of religious matters. It emphasizes that the legal adjudication of religious claims involves both internal and external engagements, which means that the process of legal adjudication is part of the social interactive process and not standing separate and apart from it.

Another central theme in the dissertation can be captured in the idea of transformation, which pointed to the interactive dynamic at the heart of the social construction of institutional

and social reality. The idea of transformation carried both positive and negative connotations. In some contexts, transformation was cast as problematic because it distorts, obscures and co-opts one way of seeing things to serve another way of seeing things. In other contexts, transformation was cast as beneficial because it is part of the process of creating and developing social, institutional and conceptual reality. The positive creative component of transformation can be overtaken by the negative distortive component when the process and purpose of transformation is placed out of sight or kept out of the reach of critical reflection. There is some ambivalence in the process of transformation insofar as the conflict and change occurring in the law's encounter with religion can either replicate existing forms of institutional and conceptual reality or it can lead to the production of something new and shared. This ambivalence highlights one of the main goals of the project, which is to decipher a way to understand and evaluate the law's encounter with religion that both embraces and critically engages with the process of transformation.

Developing and embedding an awareness of the transformative effects of the law's encounter with religion within legal analysis is an important part of this. But I found that to really develop such self-awareness requires putting into question other foundational ideas and assumptions about reason, truth and meaning in relation to the purpose and process of legal adjudication. Putting these foundational ideas and assumptions into question is a very difficult thing to do in the context of legal discourse. In my analysis I explored the functional processes of social interaction at work in the transformations occurring through the law's encounter with religion. I found, perhaps somewhat surprisingly, that these functional processes were not rudderless but contained normative and rational elements that could ground a critical reflection of the law's encounter with religion. These elements are connected to the conditions that sustain participation and engagement in the process of social interaction. From this view, the law's encounter with religion can be understood and evaluated in terms of the character of the community, as well as the philosophical presumptions that point toward openness, respect and humility. Stated somewhat differently, the law's encounter with religion can be seen as, and guided by, the structural and relational grounds of friendship.

The idea of friendship, which is the third theme I will mention here, is not a prominent term used in the analysis, but rather is a way of viewing the arc of the project as a whole. Friendship captures the implications that flow from approaching the law's encounter with

religion through the lens of its social interactive dimension. I found that the legal adjudication of religious matters reflects and produces certain types of relational dynamics, and that it is important to account for these dynamics in the exploration and evaluation of the legal analysis of religious claims. As can be seen in the summary of the chapters provided above, my approach to law's encounter with religion revolves around the idea of openness, engagement, participation and mutual connection between law and religion. These ideas are captured by the notion of friendship, which provides the basis for a genuine engagement between law and religion. It makes it possible for the differing perspectives of law and religion to be articulated, integrated and resolved. In this sense, friendship encapsulates the attitudes and practices that push against the fragmentation of legal analysis (from other forms of knowledge and meaning) and the attending degradation of decision-making (as either totally separate from or incapable of transcending the particularities of social perspective).

I will briefly unpack two aspects of what I believe it means to approach the law's encounter with religion in terms of friendship. First, friends provide critical perspective. There are things about ourselves that we are unable to see, but which a good friend can make plain to us. For example, in order to become aware of the influence of our social perspective on our deliberative capacities "…we characteristically need the judgment of perceptive and ruthlessly critical friends."[7] In order for someone to be able to shed light on what we cannot see requires that we see them as friends, which means that we must have a certain kind of relationship built on mutual recognition and respect. This provides openness to be moved and affected by the critical insights of the other. Closing oneself off to the other, foreclosing the possibility that they might see something about us that we cannot see, inhibits our critical capacity. I identified at several points in the project moments where legal analysis excluded the religious perspective and, as a result, was blind to the influence and relevance of various issues, assumptions and presumptions. The attitude of friendship that flows from approaching the exploration and evaluation of the law's encounter with religion in terms of its social interactive dimension would make it possible for law to learn from its encounter with religion. This, as I have argued throughout the project, does not require law to empty itself of its content or to deny its own perspective. Rather, for law to be understood as a 'friend' of religion means that law recognizes

[7] Alasdair MacIntyre, *Ethics in the Conflicts of Modernity: An Essay on Desire, Practical Reasoning, and Narrative* (Cambridge: Cambridge University Press, 2016) at 113 (MacIntyre referred to this as "sociological self-knowledge.")

its own limitations and that its encounter with the religious perspective is approached in a way that strengthens legal understanding and sharpens the legal adjudicative process.

Second, the best friends are ones that are quite different from each other. Having a friend that is different encourages the development of "double vision", which is learning to see one's own commitments through the eyes of another.[8] From this view, friends can offer more than increased self-awareness, and can also teach about the process of translating and engaging with different points of view. What this means is that friendship involves the capacity to embrace discomfort, which dislodges what is established and creates space for growth. Friends who live in two worlds at once are particularly helpful—Milner Ball called them "educative friends"—because they regularly have to translate between different ways of seeing the world.[9]

This view of friendship resonates deeply with the findings and arguments of my project. The potential of friends to provide critical perspective and enable real growth and transformation suggests that legal analysis should not avoid but rather seek out perspectives different than its own. This is especially the case for those perspectives—like the religious—that lie at the margins of the legal perspective, because friendship with them will have the greatest effect. The fact that a different perspective seems irrelevant to law is not a reason to exclude it; the point of engaging with those who are different is to challenge and break new ground within an established point of view. Framing law's encounter with religion as friendship sees these encounters as an opportunity for law to learn and develop, dislodging what is established and creating space for justice to grow. From this view, the law's encounter with religion has incredible potential for the growth and development of the law. This is why I have cast the relationship between religion and law simultaneously as perfect strangers and as friends. It is precisely because law and religion are perfect strangers that they might make such good friends.

As can be seen through the themes of community, transformation and friendship, approaching the law's encounter with religion through the social interactive dimension emphasizes mutual participation and engagement. Friends are in a relationship of mutual recognition and commitment, which is participatory and engaging. The dynamics of community life involve the mutual participation of individuals within community and the ongoing engagement between communities. Transformation that is fruitful and productive depends on the

[8] Volf, *supra* note 1 at 214.
[9] Ball, "Minority Scholars", *supra* note 2 at 1861 (references omitted).

conditions that foster participation and engagement.

My analysis of the social interactive dimension of law's encounter with religion showed that the bases of participation and engagement are present both in the internal workings of law and religion as well as in the external encounter between them. The law's encounter with religion cannot be understood solely from within the legal or religious perspective because it involves the two perspectives coming into contact with each other. The encounter, therefore, involves participation in something that is shared between them. This does not abandon the distinctions between law and religion, but uses the distinctions and tensions of the encounter as an opportunity for growth and development. This provides a view of the law's encounter with religion that is not naïve, idealistic or pessimistic but realistic and hopeful. It looks with optimism to the possibility of realizing the integrative potential of social interactive processes as they operate through the law's encounter with religion.

3 FUTURE DIRECTIONS AND CONCLUDING THOUGHTS

My analysis provided a way of approaching, thinking and talking about the process of law's encounter with religion rather than a descriptive or determinate analysis of the legal adjudication of legal claims. I have shown that the law's encounter with religion is 'betwixt and in between' various points of view, and fully engaged in the social interactive processes of apprehension, translation and transformation. The law is one perspective that stands alongside the others, internalizing the struggle and participating in it directly. The law also embodies the struggle, directing, shifting and guiding it according to its own values and purposes. From this view, the legal adjudication of religious matters creates a boundary that should be seen as both permeable and abiding, as an ongoing site of contestation and movement where various perspectives, despite their differences, are not excluded or marginalized. My argument does not displace a more traditional legal analysis but supplements it, highlighting the social interactive dimension at play and the importance of incorporating this dimension into the examination and evaluation of law's encounter with religion. Because of this there are many different directions of future investigation suggested by my project. I will conclude this dissertation by articulating two main directions for the future: the analytic and jurisprudential. A brief description of what

these two directions might include helps show the types of questions and issues invited by my project and the kinds of conversations to which it will continue to contribute.

This dissertation opens several analytic possibilities for further investigation into the social interactive dimension of the law's encounter with religion. I have argued in this dissertation that it is beneficial to think and talk about the law's encounter with religion in terms of friendship. This laid the groundwork for exploring the specific insights and transformations that come from establishing and developing the friendship between law and religion. This might be explored in general terms regarding the insights that a religious perspective could offer to the law's self-understanding. Some work has already been done here, as can be seen for example in the work of Rowan Williams and Stanley Hauerwas.[10] It might also be possible to explore the insights that specific religious ideas and practices offer to the way legal concepts and practices are understood. One example that I believe has significant potential is the sacramental meaning in Christian Eucharistic theology. Giorgio Agamben has already started the preliminary groundwork for this kind of investigation, for example.[11]

My analysis of the social interactive dimension of the law's encounter with religion also opens the possibility of exploring similar dimensions at work in the law's encounter with worldviews, perspectives, institutions and communities other than those falling within the scope of traditional religion. An obvious candidate for future investigation would be the law's encounter with Indigenous claims, communities and worldviews. A less obvious context in which this could also be explored is the reception of expert evidence in the litigation context.[12] Even further reaching than this, it might be possible to draw on my project in the investigation of the encounters between different systems of law as, for example, in public and private international legal contexts. All of these situations involve the kinds of communal, institutional, symbolic and discursive dimensions that inform my analysis of law's encounter with religion.

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[10] See e.g. Rowan Williams, *Faith in the Public Square* (London: Bloomsbury, 2012); Stanley Hauerwas, *The Peaceable Kingdom: a Primer in Christian Ethics* (Notre Dame: University of Notre Dame Press, 1983); Stanley Hauerwas, *A Community of Character: Toward a Constructive Christian Social Ethic* (Notre Dame: University of Notre Dame Press, 1981). See also Harold J Berman, "Law and Logos" (1994) 44 DePaul L Rev 143. Recently the Journal of Law and Religion published an essay roundtable on theology and law, see (2017) 32:1 pp 4—97.

[11] *The Sacrament of Language: An Archaeology of the Oath (Homo Sacer II, 3)*, trans by Adam Kotsko (Stanford: Stanford University Press, 2011).

[12] See e.g. Lori G Beaman, *Defining Harm: Religious Freedom and the Limits of the Law* (Vancouver: UBC Press, 2008) (explored the intersection between law, religion and other specialized scientific communities like medicine, psychology and social work).

Approaching these encounters through the social interactive, dialectical and mutually constitutive process of engagement may well enrich our examination and evaluation of them.

The analysis of this project has focused primarily on the impersonal aspects of the law's encounter with religion, such as the communal, institutional, fictional, traditional and linguistic. Another aspect of the social interactive dimension of law's encounter with religion that could be examined in more detail is the role of the *individual*. In the context of legal adjudication, the law encounters religion only when individuals bring their religious claims and arguments to the law. The individual has a crucial role in the interactive processes of the various social dimensions explored in the project—the communal, the institutional, the traditional, and the ideological. This was seen, for example, in the discussion of community in chapter 1, which showed the important role of individuals in the process of shaping community.[13] The various social dynamics of the law's encounter with religion condense in the life of a particular person appearing before the law—they are wrestled with *through* the individual. Although the individual was not absent from the analysis of my project, a more focused exploration of the role of the individual in the social interaction of the law's encounter with religion would enhance the way we understand and approach the encounter.

In addition to these analytic possibilities, there are also jurisprudential developments that offer new opportunities to apply and further the discussion of this dissertation. The first, and most obvious, example of this are the recent SCC judgments regarding the TWU dispute (discussed in chapters 1 and 5), which upheld the decisions of the law societies in British Columbia and Ontario to refuse to accredit TWU's proposed law school.[14] These decisions speak to administrative law principles and to the proportional balancing of religious freedom with other public interests connected to the equal treatment of sexual minorities. There is no doubt that these doctrinal developments will provide significant grist for the academic mill. My engagement with these doctrinal questions and challenges in this dissertation had a distinct academic purpose in mind. I did not seek to explain the legal doctrinal issues or argue for a particular path for their development. Instead, my approach throughout was to develop an understanding of the social interactive dimension of the law's encounters with religion and to explore the impact of this dimension on legal analysis and the evaluation of court decisions. In

[13] See chapter 1, sections 1.3 and 2.2.
[14] *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32; *Trinity Western University v Law Society of Upper Canada* 2018 SCC 33.

other words, questions of legal doctrine were used as the means to explore and demonstrate the social dimensions of the law's encounter with religion. The legal dispute surrounding TWU's proposed law school offered particularly fertile ground to cultivate this analysis. This restricted role of legal doctrine in my analysis frames the relevance of the SCC decisions to my dissertation project as well as to indicate how the analysis of this dissertation might be carried forward through a discussion of these decisions. Given this analytic focus, the recent SCC decisions do not disrupt the arguments offered and conclusions reached in the dissertation. Rather, they provide an opportunity to continue to explore the social interactive dimension of law's encounter with religion and critically evaluate the analysis and approach of the courts to religious matters.

The analysis that I offered in this dissertation is a starting point for examining and evaluating—or, a way of thinking and talking about—the recent judgments of the SCC regarding the TWU dispute. The social dimensions highlighted in chapters 1 and 5 remain crucial to the way that the SCC decisions are to be understood and evaluated. A few points can be made to show the continued importance of the analyses and arguments offered in chapters 1 and 5, as well as to foreshadow how a future discussion of the SCC decisions might look from the approach taken in this dissertation. Regarding chapter 1, the idea of communal interaction and integration helped expose challenges with defining the boundaries and ethos of the legal profession and legal education in rigid and objective terms. It showed how the terms that define the boundary between TWU and the legal community are connected to the process of interaction between them. The communal interactive and symbolic dimension of this process is particularly relevant to the SCC judgments. Upholding the refusal of the law societies to accredit TWU participates in the process of defining the boundary and the ethos of the legal community. It will affect the way that the legal profession is perceived, the way the law societies relate to legal educational institutions, and the way that religious beliefs and practices connect to the legal profession. The arguments and conclusions of chapter 1 provide a crucial element for understanding and evaluating the SCC decisions in this regard.

In chapter 5, I argued that the tensions and challenges of translating the dispute into legal language demonstrate the importance of accounting for the relational and discursive dimension of legal analysis. The challenges identified in chapter 5 are no less relevant to exploring and evaluating the way that the SCC approached the nature of the religious claim and the public interest concern. I argued in chapter 5 (and elsewhere in the dissertation) that dissonance and

tension in using legal language is inescapable. Although the specifics of how this appears may be different in the SCC decisions than in the lower court decisions, my analysis regarding the relational dimensions flowing from the dispute remains a crucial component for understanding and critically evaluating the case. The SCC decisions will foster certain relational dimensions and can be evaluated in terms of the structures of social engagement they establish between TWU and the legal community. It will have to be left to future analysis to show whether the SCC decisions foster or hinder the type of social engagement argued for throughout this dissertation.

It is important to emphasize that even though an analysis of the SCC decisions would indeed be relevant to the dissertation discussion it would not change the nature of the analysis. The SCC decisions do not fit directly within the analytic structure used in this dissertation project, but the social interactive dimensions raised throughout are nevertheless engaged. This means that it is not really possible to include the SCC decisions within the dissertation. The way that the social interactive dimensions apply to the SCC decisions will be different than how they applied in the discussion of the dispute leading up to the SCC decisions. This does not undermine the value of the analysis I conducted regarding the dispute leading up to the SCC decisions. The SCC decisions are the most recent intervention in the ongoing interaction between TWU and the law societies, and between law and religion more generally. But they are not the final word. Now that the SCC has spoken to the TWU dispute, we have to decide what the decisions mean for the ongoing engagement between TWU and the legal community, for the relationship between law and religion, and how they will affect the future interactions between religious communities and the institutions of state law. From this view, the analysis and arguments in this dissertation provide a foundation from which to launch an analysis of the SCC decisions. This dissertation provides a way of thinking and talking about the social interactive dimension of law's encounter with religion occurring through the SCC decisions, which is crucial for understanding and evaluating this unfolding encounter.

In addition to the recent SCC decisions, there are always other new and ongoing disputes that feature the law's encounter with religion. Indeed, Volf was right to say that we live in a rapidly changing world. This is particularly true for the law's encounters with religion. The relationship between church and state, the role of religion in society and the place religion plays in governmental social policy evolves at breath-taking speed. There are always new cases regarding religion appearing before the court. Sometimes the issues are familiar but sometimes

they are quite novel. Sometimes there are shifts in social perspective affecting the way that old issues are approached through the law. The process of working through these issues in law is betwixt and in between, and must constantly rely on the provisions of the various traditions to which we belong to try and work out resolution to conflict and a path to justice.

Perhaps, as suggested by Volf in his work on identity and difference, it is also right to say that we should lower our sights, abandon comprehensive and coherent theories about the resolution of social conflicts, and "[i]nstead of seeking overall victory, we should look for piecemeal convergences and agreements."[15] I agree in principle, but would add that focusing on the social dimensions and processes of the law's encounter with religion offers, in the constantly shifting sands surrounding the relationship between law and religion, a stable perspective from which to understand and evaluate these encounters. Such a perspective does not seek a final victory or solution to the challenges of navigating the legal adjudication of religious claims. To the contrary, the view that I have put forward points us constantly back to thinking and talking about the law's encounter with religion in a way that questions our presumptions and encourages a genuine engagement that is impactful and transformative. It presses us to view the divide between law and religion in terms of connectivity rather than difference, and in so doing insists on the possibility that law and religion, although perfect strangers, can also be friends.

[15] Volf, *supra* note 1 at 207.

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